RESTRUCTURING AMERICAN LAW SCHOOLS: PEACEMAKING IN FIRST YEAR CURRICULUM

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Restructuring is rebuilding: the creative act of purposeful alignment. The builder recognizes the value of component materials and joins them

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in a way that achieves a net result that is far greater than the mathematical sum of each part. One plus one does not equal two. 1 + 1 = 11.

The title of this article invokes several immediate rhetorical questions. For many, the first is "what is Peacemaking?" To address this question, Cheryl Demmert Fairbanks (Tlingit/Tsimshian), Tribal Court Justice and educator, will explain the historical context of Peacemaking.[1] The cultural appreciation (as opposed to appropriation) of Peacemaking is a necessary first step toward any discussion of its application in legal education.

A second rhetorical question is this: "would Peacemaking have value to law students: our future judges; attorneys; educators; and architects of our justice systems?" Nic Rossio, a graduating student at Wayne State Law School, discusses how Wayne Law's Peacemaking course changed his perspective on the legal profession.[2] He contrasts traditional approaches with the Peacemaking model, highlighting flaws of the former and applications of the latter in international legal education and broader legal culture. He explains why Peacemaking as first-year curriculum would benefit law students and, as a result, American legal practice.

A third rhetorical question often voiced is: "how might Peacemaking have application in the federal system?" Dr. William Hall, director of the Office of Collaborative Action and Dispute Resolution at the U.S. Department of the Interior, explains how his office has worked to learn about Peacemaking from Native communities and how they have begun to use this knowledge in a way that is respectful.[3] This portion is important because it offers an example of Peacemaking's growth as a form of alternative dispute resolution, reinforcing the contention that exposure to Peacemaking in law schools will better inform students on available career paths and new, viable forms of legal thinking.

The fourth rhetorical question frequently asked: "is there any empirical evidence that Peacemaking can be applied effectively in state court systems?" In response, Judge and Peacemaker Timothy Connors, and attorney and Peacemaker Margaret Kruse Connors, will outline the decades long experience they have with Peacemaking in Michigan's state courts.[4] They show that knowledge in Peacemaking processes affords lawyers another, often more helpful, way to serve their clients' needs within the state court system.

And the final, indeed most important rhetorical question, the foundation for this article: "why does it matter?" Brett Lee Shelton, Tribal Court Justice, Peacemaker and staff attorney for the Native American

1. *See infra* Part I.
2. *See infra* Part II.
3. *See infra* Part III.
4. *See infra* Part IV.

Rights Fund will provide his perspective from over 25 years of fierce advocacy in the field of Indian Law.[5] Located at the end of the article, this portion sets the tone for the primary argument. Peacemaking should be a part of first-year law school curriculum, but law schools must implement it properly and respectfully. We must not lose sight of where it comes from. Any implementation without proper appreciation for Peacemaking's Native origins risks the same cultural destruction we have seen throughout this country's history.

I. HISTORICAL CONTEXT—WHAT IS PEACEMAKING?

Before the first settlers began to colonize the eastern coast of what would become the United States of America, laws, courts, judges, and prisons did not exist as we know them today.[6] Pre-contact American Indians employed a jurisprudential system vastly different from the English-based institutions of law that the American government eventually forced upon them.[7] Their law was unwritten; in place of judges and courts were indigenous persons who would fill those roles as disputes arose.[8]

Even today, American law fails almost entirely to integrate the mechanisms for maintaining social order and positive relationships used by those who originally occupied this land.[9] But that is beginning to change. As more Americans lose confidence in our courts, some have begun looking toward "Native American processes such as Peacemaking [and] Sentencing Circles" as a solution.[10]

It is important to first reflect on "the impact of federal policies . . . on Native America."[11] Justice Cheryl Fairbanks, alongside Christy Chapman,

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5. *See infra* Part V.

6. WALTER ECHO-HAWK, STUDY OF NATIVE AMERICAN PRISONER ISSUES 4 (1996) ("Traditional Native American societies did not rely upon imprisonment to punish social offenders.").

7. Kathryn LaFortune & Violet Rush, *A Call to Study Native Americans' Experiences in Tribal and U.S. Courts*, 50 MONITOR PSYCH. 29 (2019).

8. *Id*.

9. Jonathan Sims, *Sovereignty 360: The Voices of Peacemaking*, VIMEO (July 17, 2023, 7:16 PM), https://vimeo.com/846089718/abb615a8cf [https://perma.cc/F7LR-3289].

10. CHERYL DEMMERT FAIRBANKS, THE SHIFT: TRIBAL SOVEREIGNTY AND PEACEMAKING COURTS, 15TH NAT'L INDIAN NATIONS CONF.: JUST. FOR VICTIMS OF CRIME 19 (Dec. 29, 2016), https://www.tribal-institute.org/2016/A11Fairbanks.pdf [https://perma.cc/FUD4-8398].

11. *Id*. at 9.

Rainey Enjady, and Chief Justice Emeritus Yazzie, gave an overview of such policies in their informational webinar on Peacemaking.[12]

Removal. On May 28th, 1830, President Andrew Jackson signed the Indian Removal Act into law.[13] In the same year, during his Second Annual Message to Congress, Jackson announced his pleasure "that the benevolent policy of the Government, . . . in relation to the removal of the Indians beyond the white settlements, [was] approaching a happy consummation."[14] Thus began the removal of Cherokee, Choctaw, Muscogee, Chickasaw, and Seminole tribes (collectively referred to by the government as the "Five Civilized Tribes") from their ancestral homelands in the southeastern United States.[15] Such displacements culminated in the forced migration of over 12,000 Cherokees in 1838 — during which over 4,000 perished — now known as the Trail of Tears.[16]

Reservation. Separating Native Americans from the white settlers was not enough. "By the 1850s, official federal Indian policy had coalesced into . . . placing tribes onto small and remote reservations to confine and civilize Indian people."[17] Efforts were made to destroy the Indian way of life; "federal agencies outlawed their religions and cultures."[18] Richard Henry Pratt, during his speech at the National Conference of Charities and Correction, summarized federal reservation policy tersely: "Kill the Indian in him, and save the man."[19]

Allotment. Allotment and assimilation notions were furthered through federal policies of the late 19th and early 20th centuries.[20] Most politicians, no longer viewing tribes as a military threat, moved toward "bring[ing] Indians into the American mainstream society by assimilating them."[21] The General Allotment Act of 1887 "provided for the division or allotment of reservation lands to Indian family heads and adults for ultimate

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12. *Id*. at 15.

13. Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830).

14. S.J., 21st Cong., 2d Sess., at 22–23 (1830).

15. Joel West Williams, *The Five Civilized Tribes' Treaty Rights to Water Quality and Mechanisms of Enforcement*, 25 N.Y.U. ENV'T L.J. 269, 270 (2016).

16. FAIRBANKS, *supra* note 10; *see also* Richard L. Barnes, *From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction*, 57 LOY. L. REV. 435, 445 (2011).

17. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 211 (2011).

18. *Id*.

19. Captain R.H. Pratt, *The Advantages of Mingling Indians with Whites*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION HELD IN DENVER, COL., JUNE 23–29, 1892 46 (Isabel C. Barrows ed., Bos., Geo. H. Ellis 1892).

20. Miller, *supra* note 17, at 212.

21. *Id*.

ownership in fee simple."[22] A pretext for the breaking up of tribal land ownership, the Act resulted in massive declines in Indian ownership, through both voluntary sale to white settlers and tax foreclosures.[23] Efforts were made to Christianize Indians, on the premise that doing so would replace the "nomadic savage" with the useful and productive farmer.[24] Indian heritage was systematically wiped out by separating Indian children from their families and placing them into federally run boarding schools.[25]

Indian Reorganization Act (IRA). In 1934, Congress passed the Wheeler Howard Act, more commonly referred to as the Indian Reorganization Act ("IRA").[26] The IRA "ended the practice of allotting reservations, extended the periods during which lands were held in trust, and restored unsold surplus lands to tribal ownership."[27] Initially intentioned as a step toward tribal self-determination, provision after provision was removed as the IRA moved through Congress until its final version "eliminated from the bill as originally presented the right of the Indians to make laws upon the reservations."[28] Traditional tribal governments were uprooted as they were pressured to incorporate and adopt constitutions and bylaws, all of which required approval by the Secretary of the Interior.[29] What aspired to be progressive legislation for the restoration of Native rights turned into nothing more than a subtler form of assimilation.

Termination. Post-WWII, national policy once again turned its sights on upending tribal sovereignty.[30] State power over reservations increased and Indians were exposed to state law as a means of assimilation.[31] Public Law 83-280 gave California, Minnesota, Nebraska, Oregon, and Wisconsin criminal jurisdiction over tribal members.[32] Tribes were not consulted, and were not required to give consent.[33] The federal government further acted to lessen its responsibility toward Indians by

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22. *Id*.
23. *Id*.
24. *Id.* at 212–13.
25. *Id*.
26. *See* Indian Reorganization (Wheeler-Howard) Act, ch. 576, §1, 48 Stat. 984 (1934).
27. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 832 (1996).
28. *Id.* at 833.
29. *Id.* at 832.
30. Miller, *supra* note 17, at 213.
31. *Id.* at 214.
32. *Tribal Crime and Justice: Public Law 280*, NAT'L INST. OF JUST. (May 19, 2008), https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280 [https://perma.cc/MLC5-TXSB]; *see also* Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162).
33. *Id*.

turning over educational responsibilities to states and individually relocating members from their reservations to large cities.[34] Those who were separated gradually experienced a loss of their native language, advancing the destruction of Native American cultures.[35]

Self-determination. Still in place today, the federal government began to adopt a policy of self-determination toward Native Americans in the 1960s when President Kennedy deescalated termination efforts.[36] President Nixon made it official in 1970, stating that in its new policy of Indian self-determination, "the United States would allow Indian tribes to determine for themselves what direction their lives, laws, economies, [and] educations . . . would take in the future."[37] Over time and through the passing of a variety of federal laws, tribal communities have begun to reclaim some of their sovereignty.[38] In New Mexico, the signing of the Santa Fe Indian School Act in 2000 turned over land "to be held in trust for the 19 Pueblo Governors of New Mexico."[39] As a result, tribes now own and control the school, emphasizing the "cultural and traditional belief systems" of its students.[40]

Education plays a vital role in shaping systems. It was used to assimilate Native Americans and to eradicate their culture by forcing children into boarding schools, where their traditions and languages were forbidden.[41] It can similarly be used to integrate Native judicial principles into mainstream American legal culture.

