Document généré le 17 juil. 2025 08:55

McGill Law Journal
Revue de droit de McGill

The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today

Aaron Mills

Volume 61, numéro 4, june 2016

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

URI : https://id.erudit.org/iderudit/1038490ar
DOI : https://doi.org/10.7202/1038490ar

Aller au sommaire du numéro

Éditeur(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (imprimé)
1920-6356 (numérique)

Découvrir la revue

Citer cet article

Mills, A. (2016). The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today. *McGill Law Journal / Revue de droit de McGill*, *61*(4), 847–884. https://doi.org/10.7202/1038490ar

Résumé de l'article

Le produit qui portera ultimement l'étiquette du droit et du processus légitime de sa génération, de sa révision et de sa destruction est à la fois habilité et contraint par l'ordre constitutionnel dont il émane. Un cadre constitutionnel reflète à son tour d'uniques compréhensions de ce qui existe et des moyens de connaître : un *lifeworld*. En se penchant sur sa propre expérience, l'auteur souligne la mesure dans laquelle l'éducation juridique cause du tort lorsqu'elle ne parvient pas à reconnaître et à articuler de manière préliminaire le *lifeworld* qui sous-tend tout système juridique qu'elle vise à conférer.

D'importantes questions doivent être posées lorsqu'on considère la possibilité de déplacer aisément le droit entre des contextes constitutionnels donnés, sans assujettir le droit d'une communauté au *lifeworld* d'une autre. L'auteur affirme que ce questionnement est d'autant plus important compte tenu du récent intérêt pour l'enseignement des systèmes juridiques propres aux peuples autochtones au sein des facultés de droit canadiennes. Il soutient que les différences entre le constitutionnalisme (libéral) canadien et le constitutionnalisme (que l'auteur appelle « enraciné ») autochtone s'étendent à même leur nature. Ainsi, les efforts d'articuler le droit autochtone dans les contours du constitutionnalisme libéral ignorent ou banalisent l'importance continue des *lifeworlds* autochtones pour la gouvernance des vies autochtones aujourd'hui. Plusieurs auteurs juridiques autochtones se penchent sur cette tension, et passent du simple effort de tailler une place pour le droit autochtone dans le milieu académique à se demander si et comment cette inclusion peut s'effectuer. L'auteur offre un bref survol des théoriciens autochtones (étudiants, professeurs, avocats et ainés) dont les ouvrages présentent les systèmes juridiques autochtones selon leur propre *lifeworlds*.

Sous l'angle de la relation *lifeworld*-droit, il propose trois réformes quant à l'éducation juridique au Canada : (1) enseigner que toute forme de droit est récitatif; (2) enseigner que le droit constitutionnel canadien s'insère dans le constitutionnalisme libéral; (3) exiger que les étudiants suivent un cours obligatoire sur l'ordre constitutionnel des peuples autochtones avant de suivre un cours sur leur droit. En guise d'exemple et de conclusion, il propose le plan de cours d'une classe intensive sur le constitutionnalisme Anishinaabe qu'il a conceptualisé et enseigné.

Copyright © Aaron Mills, 2016

Ce document est protégé par la loi sur le droit d'auteur. L'utilisation des services d'Érudit (y compris la reproduction) est assujettie à sa politique d'utilisation que vous pouvez consulter en ligne.

https://apropos.erudit.org/fr/usagers/politique-dutilisation/

Cet article est diffusé et préservé par Érudit.

Érudit est un consortium interuniversitaire sans but lucratif composé de l'Université de Montréal, l'Université Laval et l'Université du Québec à Montréal. Il a pour mission la promotion et la valorisation de la recherche.

https://www.erudit.org/fr/

THE LIFEWORLDS OF LAW: ON REVITALIZING INDIGENOUS LEGAL ORDERS TODAY

*Aaron Mills**

What ultimately counts as law and as the legitimate processes of its generation, adjustment, and destruction are both empowered and constrained by the constitutional order from which they derive life. A constitutional framework, in turn, reflects unique understandings about what there is and how one can know: a lifeworld. Reflecting on his own experience, the author emphasizes how legal education harms when it fails to acknowledge and to begin to articulate the lifeworld beneath any system of law it aims to impart.

There are serious questions to be taken up in considering whether we may move law between constitutional contexts without subjugating the law of one community to the lifeworld of another. The author asserts this is particularly important with respect to Canadian law schools' recent interest in teaching Indigenous peoples' own systems of law. He argues that Canadian (liberal) and Indigenous (what he calls "rooted") constitutionalisms are not only different, but different in kind. As such, efforts to articulate Indigenous law within the forms of liberal constitutionalism ignore or trivialize the ongoing significance of Indigenous lifeworlds to governance of Indigenous lives today. Many Indigenous legal scholars are adverting to this tension, moving on from simply making space for Indigenous law in the academy to asking whether and how this may be done. The author briefly canvasses Indigenous theorists (students, professors, lawyers, and elders) whose works present Indigenous systems of law within their own lifeworlds.

Tracking the lifeworld-law relationship, he proposes three reforms to legal education in Canada: (1) teach that all law is storied; (2) teach that Canadian constitutional law is a species of liberal constitutionalism; (3) require students to enrol in a prerequisite on an Indigenous people's constitutional order before enrolling in a course on their law. By way of example, he concludes with the syllabus for an intensive course he designed and taught on Anishinaabe constitutionalism.

Le produit qui portera ultimement l'étiquette du droit et du processus légitime de sa génération, de sa révision et de sa destruction est à la fois habilité et contraint par l'ordre constitutionnel dont il émane. Un cadre constitutionnel reflète à son tour d'uniques compréhensions de ce qui existe et des moyens de connaître : un *lifeworld*. En se penchant sur sa propre expérience, l'auteur souligne la mesure dans laquelle l'éducation juridique cause du tort lorsqu'elle ne parvient pas à reconnaître et à articuler de manière préliminaire le *lifeworld* qui sous-tend tout système juridique qu'elle vise à conférer.

D'importantes questions doivent être posées lorsqu'on considère la possibilité de déplacer aisément le droit entre des contextes constitutionnels donnés, sans assujettir le droit d'une communauté au *lifeworld* d'une autre. L'auteur affirme que ce questionnement est d'autant plus important compte tenu du récent intérêt pour l'enseignement des systèmes juridiques propres aux peuples autochtones au sein des facultés de droit canadiennes. Il soutient que les différences entre le constitutionnalisme (libéral) canadien et le constitutionnalisme (que l'auteur appelle « enraciné ») autochtone s'étendent à même leur nature. Ainsi, les efforts d'articuler le droit autochtone dans les contours du constitutionnalisme libéral ignorent ou banalisent l'importance continue des *lifeworlds* autochtones pour la gouvernance des vies autochtones aujourd'hui. Plusieurs auteurs juridiques autochtones se penchent sur cette tension, et passent du simple effort de tailler une place pour le droit autochtone dans le milieu académique à se demander si et comment cette inclusion peut s'effectuer. L'auteur offre un bref survol des théoriciens autochtones (étudiants, professeurs, avocats et ainés) dont les ouvrages présentent les systèmes juridiques autochtones selon leur propre *lifeworlds*.

Sous l'angle de la relation *lifeworld*-droit, il propose trois réformes quant à l'éducation juridique au Canada : (1) enseigner que toute forme de droit est récitatif; (2) enseigner que le droit constitutionnel canadien s'insère dans le constitutionnalisme libéral; (3) exiger que les étudiants suivent un cours obligatoire sur l'ordre constitutionnel des peuples autochtones avant de suivre un cours sur leur droit. En guise d'exemple et de conclusion, il propose le plan de cours d'une classe intensive sur le constitutionnalisme Anishinaabe qu'il a conceptualisé et enseigné.

* JD (Toronto), LLM (Yale), SSHRC Talent Award winner, Vanier Canada Scholar, Trudeau Foundation Scholar, and doctoral candidate (University of Victoria). I'm a Bear Clan Anishinaabe from Couchiching First Nation, Treaty #3 Territory and from North Bay, Robinson-Huron Treaty Territory. The fantastic work of the *McGill Law Journal*'s editorial board has greatly improved this article. I'm also grateful for the engagement of audience members when I presented an earlier version of this article at the symposium on Indigenous Law and Legal Pluralism that preceded this special issue.

© Aaron Mills 2016

Citation: (2016) 61:4 McGill LJ 847 — Référence : (2016) 61:4 RD McGill 847

Introduction: Lifeworld, Legality, and Legal Education

I'm[1] one of the many who found law school extraordinarily challenging. As dawning slowly rolled over my peers that first year, I fumbled clumsily in the dark. I waited for my light bulb to appear. I waited and waited, but it never came. I just couldn't get it. And I didn't understand why; I'd been a strong student until then. Many of my professors were excellent too; in most instances, I couldn't tell myself the problem was their teaching. As clarity set over my friends, I slipped further into a cloud of confusion and I began to question if I belonged. As I listened to their brilliant questions—which not only synthesized but creatively applied the material in new ways—I felt stupid.

I understood the new words in my texts, the new words from the front of the lecture hall. But for the life of me, I couldn't understand how to make the right meaning of them in sentences and paragraphs. To me, these were an endless litany of non-sequiturs. None of them fit together to produce the understanding it seemed everyone else acquired. The lessons didn't slowly cohere as a structure that I could then wield to frame future sentences. I never learned to think like a lawyer. Class became a battleground, law school a war, but one I waged inside of and against myself. I wanted desperately to accept the knowledge shared as given, yet I resisted it with all my being. Some days it seemed I fought over almost every utterance. Every sentence was a clash over stakes I couldn't articulate, but which pounded their urgency throughout me, sometimes so powerfully it felt as though my chest might burst as I sat there, silently.

Unable to identify what was happening, my frustration turned into a deep sense of failure. A professor who asked from across his desk what happened during my December exam was kind and encouraging. He wanted me to succeed. But I'd figured out I wasn't like the others here. I wouldn't be a lawyer or an academic. I'd work till eleven almost every night and then fail out while others moved on to accomplish the things I wanted. I'd be the one making excuses so as not to appear to others as stupid as I'd come to know I was. I'd just changed my mind, I'd say, hoping they'd quietly just leave me behind.

I hated my first year of law school.

---

[1] Throughout this article I speak in a tone and manner intended to be accessible to a wide audience, including beyond the academy. I've used language with this goal in mind, too, including, for instance, diction, the use of contractions, and my decision to address you directly (i.e., in the second person). Although we've likely never met, I speak as though we're already in a relationship, inviting you into this possibility. This express linguistic choice is part of my small effort to provincialize the presumptive lifeworld within which law journal communication ordinarily happens.

Fortunately, second year, and especially the summer following it, brought three interventions that, together, set me on a new course. The first was that I began to read papers that hadn't been assigned but which addressed what I cared most about: how Canadian law works for and against Indigenous peoples. Some of these made an enormous difference for me, opening up critique unavailable in my classes, the lack of which seemed very much to have something to do with that pounding in my chest.[2] These papers offered me three connected gifts. First, they helped me to identify that colonialism is alive today and that law, including constitutional law, is part of how it operates. This was to name an important part of why I hurt as I learned about the *Indian Act*[3] and about the section 35[4] jurisprudence. Second, these papers began to disclose to me the boundaries of Canadian law. In identifying viable constitutional options not taken, I began to understand—not consciously, not in a way I could yet articulate—that Canadian law lives somewhere. Perhaps, I began to realize, it isn't just the law but the context that creates and sustains it which is adverse to Indigenous peoples' well-being. Third, some of these papers—notably Darlene Johnston's "Aboriginal Traditions of Tolerance and Reparation"[5]—take significant steps in revealing not just Indigenous peoples' own systems of law, but the Indigenous lifeworlds[6] beneath them.

