

Miinigowiziwin: All That Has Been Given for Living Well Together
One Vision of Anishinaabe Constitutionalism

by

Aaron James Mills (Waabishki Ma'iingan)
BA, Carleton University, 2005
JD, University of Toronto, 2010
LLM, Yale University, 2012

A Dissertation Submitted in Partial Fulfillment
of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

In the Faculty of Law

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Supervisory Committee

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Abstract

I take that colonialism is animated by a principle of settler supremacy, that this principle consists of three kinds of violence to indigenous peoples, and that it generally serves as the defining feature of indigenous-settler relationships on Turtle Island today. The central contention argued in this dissertation is that changing this reality will require the revitalization of not only indigenous systems of *law*, but also the indigenous *legalities* of which they form part.

To that end, I present a minimalist picture of what I argue diverse liberal legalities share in common, and I identify that the uniquely Canadian sense of legality is of the liberal kind. In particular, I argue that Canada's unique form of liberal constitutionalism cannot serve as the constitutional framework within which indigenous law is revitalized without enacting one of settler supremacy's three forms of violence. Rather, to eliminate colonialism we shall have to advert to the fact that indigenous law was and is generated by unique indigenous legal processes and institutions, which find their authorization in unique indigenous constitutional orders, which are in turn legitimated by indigenous peoples' unique and varied creation stories.

The heart of this dissertation is a close examination of one indigenous people's legality. Based on my engagement with the gifts of diverse Anishinaabe writers and orators and on close work with my circle of elders, with *aadizookaanan*, in community and on the land, I present one view of Anishinaabe legality and explain how it results ultimately in *inaakonigewin*, an Anishinaabe conception of law.

In so doing I give special emphasis to the earth-centric 'rooted' form of constitutionalism operative within Anishinaabe legality, which is characterized by mutual aid and its correlate structure, kinship. I use the language of rootedness to emphasize that what's critically at stake in my argument is a distinct kind of constitutionalism and not the distinct subject position of those who inhabit it (i.e. not indigeneity *per se*). Unequivocally indigenous peoples have been rooted constitutionalism's exemplars, but it's a kind of constitutionalism (and more generally, of legality) available to all.

In the second half, I apply my comparative study of liberal and rooted legality difference to the problem of violence in contemporary indigenous-settler relationships. That discussion identifies that two principles of indigenous-settler reconciliation are necessary to ground our relationships in non-violence. I thus examine how various commonly proposed models of indigenous-settler relationship fare against the two principles. I conclude that one vision of treaty, treaty mutualism—which is a form of rooted constitutionalism—is non-violent to indigenous peoples, settler peoples and the earth. I invite all to practise it today.

Before concluding, I consider a host of counter-arguments on themes of fundamentalism, power, and misreading. Of these, fundamentalism gets special treatment. Since this dissertation defends a view of constitutional incommensurability, and since so many Canadians (and many indigenous persons, too) refuse even to countenance such a possibility *on grounds of fundamentalism*, I've tried to carefully and clearly reject fundamentalism throughout the argument, not just as it winds down.

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By comparison to other dissertations I've read, these acknowledgments are inordinately long. While in one sense I feel bad about that, I can't apologize for it. As anyone who reads through to the end of chapter six will hopefully discover, these four pages are what enable me to offer up this dissertation. Of all of it, they're the most important thing I have to say.

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¹ Ron Geyshick, "Friends on the Hillside" in Ron Geyshick with Judith Doyle, *Te Bwe Win (Truth): Stories By An Ojibway Healer* (Toronto: Summer Hill Press Ltd., 1989) at 40.

life, but the world which holds it. You're like the earth to me and it's been the most remarkable honour to grow with you, to grow from you.

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Music has always powerfully shaped my creative expression and never more so than with this dissertation. Most of it was written in an isolated house standing among spruce, poplar and pine on beautiful Rainy Lake. The living room, where my corner desk sat, was framed in glass. Like all doctoral students, sometimes my progress was slow or halted. Many such nights I stood with arms crossed, gazing out through my glass walls at what seemed the endless dark. But sometimes in those moments my music made a prism of the window black, aligning my spirit with just the focus it needed to vent my furor and my faith onto these pages. The spirit driving

my argument forward would have been less sincere, clear-eyed, candid and *urgent* without the stunning beauty of certain sounds. I honour the artists who offered them: Jóhann Jóhannsson and BJNilsen's "I Am Here (Salve Regina)", Mogwai's "Folk Death 95", Arturo en el Barco's "Candy Tucker", Ben Frost's "Theory of Machines", Son Lux's "Lost It to Trying" and above them all, Explosions in the Sky's "The Birth and Death of the Day". Without its sun rising, its children laughing, its elders modeling, its bears charging, its circle of ancestors teasing, its thunderers reveling, and its sun at last burning day down before lighting it up once more, I'm not sure that this dissertation would have centred and celebrated life. It might have been only an angry fire, the sacred one having been extinguished by argument without gift.

Now, to my family.

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You've all gifted me with so much. To speak my gratitude and to offer up this work is but one small response. May it travel the circle to those in need of it.

Dedication

For all of the indigenous peoples of Mikinaakominis who want more than self-determination; who want to remember what freedom meant to our ancestors, to understand the kind of community it created, and to imagine how we can reconstitute those communities today.

Because of Tersh and my circle of relatives holding me in place, whose gifts showed me how.

What will we do now?
We've lost it to trying, we've
lost it to trying.

What can we say now?
Our mouths only lying, our
mouths only lying.

Give in and get out!
We rise in the dying, we
rise in the dying!

Son Lux, *Lost It To Trying*

1. Introduction

Elder Harry Bone kindly reminded me that my first words are important ones and that I might wish to speak to the spirit of my project before introducing the problem it takes up.² I'm grateful for his guidance, and so I say *boozhoo indinawemaaganidok* (hello my relatives). I've written this dissertation to support healing within indigenous communities, between indigenous and settler peoples, and between all of us and Mikinaakominis, Turtle Island. An understanding of how indigenous law works is essential to achieving these goals. I've sought here to deepen my own understanding of it and to empower others to do the same, but I'm mindful also of nokomis' desire that our Anishinaabe conception of law be explained to the "law-keepers of the Canadian government".³ A deeper understanding of indigenous law will help them to appreciate that "they need to know how we feel and how important it is that we get along well."⁴

I've brought a resolute commitment to this work fueled by anger and hope, though not in equal measure. At this point in my life, I'm grateful to be able to say it's the latter feeling which leads. As bad as I believe things are, I have what seems a limitless and irrepressible hope in our ability to transform how we relate to one another and to the earth. We're so powerful. Together we already hold all the gifts needed to support creation's thriving, and our flourishing within it.

I hope you find something here to help you use your gifts to contribute to these goals, and to support your relatives to use theirs. As so many have said, take what's helpful; leave the rest.

a. The Problem

During the six years I've been at work on this PhD, indigenous peoples in northern Mikinaakominis have endured the brutal slayings of Tina Fontaine, Barbara Kentner, and Coulton Boushie (and countless others who haven't garnered national attention), the Truth and Reconciliation Commission of Canada,⁵ the National Inquiry into Missing and Murdered Indigenous Women and Girls,⁶ la Commission d'enquête sur les relations entre les Autochtones et certains services publics au Québec,⁷ the Seven Youth Inquest,⁸ and formal confirmation of systemic racism in the Thunder Bay Police Service⁹ and in its civilian oversight board¹⁰. Class

² Teaching of elder Harry Bone (21 February 2019) Lord Selkirk Highway (#75). Elder Bone offered reflections on my draft dissertation as we drove from Winnipeg to Roseau River Anishinabe First Nation.

³ Teaching of elder Bessie Mainville (17 June 2014) Couchiching First Nation [Elder Bessie Mainville (17 June 2014)].

⁴ *Ibid.*

⁵ Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada, vols 1-6* (MQUP, 2015).

⁶ The National Inquiry Into Missing and Murdered Indigenous Women and Girls, *Final Report: Reclaiming Power and Place, vols 1a, 1b* (Her Majesty the Queen in Right of Canada, 2019). For thoughtful reflections on MMIWG, see Kim Anderson, Maria Campbell & Christi Belcourt, eds, *Keetsahnak: Our Missing and Murdered Indigenous Sisters* (Edmonton: University of Alberta Press, 2018).

⁷ Gouvernement du Québec, "La Commission" (2 may 2017), online: *la Commission d'enquête sur les relations entre les Autochtones et certains services publics au Québec* <<https://www.cerp.gouv.qc.ca/index.php?id=3>>.

⁸ Verdict of Coroner's Jury and Recommendations, *Inquest into the Deaths of Jethro Anderson, Curran Strang, Paul Panacheese, Robyn Harper, Reggie Bushie, Kyle Morrisseau, Jordan Wabasse* (28 June 2016), online: <<https://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/Inquests/Verdictsandrecommendations/OCCVerdictsSevenFirstNationsYouths.html>>.

⁹ Gerry McNeilly (Independent Police Review Director), *Broken Trust: Indigenous Peoples and the Thunder Bay Police Service* (Toronto: Office of the Independent Police Review Director, 2018).