"[Peacemaking] is an indigenous way of resolving disputes."[42] Where American jurisprudence revolves around adversarialism, pitting parties against one another, Peacemaking seeks to promote consensus through "cooperation, comity, and unity."[43] Instead of instigating a fight, Peacemaking brings together group members implicated by the dispute, has each person face one another, and facilitates a decision-making process that seeks widespread agreement.[44]

There is an emphasis on history; one must "understand[] the significance of oral tradition and Native American language as the

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34. *Id*.
35. FAIRBANKS, *supra* note 10, at 15.
36. Miller, *supra* note 17, at 214.
37. *Id*.
38. *Id.*
39. *About SFIS*, SANTA FE INDIAN SCH., https://www.sfis.k12.nm.us/about_sfis [https://perma.cc/UQ3B-LXHC].
40. *Id*.
41. Miller, *supra* note 17, at 204.
42. Sims, *supra* note 9.
43. FAIRBANKS, *supra* note 10, at 9.
44. *Id.* at 18.

common law of Tribes."[45] This "common law comes directly from the native language and [their] cultural viewpoint."[46] Oral tradition has acted as "the glue that has kept [Native] people together in the face of severe termination policies of the federal government."[47] In the face of hundreds of years of dispossession, assimilation, and cultural genocide, Native communities have endured.[48] Today we, as Americans, occupy Native lands. Yet the traditional American system of law operates almost entirely exclusive of Native oral tradition.[49] Teaching indigenous justice "is a way to put back some of [Native] people's way into this justice system."[50]

Peacemaking acknowledges a blind spot apparent in the traditional adversarial system—parties to litigation will often have a continuing relationship once the dispute reaches an end.[51] Parents in a custody battle will still have to interact with one another after a judge orders rules for shared custody. An employer being sued for discrimination must continue the relationship with their employee if a court orders reinstatement of the latter. Even in criminal adjudications, the convicted party will have a continuing relationship with their community upon release. Peacemaking acknowledges these relationships; it is a "holistic philosophy . . . that connects everyone involved with a problem or conflict on a continuum with everyone focused on the same center."[52]

"Peacemaking, for some who aren't used to that term, might appear standoffish; or it might not feel natural to them."[53] But to those who have both a native and legal background, Peacemaking is self-explanatory; it aligns with an innate understanding of how justice should operate.[54] Parties to a civil or criminal dispute, alongside others with an interest in the outcome (such as family or members of the community), sit facing one another in a Peace Circle.[55] A Peacemaker is responsible for guiding discussion.[56] Their role is to lead those involved toward making things

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45. *Id.* at 9.
46. *Id.* at 16.
47. *Id*.
48. Theresa Rocha Beardall, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 543 (2021).
49. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 560–61 (2021).
50. FAIRBANKS, *supra* note 10, at 25 (quoting Sr. Youth Court Judge Hilda Nickey).
51. *Id.* at 22.
52. *Id.* at 21 (quoting Ada Pecos Melton, citizen of the Pueblo of Jemez and President/Owner of American Indian Development Associates).
53. Sims, *supra* note 9.
54. *Id*.
55. FAIRBANKS, *supra* note 10, at 24.
56. *Id.*

right, to repair the damage.[57] At the opening of the session, the Peacemaker states the purpose, then leads everyone in prayer or a moment of silence to set the sacred space.[58] Introductions follow; though those participating may know each other, it is important to understand each person's role and their perspective on what brought them to the Circle.[59] Attorneys may take part as participants or facilitators, but they do not join the Circle in any representative function. The party filing the complaint begins the discussion; their right to be heard is represented by a talking piece, which moves around the circle as each person takes their turn to speak.[60] Listening is more important than talking; interruptions are not permitted.[61] There is no time limit, as respect for every speaker is necessary to the process of healing.[62] Speakers are free to say whatever they feel they must, though the Peacemaker may offer questions should anyone be unsure where to begin.[63] A peacemaker may, at times, remind members of the Circle of the principle guiding this process: be tough on the issue, and gentle on the person.[64] Though parties may still find themselves in disagreement on a particular issue, they must agree to disagree with respect.[65]

After everyone has had an opportunity to speak their mind, ask questions, and respond, the Peacemaker takes a recess to give parties the opportunity to craft their own solution.[66] The goal is to have parties build off one another's ideas through discussion, apology, and forgiveness.[67] The Peacemaker does not force the parties to reach a resolution.[68] If they are unable to do so, the matter may be referred to the adversarial court for litigation.[69] Otherwise, in jurisdictions that have begun to use and appreciate Peacemaking processes, the parties' solution is binding and

57. *Id*.
58. *Id.*
59. *Id.* at 34.
60. *Id.* at 31.
61. *Id.* at 26.
62. *Id.* at 24.
63. *Id.* at 26.
64. *Id.* at 2.
65. *Id.* at 10.
66. *Id.* at 26.
67. *Id*.
68. Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 UNIV. TOL. L. REV. 821, 833 (1996) ("If the peacemaker uses her position to bully or connive rather than to assist people in arriving at their own fair resolution, that peacemaker will lose respect and authority.").
69. *See generally* Jackie O'Brien, *Beyond Due Process: An Examination of the Restorative Justice Community Courts of Chicago*, 113 J. CRIM. L. & CRIMINOLOGY 685, 705–06 (2023).

enforceable by court order.[70] In the end there is closure.[71] The session closes with another prayer or moment of silence, parties affirm each other's participation, and put the dispute behind them.[72]

The use of circles in the Peacemaking process is significant.[73] It represents equality.[74] In contrast to the courtroom, each person in a Peace Circle "is the same distance apart and no one is seated higher than or stands apart from others."[75] It channels spirituality. "A group of people in a circle become united."[76] And it creates synergy. "The circle has no beginning or no end."[77]

The Peace Circle has, as Justice Cheryl Fairbanks explains, tremendous cultural significance:

> Peace Circles have been used by our indigenous ancestors since time immemorial. It has really been our way of life. [In] resolving disputes, talking it out, making things right, the sacred space of the peacemaking circle allows for fairness and healing to not just the family and community, but also to the individual.[78]

Tribal sovereignty is finally beginning to enter a period of restoration and reaffirmation. After centuries of limitations promoted through federal policy, today in the United States "some 400 tribes have their own justice systems."[79] The American justice system has an opportunity to take note. The law often does not have an answer or solution for every situation and not all situations belong in the courts. But in applying Peacemaking processes to non-Native situations, we must do so respectfully, acknowledging its Native roots.

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70. *Id*.
71. FAIRBANKS, *supra* note 10, at 26.
72. *Id.*
73. *Id.* at 32.
74. *Id.*
75. *Id.*
76. *Id*.
77. *Id*.
78. Sims, *supra* note 9.
79. Tony Tekaroniake Evans, *Native Negotiations Are a Winning Alternative to Courts*, AM. INDIAN MAG. (2023), https://www.americanindianmagazine.org/story/Native-negotiation-methods [https://perma.cc/65KT-K9EE].

II. PEACEMAKING AND LAW SCHOOL CURRICULUM

A. Introduction

Images of skywoman speak not just of where we come from, but also how we can go forward.

Robin Wall Kimmerer[80]

I did not have any aspiration to become a lawyer while growing up. It was not until late into my undergraduate degree that I began to consider law school. I based this consideration more in practicality than in passion; law seemed a safe option that aligned with my skills. Standing at this fork in the road while graduation drew nearer, I sent a cold email to Max Rhodes, founder of Faire,[81] asking for advice. I had listened to an interview of his and was struck by what he had to say on practicing patience early in one's career.[82] Though the naiveté in sending a bulleted list of the pros and cons in potential professional avenues to the founder of a company then worth more than half a billion dollars is retrospectively apparent, Rhodes responded. He was concise: "Don't go to law school."[83]

The farther I get into my legal education, the more I wonder whether I should have heeded this advice. In my email to Rhodes, I had listed "ability to enhance analytical skills" under the pros of this path.[84] Such is, after all, one of the primary objectives of law school. Soon after opening our first casebook, our professors tell us their job is to train us to "think like a lawyer."[85] But in my experience with the American system of legal

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80. ROBIN WALL KIMMERER, BRAIDING SWEETGRASS INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE AND THE TEACHINGS OF PLANTS 6 (Milkweed ed. 2013).

81. Faire is an online wholesaler that aims to bring small businesses together by connecting smaller brands with smaller retailers, empowering them to compete with giants like Walmart and Amazon. I reached out to Rhodes in May of 2019; in October of the same year Faire secured its Series D round funding at a $1 billion valuation. *See* Lauren Debter, *Faire, A Wholesale Marketplace, Notches $1 Billion Valuation*, FORBES (Oct. 30, 2019, 9:44 AM), https://www.forbes.com/sites/laurendebter/2019/10/30/faire-wholesale-marketplace-series-d-1-billion-valuation/?sh=2f4f8e087aa9 [https://perma.cc/26WU-E9DH].

82. *Max Rhodes of Faire with Anu Hariharan on Scaling and Fundraising*, Y COMBINATOR (Apr. 16, 2019), https://www.ycombinator.com/blog/max-rhodes-of-faire-with-anu-hariharan-on-scaling-and-fundraising [https://perma.cc/3GJM-X93P].

83. E-mail from Max Rhodes, Founder & CEO, Faire, to Nicholas Rossio (May 25, 2019, 3:38 PM) (on file with author).

84. Email from Nicholas Rossio to Max Rhodes, Founder & CEO, Faire (May 25, 2019, 2:48 PM) (on file with author).

85. *See*, *e.g.*, John Rappaport, *What Early Childhood Development Can Teach Us About Mastering Legal Reasoning*, UNIV. OF CHI.: THE L. SCH. (Oct. 4, 2017),

education, I have found that the frame for analytical reasoning offered is largely one-dimensional. In teaching us to "think like a lawyer," law schools tell us that lawyers share a common mode of thought. Assimilation is necessary to join the club. But American legal culture is not so homogeneous.[86] It is an orchestra; it requires diversity in musical talent and expertise to produce a cohesive sound. Law schools' failure is in training students on only one instrument.

Yet law students are quick to assimilate. They can hardly be blamed; stepping into law school is a disorienting experience. First-year students often struggle to remain afloat in a sea of unfamiliar language and confusing textual analysis.[87] When one is thrown off balance, a natural reaction is to reach for the nearest object to steady oneself. The result is a near universal reliance on the Langdellian case method in legal pedagogy, particularly prevalent in first-year curriculum.[88] Law schools' reliance on this formalistic approach to legal reasoning disservices their students and fails to adequately prepare them to enter the profession.[89]

The dominance of formalism in American law schools, from which Langdell's case method is derived, is generally agreed upon amongst scholars.[90] My first-year experience at Wayne State Law School affirmed its dominance.[91] Though students have options to move away from—and perhaps even challenge—legal formalism later in their law school careers, the mandatory first-year curriculum establishes the model as central to

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https://www.law.uchicago.edu/news/learning-think-lawyer [https://perma.cc/6MN3-GCMP].

86. Michael L. Buenger, *Do We Have 18th Century Courts for the 21st Century?*, 100 KY. L.J. 833, 837–38 (2011) ("There is scant attention given in professional education to the diversity that underlies American legal culture and its judicial systems, a fact reflected in our law schools and to a lesser extent our professional associations.").

87. Sha-Shana Crichton, *Incorporating Social Justice into the 1L Legal Writing Course: A Tool for Empowering Students of Color and of Historically Marginalized Groups and Improving Learning*, 24 MICH. J. RACE & L. 251, 260 (2019) ("[F]irst-year law students comprised the largest group of law students to indicate that stress negatively impacted their law school performance.").

88. *See infra* Part II.B.

89. Larry O. Natt Gantt, *Changes in Legal Education and Legal Ethics: Article: The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699, 706–07 (2012) ("The case method's claim to fame was that it taught people how to think like a lawyer in terms of critical analysis and understanding the way in which the judicial process resolves issues, but it falls pretty far short of actually training people to know how to be a lawyer.").

90. Jeremiah A. Ho, *Law as Instrumentality*, 101 MARQUETTE L. REV. 131, 174 (2017).

91. *First-year Courses*, WAYNE STATE L., https://law.wayne.edu/academics/courses/first-year [https://perma.cc/2EMF-BS28].

students' legal education.[92] The issue lies in the primacy of this theory and the lack of early exposure to alternative trains of thought. If law school is meant to teach students how to "think like a lawyer," it follows that transitional first-year curriculum will have a profound impact in shaping the way students analyze and process legal problems as they adapt to their new environment. Frameworks established early on will guide students through the remainder of their time in the institution.[93] This makes the first year of law school a critical period; seeking clarity in foreign territory, students internalize the methods their professors give to make sense of their new and challenging environment.[94] In failing to offer alternatives to the formalistic approach to legal reasoning in first-year curriculum, law schools end up manufacturing one-track minded lawyers who are unable to approach legal problems with the necessary creativity for great lawyering.[95]

This is not to say that law schools should purge formalism[96] from their first-year curricula. Formalism can be a valid form of legal reasoning. It is not, however, the only valid form of legal reasoning. Law schools must expose new students to alternative approaches to legal thought process to

92. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 653 (2007) ("It is not implausible to attribute the unusual combativeness of American lawyers to their training, and specifically to the first year of their training, which inaccurately treats the law suit as the defining event in the legal system.").

93. Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 UNIV. BALT. L. REV. 173, 209 (2010) ("Teaching legal research as a legal skill provides both the basic legal knowledge necessary to 'think like a lawyer' and reinforces and helps to immerse first-year law students into the cognitive apprenticeship necessary to succeed in law school.").

94. RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY (2016). Reciting a private note from an unnamed law professor: "[S]tudents are natural formalists because formalism is an intellectual crutch and they are in an unfamiliar environment." *Id.* at 301.

95. *Id.* at 300. Posner differentiates students with an interest in becoming legal intellectuals with those who strive to become successful legal professionals. *Id.* at 301. The latter, which he contends is the majority, overemphasize the role of legal doctrine and jargon; formalistic curriculum and teaching practices fan the embers of this desire. *Id*. In the process, such students minimize the importance of the intersection of social sciences. *Id.* at 365.

