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Social media and social change lawyering: influencing change and silencing dissent

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Abstract
The Law Society of Ontario (formerly, the Law Society of Upper Canada) oversees the legal profession in Ontario, Canada, through The Rules of Professional Conduct ('Rules'). All future lawyers and paralegals must adhere to the Rules. The Law Society sometimes provides guidance on sample policies informed by the Rules. In this article, the author closely examines the Law Society's guidance on social media. The author argues that this guidance fails to understand how the Rules regulate experiences out of the legal profession and fails to see the positive possibilities of social media to influence social change, especially in ways that conflict with the colonial legal system. The author concludes that the Law Society must take a positive approach and provide some guidance for the legal profession on their social media use, especially around critiquing the colonial legal system. This positive approach is essential to avoid duplicating the systems and structures that perpetuate disadvantage in marginalized communities.

Keywords
feminist legal theory, Indigenous feminism, Indigenous feminist legal theory, Indigenous legal theory, legal theory, professional regulation, social change, social change lawyering, social media, Twitter

In July 2017, Justice Wagner (as he was then known) decided to exclude several groups from intervening in the appeal by Trinity Western University (TWU), a Canadian law school in British Columbia (Gallant, 2017). TWU was alleged to have a homophobic community covenant ban, prohibiting sexual relations outside of heterosexual marriage (Gallant, 2017). The Supreme Court of Canada's then Chief Justice McLachlin added another day of hearings to include the previously excluded and marginalized LGBTQ groups as interveners (Gallant, 2017). This variance was only made after strong outrage expressed by many on Twitter (Gallant, 2017).

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Disagreement and debate in the legal community is not unusual. However, sometimes disagreement between lawyers can be used as a means to silence dissenting views that would otherwise encourage progressive change. Allowing space for dissent is challenging given the existing power structures within the legal profession and the silencing of target groups who come from these marginalized communities. In the context of these power relations, I explore whether lawyers have a professional responsibility to engage in social media as a tool to bring about social change, especially when advocating on behalf of marginalized communities, including Indigenous communities.[1] In answering this question, I highlight how social media and social change are interconnected in the Canadian context and what this means for social change lawyering. I utilize social change lawyering to call attention to the ways in which 'systems and structures perpetuate disadvantage' (Farrell, 2014: 218).

Social change lawyering reveals the problems with laws, policies, procedures or the conduct of state or non-state actors (Farrell, 2014: 209). Community lawyering considers how a client's community, culture or 'non-legal influences' affect the client (Zuni Cruz, 1999: 241). I acknowledge non-legal influences in assessing how laws, policies, procedures or conduct of state or non-state actors affect Indigenous people. However, I want to call attention to the scholarly gap in discussing social media and social change in the Canadian context. Although there is scholarship discussing the Arab Spring, Occupy Movement and Black Lives Matter (Campbell, 2017; Cox, 2017; De Choudhury et al., 2016; Freelon, 2018; Newsroom et al., 2012), academic research dealing with the *Idle No More* movement is lacking (Tupper, 2014).[2] This is despite *Idle No More* transcending boundaries and impacting Australia (*Idle No More*, 2015). To highlight this gap on social media and social change, I use an autoethnographic approach to 'disrupt the colonizing process of forgetting' (Fitzpatrick, 2018: 44); to speak back to dominant discourses, especially where silencing occurs (Tsalach, 2013: 72) and to challenge the idea that law is abstract or neutral (Matsuda, 1996: 8–9).