¹⁰ Hon Murray Sinclair, *Thunder Bay Police Services Board Investigation: Final Report* (2018).

action lawsuits are also underway for 60s Scoop survivors¹¹ and indigenous women who've suffered forced sterilizations.¹²

For many indigenous peoples living in Canada, the experience of violence is ordinary. This should surprise no one. The Supreme Court of Canada came close to taking judicial notice of this fact. The year before I began my PhD, LeBel J. wrote for a 6-1 majority that "To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."¹³

I welcomed this development. The judiciary should be required to have such a depth of knowledge about colonialism that it can take judicial notice of it. Yet I suspect most indigenous persons will, like me, take issue with an aspect of the framing here. That violence is normalized for indigenous peoples isn't the legacy of colonialism; it's colonialism still happening. Colonialism isn't a settled (read: historical) fact regarding European arrival and indigenous displacement, the *effects of which* are contemporary. *Colonialism* is contemporary.

Colonialism only seems like an historical fact when construed substantively as a set of practices, because its particulars have changed through time. But colonialism isn't reducible to a set of particulars. It's the relationship between settler and indigenous peoples which enables those practices and which accommodates their temporal adjustments.¹⁴ Because colonialism's technologies and practices have proven dynamic,¹⁵ redescription of colonialism across generations is the very thing we should expect.¹⁶ The settlement-displacement era often represented as the whole of colonialism is but one movement in a centuries-spanning relationship. The attempted erasure of indigenous difference through political absorption¹⁷ is another face of the same subordinating relationship marked in time. The question is what sustains that relationship—what allows for its adaptive reformation such that it survives today?

¹¹ Government of Canada, "Are you part of the Sixties Scoop class litigation?" (1 December 2018), online: *Government of Canada* <<https://www.aadnc-aandc.gc.ca/eng/1517425414802/1517425436379>>.

¹² In Saskatchewan, Maurice Law, "Forced Sterilization Class Action" (19 September 2018), online: *Maurice Law* <<https://www.mauricelaw.com/forced-sterilization-class-action>>; in Alberta, Koskie Minsky, "Forced Sterilization of Indigenous Women Class Action" (undated), online:

Koskie Minsky <<https://kmlaw.ca/cases/coerced-sterilization-indigenous-women-class-action/>>. See also UN Committee Against Torture (CAT), Concluding Observations on the Seventh Periodic Report of Canada, para 50, UN Doc CAT/C/CAN/7 (2018); Yvonne Boyer & Judith Bartlett, "External Review: Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women" (2017).

¹³ *R v Ipeelee*, 2012 SCC 13 at 60.

¹⁴ Compare with Patrick Wolfe's formulation: "settler colonizers come to stay: invasion is a structure not an event". Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 *Journal of Genocide Research* 387 at 388.

¹⁵ James Tully, *Public Philosophy in a New Key: Volume 2, Imperialism and Civic Freedom* (CUP, 2008) [Tully, *PPNK 2*] ch 7 at 211-212.

¹⁶ We've moved from non-persons, to moral persons without political agency, to citizens, to voting citizens, to 'citizens plus', in the sense of being the beneficiaries of a unique-to-aboriginal-peoples constitutional rights regime.

¹⁷ Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (First Session, Twenty-eighth Parliament, 1969). A sweeping indigenous reaction to this 'White Paper' came under the leadership of Harold Cardinal as the 'Red Paper': Indian Chiefs of Alberta, *Citizens Plus* (Indian Association of Alberta, June 1970). An influential study of how Canada's efforts at indigenous assimilation have since evolved is Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) [Coulthard, *Red Skin, White Masks*].

I suggest the answer is *the principle of settler supremacy*. Colonialism is a relationship defined by the principle of settler supremacy, which mandates that the interests of settler persons and peoples are to be given priority over the interests of indigenous persons and peoples, insofar as those interests derive from their indigeneity. It presumes that settler and indigenous interests are necessarily in conflict and thus that the one must be pursued as against the other.¹⁸ In consequence, settlers strive either to use indigenous peoples and territories to further their own ends, or to remove them from their inconvenient position in the way. Yet both projects are always imperfect. Albeit too often bloodied and broken, indigenous peoples have widely refused the respective consequences of annihilation and assimilation.¹⁹ That we not only survive, but survive *as indigenous peoples* serves as both a reminder and a condemnation of colonialism.

The principle of settler supremacy enables the priority of settler interests through three kinds of violence to indigenous peoples.²⁰ However, before explaining them it would be wise to reflect on why this is a challenging claim to present. First, how each kind of violence is enabled by this principle has shifted through time. Thus certain applications of the principle which previously justified settler action (including through policy²¹ and legislation²²) might not be acceptable to many settlers today.²³ Starvation,²⁴ the pass system²⁵ and residential schools are obvious policy examples. Yet eliminating these applications of the principle is unacceptable as it would serve to sanitize settler history of its violence. There's also the argument that violence operating at a policy level hasn't disappeared, but is now concealed in bureaucracy.²⁶ Thus I raise the need for reader sensitivity, but leave readers to apply it themselves.

¹⁸ For a compelling contrary view, see 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* (Aboriginal Healing Foundation, 2011 [2008]) 13 at 29.

¹⁹ Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014).

²⁰ There's a fourth kind of violence as well, but owing to its complexity I defer introducing it until chapter 7. It builds upon the third kind of violence settler supremacy enables, so if we understand it, we're working towards understanding the fourth kind as well.

²¹ John L Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Ian AL Getty & Antoine S Lussier, eds, *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, Nakoda Institute Occasional Paper No. 1 (Vancouver: UBC Press, 1983) 39.

²² Part of the legislative history includes *Royal Proclamation, 1763*, RSC, 1985, App II, No 1; *An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury*, S Prov C 1850, c 74; *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S Prov C 1850, c 42; *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians*, S Provo C 1857, c 26; *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian affairs, and to Extend the Provisions of the Act*, SC 1869, c 6 (31st Victoria, Ch 32); *An Act to amend and consolidate the laws respecting Indians*, SC 1876, (39th Victoria, c 18). More generally, see John Milloy, "Indian Act Colonialism: A Century of Dishonour, 1869-1969" (Research Paper for the National Centre for First Nations Governance, 2008).

²³ Although see Darlene Johnston, "Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism" in Micheline Labelle, Rachad Antoinius & Georges Leroux, eds, *Le devoir de mémoire et les politiques du pardon* (Sainte-Foy: Presses de l'Université du Québec, 2005) 141 [Johnston, "Aboriginal Traditions of Tolerance and Reparation"] at 146, 154.

²⁴ James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013).

²⁵ F Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935" (1988) 13:1 *Prairie Forum* 25.

²⁶ Paul Driben and Robert S Trudeau, *When Freedom Is Lost: The Dark Side of the Relationship between Government and the Fort Hope Band* (Toronto: UTP, 1983); Dean Neu & Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (Winnipeg: Fernwood Publishing, 2003) [Neu & Therrien, *Accounting for Genocide*].

Second, the principle of settler supremacy obviously doesn't operate transparently. One won't find a Canadian court, legislature, or minister appealing to it as justification for state action. It operates unseen and unheard. It's a principle which must be inferred from consequences and patterns in legal positions and in legal reasoning. In future I'll present a comprehensive case for its existence, but that will take considerable resources. To sustain my dissertation's focus, here I constrain myself to the reasonableness of the inference. A large part of that reasonableness consists in the three kinds of violence the principle enables.

The first kind of violence is settler violence against indigenous *persons*. It targets individuals' bodies, minds, hearts and spirits. It's the most visible and thus identified and understood of settler supremacy's three kinds of violence. It's often discussed empirically.²⁷ I'm not suggesting that as a general matter Canada or Canadians actively promote this sort of violence today. Most do not. And yet there are the many examples of violence which indigenous individuals experience, *on a systemic scale*, which I referenced at the outset. If we moved beyond the timeline that constrained my opening paragraph, we'd add many more examples. In this century, the deaths of Neil Stonechild²⁸ and Dudley George²⁹ certainly stand out.

The second kind of violence is to indigenous *peoples*.³⁰ It's group-centred violence that attacks our languages, ceremonies, economies, oral traditions, child-rearing practices, medicinal practices, the patterned mobility of our communities, and of course our earth interactivity, just to identify a few of its objects. It includes all the knowledge forms and practices of being which, albeit provisionally, help individual persons to identify as a people. It seeks to destroy the group in which individuals might seek belonging.

Canada's Indian Residential Schools programme was a comprehensive institutional investment in unmaking indigenous peoples so that only persons remained (see how "indigenous" then drops out). Persons isolated from their practices of peoplehood can be remade as a different people, which was precisely the point.³¹ Violence to indigenous peoples was thus the primary means Indian Residential Schools deployed for achieving their stated goal of indigenous ethnocide: the termination of indigenous peoples *as peoples*.