96. The Legal Information Institute from Cornell Law School defines *legal formalism* as "A theory that legal rules stand separate from other social and political institutions." *See Legal Formalism*, CORNELL L. SCH., https://www.law.cornell.edu/wex/legal_formalism [https://perma.cc/JQZ2-2WS4].

expand students' understanding of what law is, how law works, and how law may be changed.[97]

Because Peacemaking countervails the norms established by law schools' reliance on formalism in first-year curriculum, courses teaching it are best suited to provide new law students with an alternative legal perspective. Rather than breaking down sets of facts into pieces that are then weighed by their subjective legal relevance, Peacemaking reminds students to consider the people within the problem.[98] It seeks mutual understanding over adversarial dominance.[99] And it gives a voice to the communities which would otherwise go unheard.[100] In exposing students to Peacemaking as part of their first-year curriculum, American law schools will fulfill the responsibility they have to their students, to broader legal culture, and to those the law serves.

B. The Current Approach: Law School's Reliance on Formalism

> We set ourselves up as arbiters of what is good when often our standards of goodness are driven by narrow interests, by what we want.
>
> Robin Wall Kimmerer [101]

The case method used in law school's pedagogy today is often credited to Christopher Langdell, the late 19th century Dean of Harvard Law School.[102] Langdell believed that law should be approached as a science, that the scientific method which had seen much development throughout

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97. Ho, *supra* note 90, at 171 (paraphrasing Duncan Kennedy: "[L]aw courses segregated each legal doctrine issue into a tub on its own bottom, which misled students from learning an integrating vision of what law is, how it works, or how it might be changed.").

98. Forrest S. Mosten, *Unbundled Services to Enhance Peacemaking for Divorcing Families*, 53 FAM. CT. REV. 439, 445 (2015) ("The evolution from adversarial advocacy toward a more client-centered approach to our work is well underway. Offering unbundled services to clients with a peacemaking approach furthers this effort.").

99. William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 76 (2005) ("[T]he ancient Indian method of dispute resolution known as Tribal Peacemaking . . . can guide the journey toward greater mutual understanding and trust.").

100. Natasha S. Vedananda, *Learning to Heal: Integrating Restorative Justice into Legal Education*, 64 N.Y. L. SCH. L. REV. 95, 103 (2019–2020).

101. KIMMERER, *supra* note 80, at 92.

102. Ho, *supra* note 90, at 142 (summarizing the history around Langdell and the development of the case method). He notes that there is debate regarding whether the case method may be completely and totally attributed to Langdell. *Id.* Many of the thousands of pages of Langdell's handwritten notes, housed at the Harvard archives, are illegible. *Id.* Thousands more were destroyed in the 1940s. *Id.* There is still, however, general agreement that Langdell played a significant role in the creation of the case method. *Id*.

the 19th century applied just as easily to law.[103] Scholars and historians studying Langdell and his formalist notion of law as science[104] often use a quotation from the preface of his casebook on contract law to characterize Langdell's conflation of law as science with legal education:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.[105]

Though there was initially considerable hesitance toward widespread adoption of Langdell's case method, it gradually gained acceptance throughout the 20th century.[106] Today its acceptance is near universal, and the case method remains dominant in the design of legal classroom instruction.[107]

The Langdellian case method is especially influential in first-year law courses, where "students are taught formal rules of law and are assessed on their ability to apply those rules in a logical, usually deductive manner."[108] One need only open any first-year casebook to see this. Though peppered with the occasional introduction or practice problem, appellate cases fill the pages.[109] Appellate cases dominate assigned readings and the topics for classroom discussion. And throughout such discussion, professors use Socratic dialogue to mimic the scientific method.[110] Thus begins the process of nurturing the student's ability to

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103. *Id.* at 146.

104. *Id*. ("Langdell's case method was grounded in the formalist notion of law as science.").

105. *See* C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS vi (1999).

106. Ho*, supra* note 90, at 145.

107. *Id.* at 178 ("American law schools continue to rely on Langdellian pedagogy.").

108. Adam G. Todd, *An Exaggerated Demise: The Endurance of Formalism in Legal Rhetoric in the Face of Neuroscience*, 23 LEGAL WRITING 84, 121 (2019).

109. *See generally* RONALD D. ROTUNDA & BENNETT L. GERSHMAN, MODERN CONSTITUTIONAL LAW (12th ed. 2021); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE (5th ed. 2016); CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW (4th ed. 2019).

110. Rubin, *supra* note 92, at 654.

"think like a lawyer."[111] The instruction takes on a formulistic nature. First, the professor chooses a student to recite the facts of the case.[112] Next, either remaining with this student or moving on to another, the professor asks the student to distinguish the relevant facts.[113] From there, the student-professor exchange transitions to an identification of the issue the case represents.[114] It then moves on to an articulation of the legal rule created by the case, with an analysis of the court's reasoning in reaching its holding.[115] As this formula repeats class after class, it becomes second nature to students; it begins to frame the way they think.[116]

Under the dominant culture of law school, this restructuring of students' thought processes is not given second thought. It is, after all, the goal; the Langdellian case method sets itself out to teach law students how to "think like a lawyer."[117] In presenting the law as science, the case method directs students to read appellate opinions like a surgeon wielding a scalpel. Each body the surgeon cuts into is unique; organs vary in size[118] and density of muscle tissue is diverse.[119] But each is composed of the same discernable parts. The surgeon's job is to recognize these parts and how they interact with one another, allowing them to identify and correct the problem.[120] The case method convinces students that the law is no different.[121] Each set of facts, however unique, can be boiled down to

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111. Ho, *supra* note 90, at 150 ("[T]he Socratic dialogue between the professor and students about those case opinions attempts to approximate what scientists would do.").

112. ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 67 (2007).

113. *Id*. at 67–68.

114. *Id.* at 69–72.

115. *Id*. at 166.

116. *Id*. at 9.

117. Ho, *supra* note 90, at 148 (describing "thinking like a lawyer" as the most defining heuristic of the Langdellian case method).

118. Carla R.P. Oliveira et al., *Sizes of Abdominal Organs in Adults with Severe Short Stature Due to Severe, Untreated, Congenital GH Deficiency Caused by a Homozygous Mutation in the GHRH Receptor Gene*, 69 CLINICAL ENDOCRINOLOGY 153, 153 (2008) ("The sizes of some organs (e.g. liver and kidney) correlate closely with body weight and body surface area . . . .").

119. Kaitlyn C. Leonard et al., *Anatomical and Ontogenetic Influences on Muscle Density*, SCI. REPORTS. (Jan. 22, 2021), https://doi.org/10.1038/s41598-021-81489-w [https://perma.cc/RP23-24LV] ("[O]lder individuals tend to have denser muscles than younger individuals.").

120. *What Is the Job Description for Surgeons?*, AM. COLL. OF SURGEONS, https://www.facs.org/for-medical-professionals/education/online-guide-to-choosing-a-surgical-residency/guide-to-choosing-a-surgical-residency-for-medical-students/faqs/job-description/ [https://perma.cc/86FU-3MBC].

121. Todd, *supra* note 108, at 123. Todd describes formalism as being grounded in the ideal of advancing the "rule of law." *Id*. at 124. He discusses the importance of this

recognizable pieces from which a rule can be drawn.[122] Professors teach law students to use this scientific process to "make the decisions about the law predictably, rationally, [and] free of improper bias."[123] But legal fact patterns are not human bodies. Each torso a surgeon opens contains a heart, and it will always be found in the same place. In dissecting an appellate opinion's facts, one can only use experience as a generalized guide. The legal reader must entertain the possibility that they will find no heart, or at the very least that it may not be found in the same place.

The case method improperly assumes that there is only one way to "think like a lawyer." Its formalistic approach is appropriate, even preferred, in some contexts. Simple contract disputes, for example, may lend themselves well to the sterile rationality[124] underpinning its scientific approach to law. When a dispute arises out of a contract using boilerplate language, it makes sense to look toward other instances involving functionally identical contract language to determine how to resolve the disagreement. But in purporting to be *the* method of legal reasoning, applicable in all circumstances, the case method attempts to accomplish too much. By exposing students only to the case method during their first-year curriculum, law schools "fail[] to teach law in its entirety."[125] Sterile

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approach in the context of the public impression of the judiciary, noting promises each of the most recent Supreme Court appointees (at the time of writing) made during their confirmation hearings to make decisions "based on the law and only the law." *Id*. at 122–23. Even Todd, however, implicitly recognizes that this is not always a judicial reality: "Whether these judges in fact adhere to this principle does not diminish the fact that legal rhetoric directed at these judges is expected in form to appear to do so." *Id*. at 123. As the public's approval of the Supreme Court at the time this article was written remains near record lows, one wonders whether a reliance on formalism's strict "rule of law," or at least the appearance of it, carries the same weight. *See* Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023) https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx [https://perma.cc/ZH4K-6HXB].

122. *See* Ho, *supra* note 90, at 146–47 (describing Langdell's "law-as-science" approach).

123. *Id*.

124. Theresa M. Beiner, *Insights into the Woes of a Profession, Review of How Lawyers Lose Their Way: A Profession Fails Its Creative Minds, by Jean Stefancic & Richard Delgado*, 20 GEO. J. LEGAL ETHICS 101, 109 (2007). The term "sterile rationality" as it describes formalism is taken from Stefanic and Delgado's book. *See* JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (Duke Univ. Press 2005). The context in which they use it suggests derogation, yet it need only be perceived as such where it is misapplied. Simple legal problems may benefit from the efficiency inherent in such sterile rationality. *See id.*

125. Ho, *supra* note 90, at 169. Ho describes the nature of the case method to replace legal creativity with pseudo mathematical formula. *Id*. at 150. Quoting Grant Gilmore, Ho notes, "at least in Langdell's version, [the case method] had nothing whatever to do with getting students to think for themselves; it was, on the contrary, a method of indoctrination

rationality displaces multifarious legal interpretations; rigid rules usurp social context.[126] Reorienting the way law students think so as to have them reduce all legal problems to predictable patterns leaves them unprepared for real-world practice.

Many rationalize reliance on formalism in law school pedagogy, and in its use as a model for how first-year students should think about the law, by recognizing that formalism dominates outside of law classrooms, too.[127] Generally, "[j]udges aspire to formalist ideals and [to] seek to administer justice impartially."[128] As such, an advocate must adhere to formalism's principles in order to have any hope of persuading the judge to take their position.[129] True to these formalist ideals, however, the argument fails to consider the "why" behind its asserted truth. It fails to perceive the self-actuating system that drives formalism's dominance across legal culture. The judges who expect advocates to present arguments made within the walls of formalism's ideals were once students themselves. They underwent the same indoctrination today's law students go through, which leverages the case method to laud formalism as the true way to "think like a lawyer."[130] They went into their legal careers with the framework their legal education gave them, analyzing legal problems within it.[131] And upon attaining judgeship, this framework for legal reasoning found its way into their opinions. Some of these opinions are published in updated casebooks, which are then used to frame the legal thought process of the next generation of lawyers. To assert that law students must internalize formalism's ideals to meet a judge's expectations

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through brainwashing." *Id*. at 168. In offering the case method as the singular view of law, reductive by definition in its attempt to reduce legal problems to recognizable and predictable components, law schools fail to present first-year students the opportunity to "obtain a general picture of the law as a whole." *Id*. at 169 (quoting JOSEF REDLICH, THE COMMON LAW AND CASE METHOD IN AMERICAN LAW SCHOOLS 14 (1914)).

126. Beiner, *supra* note 124, at 109 (quoting STEFANCIC & DELGADO, *supra* note 124, at 48–49).

127. Todd, *supra* note 108, at 125. Todd notes the inconsistency in judge's reliance on formalism, referring to a reliance on the "guise of formalism." *Id.* Acknowledging this realist critique that judges, claiming to adhere to formalism, often stray from its boundaries in formulating their opinions, Todd contends that this is of little import. *Id.* "Mask or no mask," he says, "a judge uses the discourse of formalism to articulate and justify her decisions." *Id.* at 126.

128. *Id*. at 125.

129. *See id*. at 126 ("[T]he advocate seeking to persuade a judge is bound to present his arguments in formalist conventions").