Throughout this article, I provide evidence of three instances of silencing to draw attention to positive possibilities for social media and social change lawyering as an Indigenous lawyer. I see social media as a powerful tool in making space for dissenting perspectives to bring about social change. First, I describe my experiences as being the only First Nations woman with lived experience in the sex trade to publicly oppose the then-Conservative government's Bill C-36, *For The Protection of Communities And Exploited Persons*, which is now law. Immediately after I testified (Sayers, 2014), I faced intimidation and harassment from opposing groups. Alarmingly, the opposition started to reveal private information about me on social media in an effort to silence me.[3] Second, I outline my experiences as being under a good character investigation by the Law Society of Ontario (formerly, the Law Society of Upper Canada) as a result of self-disclosures to my regulator, while at the same time my regulator was lauding its initiative to require lawyers to describe his or her commitment to equality, diversity and inclusion. During this investigation, my frustration with this initiative grew as some lawyers opposed it on the basis that it was compelled speech (Alford, 2017; Pardy, 2017).[4] This argument ignored how this initiative silenced those who could not speak out in dissent, fearing heightened surveillance. Finally, I describe an experience of silencing by a non-Indigenous woman of colour at a provincial bar association. Through these stories, I want to invite others to remember the historical practice of denying Indians, as defined by the *Indian Act*, the right to enter law school, practice law or hire lawyers.[5] And, through telling my story, I aim to reveal the systems and structures that perpetuate disadvantage.[6] I also call on the Law Society to make space for dissenting views by urging the Law Society, and similar institutions, to take a positive approach on social media guidance.

Indigenous people have a unique relationship with the legal systems of states that emerged out of colonialism. Colonial laws and policies legitimize and validate settler colonialism; they do not remain in the past and are omnipresent (Arvin et al., 2013; Simpson, 2014: 11). Similarly, Mignolo and Grosfoguel contend that coloniality, essential to critiquing decolonization projects, is ongoing (Gaztambide-Fernández, 2014, 198; Grosfoguel, 2007: 219–220). Both call on others to think about

possibilities of decolonization in a broader, freer sense (Gaztambide-Fernández, 2014: 201; Grosfoguel, 2007: 220). Part of this context, and within coloniality, is how the law and its actors are discussed on social media. That is, social media becomes a tool to challenge a marginalized group's invisibility and dehumanization (see Maldonado-Torres, 2007: 257).

Farrell (2014) outlines that '[s]ocial media's greatest strength is encouraging conversations' (p. 212). This is especially true for Twitter given how fast users can share conversations (Farrell, 2014: 212; Latina and Docherty, 2014: 1105). Farrell (2014) highlights that 'Twitter creates relationships with influencers, policy makers and [travellers]' (p. 214). Influencing change is contextual. A user who contributes to discussions from a different perspective has a greater possibility to influence the conversation. Although I am not the first Indigenous woman to write about her experiences in the sex trade, online or elsewhere, I influenced the discussion (to some extent) around the topic and engaged with policymakers. This kind of influence does not come without its downfalls.

After this engagement online, people saw me as an expert on the issue. While I have a unique understanding on the topic that is informed by lived experience and conventional legal education, I neither intended nor wanted to take on this role. Some of my writings, to this day, are still being circulated and cited as authoritative sources on the history of prostitution in Canada, including the history of such provisions originating in the *Indian Act* (Sayers, 2013). Given the level of harassment against me when I publish work, I now have a members-only blog instead of a public-facing blog. Although this provides a small sense of safety, it limits the reach of such communications to a broader audience, which is a form of silencing.

Self-regulation is one of the hallmarks of the legal profession, but this governance structure is not without its drawbacks in silencing dissenting views. The good character requirement is a legislative requirement for all licensing candidates (*Law Society Act*, RSO 1990, c L-8, s 27(2)). An individual must be honest and must disclose any good character issues at the time of applying (Law Society, n.d-a). This process is not very transparent, thereby calling into question its legitimacy about what is required of a candidate, including the standard to meet and the process involved (Ha-Redeye, 2016; Woolley, 2007, 2013; Woolley and Stacey, 2008). A group of lawyers in Ontario brought forward a motion asking the Law Society to review and report on the good character requirement and its assessment at the application stage, especially as it concerns Indigenous and racialized applicants (McRobert, 2018; Robinson, 2018; Spratt, 2018). While there are no reported cases of an Indigenous person being denied a license to practice law in Ontario (Woolley, 2007), the lack of transparency as to how the Law Society decides which applications to further investigate and on what basis, is troublesome. One could argue that this secretive process does not accord to the Law Society's commitment to equality, diversity and inclusion; commitment to access to justice; and commitment to protect the public interest.[7] In fear of inviting increased surveillance, I refrained from utilizing social media to speak out against the Law Society's commitments. This is where the Law Society can offer some guidance to lawyers.