---

2 Five papers that really stood out for me include: Darlene Johnston, "Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism" in Micheline Labelle, Rachad Antonius & Georges Leroux, eds, *Le devoir de mémoire et les politiques du pardon* (Sainte-Foy: Presses de l'Université du Québec, 2005); Darlene Johnston, "Lo, How *Sparrow* Has Fallen: A Retrospective of the Supreme Court of Canada's Section 35 Jurisprudence" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 197; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37; John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.

3 RSC 1985, c I-5.

4 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 *Supra* note 2.

6 By "lifeworld", I mean the ontological, epistemological, and cosmological framework through which the world appears to a people. In other works, I argue that lifeworlds begin with creation stories. Of course, within a people, individual persons will always have unique perspectives; none is *determined* by their lifeworld. This is to say that lifeworld establishes a range of possibility, not a set of determinate ends. Those with persistent concerns (especially anti-essentialism concerns) about this concept might be interested in Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation* (Toronto: University of Toronto Press) [forthcoming] [Mills, "Rooted Constitutionalism"], which explores conceptions of Indigenous identity while complicating considerations around fundamentalism.

I could tell that something deep was going on here and it made me hopeful.

The second intervention followed from the first. I enrolled in a summer program at the University of Victoria (UVic) on Indigenous peoples' own systems of law and, even more exciting, John Borrows was teaching a course on Anishinaabe law. The program had an enormous impact not just on my education but on my life. The following September, back in Toronto, I remember one of my friends commenting, as I crossed the parking lot between Falconer Hall and Flavelle House, that my shoulders seemed so much lower, my steps so much higher. The 2009 UVic summer program opened an entirely new world to me. If the articles I'd read had been signposts for a new door to walk though, that program blew the door wide open. I understood that my life wouldn't have to pass either in the darkness of permanent critique or in fighting within a system at its best unrepresentative of how I understood law and at its worst openly hostile to that understanding. I could actually develop my own positive project based in Anishinaabe law and build understanding and professional community from there. I can't overstate the importance of this gift for my life.

The third thing that happened following second year was that I began to return to Couchiching First Nation, where I'm a band member, as an adult. Although I'd visited often, I hadn't grown up there for reasons that have everything to do with colonialism. But I now returned, wanting to learn about Anishinaabe law. Not Canadian law or international law as it regards us; I wanted to know about *our own* law. In the UVic summer program, I'd felt hope and I wanted to understand Anishinaabe law much more deeply. I began connecting with some of the nearby *gete-Anishinaabeg*[7] and knowledge keepers interested in sharing their teach-

---

7 "The old (or old-time) people". Almost everyone I know today (including many of the *gete-Anishinaabeg* themselves) use the word "elder". I don't like this word, which is awkward because it's a word with tremendous purchase in and out of our communities. I mean no disrespect in rejecting it. I worry that its common usage today in Indigenous contexts connotes an institutionalization of hierarchy that misleads as to how authority actually functioned in our own legal orders (being diffuse and persuasive, not centralized and coercive) prior to colonial imposition. I find no existence of any such term in any of the old glossaries, dictionaries, or ethnographies. I think it's a contemporary redescription of our old people that misrepresents their role and thereby does all of us a disservice. I prefer *gete-Anishinaabeg* because it connotes what I actually intend: a group of Anishinaabeg with exceptional insight and discernment, a self-acknowledged responsibility to share, and a relational mode of being acquired through long years of sitting with and within creation. I don't think our "elders" were ever an institution invested with coerceive legal or political authority; I do think they have, and have always had, vital roles and responsibilities in our communities—so much so that we cannot get by without them—and they hold my deep respect for the work they do and the gifts they have.

ings, especially *nokomis*,[8] Bessie Mainville of Couchiching, and Fred Major of Mitaanjigamiing. I was ignorant about how to carry myself in a good way around them and made many mistakes. Amazingly, my passion for our law was recognized, my errors forgiven, and I was allowed to grow important relationships that continue to have a leading role in slowly revealing the lifeworld beneath Anishinaabe law to me.[9] This is why *gete-Anishinaabeg* say to learn the language. This is why they encourage attendance at ceremonies. Although both are beautiful and effective, there's nothing literally *magical* about either our language or our ceremonies that conjures up understanding. The point is rather that they serve to disclose the Anishinaabe lifeworld: the set of ontological, cosmological, and epistemological understandings which situate us in creation and thus which allow us to orient ourselves in all our relationships in a good way. Without having begun[10] to internalize our lifeworld, one has no hope of understanding our law.

The same is of course true for all societies: without at least an implicit understanding of the world beneath Canadian law—Canadian constitutionalism, which is a species of liberal constitutionalism—one has no hope of understanding Canadian law. If you don't accept the sanctity of autonomous selves, you may understand every sentence of Canada's *Charter* but you'll fail to derive its meaning. If the concepts of the sovereign and the consent of the governed aren't intuitive to you, you may understand every word in a constitutional provision establishing the separation of powers, but fail to appreciate what's at stake in it.

My lack of understanding of liberalism was my problem in law school. On the inside, I was railing against liberalism without knowing what or even *that* it is. I had no idea that the concept "rule of law", taught to me as universally valid and morally unassailable, turns on an understanding of persons, of community, and of freedom situated in time and place—an understanding which is genealogical, storied, and entirely wrapped up in culture. I had no idea that the rule of law, with all this baggage, is part of the *very thing* said to be contracted for in the imagined social contract purported to justify Canada's sovereignty (including, importantly, for the

---

8 "My grandmother".

9 And in constrained ways, to others: through our work together, *nokomis* decided she wanted to share some of her teachings more broadly (see Bessie Mainville, "Traditional Native Culture and Spirituality: A Way of Life That Governs Us" (2010) 8:1 Indigenous LJ 1).

10 This is a critical point: worldview isn't something one either does or doesn't have. For all of us, whether babies first coming to understand ourselves as beings in the world, adults radically shifting how we understand the world, or as people comfortably settled into and deepening our existing understanding, worldview is something that settles over time.

purposes of this article, the imposition of its constitutional order) over the Indigenous lands, peoples, and lifeworlds already present. I didn't understand this until I took a course on law and liberalism in my LLM degree. Throughout my JD, I had no language for expressing the profundity of what was so terribly wrong with what I was learning. I had nothing more focused than a physical reaction and a relentless emotional response to all of the beneath-the-law that was unsaid yet taken as sacred and that was necessary to make the law I was learning coherent. But it felt like violence alright and my reactions were visceral.

All of which is a way of saying that my legal education presumed a common, foundational set of understandings between it and I that proved absent.[11] I struggled to make sense of the words because the glue holding their assemblages together was the lifeworld of Canadian liberalism, which I couldn't get to stick. My Anishinaabe ears just couldn't hear why in a criminal law matter, I should desire vindication of the right, why liberty should even be forefront in my mind, or why a criminal harm to one person should constitute a harm to all. Similarly, my criminal law professor (who I very much liked) couldn't understand my strong rejection of desert as a justification for punishment. Across all my first-year courses there was a disconnect in context never breached, and that couldn't have been breached, for I wasn't taught "this is the law *within Canada's liberal constitutional context*." I was taught "this is the law in Canada." I didn't even understand that the Canadian law I was learning *had* a world beneath it, much less a liberal world. The things that accounted for the law's being Canadian were our constitutional idiosyncrasy (being formally a constitutional monarchy, federalist, and securing particular kinds of group rights) and, of course, the doctrine it gave rise to, but never *our notion of legality itself*.[12] Insofar as that goes, the story was simply: law is

---

[11] For wonderful studies of this tension, see Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989–1990) 6 Can Hum Rts YB 3; Patricia Monture-OKanee, "Thinking About Aboriginal Justice: Myths and Revolution" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 222 [Monture-OKanee, "Myths and Revolution"].

[12] By far the most effective illustration of lifeworld misrecognition I've encountered is Leroy Little Bear, "Dispute Settlement among the Naidanac" in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 341 [Little Bear, "Dispute Settlement"]. With devilishly clever humour, Little Bear shows rather than tells the absurdity of trying to identify another society's legal system against the expectations of one's own. He shines a spotlight precisely on the reality that distinct lifeworlds make meaning of law (and processes and institutions of norm generation, etc.) in distinct ways.

law is law. I experienced it as an institutional erasure of the distinction between the concept and conceptions of law.[13]

The rest of this article attends to the lifeworld-law relationship and my thesis in respect of it—that what we call law exists as such only within its own lifeworld. In particular, I focus on Indigenous law revitalization today to illustrate the stakes in failing to attend to the distinction between internal and external legal pluralism (i.e., legal pluralism within and across distinct lifeworlds). In Part I, I canvass some recent Indigenous work that insists on the need to situate the study of Indigenous law within Indigenous lifeworlds. To expand upon what lifeworld means and to make the conversation more concrete, I turn to my doctoral work in Part II. I offer a simple sketch of what I call a "rooted" constitutional logic, which characterizes Anishinaabe lifeworld and thus Anishinaabe constitutional order. My hope is that with at least the thin contours of rooted constitutionalism in view, some foundational differences between Anishinaabe (again, a species of rooted) and Canadian (a species of liberal) lifeworlds will be disclosed. I contend that where the lifeworlds of the peoples to be brought into a pluralist arrangement are not only different but different *in kind*, external legal pluralism sometimes allows "legal pluralism" to serve as a redescription of imperialism. Thus, I then consider how distinctions of this magnitude might be responsibly taken up in legal education, offering three specific recommendations. The third of these is, I believe, novel to legal education in Canada, so I conclude with one example of what taking up this recommendation could look like: the syllabus for an intensive course I built and taught at Lakehead University in 2015.

I. Lifeworld and Contemporary Scholarship on Indigenous Legal Orders

Because of the groundbreaking work of Indigenous scholars like those I've cited above, I'm one of many new Indigenous scholars entering both an academy and a legal profession keen to better understand how we (that is, Indigenous societies) govern ourselves and manage conflict, and how they and the institutions they populate might learn from us. That's no small thing for those who've come before me to have accomplished. And yet, seen from a distance, it's still only a small step. Now the central struggle is to educate those wanting to know more about the paramount importance of engaging not only with Indigenous legal orders, but also *and necessarily* with the lifeworlds beneath them. One can't simply translate law across distinct constitutional contexts and expect it to retain its

---

[13] John Rawls famously draws a distinction between the concept and competing conceptions of justice in John Rawls, *A Theory of Justice*, revised ed (Cambridge, Mass: Harvard University Press, 1999) at 5, 8–9.

integrity and thus its functionality; the discussion must first be between the respective constitutional orders generative of each of those systems of law.