Canadians have widely differing views as to what their individual and collective responsibilities are vis-à-vis violence to indigenous *peoples*. Some feel strongly about the necessity for historic redress. Those with a more classical liberal sensibility tend towards indifference (or even hostility) toward group interests generally, which they see as substantive

²⁷ Native Women's Association of Canada, "Fact Sheet: Violence Against Aboriginal Women" (undated), online: *Native Women's Association of Canada* <https://www.nwac.ca/wp-content/uploads/2015/05/Fact_Sheet_Violence_Against_Aboriginal_Women.pdf>; David Jean-Denis, "Homicide in Canada, 2016" (22 November 2017), online: *Juristat* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54879-eng.pdf>>; Ben Leber, "Police-reported hate crime in Canada, 2015" (14 June 2017), online: *Juristat* <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/14832-eng.pdf?st=LS7YrmjG>>.

²⁸ Hon David H Wright, *Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild* (Saskatchewan: Government of Saskatchewan, 2004).

²⁹ Hon Sidney B Linden, *Report of the Ipperwash Inquiry, Volume 1: Investigation and Findings* (Toronto: Government of Ontario, 2007).

³⁰ Indigenous peoples, like all peoples, are internally differentiated. The shared practices of indigenous peoplehood are fluid yet stable, always changing with the world around us. See Tom Holm, J Diane Pearson, Ben Chavis, "Peoplehood: A Model for the Extension of Sovereignty in American Indian Studies" (2003) 18:1 *Wíčazo Ša Review* 7; Jeff J Corntassel, "Who Is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Re-articulating Indigenous Identity" (2003) 9:1 *Nationalism and Ethnic Politics* 75 at 91-93.

³¹ See generally Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada, Vol 1* (MQUP, 2015).

impositions of ‘special interests’ on what is supposed to be neutral public ground. Yet even the subset of Canadians who feels that this violence is justified, or that it just isn’t the sort of consequence that requires justification, aren’t challenged to identify *that* it’s violence.

The same can’t be said of the third kind of violence which the principle of settler supremacy enables. Unlike the first two categories, this one isn’t substantive: it doesn’t target particular indigenous practices, doctrines, or embodiments. The violence it contemplates is to indigenous peoples’ capacity to understand the world on our own terms and to organize ourselves accordingly. It’s far more abstract than specific practices, which is what makes it difficult to identify. This kind of violence denies indigenous peoples our ability to speak and to live our truths, and over enough time, even to imagine our lives constituted within our own understandings of persons, freedom, and community.

This third kind of violence can accomplish indigenous erasure even if we recognize ourselves and are recognized by others as unique peoples. We might achieve recognition as peoples, but in a sense not our own; we might retain all the substantive trappings of peoplehood, but lose something much more profound. Leroy Little Bear expressed my anxiety when he said “One of the problems with colonialism is that it tries to maintain a singular social order by means of force and law, suppressing the diversity of human worldviews.”³²

I appreciate the lofty level of abstraction at which we’re now operating. A central goal of this dissertation is to clarify what this sense of loss consists in, so that it can be communicated, discussed, and responded to. I’ve long had a powerful sense that the absencing of something like ‘worldview’ in dialogues about indigenous-settler reconciliation skews the discourse (and thus in law, the doctrine) in favour of settler interests. Thus in turning our attention to the relationship between worldview and social order, I believe Little Bear points us in the right direction.

As a stark example of what I mean, in an often cited passage, then-Chief Justice of Canada Dickson stated in 1990 that:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.³³

This statement is as helpful as it is preposterous because it lays bare that the operation of Canadian constitutional law is impacted by the principle of settler supremacy.³⁴ In fact, confronted with a judicial pronouncement as brazenly—indeed, belligerently—settler-sided as this one, one wonders whether in Canada the principle of settler supremacy isn’t only a moral principle, but also a constitutional one.³⁵

³² Leroy Little Bear, “Jagged Worldviews Colliding” in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision*, (Vancouver: UBC Press, 2000) 77 [Little Bear, “Jagged Worldviews Colliding”].

³³ *R v Sparrow*, [1990] 1 SCR 1075 at p 1103.

³⁴ Some critiques of s. 35 jurisprudence as colonial include 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: LSUC, 2005) 197; 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; Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23 Windsor YB Access Just 17; John Borrows, “Sovereignty’s Alchemy: an Analysis of *Delgamuukw v. British Columbia*” (1999) 37:3 Osgoode Hall LJ 537.

³⁵ To take just one (but perhaps the most obvious) example of evidence for this claim, consider the application of the principle of *terra nullius* through the doctrine of discovery to Mikinaakominis. See Canada, Royal Commission on

I'll have nothing more to say about the first two kinds of violence settler supremacy enables. They've been well studied; there's no lack of advocacy around them. If Canada wanted to address them, it would have. Idle No More brought them directly (and peacefully) into the foreground of Canadians' attention, yet they're still not voting issues. My view is that at best, actions responding to these kinds of violence will blunt the force of colonialism by reforming it.

The third kind of violence hasn't received the attention the first two have and I think most Canadians have yet to understand how sweeping it is. I believe it holds the potential to yield *transformative* change in indigenous-settler relationships. I've stated my view: The crisis of indigenous-settler relationships—the reason why we're in need of reconciliation—is colonialism, a violent relationship defined by the principle of settler supremacy. The transformative task I set for myself in law school, and which this dissertation now seeks to realize, is to discern a non-violent ground from which to grow indigenous-settler relationships.

Because I took up this task in law school, and because I never saw my way of thinking reflected in the cases I read or in the liberal constitutional order I slowly came to understand, my thinking was much like Little Bear's: worldview powerfully conditions how one thinks about social order. Coast Salish scholar Sarah Morales expresses this point so clearly: "The starting point of any research pertaining to Indigenous law must be to gain a better understanding of the particular cultural context in which the laws and legal orders take place. A failure to do so would risk translating the laws and legal traditions through an inappropriate cultural lens."³⁶ Since my cultural context was elsewhere, I had to go find it.

b. The Question

I'd been making regular visits to nokomis ('my grandmother'), Bessie Mainville of Couchiching First Nation, for two years. My tobacco always carried the same question: 'noko, can you teach me about our law?' Her generosity was remarkable and I was riveted. I learned about ceremony, good and bad behaviour, the value of stories, her life, and the history of the Boundary Waters Anishinaabeg.³⁷ Yet I continued to wait for her to get started on law.

I figured I was being trained to receive the knowledge I sought. I was a computer with the wrong operating system and she was the installation disc with my new set-up program. Once I'd been rebooted, she'd begin. Except she didn't. It took me two years of sitting at my grandmother's kitchen table to learn how to learn, at which point I realized I had it all wrong. I thought I had to be ready to hold knowledge of Anishinaabe law responsibly. Instead, I had to be ready to recognize the law in the knowledge.³⁸ Without concepts like 'rights', 'duties' and 'rules'

Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol 1: Looking Forward and Looking Back* (Ottawa: Minister of Supply and Services, 1996) at 695-696 and Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada, vol 6* (MQUP, 2015) at 29-33. Important for our purposes, the principle continues to find applicability in Canadian constitutional law doctrine: John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701; John Borrows, *Canada's Indigenous Constitution* (Toronto: UTP, 2010) [Borrows, *CIC*] at 17-18; John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: UTP, 2017) ch 1 at 18.

³⁶ Sarah Morales, "Locating Oneself in One's Research: Learning and Engaging with Law in the Coast Salish World" (2018) 30:1 CJWL 144 [Morales, "Locating Oneself in One's Research"] at 149.

³⁷ This term refers to the Anishinaabeg who inhabit the lands and waters along the border between northwestern Ontario and Minnesota, from the western end of Lake Superior to Lake of the Woods. Most importantly for me, it includes the Rainy Lake and Rainy River Anishinaabeg.

³⁸ See Morales, "Locating Oneself in One's Research" at 147, 148.

in her teachings, the law got lost upon reaching my ears. When I finally got it, I was able to hear the law she'd been sharing since I first gave her tobacco.

Unfortunately listening wasn't the only problem I had; speaking, too, could be a challenge. One summer day I'd driven *nokomis* out to Manitou Rapids to meet elder Annie Wilson (now in spirit) who was one of her teachers. On the drive home, I was stunned to hear *nokomis* instruct me not to ask elders about our own 'law' anymore. It's the only time she's ever directly corrected me. She paused before explaining that I couldn't expect to engage elders within the discourse familiar to me. Her rationale was striking: 'law' isn't how most elders talk or think about the thing I want to learn about, and it will likely lead them in another direction. I was travelling the wrong path.

This was a major breakthrough. It helped me appreciate the scale of the task of learning Anishinaabe law. With the prospect of "functional or structural equivalents"³⁹ between it and Canadian law having dropped out, the question 'what's our version of the thing' dissolved, as *the* thing was suddenly *their* thing. I now had to ask 'what's *our* thing?' How do we think about law? This was Little Bear's insight all over again, now much more directly understood.