The Law Society develops resources for lawyers licensed to practice law in Ontario, Canada, as the regulatory body overseeing lawyers and paralegals. Such resources include resources on practice management (Law Society of Ontario, n.d.-b). These resources must be read in the context of the *Rules of Professional Conduct* ('Rules'; Law Society of Ontario, n.d.-b). One resource includes a sample social media policy ('Sample Policy'; Law Society of Ontario, n.d.-c). The Rules are similar to those enacted and passed by Law Council of Australia (2015) and the Sample Policy analogous to the Law Institute of Victoria's (2012) Guidelines on the Ethical Use of Social Media.

While a good starting point, the Sample Policy misses the mark when it comes to Indigenous lawyers. The Sample Policy simply adopts the Rules that regulates all lawyers, including Indigenous lawyers, without a critical understanding in how the Rules have been used to police and regulate certain experiences out of the legal profession (Backhouse, 2016: 128, 137, 140–141; Woolley,

2007, 2013; Woolley and Stacey, 2008). As such, one must examine the Sample Policy in an Indigenous feminist legal theory (IFLT) through a decolonial lens. While some people use the term decolonial to also mean anti-colonial, the use of the term in this way erases the violence done through colonial law (Hunt, 2014; Smith, 1999: 31). The use of decolonial in this way also erases the violence done through the regulation of Indigenous people's activities through colonial laws and legal means (Snyder, 2014: 367). I adopt decolonial to mean anti-colonial *and* anti-violence. This approach recognizes this ongoing practice of settler colonialism while also acknowledging the limitations of other theorizations, like feminist legal theory or indigenous legal theory.

Snyder (2014) theorized IFLT after noticing a gap in feminist legal theory, Indigenous feminist theory and Indigenous legal theory that 'speak past one another' (Snyder, 2014: 367). Feminist legal theory unequivocally accepts colonial law as valid and just, but ignores Indigenous legal theory (Snyder, 2014 cited in Sayers, 2016). Indigenous feminist theory views Indigenous legal theory as valid, and only sees colonial law as deserving of critique. (Snyder, 2014 cited in Sayers, 2016). Indigenous legal theory develops a romanticized image of Indigenous communities, essentializing Indigenous women's roles (Snyder, 2014: 367; Snyder et al., 2015: 599). I prefer ILFT as opposed to an intersectional feminist approach because I often see intersectional feminism being used to silence critique.[8] In this same breath, when I use settler colonialism to call attention to the ways in which this process is present and ongoing in colonial Canada, I intend to adopt a particular story – my story – to speak back to settler colonialism as a tool to silence critique.

The Sample Policy developed by the Law Society suggests that users online must be responsible (Law Society of Ontario, n.d.-b). This term is not defined; rather, there are merely references to other rules. One such rule includes Rule 5.6-1, Encouraging Respect for the Administration of Justice (Law Society of Ontario, 2017). The commentary following Rule 5.6-1 suggests that an Indigenous lawyer who criticizes the colonial legal system risks violating this rule. For instance, the commentary states that a lawyer 'should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations' (Law Society of Ontario, 2017: Rule 5.6–1). This is especially true for those individuals who also use social media or engage in social media as part of their practice. At the time of editing, I am not aware of any lawyer being formally disciplined for their social media use.[9] Therefore, I rely on the case of a nurse, another self-regulated occupation similar to the legal profession in Canada.[10] Ms. Strom, a nurse, criticized the healthcare system after her grandfather's treatment (Hill, 2017; Saskatchewan Registered Nurses' Association, 2016). The Investigation Committee of the Saskatchewan Registered Nurses' Association (2016) found Ms. Strom guilty of professional misconduct after she posted comments about her grandfather's healthcare on her Facebook. Ms. Strom is the first nurse to receive discipline for her social media comments (Hill, 2017).

Another problem with the Sample Policy implies a reference to the rule of integrity (Law Society of Ontario, 2017: Rule 2.1–1; Law Society of Ontario, n.d.-b). The commentary in this section on integrity refers to 'Dishonourable or questionable conduct', including conduct either in private life or professional practice (Law Society of Ontario, 2017: Rule 2.1–1(3)). While the Law Society of Ontario (2017) is not concerned with 'purely private or extra-professional activities' (Rule 2.1–1(4)), it is unclear where the line is drawn regarding private activities and *purely* private activities. The Rules or the Sample Policy become an issue especially for Indigenous lawyers who may return to their community to work.