This is a responsibility more and more scholars are taking up. I'm in the third year of my PhD and my dissertation is on Anishinaabe constitutionalism.[14] I've carefully assembled what I think is a most incredible committee for such a project: John Borrows, James Tully, Heidi Stark, and Jeremy Webber. I'm so blessed to be shaped and guided by this team. Each is brilliant and has reshaped or is reshaping his or her respective field. Each works very seriously with Indigenous legal orders. And critically, albeit in different ways and to different degrees, each has attended to the lifeworld point in how they go about that work.

Jeremy Webber has explicitly theorized the commitment to these ideas in two critically important papers that should be required reading for everyone in the field.[15] He establishes that *all* law—not just Indigenous peoples' legal systems—is a function of lifeworlds (although he uses different language to make the point). Heidi Stark's work on treaty relationships reflects the same commitment. She's intentional and rigorous in reasoning her treaty analysis through Anishinaabe lifeworld.[16] John Borrows took working explicitly within Anishinaabe worldview and through Anishinaabe communicative practices as his central project in *Drawing*

---

[14] By Anishinaabe "constitutionalism" I don't mean a combination of founding documents and informal but clearly established conventions: such ideas represent but one conception of the broader concept of constitutionalism. I mean constitutionalism as a framework for how we constitute ourselves as political community. If a lifeworld is a set of ontological, cosmological, and epistemological understandings through which the world appears to us (the "world" within which all viewing happens with respect to the inherently situated notion of "worldview"), a constitutional order is the framework through which we manifest those understandings in pursuit of the vision of freedom they suggest. Thus any constitutional order—as I intend that term—reflects an understanding of what a person is and what community is, and pursues a vision of freedom determined by these understandings for its members. It's only against a shared set of such understandings that law comes into the world.

[15] See Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167; Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579. In the former, Webber explains that the nature of law is intimately connected to the processes of its generation; in the latter, he adds that those processes, too, are part of a distinct legal language unique to each society.

[16] See Heidi Kiiwetinepinesiik Stark, "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada" (2012) 36:2 Am Indian Q 119; Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 Am Indian Culture & Research J 145.

Out Law.[17] He not only told, but showed all of us one way to go about this work. Finally, James Tully's theory of dialogue, and his use of Bill Reid's *The Black Canoe* as symbolic of it, invokes this very point. Tully shows that we have different customary ways of speaking and knowing, and that we shall have to learn these, first, if we're to communicate anything meaningful to one another.[18] His extraordinary study of imperialism excoriates liberal (and neoliberal) powers for their shifting, imperial use of law to dominate Indigenous peoples, lands, and lifeworlds.[19] Finally, his transformative new work on the nexus between Indigenous-settler relations and human-earth relations (earth democracy and Gaia citizenship) often draws explicitly from the lifeworlds beneath Indigenous legal orders.[20]

It's an incredible time for the resurgence of Indigenous law, and I have much gratitude. I'm part of a generation of upcoming Indigenous scholars benefiting from the support and guidance of so many established scholars (importantly, not just through law schools) whose encouragement is to begin my work with the understanding that all systems of law live within and are generated through particular worlds. Rather than minimizing their differences, I must fully take them up. It's becoming part of the orthodoxy of legal education in Canada *that* Canadian law needs to relate with Indigenous legal orders. The centre of the dialogue on that relationship is thus now beginning to shift to *how* they ought to relate with one another. We realize that the answer isn't obvious; it has become commonplace for me to hear Indigenous legal scholars questioning what happens when we bring Indigenous law into Canadian or American law, legal institutions, and law schools. We advert to a question of power here. More and more of us identify an act of translation happening and worry about what gets structurally reframed or, worse, simply translated *out*. Professor and judge Christine Zuni Cruz expresses this worry when she cautions that

---

17 John Borrows (Kegedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

18 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

19 James Tully, *Public Philosophy in a New Key: Imperialism and Civic Freedom*, vol 2 (Cambridge: Cambridge University Press, 2008) ch 5, ch 7 at 210–16 [Tully, *Public Philosophy*].

20 James Tully, "Reconciliation Here on Earth" in Asch, Borrows & Tully, *supra* note 6; James Tully, "A View of Transformative Reconciliation" (Lecture delivered at the Strange Multiplicity at 20: Indigenous Studies and Anti-Imperial Critique for the 21st Century Conference, Yale University, 1 October 2015); Tully, *Public Philosophy*, *supra* note 19 at 293; James Tully, "On Gaia Citizenship" (Mastermind Lecture, University of Victoria, 20 April 2016).

> [l]aw is a dynamic force. Western written law contains Western values, beliefs, and precepts that dictate thinking, behaviour, and approach to justice. Once law is adopted, it begins its work. If any law must be written, and applied to us, it should be law we fashion and create based on our own understanding of law, with knowledge of the importance of the relationships critical to our communities. It should also be based on what we know motivates and influences our social structure, with an understanding of our social reality and our separate consciousness as Indigenous peoples.[21]

Cruz's formulation beautifully captures the vital importance of lifeworld to law. Unless we intentionally guard against doing so, when we bring Indigenous law into Canadian legal education, legislation, or courts, we take it out of its own lifeworld and into another. I'm not categorically suggesting that these aren't places for Indigenous legal orders. I'm saying we must always account for this movement. I'm saying that, for those of us who appreciate what's at stake in the relationship between a legal order and the constitutional order which gave and which sustains its life, there are very serious questions to be taken up in considering whether we may safely move law between constitutional contexts.[22]

To illustrate that the conversation is deepening, I want to focus on how many of us are now attending to the lifeworld-law relationship. We bring different understandings and use different words (even in English) to talk about the world beneath law and this is to be celebrated. Further, some of us openly engage the relationship between lifeworld and law while others of us prefer to work implicitly, even through indirection. We differ even in how we conceptualize the relationship: some of us draw out the kind of distinction between lifeworld (and hence constitutional order) and law that I have here, while others (including many *gete-Anishinaabeg*) collapse lifeworld and law, saying that for Indigenous peoples, lifeworld *is* law.[23] But in our respective ways of organizing and ex-

---

[21] Christine Zuni Cruz, "Law of the Land: Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 315 at 335.

[22] See Sákéj Henderson's enlightening discussion of what he calls the "pretense of benign translatability" across distinct "constitutional wordworlds" (Sákéj Henderson, "Governing the Implicate Order: Self-Government and the Linguistic Development of Aboriginal Communities" in Proceedings of the Conference of the Canadian Centre for Linguistic Rights (Ottawa: University of Ottawa, 1995) at 285).

[23] See Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) at 13 (speaking of "The Great Laws of Nature") [Johnston, *Ojibway Heritage*]; Art Przybilla & Randy Councillor, *Ojibwe Tales: Stories of the Ojibwe People* (Jacksonville, Ill: Lake States Interpretive Association, 2004) at 27 (drawing on the teachings of Randy Councillor to explain "The Great Law"); Cecil King (Address delivered in Sudbury, Ont, 25 February

pressing our understandings, each of us is disclosing the same powerful insight that every system of law—Indigenous or not—has a home.

Sákéj (James Youngblood Henderson)[24] and Patricia Monture[25] are for me among the most powerful intellectuals explaining the relationship between lifeworld and law. Much of Leanne Simpson's work builds from a world beneath too.[26] Harold Johnson[27] and Sylvia McAdam (Saysewahum)[28] have produced texts of exceptional importance. Because of the combination of their accessibility and their relentless commitment to situating Nehiyaw (Cree) law in respect of Nehiyaw lifeworld, they make wonderful starting points for anyone wanting to appreciate the importance of lifeworld to law.

2014) (teaching about "*Enendegwad*, the Law of the Orders"); Fred Kelly, "Reconciling Sovereignties: Combining Traditional Law and Contemporary Western Law to See Truth and Reconciliation" (Lecture delivered at the Faculty of Law, McGill University, 21 September 2015) (teaching about four orders of law, the foundation of which is "*Kagakiwe Inaakonigewin*" or sacred law); Harry Bone (Giizis-Inini) in Joe Hyslop et al, *Dtantu Balai Betl Nahidei, Our Relations to the Newcomers: Treaty Elders' Teachings Volume 3* (Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2015) at 19, 173, 175 (teaching of "*Gagiige-Onaakkonigewinan* (eternal law)" as the foundation of law); Arthur Solomon, "Notes on the Philosophy of an Indian Way School" in Michael Posluns, ed, *Songs for the People: Teachings on the Natural Way* (Toronto: NC Press, 1990) 98 (teaching about "the natural way" and Creator's "original instructions" that constitute it); Oshoshko Bineshiikwe – Blue Thunderbird Woman et al, "Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law", online: <www.turtlelodge.org/2015/11/manitoba-elders-share-a-message-with-national-energy-board-and-the-public>.

24 James (Sákéj) Youngblood Henderson, "*Ayukpachi*: Empowering Aboriginal Thought" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 248 at 271–74; James (Sákéj) Youngblood Henderson, "*Sui Generis* and Treaty Citizenship" (2002) 6:4 Citizenship Studies 415 at 425; James (Sákéj) Youngblood Henderson, *The Míkmaw Concordat* (Halifax: Fernwood, 1997) at 32; James (Sákéj) Youngblood Henderson, Marjorie L Benson & Isobel M Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont: Carswell, 2000) at 401–19.

25 Patricia A Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood, 1999) at 55–61; Patricia Monture, "Notes on Sovereignty" in Andrea P Morrison & Irwin Cotler, eds, *Justice for Natives: Searching for Common Ground* (Montreal: McGill-Queen's University Press, 1997) 197; Monture-OKanee, "Myths and Revolution", *supra* note 11; Patricia A Monture-OKanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992) 56:2 Sask L Rev 237.

26 Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring, 2011); Leanne Simpson, *The Gift Is in the Making: Anishinaabeg Stories* (Winnipeg: Highwater Press, 2013).

27 Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich, 2007).

28 Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing* nêhiyaw *Legal Systems* (Saskatoon: Purich, 2015).

A great many younger scholars who have or who are emerging from what I think of as the Victoria School (which marries a substantive commitment to Indigenous law with a theoretical commitment to the social production of law) have the lifeworld-law relationship squarely in their sights. I find so much to be excited about when I imagine the potential impact of Indigenous law scholars and practitioners like Aimée Craft,[29] Rob Clifford,[30] Dawnis Kennedy,[31] Johnny Mack,[32] and Danika Billie Littlechild,[33] just to name a few. Of course, there are many other amazing scholars to emerge from the University of Victoria Faculty of Law in recent years who are seriously engaged with Indigenous peoples' own legal orders, but these ones strike me as particularly engaged with the life beneath law. I'm so fortunate to have been able to learn from them during my PhD (and in the cases of Kennedy and Littlechild, during my JD too).

Next, there are those doing work with the old people on the lifeworld-law relationship of their respective peoples.[34] And finally, there are the growing number of old people choosing to speak for themselves, wanting to share aspects of their teachings openly, and insisting (although often too gently to be called insistence) on the primacy of understanding Indigenous lifeworld before one can understand Indigenous law.[35] Texts of ex-

---

29 Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich, 2013); Aimée Craft, *Anishinaabe Nibi Inaakonigewin Report* (University of Manitoba's Centre for Human Rights Research and Public Interest Law Centre, 2014), online: <static1.squarespace.com/static/54ade7ebe4b07588aa079c94/t/54ec082ee4b01dbc251c6069/1424754734413/Anissinaabe-Water-Law.pdf> [Craft, *Anishinaabe Report*].