Another way I came to understand that I must learn *how to learn* Anishinaabe law was through an *aadizookaan* (a sacred story). It was told by Randy Councillor from Naicatchewenin First Nation (Northwest Bay, also on Rainy Lake) and published with the assistance of his friend, Art Przybilla. It's called "Nanabozho Learns"⁴⁰ and it's a story of Nanabozho, when he was still quite small, carefully watching a scene unfold with his grandmother. It goes like this.

A snake has chased a frog to exhaustion, but just before the snake strikes, the frog leaps into a patch of poison ivy. At successive moments when the boy is sure the frog has had it, he interjects, only to be silenced each time by his grandmother's authoritative "watch and learn". The snake thinks only time separates him from his meal, as the poison slowly burns the frog to death. He falls asleep in the sun, content to wait his prey out. The frog seizes the moment to remove himself from the ivy, find some jewelweed, pad himself until glistening, and hop away in good spirits. The mystified boy takes it all in and asks his grandmother if the frog will die.

"No," she replied, "and you must learn as that frog has that for every danger there is a safe way and that for every poison and disease there is a remedy if we but know where to find it. The frog has learned that the remedy for the poison of the ivy is the oil from the leaf of the Jewelweed-the Spotted Touch-Me-Not."⁴¹

The *aadizookaan* immediately concludes: "On this day Nanabozho learned to learn."⁴²

As *aadizookaanan* intend, we might all take something different from this story. For me the significance is that Nanabozho learned to shift not so much *what* (substance), but *how* he thinks. He took for granted that, like him and the snake, the frog would reason according to a principle of non-harm. But it instead reasoned through a principle of wellness, a holistic principle which contemplates both harm and healing. Wellness isn't a specification of non-harm, but rather an alternative to it; not another conception of non-harm, but an altogether distinct concept of what it means to sustain the integrity of persons.

³⁹ Kirsten Anker, "Teaching 'Indigenous Peoples and the Law': Whose law?" (2008) 33:3 Alt LJ 132 at 134.

⁴⁰ Randy Councillor with Art Przybilla, "Nanabozho Learns" in *Ojibwe Tales: Stories of the Ojibwe People* (Jacksonville, IL: Lake States Interpretive Association, 2004) 23.

⁴¹ *Ibid* at 25.

⁴² *Ibid*.

This is the kind of shift that I argue is required to overcome colonialism. The principle of settler supremacy causes indigenous peoples to experience violence in the suppression and attempted erasure of their unique *legalities*. Indigenous peoples have distinct ways of thinking about persons, freedom, belonging, community, constitutionalism⁴³ and legal process—all of which one must have at least begun to learn about before she can begin to learn about an indigenous people's system of law. In Borrows' uncharacteristically blunt (but dead-on) assessment, if efforts at indigenous-settler reconciliation fail to attend to indigenous ideas about law, then "we are just rearranging deck chairs on the Titanic."⁴⁴ Further, none of this risk is avoided just because Canada recognizes indigenous peoples as peoples. On the contrary, the recognition of peoplehood can be a strategy to contain indigenous legality difference. I specify and unpack this phenomenon as the problem of 'constitutional capture' in chapter three.⁴⁵

To sum up, my central contention is that an accounting for colonialism must push past violence to indigenous persons and peoples, and include also violence to indigenous legalities. This contention was formulated initially as the following two-part research question:

- (1) What is an Anishinaabe conception of law and how does it work?
- (2) What capacity does it have to address the problem of colonialism, and thus to realize indigenous-settler reconciliation?

I've answered the first question by arguing that any system of law exists as such only within its own legality (a version of Little Bear's insight). I've thus proceeded to articulate a vision of Anishinaabe legality in order to present an Anishinaabe conception of law. The scale of this project meant I wasn't able to fully explain how Anishinaabe law works, however I've provided sketches for further lines of inquiry in areas I couldn't immediately pursue.

The second question has been answered through *comparative legality*. I've introduced a 'rooted' mode of legality (of which Anishinaabe legality is an instance) and I've presented a liberal conception of legality. The comparison between the two yields two principles of indigenous-settler reconciliation, respect for which answers the problem of colonialism. This is achievable through a particular conception of treaty, treaty mutualism.

c. The Method

I was fortunate to have learned from my elders before beginning my PhD that if I want to learn about *inaakonigewin* (an Anishinaabe conception of law), I have to get out of my head.⁴⁶ Gordon

⁴³ Hamilton and Sinclair wrote near the beginning of the 1991 Manitoba Justice Inquiry report that "There were and are Aboriginal constitutions that are the supreme 'law of laws' for some Aboriginal peoples and their nations." AC Hamilton and CM Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, Province of Manitoba, 1991) at 22.

⁴⁴ John Borrows, "Fourword" (2002) 1 Indigenous LJ vii at xvi.

⁴⁵ My use of this concept is much indebted to James Tully's work on constitutionalism in diverse societies. One (of so many) apt passages is "How can the proponents of recognition bring forth their claims in a public forum in which their cultures have been excluded or demeaned for centuries? They can accept the authoritative language and institutions, in which their claims are rejected by conservatives and comprehended by progressives within the very languages and institutions whose sovereignty and impartiality they question." James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: CUP, 1995) [Tully, *Strange Multiplicity*] at 56. I take Glen Coulthard's indictment of the liberal discourse of recognition to be another expression of this worry. Coulthard, *Red Skin, White Masks*.

⁴⁶ See also Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Publishing, 2011) [Simpson, *Dancing on Our Turtle's Back*] at 41-42.

Waindubence, Grand Council Elder to the Anishinabek Nation⁴⁷, recalls one of his mentors saying “the Red Road you seek runs between the mind and the heart. It’s a very short distance, but it might take you a lifetime to see where you belong in the circle of life.”⁴⁸ Thus while I hope this dissertation demonstrates a deep commitment to rigour, I don’t think the approach I’ve taken is easily reconcilable to dominant methodological or disciplinary conventions in academia.

Rather, my method has involved three related kinds of practices: Anishinaabe *izhichigewin* (an Anishinaabe way of doing things), Anishinaabe *inendamowin* (an Anishinaabe way of thinking)⁴⁹ and Anishinaabe *inaadiziwin* (an Anishinaabe way of living).⁵⁰ Together they’ve involved four ways of knowing: through mind, body, spirit, and heart.⁵¹ In retrospect, I think there’s something of the *biskaabiiyang* research methodology developed at the Seven Generations Institute next to my community, and which Wendy Makoons Geniusz⁵² and Leanne Simpson⁵³ have written about. Although I’ve learned a little bit from two of the elders at its centre,⁵⁴ I didn’t set out with this approach in mind and in fact discovered it much later.

Engaging these three kinds of practices has meant thinking not only analytically and critically, but also narratively. In particular, I’ve spent a great deal of time, in community and on my own, working with *aadizookaanan*. Physically it has meant learning on the land: making offerings at sacred sites (petroforms, petroglyphs, burial mounds, places where *aadizookaanan* were present and marked the earth, places where *manidoog* live), harvesting medicines and lodge poles, and interacting with all kinds of plants, animals and *manidoog*. Spiritually⁵⁵ it has meant learning through visions, prayer, and spending time in ceremony. Whether as a participant or as a

⁴⁷ That is, of the political territorial organization (PTO) representing 39 First Nations in Ontario and affiliated with the Union of Ontario Indians, not the ‘nation of Anishinaabe peoples’ in the ethno-national sense.

⁴⁸ Margo Little, “Gordon Waindubence (1955—): Giving His Gifts Away” in *Portraits of Spirit Island: The Manitoulin School of Art Comes of Age* (HighGrader Magazine, 2009) 112 at 114.

⁴⁹ Basil Johnston offers a reflection on what it means to ‘think Indian’. As I understand his teaching, it’s impossible to think in an indigenous way without also acting in one. This requires me to recognize that in addition to my mind, I’m also a body, spirit and heart in the here and now. Basil Johnston, “Think Indian” in *Think Indian: Languages Are Beyond Price* (Cape Croker Reserve: Kegdonce Press, 2011) 177 [Johnston, “Think Indian”].

⁵⁰ Grandmother Sherry Copenace explained *inaatiziwin* to me as “Who we are, how we think and act, like who we are, in our whole lifetime” and “How we’re going to be with life.” Teaching of grandmother Sherry Copenace (24 June 2018) Ojibways of Onigaming First Nation [Grandmother Sherry Copenace (24 June 2018)]. The Ojibwe People’s Dictionary gives it as “a certain character, a certain nature, a certain way of life”. University of Minnesota, *The Ojibwe People’s Dictionary*, online: < <https://ojibwe.lib.umn.edu/main-entry/inaadiziwin-ni> >.

⁵¹ Basil Johnston identifies these as four of five aspects of the human body, the other being soul. I wonder whether soul has an associated form of reason I haven’t learned about. See Basil Johnston, “Introduction” in *Living in Harmony / Mino-nawae-indawaewin* (Cape Croker First Nation: Kegdonce Press, 2011) 3 [Johnston, “Introduction” in *Living in Harmony*] at 5. I note also the similarity with Kathleen E. Absolon’s methodology. See Kathleen E Absolon (Minogizhigokwe), “The Petals: Diverse Methodologies”, in *Kaandossiwin: How We Come to Know* (Winnipeg: Fernwood Publishing, 2011) ch 9. Finally, I also think there’s a strong affinity here with Coast Salish scholar Sarah Morales’ approach to methodology: Morales, “Locating Oneself in One’s Research”.