130. Gerald P. Lopez, *Transform—Don't Just Tinker With—Legal Education (Part II)*, 24 CLINICAL L. REV. 247, 376 (2018) ("[M]any and perhaps most praise legal education's brand of 'case method' as the way of inculcating a deep and supple understanding of 'how to think like a lawyer.'").

131. Rubin, *supra* note 92.

and to therefore be persuasive is a misstatement; or perhaps more accurately, a misdirection. To the extent that judges expect formalism, they do so *because it is what they were taught*. Continued reliance on formalism's case method in legal education thus creates the condition it uses to justify itself.

Though formalism has its place, we must teach the next generation's lawyers that it is not all-encompassing, and that there are alternative approaches to legal reasoning. Introducing Peacemaking into first-year curriculum is perfectly positioned to do this. It presents a fundamentally different way to think about law, a different way to "think like a lawyer." Peacemaking offers a people-centric approach which reminds students that the legal decisions they will make throughout their careers impact not merely some vague concept of the law and its doctrine, but the lives of the clients they serve and the communities those clients belong to.[132] In combination with the case method, it offers students diversity in the frames through which they will analyze legal problems as they continue through law school. Most importantly, it interrupts the system which turns legal formalism into a self-fulfilling prophecy.

Change across legal culture cannot occur while the current system remains in place. Law schools must begin to appreciate that they stand in the most prudent position to disrupt the cycle.

C. Rethinking Law Students' Assumed Tendency Toward Formalism

> Our toddlers speak of plants and animals as if they were people, extending to them self and intention and compassion—until we teach them not to.
>
> Robin Wall Kimmerer[133]

In my own law school experience, I have found that many of my professors decry formalism as a suboptimal method for appellate writing. At the same time, professors used the case method almost exclusively in my first-year courses. And it was familiar; the near-mathematical nature of classroom instruction made me feel more as though I understood what I was doing. The appellate opinions my professors taught felt like sample problems, and my professors instructed me to simply use the variables within them to solve for X in the next equation.

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132. *See generally* Susan J. Butterwick, et al., *Alternative Dispute Resolution: Tribal Court Peacemaking: A Model For The Michigan State Court System?*, 94 MICH. BAR J. 34, 34–38 (2015).

133. KIMMERER, *supra* note 80, at 57.

The notion that law students lend themselves to legal formalism is not isolated to my law school. Richard Posner, in articulating his thoughts on the problem with American law schools, recognized "the proclivity of law students toward formalism."[134] But proclivity toward a thing is not the same as wanting—or even preferring—that thing. Law school is an unfamiliar environment; many students struggle to adapt. Members of my first-year cohort frequently threw around the term "imposter syndrome."[135] The case method's scientific approach to law extends to students a familiar hand amidst often overwhelming uncertainty. As Posner describes, "students are natural formalists because formalism" makes them feel as if they "possess[] . . . a technical vocabulary . . . making them feel like . . . a real professional."[136] Formalism may comfort students, but only as an "intellectual crutch."[137] Students' desire for answers in the face of uncertainty is understandable. But an educator's role is to explain the unfamiliar rather than affirm the familiar. Law schools have a duty to develop in students a more full and meaningful understanding of law.

Uncertainty is not the only hurdle law students must overcome. Those pursuing a legal education suffer far higher rates of depression and anxiety than other students.[138] Professors Jean Stefancic and Richard Delgado set out to draw a connection between the unhappiness within the legal profession and formalism.[139] Beiner acknowledges the apparent

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134. Jamie J. Baker, *Keeping Up with New Legal Titles*, 108 L. LIBR. J. 449, 467 (2016) (reviewing RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY (Harv. Univ. Press 2016) (summarizing briefly Posner's critique of formalism in *Divergent Paths*, where Posner posits that legal academia is the ideal institution to address and correct what he describes as deficiencies in the federal judiciary)).

135. *See* Peter F. Lake*, Section I: Insights on Legal Education: When Fear Knocks: The Myths and Realities of Law School*, 29 STETSON L. REV. 1015, 1029 (2000).

136. Baker, *supra* note 134, at 467 (internal quotation marks omitted) (quoting POSNER, *supra* note 94, at 299).

137. *Id*. (quoting POSNER, *supra* note 94, at 302).

138. K. Jane Childs, *(Re)Counting Facts and Building Equity: Five Arguments for an Increased Emphasis on Storytelling in The Legal Curriculum*, 29 B.U. PUB. INT. L.J. 315, 349 (2020). Childs argues that avoidance of storytelling in legal pedagogy facilitates the mental health issues students end up struggling with. *Id*. at 328. She notes law school's notion of "thinking like a lawyer," its relegation of individual student perspectives, and the feelings of isolation and disconnect it creates. *Id.* at 350.

139. Beiner, *supra* note 124, at 101 (citing STEFANCIC & DELGADO, *supra* note 124, at 3). Stefancic and Delgado's research compares the lives of Ezra Pound —an American poet— and Archibald MacLeish —an American poet, lawyer, and public servant— to look at the problem of unhappiness amongst modern lawyers. *See generally* STEFANCIC & DELGADO, *supra* note 124. Through this unique conceptualization of the well-documented problem of dissatisfaction within the legal profession, Stefancic and Delgado draw thought-provoking conclusions about formalism's role. *See generally id*.

contradiction between Stefancic and Delgado's hypothesis and students' proclivity toward formalism:

> While Professors Stefancic and Delgado argue that the disconnect between what students' instincts tell them about what would be a just outcome and the dictates of formalism leads students to angst, I have found that law students are often reluctant to embrace indeterminacy in law and instead want formalism—a more certain and "cookie-cutter" approach to the law.[140]

But why do students do that which makes them unhappy? Stefancic and Delgado's thoughts on the matter,[141] in combination with Posner's explanation for students' default acceptance of formalism,[142] help to explain the apparent paradox. Beiner errs in conflating proclivity with desire.[143] She claims that students welcome formalism with open arms while showing reluctance toward indeterminacy in law without asking why this may be.

In a sense, Beiner answers the question she fails to ask. Students default to formalism because its "cookie-cutter" approach is easier to understand.[144] Formalism is familiar. It alleviates uncertainty and reassures students they fit in and that they are "real professionals."[145] Though comforting in the short-term, formalism's eschewing of social context in favor of strict rules is harmful to long-term happiness. It "draw[s] all spirit out of [the] work, robbing it of richness, detail, juice, and anything else that might render it sustaining."[146] Such explains the higher rates of depression amongst law students and the increased problems with addiction, divorce, and problems with physical health as they enter the profession.[147]

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140. Beiner, *supra* note 124, at 119.
141. STEFANCIC & DELGADO, *supra* note 124, at 64.
142. Posner, *supra* note 94.
143. Beiner, *supra* note 124, at 119.
144. Posner, *supra* note 94, at 302.
145. *Id.* at 298.
146. Beiner, *supra* note 124, at 110.
147. *Id.* at 111–12. Stefancic and Delgado also recognize other factors leading to the struggles lawyers have with their mental and physical health, citing long hours and little time for recreation or physical activity. *Id.* at 110–12. However, they connect this to formalism's prevailing position in legal culture. *Id*. The toll of long hours on lawyers' health is exacerbated by the unfulfilling "cookie-cutter" nature of legal practice. *Id*. at 112. Likewise, formalism "does not permit lawyers to consider other knowledge they possess that might affect the outcome and therefore makes the practice of law a deadening endeavor." *Id.* at 108.

Critics of Stefancic and Delgado's position offer an alternate explanation for this unhappiness: those who choose to enter the legal profession are simply predisposed to be unhappy.[148] Research from law professor Lawrence Krieger and psychologist Kennon Sheldon, however, lays this hypothesis to rest. Analyzing students' sense of well-being throughout their time in law school, Krieger and Sheldon found that law students, at orientation, were happier and more intrinsically oriented than a sample of undergraduate students.[149] As they progressed through law school, however, students showed consistent declines in positive affect and life satisfaction.[150] Extrinsic motivations began to overcome the intrinsic, and students grew more concerned with status and impressing those around them than with using their education to help others.[151]

These changes in personality support Stefancic and Delgado's theory. The rigid frame offered by formalism takes fact patterns that represent real human pain and deconstructs them to the point of obfuscation. It entirely disconnects students from the social context that led to the litigation in the first place.[152] More than that, it isolates students who attempt to import any such social context into classroom discussions while reinforcing depersonalization (or dehumanization) in factual analysis. When answering their professors, first-year students are nudged toward giving responses that comport with the case method's form of instruction.[153] Attention is drawn away from students who wish to begin with a description of those involved in the particular case, or the pertinent social context to the situation.[154] The people in legal fact patterns are turned into chess pieces, with legal rules dictating how they may be moved.

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148. *Id.* at 124–25.

149. *Id.* at 125 (quoting Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 433 (2005)).

150. *Id.* at 126.

151. *Id*. at 125–26.

152. Jess M. Krannich, et al., *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 393 (2009) ("By forcing students to narrowly focus on only the legal consequences of disputes, the case method excludes the social context in which disputes occur from students' frames of reference.").

153. MERTZ, *supra* note 112, at 82 ("As [students] apply facts to law, they learn rules for building appropriate analogies between cases. These rules are as often gleaned from the way a professor retells the story, or redirects discussion to students who are on the right track, as from explicit admonitions.").

154. *Id.* at 99 (describing the systematic restructuring of the way law students recount stories. "[A]s students are drawn into this new discursive practice, they are drawn away from the norms and conventions that many members of our society[] . . . use to solve conflicts and moral dilemmas").

It is no surprise, then, that law students increasingly lose sight of the intrinsic motivations they entered law school with.[155] Their disillusionment toward the legal profession, facilitated by formalism's severing of facts from the human beings within them, seeps its way into students' everyday lives. They begin to approach things outside of the law from the same detached perspective.[156] And in this way, law school fulfills its promise; "thinking like a lawyer" becomes the default.

The findings that Elizabeth Mertz details in her research lend further support to the idea that law school creates dispassionate individuals.[157] Mertz studied eight first-year contracts courses in law schools across the country, transcribing the dialogue between professors and their students.[158] The study largely detailed the gradual metamorphosis in students' thought processes throughout their introductory year in law school. In one transcript, Mertz succinctly captures this transition:

Professor: How did this get to the appellate court?
Student: Well the um the patient was a woman who wanted a-
Professor: How did this case get to the appellate court?
Student: The defendant disagreed with the way the damages were awarded in the trial court.
Professor: How did this case get to the appellate court?
Student: It was appealed.
Professor: It was appealed, you say. Did you find that word anywhere except in the problem?[159]

After the student gives the desired response, the professor incorporates the student's language into a subsequent question. Mertz characterizes this process as "uptake."[160] In repeating a student's answer, the professor indicates that they heard and took note of the answer.[161] This can also be

155. Beiner, *supra* note 124, at 125 ("Sheldon and Krieger opine that students begin law school with intrinsic motivations, but move toward extrinsic motivations, leading to a decline in [subjective well-being]").

156. *See* Susan Sturm, *Lawyering Paradoxes: Making Meaning of The Contradictions*, 62 SANTA CLARA L. REV. 175, 229 (2022) (discussing the restructuring of law students' mode of analysis outside legal contexts). Regarding conversations with their peers, students found themselves "listen[ing] for how they can use or refute what they are hearing, and report finding it more difficult to listen with the goal of understanding, empathizing, or appreciating the perspective and experience of others." *Id*.

157. *See* MERTZ, *supra* note 112, at 9. Mertz leverages her anthropological background to answer what it means to "think like a lawyer" in the context of first-year law school instruction. *Id.*

158. *Id.* at 13.

159. *Id.* at 53–54.

160. *Id.* at 54. Mertz defines uptake as the process by which a "professor, in framing a question, includes some reference to the student's previous answer." *Id.*

161. *Id*.

understood as positive reinforcement; the professor grants a student something they desire—affirmation that their response was correct—after a student gives the type of answer the professor sought.[162] In repeating the original question after receiving responses contrary to this sought-after answer (which Mertz describes as "nonuptake"[163]), the professor uses positive punishment—the discomfort attached to the indication of one's wrong answer in front of their peers—to extinguish students' behavior of offering such answers.[164] Through this process, professors shape the way their students think.