As both an Indigenous person and a woman, I risk facing harsher scrutiny especially for my private activities. This line is significantly blurred when I inquire about the difference between private activities and purely private activities. Parallel arguments are advanced as the Law Society's Rules are highly discretionary requiring guidance from Canada's highest court (Canadian Civil Liberties Association, 2017: 4–5). I also fear that my past good character investigation may be used to discredit any future work that I do in the community and I fear that speaking out about the effects

of such investigation will be viewed as undermining the importance of good character, especially in protecting the public. Accordingly, any Sample Policy from the Law Society must adopt an ILFT lens, acknowledging the racialized and gendered nature of the web and in effect, social media. Outside of the regulator, professional associations are intended to provide peer support and mentoring. However, the silencing I experienced in these contexts also causes me to question my relationship with conventional bar associations and their role in the legal profession.

Although discussions on diversity and inclusion in the legal profession are plentiful, they usually imply that these efforts are contributing to substantial change and can leave little room for how to improve these efforts from an Indigenous perspective. Near the end of one provincial bar association meeting, I stood up and spoke about the requirement to address diversity and inclusion as it relates to licensing procedures and the accommodations policies adopted by the Law Society. From my experience, these policies perpetuate the challenges faced by marginalized communities. In response, a Black woman lawyer stood up and implied that there was plenty of work being done already. She said, 'Look at me!', with her hand pointed back at her. Her comments and action of pointing back at herself effectively silenced the issues I raised. She concluded by stating that diversity and inclusion has been a problem since the 1970s, and thereby, highlighting that it is still a problem. My response, which was provided for the record, 'If the problem has been around since the 1970s, why is this still a problem?' I refused to remain silent, and placed the responsibility of these issues back onto everyone in the room, not just the Black lawyer and myself. This incident speaks of the ongoing effects of settler colonialism and its policies or laws that exploit Indigenous labour but that this labour does not result in any systemic change to the benefit of Indigenous people (see Grosfoguel, 2007: 217).

After I spoke about the diversity and inclusion issues, an older White male lawyer asked me if the diversity and inclusion issue was really an issue. Later, when the executives of the same provincial bar association were talking about their diversity and inclusion efforts, they were visibilizing their work but at the same time minimizing the issues I was raising. In distracting from the issues raised, one must ask what are these associations and institutions protecting? Hunt asks similar questions when she calls attention to the fact that only certain kinds of violence are made visible in discussions on violence and law (Holmes et al., 2014: 543). These kinds of efforts to also visibilize certain work erase the ongoing effects of settler colonialism and how it impacts Indigenous lawyers. When the focus is only on efforts (and in particular, those efforts that silence critique), it is settler colonialism that is protected (see Backhouse, 2016: 141).

Hunt (2014) writes about violence and the law from a responsibilities-oriented perspective (pp. 21–23). Hunt's (2014) work differs in that she links the violence that Indigenous women experience as being connected to both physical and state violence (pp. 21–23; see also Maldonado-Torres, 2007: 255–256). I write about silencing as a violence that is rarely acknowledged as such; the kind of violence these institutions, like the Law Society, produce and promote. And, so, adopting a responsibility-oriented lens towards discussions on proposals by the Law Society, including the Sample Policy, is about understanding that each proposal comes with responsibility to ensure that it does not place the burden entirely on the shoulders of those impacted by silencing, like marginalized groups. Hunt puts into practice a responsibility-oriented lens when she writes about what it means to witness violence and to take on responsibility to do something about this violence.

In taking on a responsibility-oriented lens, the Law Society's social media guidance can pay particular attention to how marginalized communities use social media to voice dissenting perspectives. For example, the Sample Policy's reference to the Rules creates vagueness and does not offer any guidance. I recommend that the Law Society adopt a positive approach in the context of social change lawyering by providing assurance about what kind of online behaviours would not violate the Rules. This guidance would avoid the kind of legal challenges that require a court's interpretation of the Rules (see Canadian Civil Liberties Association, 2017). Similar to the Sample Policy, the Law Society can provide examples that serve as a guideline. These examples could outline what sort of comments

or writings will undermine the administration of justice, for example. It is within the Law Society's interests to remain timely and relevant, while also refraining from reproducing the structures and systems which have regulated Indigenous people out of the legal profession a mere few generations ago. Plainly, it is a lawyer's professional responsibility to engage in social change lawyering through social media. However, guidance from the Law Society must go beyond vague sample policies and must encourage social media use to encourage innovation and social change.