⁵² Wendy Makoons Geniusz, “Introduction: Decolonization and Biskaabiiyang Methodologies” in *Our Knowledge Is Not Primitive: Decolonizing Botanical Anishinaabe Teachings* (Syracuse: Syracuse University Press, 2009) [Geniusz, “Introduction: Decolonization and Biskaabiiyang Methodologies”] ch 1. See also *ibid* at 191.

⁵³ Simpson, *Dancing on Our Turtle’s Back* at 49-53.

⁵⁴ Elders Tobasonakwutiban and Annie Wilson, both now in spirit. Wendy Makoons Geniusz identifies the elders involved in the program in Geniusz, “Introduction: Decolonization and Biskaabiiyang Methodologies” at 9.

⁵⁵ Trish Monture says “If you put your hand over your heart, what do you feel? You have a spirit. You do not just have a mind. Your spirit knows things.” Patricia A Monture-Okanee, “The Violence We Women Do: A First Nations View” in Constance Backhouse & David H Flaherty, eds, *Challenging Times: The Women’s Movement in Canada and the United States* (Montreal & Kingston: MQUP, 1992) 193 [Monture-Okanee, “The Violence We Women Do”] at 195.

helper, over these years I've been involved in sweat lodge, shake tent, sunrise, pow wow, pipe, water, fasting, naming, spring, fall, and condolence ceremonies. Finally, my most significant form of heart learning has been the teachings received through relationships I've deepened or created during this time. This includes virtually countless hours sitting with elders (or driving them around, hiking with them in the bush etc.) and reflecting on their teachings. Knowing through my heart has also included the time I've spent in community—*odena*—(most significantly at Couchiching and at Mitaanjigamiing) and working with *dewe'igan*, my drum.⁵⁶

The combination of these three kinds of practices (again, Anishinaabe *izhichigewin*, *inendamowin* and *inaadiziwin*) has had a marked impact on this work, which I hope is reflected in its tone. While I hope to be persuasive, I haven't written in a manner that seeks to compel anyone's agreement.⁵⁷ My words extend only as far as my limited understanding, which will be more helpful for some, less so for others. However I'm not disappointed by this. On the contrary, it's all that *debwewin*, an Anishinaabe conception of truth, allows for.⁵⁸

Basil Johnston explained this word clearly (in his own orthography and conjugated in third person singular—there's no infinitive form in *anishinaabemowin*) when he wrote:

Let's take another word, the word for truth. When we say "w'daeb-awae" we mean he or she is telling the truth, is correct, is right. But the expression is not merely an affirmation of a speaker's veracity. It is as well a philosophical proposition that in saying a speaker casts his words and his voice as far as his perception and his vocabulary will enable him or her, it is a denial that there is such a thing as absolute truth; that the best and most the speaker can achieve and a listener expect is the highest degree of accuracy. Somehow that one expression, "w'daebawae," sets the limits to a single statement as well as setting limits to truth and the scope and exercise of speech.⁵⁹

Senator Murray Sinclair, an Anishinaabe and a great legal mind, offers much the same message:

an Aboriginal person would necessarily be unwilling or unable to insist that his or her version of events is the complete and only true version. According to the Aboriginal world view, truth is relative and always incomplete. When taken literally, therefore, the standard courtroom oath-to tell the truth, the whole truth and nothing but the truth-is illogical and meaningless, not only to Aboriginal persons but, from the Aboriginal perspective, to all people. The Aboriginal viewpoint would require the individual to speak the truth "as you know it" and not to dispute the validity of another viewpoint of the same event or issue. No one can claim to know the whole truth of any situation; every witness or believer will have perceived an event or understood a situation differently.⁶⁰

⁵⁶ Teaching of elder Bessie Mainville (2 December 2015) Couchiching First Nation [Elder Bessie Mainville (2 December 2015)].

⁵⁷ I believe there's a strong affinity here with James Tully's 'public philosophy' approach to academic endeavour, in which academics do (and *can* do) nothing more than offer and receive reasons for various perspectives the way everyone else does. See James Tully, *Public Philosophy in a New Key: Volume 1, Democracy and Civic Freedom* (CUP, 2008) [Tully, *PPNK 1*] ch 1 at 28-29.

⁵⁸ Almost every elder I worked with voiced concern about the possibility of being read as authoritative. Because I know them and trust their knowledge, they truly are authorities for me. However, they're the first to say that their views reflect only the truth as they know it; please read them in the humble spirit in which they shared.

⁵⁹ Basil Johnston, "Is That All There Is? *Tribal Literature*" (Spring 1991) 128 *Canadian Literature* 54 at 57.

⁶⁰ 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 Publishing, 1994) 173 at 180.

Since *debwewin* refers to the truth insofar as one knows it⁶¹, and since one comes to know things through four distinct modalities, one can appreciate why elder Jim Dumont would say that “in Ojibwe thinking, to speak the truth is to actually speak from the heart.”⁶² Elder Fred Kelly similarly connects truth with heart and with spirit.⁶³

In a separate work, Basil Johnston began to address the western concern about how conflicting accounts of knowledge are to be resolved:

Some glean more from their observations, others less, but each one in proportion to his talents. What one person understands of what he sees or hears is not to be belittled, demeaned, or ridiculed. For how is anyone to know for certain that he is right and another, wrong? And if such a person were to say that another is wrong, it would be arrogant. Where differences in opinion occurred, men and women said Kitchi-Manitou has given me a different understanding.⁶⁴

Elder Nancy Jones of Nigigoonsiminikaaning First Nation, located 20 minutes east of Couchiching, has allowed one of her orations on this topic to be transcribed. It’s quite stunning; I direct folks wanting further explanation to it.⁶⁵

The combination of Anishinaabe *izhichigewin*, *inendamowin* and *inaadiziwin* also has me engaging with diverse sources. The examples which follow may suggest an ethnohistorical approach, but I think even it isn’t broad enough. To my own mind, my approach to this dissertation has been something like Georges E. Sioui’s notion of an Amerindian autohistory,⁶⁶ although in my case I suppose it would be an autophilosophy—where philosophy is understood to be engaged through all four knowledge modalities. Leanne Simpson beautifully connected this understanding with the notion of *debwewin* canvassed above when she explained that within Anishinaabe epistemology, “‘Theory’ isn’t just an intellectual pursuit – it is woven within kinetics, spiritual presence and emotion, it is contextual and relational. It is intimate and personal, with individuals themselves holding the responsibilities for finding and generating meaning within their own lives.”⁶⁷

⁶¹ See Helen Agger, *Following Nimishoomis: The Trout Lake History of Dedibaayaanimanook Sarah Keesick Olsen* (Penticton, BC: Theytus Books, 2008) [Agger, *Following Nimishoomis*] at 3 and Darlene Johnston, “Connecting People to Place: Great Lakes Aboriginal History in Cultural Context”, Expert Report to the Ipperwash Commission of Inquiry (2006) at 4. Compare also with James Tully’s notion of aspectivity: “The identity, and so the meaning, of any culture is thus aspectival rather than essential: like many complex human phenomena, such as language and games, cultural identity changes as it is approached from different paths and a variety of aspects come into view.” Tully, *Strange Multiplicity* at 11; “On the aspectival view, cultural horizons change as one moves about, just like natural horizons.” *Ibid* at 13.

⁶² Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission of Canada, 2015) at 13, citing to TRC, AVS, Jim Dumont, Statement to the Truth and Reconciliation Commission of Canada, Winnipeg, Manitoba, 26 June 2014, Statement Number: SE049.

⁶³ *Restoule v Canada (Attorney General)*, 2018 ONSC 114, Transcript vol 21, examination-in-chief of elder Fred Kelly (Court File Nos: C-3512-14 & C-3512-14A) [*Restoule v Canada*, Transcript of elder Fred Kelly] at 2855.

⁶⁴ Basil H Johnston, “Thou Shalt Honour Earth Mother” in *Honour Earth Mother / Mino-audjaudauh Mizzu-kummik-quae* (Kegedonce Press, 2003) 145 [Johnston, “Thou Shalt Honour Earth Mother”] at 148.

⁶⁵ Nancy Jones, “Gakina Dibaajimowinan Gwayakwaawan / All Teachings Are Correct” in H James St Arnold & Wesley Ballinger, eds, *Dibaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013) 9.

⁶⁶ Georges E Sioui, *For an Amerindian Autohistory*, trans by Sheila Fischman (Montreal: MQUP, 2005 [1995]).

⁶⁷ Leanne Simpson, “Land As Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation” (2014) 3:3 Decolonization: Indigeneity, Education & Society 1 [Simpson, “Land As Pedagogy”] at 7.