This interaction summarizes the restructuring of students' analytical problem-solving approach which occurs during their first year in law school. When asked how the case reached the appellate court, the student attempted to recount a story.[165] They focused on the individuals involved and their perspectives.[166] After being cut off, the student added legal terms into their story, replacing "woman" with "defendant."[167] When their professor indicated that this response was still incorrect, the student abandoned their attempt to tell a story altogether.[168] Ignoring context for the most literal explanation, they responded: "It was appealed."[169] In summarizing this phenomenon, Mertz explains that uptake (or positive reinforcement) occurs where students produce answers focused on layers of textual and legal authority, and nonuptake (or positive punishment) occurs where they offer a narrative telling a story between two people.[170]

This dispassionate form of reading contributes to the unhappiness which Sheldon and Krieger contend is conceived during law school.[171] But the emphasis on formal rules over human emotion does not contain itself to legal analyses. The stated goal of law school is, after all, to train students

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162. *Positive Reinforcement*, APA DICTIONARY OF PSYCH., https://dictionary.apa.org/positive-reinforcement [https://perma.cc/3XSC-GEVM] (last updated Apr. 19, 2018).

163. MERTZ, *supra* note 112, at 54 (noting that repetition of the original question is the purest form of nonuptake).

164. *Positive Punishment*, APA DICTIONARY OF PSYCH., https://dictionary.apa.org/positive-punishment [https://perma.cc/66ZZ-NVHE] (last updated Apr. 19, 2018).

165. MERTZ, supra note 112, at 53–54.

166. *Id*.

167. *Id*. at 54.

168. *Id.*

169. *Id*.

170. *Id.* at 56. The result is an extinction of human conflict stories—and the "social contexts and moral overtones" inherent in them—in favor of the legal authorities drawn from them. *Id.*

171. Beiner, *supra* note 124, at 125 ("Krieger and Sheldon argue that the nature of law school and the conflicts it causes for individuals result in lowered self-esteem, life satisfaction, and well-being in law students.").

to "think like a lawyer."[172] The language used here is significant; law schools could aim to train students how to argue like a lawyer, or how to practice like a lawyer. The choice to train students how to *think* like a lawyer is deliberate.[173]

In narrowing students' gaze around what formalism deems "relevant facts," the method becomes second nature. It draws students "away from the norms and conventions that many members of our society, including future clients, use to solve conflicts and moral dilemmas."[174] Such social disengagement fosters the dissatisfaction that is so prevalent in legal culture.[175]

The problem is not that American law schools teach formalism. It is that they use it as a one-size-fits-all approach.[176] Students are told to build a house while law schools offer them only a hammer. It can be a powerful tool when put toward its intended use, but the hammer provides no help in cutting boards to length or digging a foundation. Current legal pedagogy similarly leaves students unprepared to enter the profession.

D. The Potential of Peacemaking

Reciprocity is key to success. When sweetgrass is cared for and treated with respect, it will flourish, but if the relationship fails, so does the plant.

Robin Wall Kimmerer[177]

Peacemaking is best suited to fill the ideological gap in first-year law school curriculum. Some scholars argue for a restructuring emphasizing

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172. Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 208–09 (2010) ("[T]he process used to teach students to think like a lawyer[] [is] the defining goal of most law schools" (quotations omitted) (quoting David T. ButleRitchie, *Situating "Thinking Like a Lawyer" Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 34 (2002–2003))).

173. Ho, *supra* note 90, at 148. Ho discusses the history of "thinking like a lawyer" as it coincides with the rise of the Langdellian case method in law schools. *Id.* Use of the term "think" elevated legal education above simple behavioral training. *Id.* at 147–49. It created a necessary mind state for law, putting it next to established sciences which were thought to require certain modes of thinking. *Id.* at 149.

174. MERTZ, *supra* note 112, at 99.

175. STEFANCIC & DELGADO, *supra* note 124, at 48.

176. Ho, *supra* note 90, at 141 (referring to Langdell's case method: "[L]aw schools continue to impart knowledge and training using a pedagogy steeped in the nineteenth century . . . ." (footnote omitted)).

177. KIMMERER, *supra* note 80, at 262.

the development of legal skills[178] over the answer-driven formalist framework currently in place, but this does not go far enough. Typical legal skills courses—Negotiation, Alternative Dispute Resolution (ADR), Appellate Advocacy and so on—operate within the boundaries of the traditional adversarial system.[179] Peacemaking is unique in that it offers a true alternative method of lawyering. Rather than operating to punish wrongdoing, Peacemaking aims to heal relationships, not only between parties but within the communities the individuals represent.[180] These ends are accomplished in part through Peacemaking circles. The process involves bringing adverse parties together alongside community members who share a stake in the outcome of the dispute.[181] Peacemakers guide the endeavor, asking questions to prompt discussion.[182] Each member of the

178. Sara K. Rankin, *We Have a Dream: Integrating Skills Courses and Public Interest Work in the First Year of Law School (and Beyond)*, 17 CHAP. L. REV. 89, 90 (2013) ("We have found that these [integrated skills] projects provide our first-year students with exceptional training in practical skills, generate remarkable student satisfaction, and reignite student passion for the practice of law."); *see also* Ho, *supra* note 90, at 172 (quoting DUNCAN KENNEDY, LEGAL EDUCATION AS TRAINING FOR HIERARCHY, *reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 54, 65 (David Kairys ed., 3d ed. 1998) "A more rational system would emphasize the way to learn law rather than rules, and skills rather than answers."). Kennedy is closer to being on point; the impact of an emphasis on legal skills in first-year curriculum depends entirely on the nature of the skills being taught. *See generally* Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 198 (2012) (identifying and discussing a "short list of practical skills not effectively taught in law school."). To develop an understanding of the professional scope to which legal training may be applied requires an emphasis on skills showing how lawyering can be effectuated outside the adversarial system. *See* Kimberlee K. Kovach, *Lawyer Ethics must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 413 (2003) (advocating for a revision to the Model Code of Professional Responsibility to accommodate growing interest in non-adversarial legal practice).

179. *Upper-level Courses*, WAYNE STATE L., https://law.wayne.edu/academics/courses/upper-level [https://perma.cc/8H4S-LES6]. The listed courses are examples of those which fill the "professional skills" requirement at Wayne State. *Id.*

180. Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges as the "New" Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL'Y 329, 344 (2003) (explaining how Peacemaking's emphasis on community differentiates it from traditional alternative dispute resolution (ADR)). "ADR mechanisms focus on the self." *Id.* at 339. Communities are thus excluded from the healing process. *Id.* at 339.

181. *Id.* at 346 ("Following the basic principles of restorative justice, peacemaking circles involve community members in the process of healing and rebuilding tarnished relationships in a place that promotes unity and equality").

182. Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 900 (1999) (describing the role of a peacemaker and contrasting it with that of a mediator).

circle has an opportunity to speak their truth without interruption; a talking piece is passed around to represent whose turn it is to speak.[183]

A lawyer's job is to reach a satisfactory outcome for their client, and the results from methods like Peacemaking circles strengthen the argument for Peacemaking's integration into the first-year legal curriculum. A comprehensive study on Canada's Community Holistic Circle Healing (CHCH) program—initiated to respond to incest and sexual assault within Native communities in Manitoba—found that most circle participants left satisfied with the experience.[184] They appreciated the ability to participate in the resolution of their conflict themselves and enjoyed the mutual respect the circle offered.[185] In addition to being preferred by participants, the CHCH program was also economically advantageous. The study found similar government services would have cost approximately five times more than what was spent on the administration of CHCH.[186]

The recidivism rates reflected client satisfaction. Only 2% of clients reoffended over a ten-year period, compared to the 13% recidivism rate for sex offenders in traditional government programs.[187] Peacemaking serves the ends the legal profession is supposed to meet. It works. Exposing students to Peacemaking adds an incredibly effective tool to their toolbox, allowing them to work with more than just a hammer.

Many American law schools offer courses that represent diverse legal theories. I can participate in writing this article only because Wayne State Law School's Peacemaking course exposed me to the potential for Peacemaking in the law. But law schools have it backwards in reserving

183. James D. Diamond, *In the Aftermath of Rampage Shootings: Is Healing Possible? Hard Lessons from the Red Lake Band of Chippewa Indians and Other Indigenous Peoples*, 11 GEO. J. L. & MOD. CRIT. RACE PERSP. 101, 125–26 (2019).

184. Smith, *supra* note 180, at 363.

185. *Id*. Responding program participants consisted of both victims and victimizers. *Id.* at 362. They appreciated Peacemaking circles because it allowed them to have a voice in the administration of justice. *Id.* at 363. Smith acknowledges, however, that satisfaction was not exclusively favorable. *Id.* Some participants took issue with the lack of privacy and difficulty in working through these matters with family and friends. *Id.* This response was the minority; the community as a whole "continues to see the process as helpful and desirable." *See id*.

186. *Id.* at 364 (internal quotation marks omitted) (quoting Executive Summary from Solicitor General Canada, Federal Government Announces Release of Report on Healing Program for Victims and Offenders (June 11, 2001) (on file with HAMLINE J. PUB. L. & POL'Y) "Overall, the research indicates that for every $2.00 the provincial and federal government spends, the community receives well over $6.21 to $15.90 worth of services and value-added benefits.").

187. *Id.* at 365.

such courses for upperclassmen.[188] Wayne State may have given me the opportunity to learn about Peacemaking, but it didn't make it easy. A friend who took the course alerted me to its existence; no professor, dean, or counselor had ever mentioned it. No professor I had discussed the course with knew that Peacemaking was even offered, and many were unfamiliar with the term entirely. Upon attempting to enroll in the course, I was put on a waitlist. Not because it was full, but because I was a 2L, and third-year students were prioritized. This practice of waiting until the last minute to introduce students to novel legal theories sends a message that alternative ideologies are but afterthoughts to the dominant formalist foundation built in their first year. Law schools have a duty to educate students on diverse methods of legal reasoning. They fail to meet this duty in forcing students to seek out such methods on their own and limiting opportunities to the final semesters of their legal education.[189]

The idea that law schools should integrate Peacemaking into first-year curricula came to me naturally after I was exposed to it. At the same time, my initial reaction upon contemplating beginning work on this article was that law schools would never respond to it. I have found the bureaucratic nature of higher education administrations makes them hesitant to change. But to refrain from acting under the assumption that those in power will not respond is nihilistic. It stands in the way of progress. In writing this article, I remind myself that law schools were initially hesitant toward the Langdellian case method which now dominates.[190]

Those fortunate enough to have been exposed to Peacemaking share my opinion about it. The profound effect it had on each of my classmates was clear; we were excited to consider how Peacemaking could be implemented in the diverse areas of law we were interested in. Our discussions ranged from human rights to corporate practice.[191] And the

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188. WAYNE STATE L., *supra* note 179. The notes under Wayne State's description of its Peacemaking course indicate that the course is reserved for graduating students.

189. Rubin, *supra* note 92, at 653. In highlighting the impactful nature of a lawyer's 1L training, Rubin succinctly articulates the system within which American legal culture moves forward. He notes the general combativeness of American lawyers compared to their counterparts in other industrial nations; in asking why this may be, Rubin emphasizes the frame that is set early in law school, "which inaccurately treats the law suit as the defining event in the legal system." *Id.* at 653.

190. *See* Ho, *supra* note 90, at 145 ("At first, other competing law schools were reluctant to use the method").

191. For discussions on how Peacemaking practices can make an impact in different areas of law, see Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons for Peacemaking?*, 36 VAND. J. TRANSNAT'L L. 449 (2003) (discussing the use of Peacemaking practices in a corporate setting to address workplace violence); Forrest S. Mosten, *Lawyer as Peacemaker: Building A Successful Law Practice*

same is true in other law schools that offer Peacemaking; three students from UCLA came together to detail their experiences with the school's *Lawyer as Peacemaker* course.[192] The eye-opening effect they describe is made more significant by the course's brevity; *Lawyer as Peacemaker* is offered only during UCLA's shorter January term, and class meets only five times.[193]

In surveying their peers, eighty percent exclaimed that they would take further courses in Peacemaking if the school offered them.[194] The remainder indicated that they might do so, meaning no students were outright opposed to taking additional Peacemaking courses.[195] Every student agreed they would recommend the course to others, with over ninety percent stating that *Lawyer as Peacemaker* would better serve students as a full-semester course.[196] And after only five class periods on the subject, all but one student expressed interest in pursuing a career in Peacemaking, even though two-thirds had not even heard the term used before participating in the course.[197]

Law students' response to Peacemaking as a form of legal interpretation is in stark contrast to their assumed proclivity toward formalism.[198] But how can we conclude students prefer formalism while withholding from them available alternatives? Students are generally made to think that their choice is binary, between legal formalism and realism.[199] Like the UCLA students, my peers and I were entirely unfamiliar with the concept of Peacemaking before our participation in the course. Upon exposure, law students easily identify with the community-centric form of legal reasoning offered through Peacemaking because it comports with their deepest core values. Empathy and compassion, largely

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Without Ever Going to Court, 43 FAM. L.Q. 489 (2009) (detailing Peacemaking's potential to compliment or replace current practices in the space of family law).