When I write, I know there is risk. Matsuda (1996) refers to this risk as backlash. I am no stranger to backlash. While writing, however, I position this backlash within the responsibility-oriented lens too. I call others who witness this backlash to also demand better. I hope that others can speak truth to power, similar to Matsuda's (1996) consciousness raising, about their own experiences without carrying the responsibility all on their own. I also have hope that this article will encourage other institutions to see social media as an important tool in facilitating open dialogue as opposed to surveilling and silencing marginalized groups. I believe there is room for these institutions to share this responsibility to facilitate social change without allowing fears of increased surveillance and silencing to continue. In the end, I share this excerpt from my response to the Law Society in my good character investigation wherein the investigator asked me what I believed good character to entail. I use this excerpt to highlight the risk I face in writing but that I continue to write because I believe it is the right thing to do:

> I believe that good character, in respect to the practice of law, is a function of honesty. It means to be of strong moral character, an understanding of right and wrong, and the ethical obligations that come with being a lawyer. It means doing the right thing, no matter what, including the personal and professional costs that might follow.

While social change lawyering could be viewed as traditional or not innovative, this is not because of the lack of will from Indigenous lawyers. This is because Indigenous lawyers are regulated in a way that perpetuates disadvantage – the coloniality of lawyering. My article brings attention to how innovation in the uses of social media is also restrained by these same powers and that everyone shares the responsibility in creating social change.

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1. I am not saying that these communities are marginalized; rather, I highlight how Indigenous communities are described in this same way. It is through these terms that colonial Canada has legitimized its settler/colonial state (see Hunt, 2014).

2. *Idle No More* is an Indigenous-led, Canadian-based movement that utilized social media to bring to light the realities of Indigenous people in Canada. I can also recall only one previously peer-reviewed published article discussing *Idle No More* and social media in relation to dissenting viewpoints (Tupper, 2014).
3. This private information included both saving and sharing details about one of my old sex working identities and linking this identity to my real name online. The Supreme Court of Canada recognized this as violence in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 ('*SWUAV*'). Justice Cromwell, in writing for the court, describes this violence when outlining concerns raised by representatives for sex workers who argued that their clients 'feared loss of privacy and safety and increased violence by clients' (Cromwell, 2012: para 71). This loss of privacy includes being outed or the linking of a sex work identity with a real identity.
4. See also a website created by a group of lawyers advocating against this initiative, the Statement of Principles: www.stopsop.com.
5. As these laws existed over 70 years ago, the changes only recently occurred in the 1950s and, thereby excluding entire generations of Indigenous lawyers and thus, many White people and other groups, including Black people, though struggling in other ways, benefited from the exclusion of Indigenous people from the legal profession (Backhouse, 2016: 126).
6. This approach is similar to Indigenous feminist writer, Lee Maracle (1990), who highlights the limitation of theories to capture certain stories. She also contends that her story is theory (Maracle, 1990: 3–15). My story is equally valid.
7. The Law Society of Ontario (2018) is committed to equality, diversity and inclusion with legislative principles, like facilitating access to justice and protecting the public interest, to be applied by the Society in its work (*Law Society Act*, s 4.2).
8. This term is often employed by White feminists to suggest they engage in an adequate analysis on women's experiences, especially on those experiences that exist at the intersection of multiple identities, and thereby, silencing any critique of their positions.
9. There is one example of a judge in Ontario, Canada, prior to editing, who released an order that stated a lawyer 'destroyed public confidence in the court's supervision' of the Indian Residential School settlements (Barrera, 2018). This does not relate to social media use, however.
10. The Ontario Bar Association's submission (OBA, 2018) on the Good Character Inquiry and Dispositions of Discharge drew on the regulation of nurses in the context of good character. I utilize this as a similar example of regulating social media use.

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