Many of the written sources I use will be familiar to ethnohistorians: original works and transcribed orations of Anishinaabeg here and gone to the spirit world (including essays, autobiographies and family histories, legends, and cultural teachings), community documents, ethnography, archival material, travel writing, dictionaries, speeches, cultural anthropology studies and the secondary works of various academics, community researchers, and professionals (ethnohistorian consultants, curators etc.) on topics too diverse to mention. Judicial decisions, court pleadings, and works of legal theory will be more familiar to legal scholars. Finally, works of political theory and of indigenous theory will be better known by folks working in political theory, indigenous government and indigenous studies.

Oral sources include teachings shared with me by elders and knowledge-keepers, *aadizookaanan*, *dibaajimowinan* (individual, family, and community narratives), *izhitwaawinan* (didactic cultural teachings), and conversations with community members interested in what I do. I often cite to their teachings, but most of what I've learned from such folks, in our lodges, on the land, and in community, is reflected in every word of this project. These teachings inform how I act, think, and live—Anishinaabe *izhichigewin*, *inendamowin* and *inaadiziwin*—such that their primary impact isn't on the dissertation, but rather its writer. The impact of my oral sources is so much more profound than what I can capture with a quotation. Readers will find it much better reflected in the spirit and vision of the project.

As I indicated in my acknowledgments, my understanding is the product of many oral sources. However, without a doubt my main teacher has been nokomis, elder Bessie Mainville of Couchiching (originally from Manitou Rapids). Her teachers were her aunts, Mary and Agnes, of Manitou Rapids. My other teacher is an elder at Mitaanjigamiing, and his teacher was his grandfather (who was about 80 when he was six). Both elders are in their mid-eighties as I write this and I'm blessed to have spent a decade so far learning from them. Most of my teachings thus come from Rainy Lake and Rainy River Anishinaabeg, within the Boundary Waters of Treaty #3. While I remain responsible for any and all mistakes I make, the understanding I have—the truth as I know it—reflects the powerful influence of my two main teachers.

Because the truth as one knows it is so deeply shaped by one's relationships, and because those relationships are shaped by place, wherever possible I prioritize local knowledge. From most proximate to most removed, those sources of authority are people, land and text of and about: Rainy Lake and Rainy River Anishinaabeg; Boundary Waters Anishinaabeg; Treaty #3 Anishinaabeg; western Anishinaabeg; Ojibweg; Odawa, Bodawodami, Nipissing and Algonquin Anishinaabeg; Menominee, Nakawēk (Western Saulteaux) and Ininiweg (Oji-Cree); Algonquian-speaking peoples; all other indigenous peoples of Mikinaakominis.

An unmistakable methodological feature of this dissertation is my use of *anishinaabemowin* (and where appropriate, other indigenous languages) to express terms of central importance to the argument.⁶⁸ Sometimes this is done for specificity, sometimes for emphasis, and sometimes because there's no corresponding term in English; in all cases my use of *anishinaabemowin* is intended to strengthen the integrity of the argument.⁶⁹ To that end, I've walked a line. I haven't progressed far in developing my capacity in *anishinaabemowin*, so it

⁶⁸ Spellings frequently vary, which may create confusion. There are multiple reasons for this. First, there are dialectical differences which lead, in particular, to consonant changes. Also, eastern dialects often truncate the first syllable. Thus where distinct spellings produce minor sound variations, these reflect actual local differences. Second, orthography in *anishinaabemowin* is only now becoming standardized.

⁶⁹ For a great example modelling this approach, see John Borrows' discussion of "bimeekumaugawin" for "stewardship" in the first four pages of John Borrows, "Stewardship and the First Nations Governance Act" 104 (2003) 29 Queen's LJ 103 at 103-106.

would be irresponsible for me to take this practice too far. Yet I'm mindful of how many times elders have shared with me the importance of the language. In particular, I'm mindful of retired professor and elder (and dear friend) Cecil King's thoughts. Reflecting on his frequent use of *anishinaabemowin* in his remarkable text, *Balancing Two Worlds*⁷⁰, he said:

If we want to change the interpretation of the history, we have to force the readers to leave all their assumptions and terminologies behind. As soon as we take on and use the terminology of the Western Intellectual Tradition, we are caught having to translate our beliefs, and ways of seeing into others' ways of seeing. I wanted to make readers re-conceptualize their knowledge of the past and see it through our eyes. By making readers learn our words, they come to see our perspective.⁷¹

In closing the same work, King connected his injunction to use *anishinaabemowin* to a larger methodological program that centres Anishinaabe worldview in academic production, for the interests of future generations. Elder King has been a big help to me, and I hope this introduction establishes my commitment to his challenge:

1. Remine the resources used by Canadian historians to tell the story of Canada.
2. Extract the words of **our** people.
3. Identify **our** heroes. Tell their stories as an integral part of the history of Canada but show how their lives were really lived as members of their nation—with their own actions and motivations separate from that of the newcomers.
4. Write a narrative in **our** way of telling a story.
5. Write from **our** worldview and show why **our** story is important—we had our own ways of believing, seeing and being in the world.
6. Use words from **our** languages.
7. Invite the reader into **our** world. Show them what Canadians have missed from their story.
8. Weave the stories of **our** ancestors from the oral tradition into the story that comes from the documents.
9. Don't apologize for stories that have a spiritual or other than human causation. These are important to who we are.
10. Ahow! Now, go out and tell our stories!!⁷²

d. Map

A novel feature of my dissertation is that I haven't approached my research question directly. Rather, I've sought first to ground it in my experience, in the earth, and in prophecy. To that end, the second chapter presents a personal narrative which introduces the petroforms at Manito Api (in Whiteshell Provincial Park). Opposite the George Copway epigraph is FIGURE 2, an image of what I've called the *Three Paths Prophecy Petroform*, which is central to my argument. In engaging the indigenous-settler reconciliation aspect of my research question through a teaching about this petroform, my question has been mediated in a particular way.

⁷⁰ Cecil O King, *Balancing Two Worlds: Jean-Baptiste Assiginack and the Odawa Nation, 1768–1866* (Saskatoon: Saskatoon Fastprint, 2013).

⁷¹ Cecil King, "Reconciling the Duality in Historical Inquiry: The Case of Jean Baptiste Assiginack" (paper presented at the Ojibwe Cultural Foundation Conference, Sudbury, 28 February 2014) [unpublished; on file with author] at 8-9.

⁷² *Ibid* at 12; emphasis in original.

Within the teaching of the petroform, worldview (and thus social order) difference is represented via distinct indigenous and settler pathways, which I call lifeways. The challenge of reconciliation is thus to sort out how the paths can come together without violence to either of them. So mediated, it seems to me that the worry about colonialism here is the third form of settler violence to indigenous peoples described above: the imposition of a settler life path upon already existing indigenous ones.

In chapter three, I argue that legality meets this challenge. One of its almost unchanging aspects, constitutionalism, serves as the interpretive limit for another which changes constantly: law. This fact has an important implication for relationships between distinct systems of law: constitutionalism is also the site of translation of law out of its own world of meaning (the problem of constitutional capture). Identifying this problem adds considerable focus to the first aspect of my research question. Now my challenge is to articulate the analytics of Anishinaabe law within its *own* conception of constitutionalism, thus avoiding constitutional translation.

The fourth chapter introduces my theoretical framework, the legality tree. It presents what I take to be the general structure of legality in the form of a four-part analytic. A relationship of progressive empowerment and constraint exists between the four parts, which are (1) creation stories (roots), (2) constitutional orders (trunks), (3) legal processes and institutions (branches), and (4) law (leaves). The overarching goal here is to enable comparative legality—so that we're not merely comparing systems of law, but the context which animates and sustains them (i.e. within which law exists as law). To that end, I deploy the legality tree metaphor in mapping out distinct liberal (using Canada as an example) and what I call 'rooted' (using Anishinaabeg as my dominant example) legalities.

Chapter five maps a view of liberal legality through the legality tree. Since most readers will be familiar (even if only implicitly) with the liberal sense of legality, in observing the legality tree reflect their existing understandings, they'll have reason to recognize its validity. This, in turn, should assist them in accepting the validity of other legalities mapped through the legality tree, which is particularly important for those legalities they experience as alien.

Chapter six is the heart of the dissertation. I would say this is because it focuses on indigenous legality, but that would be partially misleading. As category descriptors, 'indigenous' and 'settler' are of minimal utility. The language we use in any comparison should reflect the most salient factor in the distinction being drawn, which in the case of settler violence to indigenous lifeways isn't distinct indigenous and settler subject positions, but rather the distinct constitutional logics expressive of our different lifeways. As such, instead of 'indigenous' and 'settler' constitutional orders and legalities, I prefer to speak of 'rooted' and 'liberal' ones, respectively. Thus section six is the heart of this project because it presents a rooted conception of legality, and looks primarily to Anishinaabe legality to do so.

Rooted legality is the thing one must learn before she can learn indigenous law. Turning primarily to Anishinaabeg, I proceed slowly through a rooted conception of creationism, constitutionalism, legal traditions (by which I mean legal process and institutions) and finally, law. This is an effort to truly build the analytics of rooted law 'from the ground up'.