30 Robert Clifford, "Listening to Law", 33:2 Windsor YB Access Just [forthcoming in 2016]; Robert Clifford, "W̲SÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)" (2016) 61:4 McGill LJ 755.

31 Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77.

32 Johnny Mack, "*Hoquotist*: Reorienting through Storied Practice" in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) 287.

33 Danika Billie Littlechild, *Transformation and Re-Formation: First Nations and Water in Canada* (LLM Thesis, University of Victoria Faculty of Law, 2014) [unpublished].

34 For two exemplary texts here, see H Cardinal & W Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); Craft, *Anishinaabe Report*, *supra* note 29.

35 I've worked hard to build up a collection of important texts here. Some of the more important ones for me (the level of accessibility here varies widely) include: Edward Onabigon, "Elder's Comments" in Roger Neil, ed, *Voice of the Drum: Indigenous Education and Culture* (Brandon, Man: Kingfisher, 2000) 282; Basil H Johnston, "Is That All There Is?: Tribal Literature" (1991) 128 Can Literature 54; Mainville, *supra* note 9;

traordinary value here include the three Treaty Relations Commission of Manitoba *Treaty Elders Teachings* volumes.[36] There aren't many texts in which our old people share so much about our lifeworlds and the legal orders they generate, outside the boundaries of established interpersonal relationships, which ordinarily serve as the condition of possibility for this sort of knowledge transmission. My lived experience with the *gete-Anishinaabeg* I work with has been that the scope and depth of law teachings shared grows at the same rate as my participation in and understanding of our lifeworld. These books really are an incredible gift for those who want to learn.

II. Lifeworld and the Revitalization of Indigenous Legal Orders Today

My dissertation is a study of the Anishinaabe lifeworld-law relationship in two parts. The first part sets out my theoretical framework. I argue that there's a structure of normative relationship through which lifeworlds condition what ultimately counts as law. Importantly, although distinct political communities often vary widely and even foundationally in what they think law is, how it's made, and where it comes from, the general normative structure I lay out accommodates this difference. As a second step, I distinguish between liberal and rooted lifeworlds and argue that each is generative of a distinct constitutional mode and thus ultimately of distinct liberal and rooted legalities. In the third step, I suggest

---

Ogimaawigwanebiik (Nancy Jones), "Gakina Dibaajimowinan Gwayakwaawan (All Teachings Are Correct)" in H James St Arnold et al, eds, *Dibaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, Wis: Great Lakes Indian Fish and Wildlife Commission Press, 2013) 9; Archie Mosay, "Apane Anishinaabe Ogaganoonaan Manidoon (The Indian Always Talks to the Spirit)" (1996) 3:2 Oshkaabewis Native J 20; Fred Kelly, "Confession of a Born Again Pagan" in Marlene Brant Castellano, Linda Archibald & Mike DeGagné, eds, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 11; Tobasonakwut Kinew, "'Let Them Burn the Sky': Overcoming Repression of the Sacred Use of Anishinaabe Lands" in Jill Oakes et al, eds, *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* (Edmonton: Canadian Circumpolar Institute, 1998) 33; Mary Siisip Geniusz, *Plants Have So Much to Teach Us, All We Have to Do Is Ask*, ed by Wendy Makoons Geniusz, illustrated by Annmarie Geniusz (Minneapolis: University of Minnesota Press, 2015).

[36] Doris Pratt, Harry Bone & The Treaty and Dakota Elders of Manitoba, *Untuwe Pi Kin He—Who We Are: Treaty Elders' Teachings Volume I*, 2nd ed (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2014); D'Arcy Linklater, Harry Bone & The Treaty and Dakota Elders of Manitoba, *Ka'esi Wahkotumahk Aski—Our Relations with the Land: Treaty Elders' Teachings Volume II* (Winnipeg: Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2014); Joe Hyslop et al, *supra* note 23. Many of these same elders also worked on Harry Bone et al, *The Journey of the Spirit of the Red Man: A Message from the Elders* (Trafford, 2012).

that because of their genesis in the rooted constitutional mode, relationships across Indigenous constitutional orders naturally take the form of treaty (intentionally deepened, always-already-interdependent relationships) as opposed to contract (an international, exchange-centred connection between independent autonomies).

The second part of my dissertation is a detailed exploration of how Anishinaabe lifeworld both empowers and constrains Anishinaabe *inaakonigewin*, our conception of law. That is, I map out one view of the Anishinaabe instance of the rooted constitutional mode. And if I do a good enough job, it should be clear both that (1) while rooted is very different from liberal constitutionalism, it need not be scary for those considering living within it, and (2) not only is there *room* for settler society to reconstitute itself in the rooted constitutional mode—through treaty, settler society's invited in. This would mean a transformation of our shared political community, which at present has as conditions of its possibility both the domination of Indigenous peoples and the usurpation of our territories. But if settlers were willing to abandon their existing colonial relationship with Indigenous peoples, sustained through the imposition of Canada's liberal constitutional order over still-rooted Indigenous ones, they could find non-violent belonging within Turtle Island's rooted treaty order.

I offer this explanation of my project because I think that explaining the first part in more detail might assist in understanding what I mean when I invoke the lifeworld-law relationship. If you've read this far, you've understood the single, basic premise of this article. But I realize that having that understanding and appreciating what's at stake in it aren't the same. And we need to understand the stakes. Without that additional understanding, even if you can state back to me the nature of the disconnect in my Canadian legal education, you still aren't able to appreciate my experience of it.[37]

The explanation of rooted constitutionalism that follows will be a sketch only. This is necessary to avoid that discussion taking over the article. For readers wanting a fuller discussion, I've said more elsewhere.[38] I'm sure there's much to critique here; it's just one way into the understanding. Following this discussion, I want to return to Canadian legal education and offer three suggestions in light of all that has been said.

---

[37] Might I suggest, by way of comparison, Florence Parry Heide, *The Shrinking of Treehorn*, illustrated by Edward Gorey (New York: Holiday House, 1971).

[38] See Mills, "Rooted Constitutionalism", *supra* note 6.

A. Rooted Constitutionalism: One Way of Understanding Lifeworld and Law

John Borrows and James Tully, my supervisors, each give considerable attention to the Earth in their work. In Tully's recent work, human-earth relationships are central, and, for Borrows, the focus has spanned his entire career.[39] *Nokomis* and Fred, my two *gete-Anishinaabeg* teachers, have ensured from the outset of our time together that I understand that I exist in relation to the Earth and all its myriad beings. Fred, in particular, has focused on trees—how to identify them, how to work with them in a good way, how to determine direction from them, how to make medicines from them, how to hear when they speak. My mother, too, spends much of her time on the land and, in particular, in forests, hiking through bush trails almost every day, even in the dead of winter.

Given these influences, it made sense to me that the critical piece I'd been missing as ideas for my dissertation developed came to me as the structure of a tree. One day I see poplar, another maple, sometimes oak, most often white birch. The roots push deep into the earth. They grow solid and powerful, holding the tree in place. They draw life from the earth up into a stout trunk—strong enough to support the entire canopy about it. The rough lines marking the trunk's outer bark eventually give way to full curves as branches reach forth, all around, for *giizis*, the sun. As the branches reach farther from the trunk, they produce magnificent leaves, leaves which sing in the wind, which explode into colour in fall, and finally which carpet the earth before *biboon*, winter, settles in, helping to renew earth once again.

I think this image is a map for the relationship between lifeworld and law. The roots of a society are its lifeworld: the story it tells of creation, which reveals what there is in the world and how we can know. Creation stories disclose what a person is, what a community is, and what freedom looks like. The trunk is a constitutional order: the structure generated by the roots, which organizes and manifests these understandings as political community. The branches are our legal traditions, the set of processes and institutions we engage to create, sustain, and unmake law. The trunk *conditions* the branches: it doesn't *determine* what they'll look like, but it powerfully shapes them. A constitutional order similarly settles which legal processes are legitimate within it, but without ever determining a necessary given set of processes as *the* legitimate ones. Subject to the conditions the trunk will support, legal processes and their institutions may vary considerably in object, scope, and means. Law, like leaves, experi-

---

[39] My favourite is his wonderful article, John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47:4 UTLJ 417.

ences a still higher level of conditioning. It's subject to the branches, which are subject to the trunk, which is subject to what the roots will bear. All are intimately connected but never so tightly as to eliminate difference. No two trees are the same even if they're both white birch, the same age, and growing right next to one another. Similarly, while two Anishinaabe communities may have nearly identical constitutional structures, they will have laws that differ. Each level of legality within the lifeworld-law relationship is both empowered and constrained by the levels below. I want to say that every people is a tree. We tell different stories of creation (even those of us who don't acknowledge doing so or who explicitly disclaim a view of creation) and the story we tell powerfully conditions the constitutional order we bring into being. For all societies, that constitutional order will shape legal processes and institutions, and thus ultimately what we count as law.[40]

This isn't quite the full image, however. Unlike Canada's constitutional image of a "living tree",[41] no tree is actually freestanding. The roots are buried in and wrapped tightly against earth. The tree is grounded in something beyond itself. A lifeworld doesn't reflect the spontaneous ideas of those standing within it. Our creation stories are *of* something common: the earth beneath and all around us. What varies is how we understand it.

That's what's at stake. That's what I need you to understand.

The trouble isn't simply that we tell different stories which ultimately generate widely different bodies of law. That's a wonderful thing. We can learn from one another to the benefit of us all. The trouble is that some of us don't *just* differ but differ in the *kind* of stories we tell of creation. At thirty-five, my understanding is still small, but I've yet to learn of a Turtle Island Indigenous people who tell a creation story that isn't rooted in earth.[42] I believe all of our ancestors sustained political communities rec-

---

40 To be clear, I think most law professors in Canada (and indeed entire legal movements: law and society, legal pluralism, comparative law, transsystemic law, and critical legal studies, amongst others) are committed to the general view that context is vital to legal analysis and to legal education, and in particular (1) that it's critical for students to understand law as a function of legal process and of ideology, and (2) that power operates in various ways in the legitimation of one process (whether formal or informal) over another. That is, I think most of us understand that legal education must include the branches beneath the leaves. However, as I go on to explain, I don't think the same can generally be said of the trunk and roots and I see this as a serious failing of Canadian legal education.

41 See *Edwards v Canada (Attorney General)*, [1930] AC 124 at 136, 1929 UKPC 86.

42 I was honoured to be present at Sagkeeng First Nation's Turtle Lodge when *The Great Binding Law* was presented by Anishinaabe, Dakota, and Nehetho elders to representatives of Enbridge and the National Energy Board regarding Enbridge's proposed Line

oncilable to the earthway. This is why we're oriented to growth and renewal instead of progress and permanence, and ultimately why our political communities reflect conceptions of self, of community, and of freedom centred on interdependence (i.e., earthways), not autonomy.