192. Matthew Zeidel et al., *Learning to Be a Peacemaking Lawyer: Law Student Perspectives on Building Peacemaking Into Law School Curricula, Building Paths To Practice For New Lawyers, and Interdisciplinary Training*, 53 FAM. CT. REV. 526 (2015).

193. *Id.* at 526.

194. *Id.* at 531 ("We wondered if *other students* who took this course shared our thoughts . . . . In an anonymous survey in which eleven of the fifteen *other students* voluntarily participated . . . ." (emphasis added)). The writers excluded themselves from this survey.

195. *Id*.

196. *Id*.

197. *Id*. at 538.

198. Baker, *supra* note 134, at 467.

199. *See id.* at 468. Posner, in his critique of law schools' reliance on formalism, contends that legal realism puts judges in a better position to make decisions. He presents the two ideologies as either-or, implying no room for alternate approaches. Posner, *supra* note 94, at 79.

considered irrelevant in the traditional approach to legal practice,[200] are at Peacemaking's foundation. It teaches "processes that build and foster relationships,"[201] empowering clients to resolve conflicts rather than placing this power in the hands of the lawyer. In failing to provide this perspective, law schools alienate students who do not identify with the adversarial approach, particularly those who aspire to work in public interest roles.[202]

The first year of law school is a formative period in the student's life.[203] They must adapt to a novel environment; students will naturally look to figures of authority—primarily their professors—to show them how to integrate. Duncan Kennedy provocatively articulates the workings of the ensuing system:

> Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. This is the linkback that completes the system: students do more than accept the way things are, and ideology does more than damp opposition.[204]

Students enter law school as wet mounds of clay, to be shaped by the institution that surrounds them. If that institution presents them with but one approach to problem solving, they will "continue to perpetuate [its] hierarchy; . . . [and] eventually steer the industry and field" in its image.[205]

For this reason, it is imperative that Peacemaking be integrated into law schools' mandatory first-year curriculum. To offer it as an elective is

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200. Sarah Buhler, *Painful Injustices: Encountering Social Suffering in Clinical Legal Education*, 19 CLINICAL L. REV. 405, 423 (2013) ("A clinical law pedagogy that embraces and encourages critical emotional praxis subverts dominant norms of coolness, rationality, and neutrality in legal education, and disrupts dominant ideas of emotions as being separate and irrelevant to legal practice.").

201. Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing And Reconnection*, 13 NW. J. L. & SOC. POL'Y 1, 15 (2017) (discussing the implementation of restorative justice pedagogy, with a focus on Peacemaking circles, at Northwestern's Pritzker School of Law).

202. Childs, *supra* note 138, at 345–50 (discussing law schools' failure to mentor students through alternative legal narratives, tying this failure to the feeling of isolation and disconnect many law students experience).

203. *See* Rubin, *supra* note 92.

204. Ho, *supra* note 90, at 170 (quoting DUNCAN KENNEDY, LEGAL EDUCATION AS TRAINING FOR HIERARCHY, *reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 54, 54 (David Kairys ed., 3d ed. 1998)).

205. *Id.* at 171.

not enough. Law school teaches students an entirely new language.[206] As they learn to speak the language, they internalize the ideological conventions that are taught with it.[207] And these conventions entrench themselves in students as they grow more fluent throughout their time in law school. They shape students' understanding of the language. Alternative ideological conventions are far more difficult to teach after others have been cemented into the student's understanding,[208] the same way it is more difficult to teach a new language to a teenager than to a toddler. Thus, law schools must expose students to divergent ideologies immediately and simultaneously.

First-year legal curricula need not be as rigid as the conformity amongst American law schools makes it seem. Required coursework traditionally consists of Contracts, Civil Procedure, Criminal Law, Property, Torts, a course in legal research and writing, and an introduction to Constitutional Law.[209] But there is ample opportunity for change; the only thing standing in its way is administrative reluctance toward it. The ABA certainly does not require law schools to tie themselves to such an outdated mode of legal education.[210] In fact, the only explicit first-year coursework requirement set by the ABA is that students must participate

206. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 146 (2016) (noting "learning the new language of law" as part of students' transition from college to law school).

207. Mertz, *supra* note 112, at 228 ("[O]nce someone has thoroughly internalized the metalinguistic system of legal reasoning, she or he will begin to habitually marginalize some aspects of social context and morally grounded reasoning").

208. Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 671 (2017) ("Once a concept has been synaptically cemented by continued activation of the same neural pathways by the same stimulus, it becomes highly difficult to undo.").

209. Samantha Weller, *First Year Law School Curriculum: What to Expect*, https://lawpreview.barbri.com/law-school-curriculum/#:~:text=The%20classes,%26%20Writing%2C%20and%20Property%20Law [https://perma.cc/69DN-FS94] (Mar. 29, 2021).

210. Steven K. Homer*, From Langdell to Lab: The Opportunities and Challenges of Experiential Learning in The First Semester*, 48 MITCHELL HAMLINE L. REV. 265, 269 (2022):

In general, there has been a widespread sense that these educational models, if not already outdated at the time of their adoption, serve our students very poorly today. Equally important from a learning perspective, the instructional monotony of so many Socratic, doctrinal credit hours means first-year students are neither required, nor do they have the opportunity, to use diverse methods of learning to identify, analyze, and resolve legal problems.

in one faculty-supervised "writing experience."[211] Introducing Peacemaking as a required first-year course would actually satisfy one of the most recent amendments to Standard 303:

> (c) A law school shall provide education to law students on bias, cross-cultural competency, and racism:
>
> (1) at the start of the program of legal education, and
>
> (2) at least once again before graduation.[212]

The note on interpretation of this part explains it may be satisfied through "[c]ourses incorporating these topics."[213] Such concepts are at the core of Peacemaking's ideological foundation; it flips the script on traditional advocacy, teaching lawyers to filter legal problems through the perspective of the client and the communities the client represents.[214] There is no better way to meet the Standard's goal of "eliminat[ing] racism in the legal profession"[215] than to instill in students a frame enabling them to approach their future clients as human beings within a network of other human beings, rather than hollow amalgamations of legal arguments.[216]

Top American law schools are trending toward restructuring their first-year curricula. The University of Michigan Law School no longer requires Property as a first-year course.[217] In its place is a 1L Advocacy Clinic, allowing students to work on real cases under the supervision of experienced lawyers.[218] First-year students at Yale Law School have freedom to fill their second semester schedules with electives and clinics, with required coursework being contained entirely within the first

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211. *Standards and Rules of Procedure for Approval of Law Schools, Standard 303*, *in* ABA, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (2022–2023).

212. *Id*.

213. *Id.* at 19–20.

214. Butterwick, et al., *supra* note 132, at 35 ("In peacemaking, conflict provides an opportunity to build community and human relationships.").

215. *Id*.

216. *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 211, at 19–20.

217. *Class Schedule*, MICH. L., https://michigan.law.umich.edu/course-catalog?search=&areas_of_interest=All&course_type=432 [https://perma.cc/V9LV-RRKD] (last visited Feb. 3, 2024 11:40 AM).

218. *Course Catalog*, MICH. L., https://michigan.law.umich.edu/course-catalog [https://perma.cc/V9LV-RRKD] (last visited Feb. 3, 2024 11:40 AM).

semester.[219] The University of Chicago Law School has replaced Constitutional Law with their unique *Elements of the Law* course, introducing students to fields of study intersecting law such as philosophy and psychology.[220]

The international evolution of first-year legal curriculum is even more compelling. In its final report, Canada's Truth and Reconciliation Commission called upon Canadian law schools "to require all law students to take a course in Aboriginal people and the law."[221] And schools have heeded this call. In 2018, the University of Windsor Law School made its Indigenous Legal Traditions course a part of mandatory first-year curriculum.[222] Then-dean Chris Waters explained that up to this point, the university had "neglected to teach [students] that there is a whole other basket of legal traditions in Canada."[223] The Schulich School of Law has similarly integrated Aboriginal and Indigenous Law in Context into its mandatory first-year coursework.[224] The Canadian model offers an alternate system for legal culture; it disrupts the perpetuation of traditional legal formalism. Canada's CHCH program exemplifies this breaking of legal norms. The ideologies students are exposed to in law school make their way into legal practice.[225] And as the study on the CHCH program has shown, this evolution in the law benefits clients and the wider communities they represent.[226]

The first year of law school serves to mold the next generation of legal minds, shaping the forms of legal reasoning students will carry into

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219. YALE L., THE 2020 GUIDE TO ACADEMICS 4, https://ylw.yale.edu/wp-content/uploads/2020/08/411-from-YLW-Academics-2020.pdf [https://perma.cc/W7JR-3XKF]. Required coursework in the first semester consists of Constitutional Law, Contracts, Procedure, Torts, and a seminar style course in legal research and writing. *Id.*

220. *First Year Courses*, THE UNIV. OF CHICAGO: THE L. SCH., https://www.law.uchicago.edu/prospective/1Lcourses [https://perma.cc/69QG-YVLL].

221. *See* TRUTH AND RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 221, (2015), https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf [https://perma.cc/Q3ZZ-JR6G].

222. Mary Caton, *Law Students Now Required to Study Indigenous Legal Traditions*, WINDSOR STAR (Aug. 24, 2018), https://windsorstar.com/news/local-news/law-students-will-be-required-to-take-course-on-indigenous-legal-traditions/ [https://perma.cc/NA9J-N4MB].

223. *Id*.

224. *Courses & Requirements*, SCHULICH SCH. OF L., https://www.dal.ca/faculty/law/current-students/jd-students/courses.html [https://perma.cc/B9VF-BM95].

225. Cathrine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1302 (1988) ("What we do in law school shapes what we will do as lawyers, which in turn affects the lives of others.").

226. *See generally* Mark S. Umbriet Ph.D., et al., *The Impact of Restorative Justice Conferencing: A Review of 63 Empirical Studies in 5 Countries* (May 1, 2002)

practice. Peacemaking teaches legal reasoning from a place of community-oriented healing, offering students a powerful tool for dispute resolution.[227] It suits the goals of law school's introductory period by showing students that there is more than one way to "think like a lawyer." Students are more than open to it; those with even brief exposure to Peacemaking report the "eye-opening" effect it has had on their view of law and the career paths they wish to follow.[228] And there is ample space to integrate Peacemaking into American law schools' required first-year coursework.[229]

E. Conclusion

> I came to know the feel of the gravelly bottom below the muck, the sucking mud by the cattails and the cold stillness where the bottom dropped away from the shallows. Transformation is not accomplished by tentative wading at the edge.
>
> Robin Wall Kimmerer[230]

American law schools are broken. The dominance of the formalist case method has "engendered an appearance of its 'immutability' . . . [making] 'it seem[] less a tradition than a fact of nature.'"[231] The reluctance of law school administrations to upset this status quo spawns a self-perpetuating system.[232] Students are taught to think through a formalist frame; entering the profession, they craft formalist arguments; judges reading these arguments write formalist opinions; these opinions are printed in new editions of casebooks, repeating the cycle.[233]

Law is inherently malleable. It reflects our cultural values as they evolve.[234] Yet law schools continue to impress upon students an unyielding rigidity in legal interpretation.[235] They turn complex human problems into mathematical equations, reducing law to a form of

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227. Butterwick, et al., *supra* note 132, at 35 ("Goals of [peacemaking court] include increasing accountability and understanding, improving communication, and healing relationships between litigants with more tailored and durable solutions that better meet the needs of all parties").

228. Zeidel, *supra* note 192, at 531.

229. *See e.g.*, *supra* notes 209–20.

230. KIMMERER, *supra* note 80, at 89.

231. Ho, *supra* note 90, at 178 (alternation in original) (quoting Edward Rubin in his hypotheses for the case method's persistence in legal pedagogy).