With the profundity of rooted and liberal legality difference disclosed, chapter seven turns to indigenous-settler reconciliation. I produce two principles which I argue serve as conditions for non-violent indigenous-settler relationships. The first follows from what has already been argued in chapters one to six: because the most salient difference between indigenous and settler peoples is constitutionalism, reconciliation must take the form of a constitutional dialogue. The second principle, earth reconciliation, is more complicated. To get to

it, I consider the earth beneath the roots and the very different theses that liberal and rooted communities posit in respect of it (the sovereignty thesis and the humility thesis, respectively).

From these theses I draw out the consequence of liberal and rooted constitutional incommensurability. This conclusion connects the argument back to its starting point in the Three Paths Prophecy Petroform. The shared indigenous/settler lifeway must be either indigenous or settler and inclusive of the members of the other group, but not a combination of lifeways. The question thus becomes ‘whose lifeway?’ I present a series of arguments that, insofar as non-violence is the critical factor upon which indigenous-settler reconciliation turns, the answer should be rooted lifeways. This requires settler peoples to accept the humility thesis.

What exactly that means, however, is still unclear. Thus in the second half of chapter seven I consider how various models of indigenous-settler reconciliation accommodate the two principles. I find that I’m able to dismiss all save one in a fairly cursory manner. The sole vision of cross-constitutional relationship that I’m confident satisfies both principles (although other approaches might also do so) is a particular conception of what, in English, indigenous peoples have long called treaty. Specifically, it’s the conception of treaty I call treaty mutualism, which is simply the extension of mutual aid kinships (i.e. rooted constitutionalism) from relationships between persons to relationships between peoples.

In the eighth chapter, I take seriously the fact that even if readers are persuaded in theory by my positive project, numerous remaining concerns are likely to stop them from being persuaded in practice. Thus I consider three groups of critiques I’ve encountered during this journey. The first regards the spectre of fundamentalism in indigenous systems of law. The second regards how power factors into my arguments and the vision of rooted legality I present. I take the opportunity presented by this critique to offer an explanation of how power operates within rooted legality. The third set of critiques raise the possibility of misreading at various points in my argument. I’ve tried to take each critique seriously and I hope to have countered them, but readers will of course judge that for themselves.

Because the dissertation covers so much ground, in the ninth and final chapter of the argument I draw out the most important consequences which I believe follow from it. I’ve organized them into three groups: consequences for indigenous law revitalization, for the integrity of Canadian law, and for indigenous-settler reconciliation.

Before closing, I note two style conventions I use throughout. Beginning in chapter two, I render the first instance of each key concept introduced in italic script. Second, I find it cumbersome and distancing when a text insists on male and female pronouns in every instance. Thus I alternate between the gendered pronouns he/she, him/her, and his/hers, and unless I’m speaking about someone in particular, I do so without meaning to specify any particular gender.

In closing, it behooves me to note that one learns indigenous law through listening and watching carefully⁷³ (*ayaangwaamizin*, *noko* would say),⁷⁴ and through practice guided by the right relationships; not by frontloading lots of questions,⁷⁴ placing mind before heart, spirit, and body. Nothing I’ve written here is meant to challenge or detract from this long-proven approach.⁷⁵ Yet I wonder if my project might serve as a useful supplement. I want all those with

⁷³ Elder Bessie Mainville (2 December 2015); Teaching of elder Bessie Mainville (2 July 2018) Couchiching First Nation.

⁷⁴ Teaching of elder Bessie Mainville (12 January 2016) Couchiching First Nation [Elder Bessie Mainville (12 January 2016)].

⁷⁵ In learning indigenous law, there truly is no replacement for the experience of “productive confusion” Sarah Hunt writes about. Sarah Hunt, “Ontologies of Indigeneity: the politics of embodying a concept” (2014) 21:1 Cultural Geographies 27 at 30. Borrowes urges this approach in the first paragraph of John Borrowes (Kegedonce), *Drawing*

the commitment to learn to be able to appreciate not only the beauty, but also the logic of a drum; to understand not only *that* but also *how* the lifting of a pipe enacts governance; to discern not only the creative possibility, but also the rigour of narrative reasoning.⁷⁶ Too often I've witnessed folks who lacked a basis from which to strive to understand these things reduce them to private sphere culture and then disengage even while appreciating them.

For greater certainty, this dissertation is a vision of *how* rooted law works. It never purports to say *what* the law is. Like the four elders in my circle, I agree that it can't be written down.⁷⁷ And even if in some respects it can be written, they, not I, are the ones to do it. I also share the understanding that certain cultural practices (generally, those in which a spiritual component isn't only present, but dominant) can only be shared under specific conditions. This dissertation isn't one such context, so I've left that sort of knowledge out. I thank noko and my elder from Mitaanjigamiing for carefully guiding me away from this sort of mistake. Still, I quietly honour the spirits, unacknowledged as they travel these pages.



FIGURE 1: “Falls on Rainy River Opposite Fort Frances”, printed by Spottiswoode and Co., London. This image is reproduced from Henry Youle Hind, *Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858*, vol 1 (London: Longman, Green, Longman, and Roberts, 1860) opposite 81.

Out Law: A Spirit's Guide (Toronto: UTP, 2010) [Kegedonce, *Drawing Out Law*] at ix. Perhaps more foundationally, this is arguably what Nanabozho teaches us as well.

⁷⁶ See Darcy Lindberg, “Miyo Nêhiyâwiwin (Beautiful Creeness): Ceremonial Aesthetics and Nêhiyaw Legal Pedagogy” (2018) 16/17:1 Indigenous LJ 51 [Lindberg, “Miyo Nêhiyâwiwin (Beautiful Creeness)”] at 64.

⁷⁷ Grandmother Copenace cautions “We can do our best, but we can't capture the whole essence of it.” Grandmother Sherry Copenace (24 June 2018).



FIGURE 2: Three Paths Prophecy Petroform, Tie Creek Site, Manito Api, Whiteshell Provincial Park, Treaty #3 Territory. This image is reproduced, with permission of elder Charlie Nelson, from Roseau River Chapter, Three Fires Society, *Tie Creek Study: An Anishinabe Understanding of the Petroforms in Whiteshell Provincial Park* (Parks Branch, Manitoba Natural Resources, 1990) at 32.

These records are written on slate-rock, copper, lead, and on the bark of birch-trees. The record is said to be a transcript of what the Great Spirit gave to the Indian after the flood, and by the hands of wise men has been transmitted to other parts of the country ever since. Here is a code of moral laws which, the Indian calls 'a path, made by the Great Spirit.'⁷⁸

2. Signs and Visions

I try to follow the spirits' lead. I rarely know who I'm following and I'm sure I miss most of the signs. But sometimes a sign is placed inside—an inexplicable but overwhelming urgency to do something, to go somewhere. When I feel it, I follow the pull of my changing path as best I can.

On one such occasion, I was pulled to Manito Api. It was August of 2013 and I'd just flown into Winnipeg from Victoria. I was to head southeast for Couchiching First Nation, where every summer I spent a few weeks visiting with elders and knowledge-keepers, and connecting with people and land. But as I left the airport behind, instead of heading south to Bishop Grandin Blvd., I drove north to the Perimeter Highway and then east, out of the city and into the Whiteshell. I had no idea what I'd find; I just knew I had to go. I ignored one man who tried to redirect me and a second man who warned me, turn back, it's a bad road. As day tilted to evening, I pulled into the museum at Nutimik Lake.

I soon felt a second pull, on a report the museum has on the Whiteshell petroforms—rocks placed as deliberate images on the earth by *aadizokaanag* (ancestors and spirit beings) through which indigenous peoples received teachings and instructions on how to live well together. The student on staff refused to make me a copy, but the good news, he said, is that tonight just happens to be his weekly tour of the Bannock Point petroform site. It didn't start for a couple hours, which meant I'd be winding through rickety highway 307, for the first time, in the blackness. That wasn't ideal but it was alright; I'd done lots of night drives through bush highways, and anyways, I had to take that tour.

⁷⁸ George Copway, *The Traditional History and Characteristic Sketches of the Ojibway Nation* (London: Charles Gilpin, 1850) [Copway, *Traditional History and Characteristic Sketches*] 132.

I went ahead to Bannock Point. I knew this was a place of spiritual importance for Anishinaabeg (although at the time I didn't know just how important) and I wanted to acknowledge the Spirit before the tourists showed up. I drummed four songs, prayed, and made my offerings. The first of the tourists, a stout man with a Tilley hat, appeared as I finished my last song. He huffed, audibly annoyed that my ceremony was disrupting his cultural experience.

Our guide was friendly to be sure, but as a summer student he didn't know much about the petroforms, about local Anishinaabeg, or about Anishinaabe culture more generally. I set myself against intervening but a couple of times I'd have burst if I didn't add to the young lad's tepid recitations. Still, it was wonderful to be with the petroforms. I lagged behind the group as much as possible to appreciate what learning I could take from the petroforms. Again and again our guide tried to usher me along until at last he didn't, presumably just hoping I wouldn't get lost. The tour came to a close at the museum, where something unusual happened. After the group dispersed, the guide handed me the report I'd been so drawn towards. He didn't explain. He just said he felt I should have it. I have it still.