The trouble I had as a law student is that Canadian constitutionalism isn't rooted. Its foundational presumption of earth-alienation is the condition of possibility for Canadians having as constitutional image a lone freestanding tree—free even from the earth beneath it. This instrumental relationship with the Earth is true of all liberal constitutional orders. As you might imagine, this factored rather significantly into my Canadian legal education, establishing a major disconnect between the Anishinaabe lifeworld I brought to the classroom and the liberal lifeworld it expected of me. The latter world, as I experience it, is centred on division. It presents a categorical divide in moral status between humans (culture) and all other beings (nature). Humans are further divided internally. In our natural (i.e., literally as part of nature: pre-political) state, we exist (or imagine ourselves to have existed) as inherently disconnected units,[43] although we're capable of *choosing* inter-human connection through social contract. In this world, earth merely forms the background against which humans live out history. This world's constitutional order isn't rooted in earth but rather is spontaneously created through human will. It has no roots pre-

3 Replacement Program. The statement stands as perhaps the best evidence I know that, although they may offer different accounts of how it works, many, and I suspect all, Turtle Island Indigenous peoples understand themselves to be rooted in earth (see Oshoshko Bineshiikwe – Blue Thunderbird Woman et al, *supra* note 23).

43 I recognize that while all liberals share some kind of deep political commitment to individual autonomy, many today don't accept that individuals are, or could be, ontologically autonomous. For the purposes of my article, however, nothing turns on the distinction between ontological and strictly political liberals. From a rooted perspective, the former are mad, the latter committed to madness, and the result the same. Regardless of how a liberal might present the social contract said to justify Canada's exercise of constitutional authority over Canadians, the statutes and customs that comprise Canada's constitutional order are nonetheless committed to an earth-alienating politics of division. Critics may point to the protection of collective interests (for instance, French language, Catholic education, regional, women's, and most importantly for this article, Aboriginal interests) enshrined in Canada's constitution. First, these are all forms of human association. Second, while the formal existence of such rights is sufficient to establish that Canada's constitution isn't classically liberal, these rights hardly challenge Canada's commitment to the *priority* of individual autonomy. James Tully explains the ordinal ranking of four distinct kinds of constitutional rights in modern constitutional orders like Canada's (see Tully, *Public Philosophy*, *supra* note 19 at 249–55). On Tully's analysis, in a contest, minority (tier four) rights will generally give way to or be read within civil liberties (tier one rights). For an important case that seems to stand as evidence that this ranking applies in Canada *vis-a-vis* Indigenous peoples, see *R v Kapp*, 2008 SCC 41 at paras 64–65, [2008] 2 SCR 483. Justice Bastarache's dissent is especially forceful on this issue (see *ibid* at paras 78, 109, 110).

cisely because it isn't *actually* connected to life. Humans simply imagined it and built their constitutional order upon an idea.[44]

The earth-alienation aspect of the lifeworld generative of liberal constitutionalism explains why most Canadians aren't able to see a link between the *Charter* and global warming, which to me couldn't be clearer. Because of liberalism's view of persons as autonomous and because of its anthropocentric view that only humans are persons, from my perspective it's a worldview irredeemably committed to violence. And because this violent constitutional foundation is hegemonic within Canadian legal education, we generally allow it to occlude contestation that might otherwise enrich classroom discussion from rooted constitutional perspectives ("generally" because heroic attempts from Indigenous students and professors are sometimes made; note also that "rooted" isn't to be conflated with "diverse" or "dissenting"—all good professors make room for these).

What might such perspectives consist of? For political communities rooted in interdependent conceptions of self-community (i.e., in earthways), freedom has a very different meaning than it does within liberal constitutional orders. Most importantly, freedom isn't conceived in terms of autonomous human individuals. It's neither the self's experience of non-interference *from* the choice-limiting actions of others (negative liberty), nor the self's entitlement *to* a specified set of collective goods taken as necessary for establishing and securing its personal autonomy (positive liberty).[45] Rather, interdependent persons experience freedom always and only *with* and *through* others. An individual's freedom, the freedom of his or her community, and the freedom of all of its other members are mutually constitutive; each serves as an ongoing condition of the possibility of the other.[46]

This has significant implications for the structure of law. Under a rooted vision of freedom, order isn't secured through *rule* of law; law isn't the formal obligation to respect rules (i.e., rights and correlative duties). Rather, law consists in the informal responsibility to coordinate mutual aid (i.e., gifts and needs) within particular forms of relationship: law is a

---

[44] Importantly, I recognize that there are settler peoples who share this view. For a brilliant articulation of the same worry but from a different perspective, see Peter Gabel, "The Spiritual Dimension of Social Justice" (2014) 63:4 J Leg Educ 673.

[45] For more on positive and negative liberty, see Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969) ch 3.

[46] I expand on this idea in Aaron Mills, "What is a Treaty? On Contract and Mutual Aid" in John Borrows & Michael Coyle, eds, *The Right(s) Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press) [forthcoming].

framework for proper judgment.[47] In describing Anishinaabe legality in 1850, Anishinaabe author George Copway[48] expressed the distinction this way:

> Among the Indians there have been no written laws. Customs handed down from generation to generation have been the only laws to guide them. Every one might act different from what was considered right did he choose to do so, but such acts would bring upon him the censure of the nation, which he dreaded more than any corporal punishment that could be inflicted upon him.
>
> This fear of the nation's censure acted as a mighty band, binding all in one social, honourable compact. They would not as brutes be whipped into duty. They would as men be persuaded to the right.[49]

In liberal societies, the obligatory, internal relationship between rights and correlative duties specifies that the normative orientation of the

---

[47] I contend that "judgment" is much closer to the meaning of *inaakonigewin* than is "law", if by "law" we insist on constraining ourselves to imply rules, as in "rule of law". Basil Johnston defines *inaakonigewin* (in his orthography, *inaukinigaewin*) as "to decide, judge, make up one's mind, settle, consider, decree; from 'inauk', in a certain direction, way, according to some plan, idea, notion, practice, habit, and 'inigaewin', to set up, put, place, arrange, etc." (Basil Johnston, *The Gift of the Stars/Anungook gauh meenikooying* (Cape Croker First Nation: Kegedonce Press, 2010) at 97); as "[d]ecision, determination, choices, judgement" (Basil Johnston, *Ojibway Language Lexicon for Beginners* (Ottawa: Minister of Indian and Northern Affairs Canada, 1978) at 101); and, finally, he says that *inaukinigaewin* "refers to judgment, decision, measurement; to the character and nature of making a decision" (Basil H Johnston, *Anishinaubae Thesaurus* (East Lansing: Michigan State University Press, 2007) at 198). Lee Obizaan Staples and Chato Ombishkebines Gonzalez define *inaakonige* (i.e., the verb) as "s/he decides things a certain way, s/he agrees on something" (Lee Obizaan Staples & Chato Ombishkebines Gonzalez, *Aanjikiing/Changing Worlds: An Anishinaabe Traditional Funeral* (Winnipeg, Algonquian and Iroquoian Linguistics, 2015) at 154). John Nichols and Earl Nyholm render *inaakonigewin* as "law", but *inaakonige* (again, the verb) as "make a certain judgement, decide things a certain way, agree on something" (John D Nichols & Earl Nyholm, *A Concise Dictionary of Minnesota Ojibwe* (Minneapolis: University of Minnesota Press, 1995) at 66). Finally, Bishop Baraga defined *inakonigewin* as "regulation, law-giving, appointment, order, constitution" and *inakonige*, in the first person, as "I make regulations or laws in a certain manner, I order, arrange, settle" (Frederic Baraga, *A Dictionary of the Otchipwe Language, Explained in English* (Cincinnati, 1853) at 149). There are, however, many words for "law" in *anishinaabemowin* (I've simplified matters in this article by talking only about *inaakonigewin*), and Baraga gave *dibakonigewin* as "judgment, *made* or pronounced; law, justice" and *dibakonige*, in the first person, as "I judge" (*ibid* at 102 [emphasis in original]).

[48] An outstanding account of Copway's character and life is found in Donald B Smith, *Mississauga Portraits: Ojibwe Voices from Nineteenth-Century Canada* (Toronto: University of Toronto Press, 2013) ch 6.

[49] G Copway, *The Traditional History and Characteristic Sketches of the Ojibway Nation* (London: Charles Gilpin, 1850) at 144. I regret the language of "customs" and "compact", but as Copway wasn't a political theorist, I hope we can forgive him these word choices.

right- and duty-bearing parties to a given situation is directly to one another. Obligation's logic of mandatory direct exchange doesn't hold for rooted legalities, however, in which parties exercise a particular form of judgment (not judgment *simpliciter*) to distribute gifts and needs throughout their shared circle of political community (albeit through specific relationships, not randomly).[50] Thus, imagine that A gifts B and, instead of returning a gift to A, B gifts C. Where legality turns on responsibility instead of obligation, A isn't necessarily done a harm and A experiences indirect reciprocity. A's analysis of B's possible wrongdoing will turn on the relative need of A and C and, critically, on the relationships obtaining between each of them with B (and if relevant, certainly between A and C). Although a rooted legality analysis doesn't turn on this insight, it may well be that, from A's perspective, A's own interests are best served by B's gifting of C: given that A to Z are interdependent, A's freedom depends on C's gifts and, thus, as a general matter, A is interested in C's empowerment.

Finally, please note that this introduction of rooted legality is oversimplified! I present it in only the simplest of terms, without any attempt to work it through critically. For the purposes of this article, I want only to illustrate the magnitude of difference between rooted (mutual aid) and liberal (contractarian) legalities. I think the following quotation by Basil Johnston beautifully expresses what I've tried to explain here:

> The community had a duty to train its members as individuals not so much for its own benefit though there was that end, to be sure, but for the good of the person. The man or woman so trained had received a gift from the community which he was to acknowledge in some form; and that form consisted simply of enlarging one's own scope to the fullest of his capacity. The stronger the man, the stronger the community; and it was equally true that the stronger the community, the firmer its members.[51]

This insightful passage by Leroy Little Bear may also assist interested readers in developing further lines of thought in connecting the notion of a rooted constitutional order I've shared here with the experience of freedom *with* and *through*. Explaining Indigenous law, he said that

> [anthropologists] have done a fairly decent job of describing the customs themselves, but they have failed miserably in finding and interpreting the meanings behind the customs. The function of Aboriginal values and customs is to maintain the relationships that hold creation together. If creation manifests itself in terms of cyclical pat-

---

[50] For an accessible, engaging, and brilliant introduction to this idea in Anishinaabe (Potawatomi) context, see Robin Wall Kimmerer, *Braiding Sweetgrass* (Canada: Milkweed Editions, 2013).

[51] Johnston, *Ojibway Heritage*, *supra* note 23 at 70.

> terns and repetitions, then the maintenance and renewal of those patterns is all-important. Values and customs are the participatory part that Aboriginal people play in the maintenance of creation.[52]

On the understanding that at least some of the customs to which Little Bear refers have to do with law and in light of what has been shared about rooted constitutionalism, why might anthropologists sometimes struggle finding purpose behind these customs? Little Bear says that the function of Indigenous law (what he calls "Aboriginal values and customs") "is to maintain the relationships that hold creation together" and I've offered above an example of the kind of thinking that produces such a statement. What's the function of Canadian law? What kind of thinking allows for its purpose and how does it differ from mine and Little Bear's? Finally, what implication should follow from this difference for how Indigenous law is taught in law schools, if it should be taught in law schools at all?