232. *Id.* at 179 ("In staying on the boat and not rocking it, we tell ourselves that the boat is truly state-of-the-art in order to justify continual refrain from rocking the boat").

233. *See supra* Part II.B.

234. Ho, *supra* note 90, at 197.

235. *See supra* Part II.B.

arithmetic suited only for the most simplistic legal situations.[236] Great lawyering does not limit itself to solving for X. The result of this system is dissatisfaction within the profession and amongst those it is meant to serve.[237]

American law schools must integrate Peacemaking into first-year curriculum because it offers a contrary approach at a critical period in students' education.[238] During their introductory year, students develop the structures for legal reasoning that they will carry with them through the remainder of law school and beyond.[239] Other ADR courses and experiential learning offered at this stage merely give students the opportunity to apply the form of reasoning instilled in them through the case method.[240] Peacemaking is different. It requires inquiry into the "why" while maintaining the voice of the human beings at the heart of the problem.[241] It provides a more expansive understanding of the law, how it works, and how it can be used to help people. And it uncovers career paths otherwise hidden, ones which clients have found tremendous success in.[242] By exposing students to Peacemaking, law schools can fulfill the responsibility they have to their students, to the legal profession, and to all those the profession touches.

III. PEACEMAKING AT THE FEDERAL LEVEL

Despite a lack of representation within law schools, indigenous dispute resolution processes like Peacemaking are beginning to gain acceptance in pockets of the legal profession. Exposing law students to this alternative form of legal thinking is the best way to sustain its growth.

One new development is taking place at the U.S. Department of the Interior, an agency whose responsibilities to indigenous peoples include fulfilling its trust responsibilities, supporting Tribal self-governance and self-determination, and strengthening the government-to-government/nation-to-nation relationship between the federal government and federally recognized Tribes, and which employs thousands of indigenous people across the Department and its Bureaus in carrying out

236. *See supra* Part II.C.
237. *See generally* Beiner, *supra* note 124.
238. *See supra* Part II.D.
239. *Id*.
240. *Id*.
241. *Id*.
242. *See generally* Zeidel, *supra* note 192; Smith, *supra* note 180.

a wide range of missions.[243] The Department's Office of Collaborative Action and Dispute Resolution (CADR) is charged with leading collaboration, conflict management, and dispute resolution for both the workplace and matters involving external parties related to the environment and natural and cultural resources under the authority of the Administrative Dispute Resolution Act of 1996.[244] As an office of neutral, confidential, and independent dispute resolution practitioners, CADR has for several years been exploring and building its capacity to offer resilience-oriented, trauma-informed, and culturally integrated Alternative Dispute Resolution (ADR) practices where these approaches are needed by and useful to the parties involved. CADR staff members have, for example, received training in circle processes, strategies for trauma awareness and resilience, and indigenous environmental justice, and recently participated in an extensive training on Indigenous Peacemaking led by respected tribal elders and jurists. Consistent with the office's innovative orientation to practice and the inherent flexibility of ADR and giving credit to the indigenous origins of this practice, the office is currently considering how to offer Indigenous Peacemaking as a form of ADR where all parties involved request this type of service, where it is culturally appropriate, and where Departmental clients are able to dedicate funding or other resources.

IV. PEACEMAKING IN THE JUDICIAL SYSTEM

One lesser used definition of "education" offered by Oxford Dictionaries is "an enlightening experience."[245] Merriam-Webster Dictionaries define "enlightening" as "providing . . . knowledge, understanding, or insight."[246] Black's Law Dictionary defines "experience" as "a word implying skill, facility, or practical wisdom gained by personal knowledge, feeling, and action, and also the course or process by which one obtains knowledge or wisdom."[247] And one oral position, spoken upon me though my Irish ancestors, on the root of both

243. *DOI's Work with Tribal Nations*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/pmb/cadr/programs/native/tribal-nations [https://perma.cc/D7H6-SUJM].

244. *See generally Office of Collaborative Action and Dispute Resolution*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/pmb/cadr [https://perma.cc/J9UC-VQVG].

245. *Education*, OXFORD DICTIONARY OF ENGLISH (3rd ed. 2010).

246. *Enlightening*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/enlightening?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [https://perma.cc/7A9R-XTPM].

247. *Experience*, BLACK'S LAW DICTIONARY (6th ed. 1990); *see also* Chicago I. & L. Ry. Co. v. Gorman, 58 Ind. App. 381, 385 (Ind. Ct. App. 1914).

words and implications is as follows: "For what is in a word, but a sound? What is in a thought, but a quickening of the mind's eye?"

There are law schools that currently offer dedicated curricula for Peacemaking in State Court Justice Systems.[248] These courses are based on the institutional cultural appreciation of Native Peacemaking Courts in Michigan by the Michigan Supreme Court.[249] Tribal Judge Michael Petoskey (ODAWA), architect of many of Michigan's Tribal Peacemaking Courts, notes the devastating impact of federal policies on Indigenous communities and yet, through resiliency—another foundational principle of Peacemaking—Peacemaking survived in Native communities and was shared with appreciative state courts. "We are now in an era of cultural revitalization and Peacemaking is one aspect of this revitalization."[250]

This revitalization is not unique to Michigan's two peninsulas. It is nationwide. It is seen in the indigenous nations within our borders, and in our nation as well. Justice Brett Lee Shelton leads the decades long Indigenous Peacemaking Initiative at the Native American Rights Fund (NARF).[251] As he notes, Peacemaking is less focused on the concept of individual rights and more on wider community values of "responsibility, relationship, reciprocity and respect."[252] Utilizing Peacemaking pre-litigation can allow for meaningful resolution on difficult subjects, even among institutional actors. Carson Smith (Choctaw), for example, facilitated Peacemaking Circles to resolve institutional issues relating to buildings bearing tribute to certain historical figures.[253]

Cheryl Fairbanks (Tlingit-Tsimshian) grew up in Prince of Wales Island, Alaska, and teaches a Peacemaking clinic at the University of New Mexico Law School.[254] Robert Yazzie (Dine), retired Justice of the Navajo Supreme Court, also teaches Peacemaking at the University of New Mexico Law School.[255] Drawing from her understanding of the roots of Peacemaking as well as our current state and federal systems, Justice

248. *See e.g.*, *Peacemaking in State Court Justice Systems*, MICH. L., https://michigan.law.umich.edu/courses/peacemaking-state-court-justice-systems [https://perma.cc/K7E6-SK7F]; *Upper-level Courses*, *supra* note 179 (listing Peacemaking in State Court justice Systems; LEX 7658); *Peacemaking Courts*, VT. L. & GRADUATE SCH., https://www.vermontlaw.edu/academics/courses/restorative-justice/7270-0 [https://perma.cc/7D6N-AR73].

249. Evans, *supra* note 79.

250. *Id*.

251. *Id*.

252. *Id*.

253. *Id*.

254. *See Who We Are*, LIFE COMES FROM IT, https://www.lifecomesfromit.org/who-we-are [https://perma.cc/L9KP-WZ8R].

255. *Id*.

Fairbanks outlines some fundamental differences between the two. In her analysis, our current system emphasizes the following values in conflict resolution: Individualism; Competition; Autonomy. In contrast, Peacemaking emphasizes as core values for conflict resolution Community; Cooperation; and Relatedness.[256]

In 2013, the Michigan Supreme Court commissioned the exploration of tribal court Peacemaking philosophies, principles, and procedures alongside a report on whether state courts could benefit from what could be learned from their tribal neighbors. Evaluations from first year participants were overwhelmingly positive.[257]

What type of cases have benefited from Peacemaking in the Michigan state court experience? All types. The recognition that conflict among litigants affects wider communities—family, workplace, school, neighborhoods, institutions, and other relationships—is critical. Peacemaking allows for creative, tailored, and durable solutions that better meet the needs of all parties.[258]

In creating those tailored and durable solutions in Peacemaking circles, the needs of the parties have involved issues as wide-reaching as probate guardianships and estate distributions; juvenile delinquency; neglect and abuse reunification dockets; termination dockets; family court custody disputes; civil wrongful death lawsuits; business court cases and adult criminal sentencing circles.[259]

By appreciating, not appropriating, Indigenous traditional justice systems, state courts can fulfill their responsibility to provide justice to the communities they serve with dignity and effectiveness.[260] Peacemaking can–and should–be an available, concurrent path to any litigant, regardless of case type or subject matter.

Offering such a concurrent path for litigants is not so foreign a proposition to our current justice system. Consider, for example, the strength and significance of the jury in our American democracy. Inherent in both federal and state constitutions is the fundamental right of citizens to a trial by jury, not judge, in most cases.[261] The structure of that decision-making process varies dramatically from that of a singular judge: it is a

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256. Timothy Connors, *Exit, Pursued by a Bear: Why Peacemaking Makes Sense in State Court Justice Systems*, 55 JUDGES J. 24, 28 (2016).

257. *Id*.

258. *Id*.

259. *See generally* Timothy Connors, *Rights, Relationships, Responsibilities*, 48 HUM. RTS. 16 (2022); Toering, Williamson, and Lockhart, *Touring the Business Courts*, 42 MICH. BUS. L. J. 12 (2022).

260. Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

261. U.S. CONST. amend. VII; MICH. CONST. art. I, § 20.

circle, each voice having an equal say, with listening and consensus as the guide.

In Michigan, jurors are instructed as follows:

> You will be given a written copy of the final jury instructions for your use in the jury room for deliberation. . . .
>
> When you go to the jury room, your deliberations should be conducted in a serious and respectful manner. You should first select a foreperson. She or he should see to it that the discussion goes forward in an orderly fashion and that each juror has full opportunity to discuss the issues.
>
> . . . In your deliberations, you should weigh the evidence with an open mind and consideration for each other's opinions.
>
> In this jury trial your group decision-making process is important. A jury that works together to deliberate fairly and respectfully as a group is more likely to come to a fair and just result.
>
> . . . You are encouraged to share with your fellow jurors the evidence you heard and saw that others may have missed.
>
> . . . .
>
> . . . [A]s your fellow jurors speak about the evidence they found important, please listen to one another. Have the benefit of your fellow jurors' insights and ideas. Those insights and ideas may impact your thinking—or they may not—but unless you listen and allow them to speak, you will not have the chance to have your own thinking challenged.
>
> . . . [A]s in any group, some of you will be more comfortable than others in sharing your thoughts. The group will lose out if they do not listen to each other and have the benefit of everyone's input. It is important that all ideas are heard. The jury should make sure each juror's ideas are voiced and considered during the deliberations.
>
> . . . .
>
> In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced that

> it is wrong. However, none of you should surrender your honest conviction as to the weight and effect of the evidence or lack of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.[262]

Is this not as Judge Fairbanks described, community? Is it not cooperation? Is it not relatedness? Is it not consensus? Is it not respectful? Is it not inclusive? Is it not just? Is it not wise? Our right to trial by jury is the foundation, common ground, and rationale for educating future lawyers in both the theoretical and practical application of Peacemaking in all justice systems.[263]

President John F. Kennedy expressed other common ground at American University on June 10th, 1963. In pertinent part he shared from his experience as follows:

> I speak of peace because of the new face of war. . . .
>
> . . . .
>
> I speak of peace, . . . as the necessary rational end of rational men. . . .
>
> . . . [E]very thoughtful citizen who despairs of war and wishes to bring peace, should begin by looking inward . . . .
>
> . . . Let us examine our attitude toward peace itself. . . . Too many think it unreal. But that is a dangerous defeatist belief. It leads to the conclusion that war is inevitable--that mankind is doomed--that we are gripped by forces that we cannot control.
>
> We need not accept that view. Our problems are manmade--therefore, they can be solved by man. . . .
>
> . . . .

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262. Mich. M. Civ. J.I. 60.01, Jury Deliberations (2023).

263. Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large Number Externality Problems*, 46 CASE W. RES. 961, 1014 (1996). Juries represent the voice of the communities they are from, and as such the use of juries, like the use of Peace Circles, ensures that those with a stake in the outcome of a dispute—other that the primary parties involved—will also be heard. *Id*. at 1010–14.