B. Implications of Lifeworld for Legal Education Across Liberal and Rooted Constitutional Contexts

In an ideal world, I'd like this article to assist in transforming legal education in Canada such that other Indigenous students don't experience the level of confusion that I did as a law student. At the same time, I hope non-Indigenous students can learn about our legal orders in a way that avoids the violence of colonial translation from an Indigenous constitutional context into a liberal one.

First, to those of you who are Indigenous law students facing the pedagogical challenge of lifeworld occlusion and who may feel lost and stupid the way I did, I hope this article shows that you aren't alone in your struggle and that there may be something much more than an embarrassingly bad case of the usual sort of misunderstanding we all experience now and then contributing to your confusion. I know from many conversations that I'm not the only one.[53]

---

[52] Leroy Little Bear, "Jagged Worldviews Colliding" in Battiste, *supra* note 24, 77 at 81.

[53] There are other fantastic resources available where Indigenous law scholars have reflected on their law school experiences (see e.g. Patricia A Monture, "Now That the Door Is Open: First Nations and the Law School Experience" (1990) 15:2 Queen's LJ 179; Tracey Lindberg, "What Do You Call an Indian Woman with a Law Degree? Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out" (1997) 9:2 CJWL 301). While he isn't Indigenous, University of Toronto Aboriginal law professor (and retired Crown counsel) Kerry Wilkins has written on his experience of law school and while not about Indigenous peoples' experience, it's a wonderful paper many may still find of relevance (see Robert Kerry Wilkins, "'The Person You're Supposed to Become': The Politics of the Law School Experience" (1987) 45:1 UT Fac L Rev 98).

Second, for those faculty members who want to support their Indigenous students but aren't aware of the possibility of the lifeworld-law disconnect or of what an experience of it might be like, I hope this article supports your efforts to take up responsibility for this knowledge. Important steps might include making space for and participating in dialogue on this issue as it arises, advocating for your students to be heard, and constructively engaging colleagues (faculty and administration) in ways that advance discussion of this issue so that students aren't expected to do all the work themselves.

Third, I'd like to suggest three institutional reforms that, when taken together, would go a long way in addressing the problem I've presented. My first suggestion is already well underway in some of Canada's law schools. This suggestion is to include a module in the first-year curriculum—perhaps as part of a bridge week or introduction to law camp—that would expressly establish that law is storied. Before students can apprehend any particular lifeworld beneath a system of law, they must first be introduced to the more general notion that law is never a collection of freestanding rules and processes. The law always reflects narratives, and, deeper than these, a worldview. When I was in law school, "law *and*" was a major movement. Students were encouraged to pursue inquiry at the nexus of law and other social science and humanities disciplines (law and philosophy, law and economics, law and literature, etc.). While I think the "law and" approach is to be recommended, such an approach is distinct from what I'm advocating for here. I'm talking about "law *in*". Law as a discipline isn't fully constituted in and of itself; like every field of practice and inquiry, it comes from and depends upon a story for meaning and coherence. Without first attending to how law is shaped by story, the rich analyses offered through the "law and" approach risks obfuscating and even overlooking much of the work law does. Heidi Stark has a wonderfully clear and accessible paper that makes the "law in" point.[54] The Peter Gabel paper cited above would also be a wonderful choice for a module presenting the inescapably storied nature of law.[55] And as I've already indicated, Leroy Little Bear's ethnographic examination of the deeply idiosyncratic Naidanac people has deadly aim on this point.[56]

---

[54] Heidi Kiiwetinepinesiik Stark, "Transforming the Trickster: Federal Indian Law Encounters Anishinaabe Diplomacy" in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing, Mich: Michigan State University Press, 2013) 259.

[55] Gabel, *supra* note 44.

[56] Little Bear, "Dispute Settlement", *supra* note 12.

My second suggestion targets the imperialism of legal education in Canada. I suggest that teachers of constitutional law courses include a small section on constitutional context at the outset. Mine didn't. We jumped right into federalism and then spent two classes on section 35 before moving onto the *Charter*, which filled out the rest of the year. The context piece—before any doctrine is engaged—would establish that Canada's constitutional order is one of many within liberal constitutionalism. As such, this approach would own up to Canadian constitutionalism's inflexible structural commitments. In very plain language—language designed so that students with no background in political theory (or any theory, for that matter) can access it—this context component would establish the ideas and understandings liberal constitutional orders take to be sacred, which frame the boundaries of Canadian constitutional discourse and, as a result, are never subjected to interrogation under it. This contextual approach would include core concepts like the primacy of the self, individual autonomy, the sovereign, social contract, consent of the governed, rule of law, rights discourse, the vote, etc. Each of these concepts would be disclosed as a choice taken amongst other possible choices, and the common thread between these particular choices would be revealed to students. The students would then hopefully begin to perceive this assemblage of concepts as a particular, coherent *framework* for constitutionalism and thus for a particular view of legality.

The course would only proceed on the basis of the understanding that everything students are about to learn reflects this underlying framework. Evidently, such a context-setting module would be a small intervention into already dense constitutional law courses. Yet even in this limited way, this intervention will surely be met with strong opposition from many constitutional law professors who (for instance) refuse to teach section 35 on the basis that there isn't enough time in the year. Clearly, how each professor takes up such a responsibility will vary, but I'm suggesting that students need only an introductory understanding of liberalism in order for courses on Canadian constitutional law to be accountably situated within the liberal lifeworld animating and bounding them. The purpose isn't to require law students to become skillful political theorists. It's to instill in students the idea that their constitutional law is partial (i.e., storied). Otherwise, they're likely to recognize that law and legal actors may be biased (subject as they are to the vagaries of human interest and fallibility) but then falsely believe that the constitutional structure beneath them is neutral and thus spared from a concern about its particularity and exclusions. Since the framing of Canadian constitutionalism within the liberal lifeworld would only be introductory, professors could consistently refer back to this foundational liberal vocabulary as they proceed through the course. For example, a professor could discuss with his or her students the role and function of individual autonomy within the provi-

sions of the *Charter*, noting also where Canada's constitutional order deviates from classical liberalism in important ways.

My third suggestion for institutional reform is the most important. Many of Canada's law schools are already engaging with Indigenous peoples' legal orders. I've suggested that this interest has just about become mainstream and that the debate is now deepening. I frequently hear Indigenous law students and professors and Indigenous community members voicing mixed feelings and raising thoughtful, challenging questions about the uptake of Indigenous law by the state and in Canadian law schools. Often these questions regard issues of translation (ontological, epistemological, procedural, discursive) and the abstracting of law situated in particular lands, relationships, and cultural understandings (i.e., what I call rooted constitutionalism).[57] Despite the considerable time and efforts of so many, I think the complex debate around the teaching of indigenous law in Canadian law schools is still in its early days.

Although I'm still a doctoral candidate, with increasing frequency, a law professor will inform me about what's happening at his or her faculty or what new curricular moves they're contemplating with respect to Indigenous peoples' legal orders. I'm always grateful for these conversations, but they often come with some awkwardness. I'm not always able to support proceeding as described. Over time, I've figured out the reply I'm comfortable with and it's as follows. The first step is to gently suggest that I don't think it's okay to simply teach a course on an Indigenous legal order (or a comparative law course that draws on aspects of an Indigenous legal order with aspects of either Canada's common law or civil law traditions) that fails to attend to the question of lifeworld. When we do this, I worry that we do violence to Indigenous legal orders and that we mislead students about what it means to work with them. We disappear the stakes.

That said, I want to encourage the study of Indigenous legal orders at law schools in Canada. If we don't teach Indigenous law, how can we expect Canadian law practitioners to understand Indigenous perspectives (including, for instance, actions of civil disobedience which may seem like non-compliance but which are often compliant with a distinct Indigenous legal order) and, just as important, to advert to their own participation in suppressing Indigenous law, acting and advising clients as if there is none? I hope this article doesn't have a chilling effect on law faculties, but

---

[57] I've had most of these discussions informally, but one event that I found particularly useful insofar as these questions go was "Indigenous Law Across Territories: Taking Counsel Together" (Talking Circle on Indigenous Legal Traditions held at the Saskatchewan Law Foundation Conference 2015, Native Law Centre, College of Law, University of Saskatchewan, 27–29 March 2015).

rather encourages and even supports them in taking up the significant challenge of teaching Indigenous law *in the context of Indigenous constitutionalism*. That said, I would advocate for caution in *how* we go about encouraging the study of Indigenous legal orders. Those committed to teaching and studying these orders must understand that the responsibility, and hence their commitment, is larger than perhaps they appreciate. Thus, the second step in my response is to suggest that before we proceed with teaching the content of any Indigenous legal order, we must first teach students about the Indigenous constitutional order that gives it life and meaning. We need to situate the Indigenous legal order we wish to learn and teach about within its lifeworld, which is not something that just anybody can do. Further, this isn't something that we can come anywhere close to fully accomplishing within a law school. What we can offer students is a glimmer of what exists and empower them to be able to learn more elsewhere.

To put this condition into practice in law schools, I propose that students need a course (and not just a few lectures) on an Indigenous people's constitutional order before they're prepared to begin learning about its legal order. If a law school fails to institute such a prerequisite course, the odds are extraordinarily high that the students will proceed to read and distort Indigenous law through the liberal constitutional lens they know, even if unbeknownst to them. The ideal curricular response to this worry would go further still. As part of its core first-year curriculum, each law school in Canada could have a mandatory course on the rooted constitutional mode or, better yet, the constitutional orders of the Indigenous peoples on whose traditional territory it's located. Such mandatory courses would soon come to be understood as equally necessary and foundational for a serious legal education in Canada as are courses on Canadian constitutional law, criminal law, voluntary obligations, and involuntary obligations. Of course, certain responsibilities are inherent to taking up such a curricular ambition. An obvious one is the hiring of instructors with the unique qualifications necessary for teaching such courses (recognizing that views as to what those qualifications are will vary). Another equally obvious responsibility is the necessity for the law school administration to build a relationship with local Indigenous communities, who should be involved in any such endeavour.

I don't know of any law faculty that requires its students to learn about Indigenous constitutional orders,[58] so I thought it might be helpful

---

[58] Although this hasn't stopped some ambitious professors from doing their very best to take up the consequences of lifeworld-law disconnects in their teaching. Kirsten Anker, for example, documents her amazing effort to cover some of the ground within her course "Aboriginal Peoples and the Law" that an Indigenous constitutionalism course

to offer an example of what I mean. It's quite limited—the students and I had twelve hours together, divided over five days—but it's the only one I have. I built and, in January 2015, taught *Law 2555: Anishinaabe Constitutionalism*, an intensive course at Lakehead University's Bora Laskin Faculty of Law (which I'm fortunate to now be turning into a full-semester course).

I had several conditions in order for me to teach my course. First, my course relied heavily on the *aadizookaanan* (our stories from time immemorial) and they're only to be told once snow's on the ground, which meant teaching in the January-April semester. Second, I explained that the class needed to meet in a space in which we could smudge[59] and in which we could form a circle. Third, I made sure that the Dean understood that case law wouldn't be on the syllabus; my course would consist of a very different set of readings. Fourth, I needed permission to have an unusually high proportion of the grading scheme assigned to participation. The Dean agreed to all four considerations without questioning me about them. Given all I've said so far, you'll appreciate how I took that as a good sign that I'd be able to do the necessary work of ignoring the given set of law school expectations in this course and introduce new ones. My experience was that together we—the students, guests, medicines, and myself—did so. Of course, the real test came down to what the students experienced.

I arrived early each day to prepare the room. Helpers usually showed up early too. I would offer a prayer for a good class, usually before everyone got there or sometimes as they were arriving. I usually had a helper smudge everyone in the circle. I brought and opened my bundle each day. We used my talking stick for the first half of each topic and then moved into open dialogue.

I was stunned by how fully the students responded to the dramatic shift in context. Every student in the class gave it their best and the results were astounding. The level of sharing was amazing. The rigour brought to bear on what had to be a very different and challenging set of course materials, the unique contributions of students' lived experience, and the generous contribution of the Anishinaabe students' knowledge of

---

would have addressed (see Kirsten Anker, "Teaching 'Indigenous Peoples and the Law': Whose Law?" (2008) 33:3 Alt LJ 132).

59 A smudge is a ceremony that re-grounds participants in creation, assisting them in orienting themselves to one another in a good way. It supports participants in opening their hearts by letting go of obstacles to their connection and thus to effective sharing. It isn't magic; it helps us to do the work ourselves. For persons, the practice involves burning sacred medicine(s) and taking it into and over one's body and one's things. Others may have different teachings, and these, too, are correct.

the subject matter were all so rich. The students struck a terrific balance between sharing their own insights and entering into dialogue with the perspectives and questions of others. Everyone engaged respectfully and strove to engage the Anishinaabe practice of non-contradiction as they voiced their disagreement with others. For those with no experience at this, early success was a remarkable feat! Especially in a law school context where we're trained to be adversarial, it would've been easy to grow frustrated and to decline to voice one's disagreement under this condition. But this didn't seem to happen. There were artful articulations of dissent. I was so proud of the students for their commitment to and success in meeting the deep challenge my course offered. I was moved by their efforts.

What follows is my syllabus, which is just one example of what a course on Indigenous constitutionalism could look like. You'll notice that there are no headings dealing with property, voluntary obligations, etc. I probably wouldn't use those kinds of headings to organize a course I ran on Anishinaabe law anyhow. Regardless, as I said, I think that Anishinaabe law should be a separate and second-order course. Meeting times and boilerplate portions have been removed and some stylistic changes and corrections have been introduced, but what's presented is otherwise unedited from how it appeared at the time I offered the course. That being the case, in some instances I would use different language today.

Law 2555: Special Topics in Law: Anishinaabe Constitutionalism
Winter 2015—1 credit intensive

Course Description and Core Topics

This is a course about (one view of) Anishinaabe constitutionalism—the total relational structure that allows for Anishinaabe political communities to come into being, to maintain their integrity over time, and to adapt to new realities. It's a course about law, but not as most of us probably understand that word. We're going to develop our capacity to understand Anishinaabe constitutionalism "from the inside", that is, within its own cultural context. This is a daunting challenge for it requires us to be able to think about law in ways that will be foreign to many of us, including leaving conventional legal discourse behind. The goal will be to begin to understand the total relational structure through which Anishinaabe societies governed themselves prior to colonization and through which, albeit in different ways and to different degrees, Anishinaabe political communities continue to do so today.

This may sound like a deeply theoretical exercise. But the goals of this course are intimately connected to empowering students to have a direct

impact on our lives today. In having Anishinaabe constitutionalism disclosed to them, students will be able to pose questions about the relationship between Anishinaabe and Canadian constitutionalisms, and thus to be conscious of constitutional power relationships they previously could not identify.

Core topics include:

- The structure of Anishinaabe constitutionalism:
    - The vision of freedom that drives it;
    - The means by which it is organized and through which it is practised;
    - The ends toward which it strives.
- Treaty constitutionalism
- Contemporary Anishinaabe constitutionalisms
- Constitutionalism and imperial power today

Course Objectives

To assist students to:

- See law as constituted by context and not simply as given.
- Understand the structure of (one view of) Anishinaabe constitutionalism *on its own terms* (that is, not using Canadian constitutional discourse as a way in). To begin to understand its processes, how its content is generated, and how reasoning works within it.
- Articulate the similarities and differences between Anishinaabe and Canadian (and liberal generally) constitutionalisms.
- Develop their capacity to identify whether and where law sustains contemporary colonialism, and if so, to evaluate how it works.
- Contribute in new and creative ways to the work of Indigenous-settler/state reconciliation/resurgence, and, in particular, in ways that many of the leading actors in existing reconciliatory processes (participants in section 35 litigation, the comprehensive claims process, the Truth and Reconciliation Commission, etc.) are unable to.
- Learn to think in new ways.
- Begin to understand Anishinaabe lifeways.

Assessment

30% Participation. Your participation is vital to the success of this course. Consistent with Anishinaabe pedagogy, we're going to learn together and the high proportion of the grading scheme dedicated to participation reflects that intention. Participation doesn't just mean getting the readings

done and having reflected on some of them. Beyond this, it means connecting to one another in a way that allows you to share your gifts, while simultaneously ensuring you benefit from the gifts of others. This means taking risks and sharing your perspective in class. It also means being conscious of how much space one takes up in the class. It's about *how* one engages with others in the class, not the idea that more is better. We're going to learn that we need each other to make this class work; we're going to practise the very thing we're learning.

70% Take-home exam consisting of three questions.

Materials

Readings are separated into mandatory and supplemental. **All you need to read are the mandatory readings**. It would be impossible to do all of the mandatory and supplemental readings and no one is encouraged to try. While the supplemental readings provide additional content or new perspectives on the themes of the day, they are only there in case anyone wants and has time to push further than they're expected to, or in case someone feels they need additional resources for their class participation or for their exam. Having said that, please note that on all days (except our first day) there are two related topics per class, **each of which** has mandatory and supplemental readings.

Because most of the readings require you to be reflective in ways not ordinarily expected within the practice or study of Canadian law, I have assigned a lower page count for each class than what I have been told you are accustomed to. At the end of each reading, I've added content in square brackets ("[]"). To assist students to evaluate their time allocation throughout the week, the first piece of information within the square bracket indicates the page length of the reading. That the total page count for any given day is low does not mean there is little work to do, but rather that I will expect you to enter class having spent time reflecting on some of the materials that grabbed you. Occasionally there is a second piece of information, pertaining to the Indigenous or non-Indigenous identity of the author/orator. Where no second piece of information is provided, the author/orator is Anishinaabe. The vast majority of our texts come from Anishinaabe authors/orators.

Monday January 26th

Anishinaabe Law Revitalization, Constitutionalism, and Cultural Context

Mandatory (13 pages)

1. Leland Bell, "Sacred Fire", *The Beaver* (Summer 1981) 56 at 56–57. [2pp]
2. Darlene Johnston, "Welcome Address" (2007) 6:1 Indigenous LJ 1. [2pp]
3. Basil H Johnston, "Is That All There Is?: Tribal Literature" (1991) 128 Can Literature 54. [9pp]

Supplemental

4. Leroy Little Bear, "Dispute Settlement among the Naidanac" in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 341. [8pp, Blackfoot]
5. Jim Dumont, "Justice and Aboriginal People" in Royal Commission on Aboriginal Peoples, ed, *Aboriginal Peoples and the Justice System: Report of the Round Table on Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1992) 42. [42pp]
6. Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989–1990) 6 Can Hum Rts YB 3. [42pp, Cree]
7. Patricia Monture, "Notes on Sovereignty" in Andrea P Morrison & Irwin Cotler, eds, *Justice for Natives: Searching for Common Ground* (Montreal: McGill-Queen's University Press, 1997) 197. [2pp, Mohawk]
8. Royal Commission on Aboriginal Peoples, "Aboriginal Concepts of Law and Justice: The Historical Realities" in Royal Commission on Aboriginal Peoples, ed, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) 12. [13pp, multiple authors]
9. Aaron Mills (Waabishki Ma'iingan), "Opichi: A Transformation Story, an Invitation to Anishinaabe (Ojibwe) Legal Order" (2013) 34:3 For the Defence 40. [11pp]

Tuesday January 27th

(1) Freedom *Through* and the Foundation of Anishinaabe Political Community: Interdependence

Mandatory (23 pages)

10. Basil Johnston, "The Vision of Kitche Manitou" in Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) 11. [2pp]
11. Stan McKay, "Calling Creation into Our Family" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills, Ont: House of Anansi Press, 1992) 28. [7pp, Cree]

12. Kagige (John) Pinesi, "Nanabushu and the Woodpecker" in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 423. [1p]
13. Kagige (John) Pinesi, "The Mink and the Marten" in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 2 (New York: Arbor Press, 1919) 127. [2pp]
14. "The Little People" in Patronella Johnston, *Tales of Nokomis* (Okemos, Mich: Nokomis Learning Center, 1994) 34. [3pp]
15. "The Legend of the Oriole" in Patronella Johnston, *Tales of Nokomis* (Okemos, Mich: Nokomis Learning Center, 1994) 59. Illustration by Francis Kagige. [3pp]
16. Charles Nelson, "'Protection' Conflicting with Anishinabe Rights" in Jill Oakes et al, eds, *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* (Edmonton: Canadian Circumpolar Institute, 1998) 143. [2pp]
17. Archie Mosay, "Apane Anishinaabe Ogaganoonaan Manidoon (The Indian Always Talks to the Spirit)" (1996) 3:2 Oshkaabewis Native J 20. [3pp]

Supplemental

18. Fred Kelly, "Confession of a Born Again Pagan" in Marlene Brant Castellano, Linda Archibald & Mike DeGagné, eds, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 11. [25pp]
19. "The Burdock" in Patronella Johnston, *Tales of Nokomis* (Okemos, Mich: Nokomis Learning Center, 1994) 21. Illustration by Francis Kagige. [3pp]

(2) The Means of Freedom in Anishinaabe Political Community: The Gift and Responsibility

Mandatory (15 pages)

20. Arthur Solomon, "Notes on the Philosophy of an Indian Way School" in Michael Posluns, ed, *Songs for the People: Teachings on the Natural Way* (Toronto: NC Press, 1990) 98. [2pp]
21. "Sir William Johnson to the Lords of Trade" in EB O'Callaghan, ed, *Documents Relative to the Colonial History of the State of New York*, vol 7 (Albany: Weed, Parsons and Company, 1856) 525. [3pp, British]
22. Kawbawgam, "Some Ojibwa History" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 124. [2pp]
23. Jacques LePique, "Aitkin and the Ojibwa" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 131. [3pp]
24. Tobasonakwut Kinew, "'Let Them Burn the Sky': Overcoming Repression of the Sacred Use of Anishinaabe Lands" in Jill Oakes et al, eds, *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* (Edmonton: Canadian Circumpolar Institute, 1998) 33. [2pp]

25. "Nanabush and the Skunk" in Patronella Johnston, *Tales of Nokomis* (Okemos, Mich: Nokomis Learning Centre, 1994) 5. Illustration by Francis Kagige. [3pp]