> . . . Genuine peace must be . . . the sum of many acts. It must be dynamic, not static, changing to meet the challenge of each generation. For peace is a process--a way of solving problems.
>
> . . . [Peace] requires only that [we] live together in mutual tolerance, submitting [our] disputes to a just and peaceful settlement. . . . However fixed our likes and dislikes may seem, the tide of time and events will often bring surprising changes in the relations between . . . neighbors.
>
> So let us persevere. . . .
>
> . . . .
>
> . . . [L]et us not be blind to our differences--but let us also direct attention to our common interests and to the means by which those differences can be resolved. And if we cannot end now our differences, at least we can help make the world safe for diversity. For, in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's future. And we are all mortal.[264]

Five months later, President Kennedy was assassinated. But his words live on. Peacemaking is our sacred responsibility. Our law schools should reflect that.

V. APPRECIATING THE CULTURAL SIGNIFICANCE OF PEACEMAKING

Interest among legal and restorative justice practitioners in the "new" alternative dispute resolution process most frequently called "Peacemaking" is rising at what appears to be an exponential rate over the past ten years that I have been responsible for stewarding the Indigenous Peacemaking Initiative, a project of the Native American Rights Fund (NARF). To indigenous nations, Peacemaking, also called "peace circles" or "circle processes," refers to approaches to handle disputes that their ancestors used successfully for centuries or even millennia, continuing to live in community together despite the fact that disputes do naturally arise when people live and interact together.[265]

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264. Pres. John F. Kennedy, Commencement Address at American University (June 10, 1963) (transcript available in the John Fitzgerald Kennedy Library).

265. *See e.g.*, Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 825 (1996).

The wisdom of revitalizing time-tested and proven approaches to disputes is clear to indigenous nations that are fortunate enough to remember what those proven approaches entailed for their ancestors. They know there are better ways to resolve some types of disputes than relying on an adversarial court process. In fact, the Navajo Nation formally established a Peacemaking system within its largely adversarial model court system as early as 1982.[266] NARF's Indigenous Peacemaking Initiative (IPI) has been in existence since 1992.[267] It was initiated because Native American communities wanted to be sure Peacemaking was included in services sought to be provided and developed at a time when NARF was responsible for administering the Legal Services program funds targeted at serving Indian Country.[268]

Interest among Native American communities has remained strong over the years. To this day, many indigenous nations of people on this land prior to the immigration of individuals from the colonizing European nations, in both the US and Canada, are in the process of exploring and developing ways to incorporate traditional dispute resolution systems from their own cultural traditions into modern justice systems.[269] Those who have already made such developments continue to perfect their own models. If invitations received by the Indigenous Peacemaking Initiative to discuss how Peacemaking implementation has gone among Native nations in the US are any indicator, interest has also been piqued among other Western Hemisphere nations located south of the United States and Canada.

This article itself is an indicator of interest that has grown outside of native nations as well. The restorative justice movement itself recognizes its roots in indigenous circle processes for dispute resolution, though it still struggles to point out exactly how clear that connection really is. Judge Connors' court in Michigan has drawn attention and curiosity from many other state and federal judges who are considering whether implementation of Peacemaking processes is possible to help the parties on their own dockets.[270] Subtle approaches based on circle processes are

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266. James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 92 (1983).

267. *See generally Indigenous Peacemaking Initiative*, NATIVE AM. RTS. FOUND., https://peacemaking.narf.org/ [https://perma.cc/8L5A-G9MF].

268. *See generally About Us*, NATIVE AM. RTS. FOUND., https://narf.org/about-us/ [https://perma.cc/7SFR-CUDQ].

269. Zion, *supra* note 266; *see generally* Hadley Friedland, *To Light a Candle: A Solution-Focused Approach Toward Transforming the Relationship Between Indigenous Legal Traditions and The Criminal Justice System*, 56 U.B.C. L. REV. 69 (2023).

270. Butterwick, *supra* note 132.

being adopted in some courts with particularly heavy Indian Child Welfare Act-based dockets.

It makes good sense for judges and lawyers from the adversarial system to learn from other justice systems, and, when possible, to adopt practices that promise to ameliorate shortcomings of the adversarial system. This is even more true when the "alternative" justice systems are as time-tested and proven as Peacemaking. After all, the remaining tribal cultures in the United States are, by definition, older than the United States itself, and most are even older than the British system upon which the United States' system is based.

Indigenous ways are human ways. They are developed over time as people deal with their environment and the conflicts that arise between community and family members. They are tested by time—societies that do not effectively resolve internal disputes necessarily break apart. The hierarchical and adversarial model on which the United States system is based is only one option. Most indigenous cultures are generally based on equality rather than hierarchy. They emphasize valuing contributions from many perspectives rather than privileging some viewpoints and value consensus more than decision-making based on hierarchical authority.[271] Hierarchy and adversarial approaches have their own utility, but so do egalitarian and consensus-focused ways. It is optimal to draw from whichever seems most well-suited to resolve various types of disputes.

As interest in Peacemaking and related circle processes grows outside of Indian Country, two points need to be brought forward because of the interactions between the starkly different mainstream "Western" worldview and indigenous worldviews. The first is that there is danger in simply imitating what one thinks one sees others doing, without fully understanding significance and context. Peacemaking and other circle processes as practiced in indigenous communities are necessarily a part of, and derived from, an entirely different culture that is based on a different worldview.[272] Peacemaking should be studied and the processes understood as being rooted in that different worldview, so that any attempts to utilize parts of its processes are accomplished with intentional

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271. *See* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 586, 611 (2000). Atwood acknowledges a key difference between tribal and nontribal courts in how they adjudicate child custody disputes; in the tribal court, there is an emphasis on the child's perspective. *Id*. at 608–09.

272. *See generally Trigger Points: Current State of Research on History, Impacts, and Healing Related to the United States' Indian Industrial/Boarding School Policy,* NATIVE AM. RTS. FOUND. (2019), https://narf.org/nill/documents/trigger-points.pdf [https://perma.cc/F69A-7SC2]. Ironically, cultural genocide has been the preferred policy approach of the United States and other colonizing nations for the greater part of their existence.

attention to details about how to fit those processes into a context that is based on a different, and sometimes contradictory, worldview. Thus, understanding the importance of talking pieces, and how they help the process, could lead to the adoption of their use in a non-indigenous context. But the adoption should be more than mere imitation.

For example, the fact that a certain indigenous nation might be seen using a feather as a talking piece does not mean that the use of a feather as a talking piece in another cultural context is appropriate.[273] The opposite is more likely true. Moreover, the significance and meaning of the use of the feather in the indigenous context might be nearly impossible to grasp absent fluency in the relevant indigenous language and culture. It is better to learn the benefits of the use of a talking piece in general, and then explore whether the use of any particular object as a talking piece seems most appropriate in one's own context.

The other point that must be made as interest in Peacemaking and related circle processes grows outside of Indian Country is that the obligation to support and credit indigenous communities must not be forgotten. At least partially due to the historical policy preference for cultural genocide, and certainly partially due to the preference for romanticized views of indigenous peoples as "noble savages" of the past, contemporary Native Americans frequently must battle invisibility in order to even be invited to discussions of issues involving them.[274] The same is true for funding. A career working with indigenous communities and Tribal governments in the United States has taught me that chronic underfunding, across all programs and systems, is the biggest problem most Tribes and their constituent communities face.[275] Tribal programs are all too frequently funded at mere fractions of appropriate levels, compared

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273. *See generally* James D. Diamond, *In the Aftermath of Rampage Shootings: Is Healing Possible? Hard Lessons from the Red Lake Band of Chippewa Indians and Other Indigenous Peoples*, 11 GEO. J. L. & MOD. CRIT. RACE PERSP. 101, 126 (2019).

274. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is consistent in its insistence that "free, prior, and informed consent [by] indigenous nations" is the proper way to address issues impacting those nations. *Id*. at 6. This is the opposite of the invisibility that indigenous nations face in the United States. *See generally* Christine Zuni Cruz, *The Indigenous Decade in Review*, 73 SMU L. REV. F. 140 (2020) (referencing the invisibility and marginalization indigenous peoples face in the United States).

275. Michael Maruca, *From Exploitation to Equity: Building Native-Owned Renewable Energy Generation In Indian Country*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 391, 439 (2019) ("Some federal financing of tribal-owned projects does exist, and its importance cannot be overstated. However, the programs are chronically underfunded."); *see, e.g.*, Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 587 (2009) ("[T]he single biggest problem surrounding tribal judiciaries is underfunding.").

to similar systems across the rest of the country and especially on a per capita basis.

Chronic underfunding of justice systems in Indian Country is an important part of this picture. While restorative justice has grown to become a "movement" in the United States and beyond, and while community restorative justice programs exist pervasively across the United States, Native American communities struggle to find funding to support even the most humble of Peacemaking programs.[276] Courses are taught on Peacemaking in major law schools, while nearby tribes might struggle to operate a Peacemaking program with less funding than an amount that would equal the aggregate of tuition paid by students for the local law school Peacemaking class.[277] There is no set-aside for Native American Tribal programs in any funding stream dedicated to providing support for community restorative justice. There is no special federal funding to support Peacemaking in tribal communities. If they want to use federal funding to support Peacemaking, Tribal governments must carve the funds out from other justice system programs like victims' assistance, courts, and police, all of which are, as already explained, chronically underfunded.[278]

This lack of support for indigenous community Peacemaking is ironically tragic in the face of the growth of restorative justice in this country and beyond. The restorative justice movement itself recognizes its indigenous roots. When tribal efforts are restricted by extreme lack of funding, much real potential for innovation is wasted. There are several factors that make tribal Peacemaking programs the most fertile testing grounds for innovations in Peacemaking and related circle processes, which would also accrue to restorative justice practices. Tribes have abilities and desires to do things differently from how the United States has historically steered them, and the potential value of their desire and need to do things differently is becoming more recognized in the

276. *See, e.g.*, Bernard, *supra* note 265 ("The NICS provides its members' tribal courts with court services and personnel. Until funding was lost in 1989, the NICS also provided peacemaking services . . . .").

277. The Tanana Tribal Court, founded in 1981, for example, received funding from the Bureau of Indian Affairs and operated on an annual budget of $10,000. Half of this went toward paying one staff member. Judges were not paid. CONNORS, CARNS, & PIETRO, RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY 51 (1993). Tuition at Wayne State Law School, for residents, is approximately $1,180 per credit hour. *See Academic Catalog,* WAYNE STATE UNIV., https://bulletins.wayne.edu/graduate/general-information/tuition-fees/ [https://perma.cc/8KHL-BT3P]. The aggregate tuition of a Peacemaking class of thirty students at Wayne State Law School, therefore, is $35,400. *Id.*

278. *See* Aaron F. Arnold et al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 811 (2011) ("[L]ack of funding continues to represent one of the most pressing challenges facing tribal justice systems.").

mainstream lately.[279] Among those factors are: (1) tribes' wide flexibility in how to develop and implement programs due to their sovereign authorities within their own jurisdictions,[280] (2) the many different indigenous cultures within the United States, and thus many different sources for alternative approaches,[281] and (3) varying levels of assimilation to United States systems within tribal systems allows for varying frameworks within which to adopt "new" approaches.[282] In short, properly funded tribal Peacemaking programs could provide fertile testing grounds for all sorts of possible restorative justice practices.

The first step to address all of this is to combat the invisibility. Once others are exposed to the strengths and beauties within the many cultures of the indigenous peoples of this land, they become more open to and curious about how things can be done differently. Teaching about Peacemaking is one way that the invisibility is pushed away. With education, innovators see the potential for change within their own systems. This is what is happening with the primary author of this article. Because he has had the opportunity to learn about a new way of doing things, he is able to spot where, within the legal system in which he is becoming an expert, some different ways of doing things would be beneficial. This is progress, knocking at the door! Ironically, even paying attention to his viewpoint is an act more in line with Peacemaking. When we listen to a student's critique of the educational system, we are valuing a perspective other than those the hierarchy normally values: the administrators, faculty, and alumni. By giving students a legitimate voice, we are acting as peacemakers by valuing input from diverse perspectives. The primary author's perspective is a unique one that, if we pay attention, might advance us all in a better direction should we be moved to adjust course by some insight he might bring forward. I am pleased to participate in this activity, and to add what perspective I can from my own experience, because I admire the courage and energy of the primary author, as well as the journal that has the courage and openness to publish an article as different from the academic norm as this one.

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279. *See generally* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 561 (2021).

280. *Id.* at 588.

281. *Id.* at 561.

282. *Id.* at 629.