Supplemental

26. Cary Miller, "Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities, 1820–1832" (2002) 26:2 Am Indian Q 221. [25pp]
27. Bruce M White, "'Give Us a Little Milk': The Social and Cultural Meanings of Gift Giving in the Lake Superior Fur Trade" (1982) 48:2 Minnesota History 60. [12pp]
28. Jacques LePique, "Mishi Ginabig in Lake Michigamme" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 43. [2pp]
29. Kawbawgam, "A Famine and How a Medicine Man Saved the People" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 79. [2pp]
30. Letter from Jeffery Amherst to Sir William Johnson in Milton W Hamilton & Albert B Corey, eds, *The Papers of Sir William Johnson*, vol 10 (Albany: University of the State of New York, 1951) 284. [3pp]
31. Bessie Mainville, "Traditional Native Culture and Spirituality: A Way of Life That Governs Us" (2010) 8:1 Indigenous LJ 1. [6pp]

Wednesday January 28th

(1) The Ends of Freedom: Harmony as Right Relations

Mandatory (21 pages)

32. Edward Onabigon, "Elder's Comments" in Roger Neil, ed, *Voice of the Drum: Indigenous Education and Culture* (Brandon, Man: Kingfisher, 2000) 282. [5pp]
33. Gary Potts, "The Land Is the Boss: How Stewardship Can Bring Us Together" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills, Ont: House of Anansi Press, 1992) 35. [4pp]
34. Kawbawgam, "The League of the Four Upper Algonquian Nations" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 112. [2pp]
35. "Nenebuc Transforms the Bear" in FG Speck, ed, *Myths and Folk-Lore of the Timiskaming Algonquin and Timagami Ojibwa* (Ottawa: Government Printing Bureau, 1915) 39. [1p]
36. Alexander Henry, *Travels and Adventures in Canada and the Indian Territories Between the Years 1760 and 1776* (Boston: Little, Brown & Company, 1901) at 39–47. [9pp]

Supplemental

37. Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 173. [12pp]
38. Kagige (John) Pinesi, "He Who Over-Dreamed" in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 2 (New York: Arbor Press, 1919) 307. [2pp]
39. Jacques LePique, "The Beast Men" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 92. [4pp]
40. Eškwegabaw & Debegižig, "Nenabozo and the Ducks" in JPB de Josselin de Jong, ed, *Original Odžibwe-Texts with English Translation, Notes, and Vocabulary* (New York: Johnson Reprint Corporation, 1913) 23. [3pp]
41. Jacques LePique, "The Girl and the Midéwug" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 52. [3pp]

(2) The Logic of Force Sustaining Right Relations

Mandatory (5 pages)

42. "Beaver Gives a Feast" in FG Speck, ed, *Myths and Folk-Lore of the Timiskaming Algonquin and Timagami Ojibwa* (Ottawa: Government Printing Bureau, 1915) 53. [1p]
43. "Narrative of the Most Remarkable Occurrences in Canada" in EB O'Callaghan, ed, *Documents Relative to the Colonial History of the State of New York*, vol 9 (Albany: Weed, Parsons and Company, 1855) 594 at 609–12. [4pp]

Thursday January 29th

(1) Treaty Constitutionalism

Mandatory (43 pages)

44. Leanne Simpson, "Looking After Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23:2 Wicazo Sa Rev 29. [14pp]
45. Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 Am Indian Culture & Research J 145. [20pp]
46. "Introducing the Settler Treaty Card", *Briarpatch Magazine*, online: <www.briarpatchmagazine.com/pdf/settler-treaty-card_(1).pdf>.
47. Francis Bond Head, *Communications and Despatches Relating to Recent Negociations with the Indians and Arrangements for the Future Settlement of the Tribes in this Province* (Office of the British Colonist, 1838) at 1–9. [9pp]

Supplemental

48. James Tully, "Consent, Hegemony, and Dissent in Treaty Negotiations" in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 233. [18pp, Settler]

(2) Niagara, 1764

Mandatory (21 pages)

49. Image: Ojibwe Cultural Foundation, *24 Nations Belt*.
50. Image: Ojibwe Cultural Foundation, *1764 Great Belt*.
51. Letter from Sir William Johnson to Thomas Gage in Alexander C Flick, ed, *The Papers of Sir William Johnson*, vol 4 (Albany: University of the State of New York, 1925) 328. [3pp, British]
52. William Johnson & Guy Johnson, "A Conference with Chippewas" in Alexander C Flick, ed, *The Papers of Sir William Johnson*, vol 4 (Albany: University of the State of New York, 1925) 478. [4pp, British]
53. Sir William Johnson, "An Indian Congress" in Milton W Hamilton & Albert B Corey, eds, *The Papers of Sir William Johnson*, vol 11 (Albany: University of the State of New York, 1953) 278 [with omissions]. [11pp, British]
54. Letter from Sir William Johnson to Thomas Gage in Milton W Hamilton & Albert B Corey, eds, *The Papers of Sir William Johnson*, vol 11 (Albany: University of the State of New York, 1953) 336. [3pp, British]

Supplemental

55. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155. [16pp]
56. "Nations at Indian Congress at Niagara" in Milton W Hamilton & Albert B Corey, eds, *The Papers of Sir William Johnson*, vol 11 (Albany: University of the State of New York, 1953) 276. [1p, British]
57. AF Hunter, "Wampum Records of the Ottawas" in *Annual Archaeological Report 1901, Being Part of Appendix to the Report of the Minister of Education Ontario* (Toronto: LK Cameron, 1902) 52. [4pp, unknown]
58. Alan Corbiere, "Gchi-Miigisaabiigan: The Great Wampum Belt", *Anishinabek News* 18:7 (September 2006) 6. [1p]
59. Alexander Henry, *Travels and Adventures in Canada and the Indian Territories Between the Years 1760 and 1776* (New York: I Riley, 1809) at 163–73. [10pp, British]
60. Darlene Johnston, "Connecting People to Place: Great Lakes Aboriginal History in Cultural Context" (2006) Research Paper prepared for the Ipperwash Commission of Inquiry, online: <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/transcripts/pdf/P1_Tab_1.pdf>. ***Pages 14–16 only***. [3pp]
61. "NO HST!", *Anishinabek News* 22:1 (January–February 2010) 12. [1p]

62. Mark D Walters, "'*Your Sovereign* and *Our Father*': The Imperial Crown and the Idea of Legal-Ethnohistory" in Shaunnagh Dorsett & Ian Hunter, eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (New York: Palgrave Macmillan, 2010) 91. [14pp, Settler]

Friday January 30th

(1) Contemporary Colonialism and Anishinaabe Constitutionalism Today

Mandatory (11 pages)

63. Tom Flanagan, "Native Talks with the Crown Challenge Canada's Very Existence", *The Globe and Mail* (25 January 2013), online: <www.theglobeandmail.com/commentary/native-talks-with-the-crown-challenge-canadas-very-existence/article7779669/>. [2pp, Settler]
64. Anishinabek Nation, *Anishinaabe Chi-Naaknigewin (Anishinabek Nation Constitution)*, online: <www.anishinabek.ca/roj/download/Anishinaabe%20Chi-Naaknigewin%20Document%20-%20Proclaimed%20June%206,%202012.pdf>.

Supplemental

65. Harry S LaForme, "Resetting the Aboriginal Canadian Relationship: Musings on Reconciliation", online: Ontario Bar Association <www.oba.org/en/pdf/sec_news_abo_may13_laforme.pdf>. [11pp]
66. Union of Ontario Indians, "From the Anishinabek (the Ojibway, Ottawa, Potowatomi and Algonquin Nations) to the Parliament of the Dominion of Canada" (1980) 3:12 Ontario Indian 18. [6pp]
67. Context for the Anishinabek Nation Constitution is available on the Anishinabek Nation, Restoration of Jurisdiction website, online: <www.anishinabek.ca/roj/anishinaabe-chi-naaknigewin.asp>.

(2) Conclusion

Special Guest: Jana-Rae Yerxa

Mandatory (10 pages)

68. Jana-Rae Yerxa, "Gii-kaapizigemin Manoomin Neyaashing: A Resurgence of Anishinaabeg Nationhood" (2014) 3:3 Decolonization 159. [7pp]
69. Gary Potts, "Growing Together from the Earth" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills, Ont: House of Anansi Press, 1992) 199. [3pp]

Conclusion: *Weweni*—Go Carefully

I've really only made one point in this article but I've tried to put much into it. It's wonderful to see so many law schools finding ways to engage with Indigenous legal orders. It's also wonderful to hear so many Indigenous law professors, law students, and community members posing questions about this development. I've argued that we should study Indigenous legal orders at Canadian law schools, but only if we're prepared to exercise great care in how we go about it, and this means attending to the Indigenous lifeworlds beneath them. If we fail to go carefully, I worry that we open up Indigenous legal orders to further colonization by inviting legal education to liberalize them.

In addition to trying to draw attention to the paramount importance of attending to the lifeworld-law relationship and its impact on students, I've suggested three institutional reforms for Canadian law schools: (1) they should run a module introducing the idea that all law, legal processes, and legal institutions come from somewhere and can never stand outside of that home (although they may cross contexts within it); (2) Canadian constitutional law courses should situate their subject matter within the domain of liberal constitutionalism; and (3) law schools deciding to offer courses on Indigenous legal orders should first require students to take a prerequisite course on Indigenous constitutional orders. Finally, law schools need to be clear about what they are and aren't capable of. A student having completed both a prerequisite course on Anishinaabe constitutionalism and an upper-year course on Anishinaabe law isn't thereby made an expert in the subject matter the way he or she might be with respect to an aspect of Canadian law. Law schools—at least as we recognize them today[60]—can't offer that. Those wanting a deep understanding of an Indigenous legal order will have to seek it through relationships with Indigenous peoples in their communities and on their territories.

I came upon my view about the necessity of understanding something about Indigenous constitutional orders before one can meaningfully engage with an Indigenous legal order through experience. For example, I recall one time I was sharing via teleconference with a group of lawyers, judges, and friendship centre staff assembled in Kenora. This was as I was just beginning to engage publicly with my work, so I was quite green! The group was keen to better understand Anishinaabe law as they constantly dealt with Anishinaabe persons in their respective law-engaged practices and they'd all set time aside for this conversation. Sadly, I pretty

---

[60] See John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning", 33:2 Windsor YB Access Just [forthcoming in 2016].

well blew it. Not for lack of trying, of course. I gave it a good effort and I think our time together was still of some value. But the experience (and this was just one such experience) of our two meetings together clearly revealed how impossible it is to understand our law without having first had the opportunity to learn about the constitutional framework that gives it life and meaning. This experience helped me to see that because of this necessity, I needed to work out a course-length approach to sharing, and in my Anishinaabe constitutionalism syllabus for the intensive course I taught at Lakehead University, I've offered one example of the beginnings of what that could look like.

If this article helps to create discussion about the conditions under which we can meaningfully study Indigenous legal orders in Canadian law schools, I'll have achieved my aim. I'm certain some will disagree with my approach and that'll be good too. What matters is that there are more and more of us engaging in our respective best ways. We need all of our gifts.