I pulled into Fort Frances that night and fell asleep as soon as head touched pillow. I was gifted with a vision. It was a stunning day and I was at a place in the Whiteshell with beauty beyond my limited ability to wrap in words. It was a high place on worn rocks and the rich colours and vibrant ribbons all around caught and cast the sun. I was given a teaching about pathways. It has worked its way throughout me and throughout this project, and it's why I'm speaking with you now.

A year later I had a second vision during my *gii'igoshimowin* at Cape Croker, when John Borrows put me out on the land to fast. It added an important caution, echoing one of John's teachings. I hope that with what I share, I haven't made a mistake. I also wish to remind readers that commensurate with my earlier comments on Anishinaabe epistemology, the interpretation that follows is just my own, and I certainly don't hold unique knowledge about the petroforms. Please don't lose sight of this. Readers who want traditional knowledge on the Whiteshell petroforms need to speak with knowledge-keepers and medicine people from local First Nations.

That being said, what a gift that the Roseau River chapter of the Three Fires Midewiwin Society (RRTFMS), through the report the young guide gifted a copy of to me, has chosen to publicly share some of its knowledge about Manito Api.⁷⁹ The Midewiwin is an Anishinaabe law and medicine⁸⁰ society of great historical importance and which holds high regard within many Anishinaabe communities today. Some of my friends and elders belong to it.

The RRTFMS report contains the image that begins this chapter, which depicts a petroform at Manito Api's Tie Creek site. To the best of my knowledge, it doesn't have a common designation; "Three Paths Prophecy Petroform" is just a functional name I've given it here. Indigenous peoples,⁸¹ archaeologists,⁸² and the province of Manitoba⁸³ have publicly

⁷⁹ Roseau River Chapter, Three Fires Society, *Tie Creek Study: An Anishinabe Understanding of the Petroforms in Whiteshell Provincial Park* (Parks Branch, Manitoba Natural Resources, 1990) [Roseau River Chapter, Three Fires Society, *Tie Creek Study*].

⁸⁰ 'Medicine' in an Anishinaabe context has an expansive meaning not limited to biochemical action, including just about anything that can promote, sustain, or return a state of wellness. In addition to plants, it includes, for instance, animal parts, water, songs, sacred objects, dances, images, prayers, dreams, names, and places.

⁸¹ Charles Nelson, "'Protection' Conflicting with Anishinaabe Rights" in Jill Oakes, Rick Riewe, Kathi Kinew & Elaine Maloney, eds, *Sacred Lands: Aboriginal World Views, Claims, and Conflicts*, Canadian Circumpolar Institute Occasional Publication No. 43 (Art Design Printing Inc., 1998) 143 [Nelson, "'Protection' Conflicting with Anishinaabe Rights"] at 144; Niigaanwewidam James Sinclair & Warren Carious, eds, *Manitowapow: Aboriginal Writings from the Land of Water* (Winnipeg: HighWater Press, 2011) at 7-8.

referenced, analyzed, or represented images of the Tie Creek petroforms. However in joining this group, I wish to issue a caution. The Tie Creek visitor's centre contemplated in the government of Manitoba's master plan for the Whiteshell⁸⁴ was never built. In fact, in a stark reversal of intentions, a fence was erected to keep would-be visitors out.⁸⁵ Petroforms at Manito Api have been frequently damaged.⁸⁶ Additionally, the mere presence of the uninvited at a site so sacred is an ethical transgression. Tie Creek is a sacred site for numerous indigenous peoples, including Anishinaabeg. Thus to be clear, unless you're one such indigenous person or have been invited by one, *do not try to visit it*. Nothing in my writing should be taken as encouragement to do so. I choose to speak of it here only to ground my writing in the most honest and important way.

a. A Path both Indigenous and Settler: the Conundrum

The RRTFMS teaching accompanying the Three Paths Prophecy Petroform image reads, in part:

The feature shown in Figure 7 is a scroll teaching about the choice of lifestyle that the human being takes. Many of the Anishinabe ceremonies and concepts were recorded on birch bark, now called scrolls.

There are rocks on both sides for us to continue to build upon those paths that we choose. The paths we take are necessarily different. There is a path for the white man and there is a path for us. You cannot take the path in between for it ends quickly and death awaits your spirit.

At some time in the future, the two paths will come together, but we are not there yet.

This teaching is about choice. The Creator allows us to choose.⁸⁷

For some, this teaching might present an uncomfortable conundrum. It emphasizes the capacity for choice between distinct pathways, which we might better call 'lifeways' since they represent

⁸² Jack Steinbring, "The Tie Creek Boulder Site of Southeastern Manitoba" in MW Hlady, ed, *10,000 Years: Archaeology in Manitoba* (Winnipeg: Manitoba Archaeological Society, 1970) 47; J Steinbring & M Muller, "North American petroforms: Questions of their chronological and cultural placement", in J Clottes, ed, *L'art pléistocène dans le monde / Pleistocene art of the world / Arte pleistoceno en el mundo* (Actes du Congrès IFRAO, Tarascon-sur-Ariège, septembre 2010, Symposium *Art pléistocène dans les Amériques*. Special edition of *Préhistoire, Art et Sociétés, Bulletin de la Société Préhistorique Ariège-Pyrénées*, LXV-LXVI, 2010-2011, CD: p 655-668; Leo Pettipas, "The Petroform Phenomenon of Southeastern Manitoba and Its Significance" (2004) 14:2 *Manitoba Archaeological J* 41.

⁸³ Historical Resources Branch, "Whiteshell: The Petroforms of Manitoba" (Pamphlet issued by Government of Manitoba, Ministry of Sport, Culture and Heritage, revised ed, 2010).

⁸⁴ Minister of Natural Resources, *The Whiteshell Master Plan* (Department of Natural Resources, 1983) at 37.

⁸⁵ Bill Redekop, "Whiteshell's sacred stones: Petroforms speak across the ages" *Winnipeg Free Press* (30 July 2011), online: *Winnipeg Free Press* <<https://www.winnipegfreepress.com/opinion/fyi/whiteshells-sacred-stones-126445578.html>>.. An image of the fence is viewable in B.E. Schmidtke, *Tie Creek Land Use Conflict: A Geological Perspective* (Winnipeg: Manitoba Energy and Mines, Geological Services, 1988) at 11.

⁸⁶ Grabish, Austin, "Ancient petroform in Manitoba's Whiteshell park destroyed: Rocks that formed shape of snake at sacred site rearranged into inukshuk" *CBC News* (30 June 2017), online: *CBC News* <<http://www.cbc.ca/news/canada/manitoba/petroforms-ruined-manitoba-1.4185107>>.

⁸⁷ "Birch Bark Scrolls", in Roseau River Chapter, Three Fires Society, *Tie Creek Study* at 31. Leanne Simpson briefly shares a remarkably similar teaching, located at "a sacred place, sitting at the eastern doorway of the Nishnaabeg Nation", which therefore cannot be Manito Api. However, it isn't surprising that this teaching was given at multiple spots throughout Anishinaabe-akiing. Leanne Simpson, "Our Elder Brothers: The Lifeblood of Resurgence" in Leanne Simpson, ed, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) ch 4.

distinct ways that unique peoples have of living as peoples.⁸⁸ It tells us that indigenous and white (in the same context, today many of us would instead say ‘settler’) lifeways will eventually join together and that the resulting shared course will be one of our choosing.

But what ‘shared’ means here isn’t clear, for the teaching makes unequivocal the impossibility of a path between indigenous and settler lifeways which might take something from each to create something new. It might have taken the form of a negotiated middle road (the liberal response) or of a hybrid lifeway (the postmodern one), but the fact that “death awaits your spirit” should you walk it seems to render the point moot. Thus we’re stepping towards a merged lifeway—*both* indigenous *and* settler—that doesn’t have its genesis as a combination of each.⁸⁹ But if not a combination of lifeways, then a merged indigenous and settler lifeway must mean that one group has accepted the other’s lifeway as its own.

One troubling possibility is the triumph of settler supremacy. But if we’re to commit ourselves to the necessity of violence, let it be because we’ve been compelled to do so. Rather, let’s imagine that the “time in the future” when “the two paths will come together” means either that indigenous peoples have been persuaded to accept settler society’s liberal lifeway, or that settler peoples have been persuaded to accept indigenous peoples’ rooted lifeway. In either event, we shall need to understand how each lifeway works, and second, under what conditions each might admit peoples from the other path. Those explorations are taken up in chapters five-seven, which form the bulk of this dissertation.

Before turning to them however, there’s an immediate concern that must be addressed. The Three Paths Prophecy Petroform may be a compelling device for understanding relationships between indigenous and settler peoples, but like all teachings it needs interpretation. We must ask *why* non-combination of lifeways? Second and internal to that question, we need to understand what it is about lifeways which allows for the possibility of a merged community of both indigenous and settler peoples. Without an answer to these questions, the injunction to choose one kind of lifeway over another seems dramatic and unwarranted.

i. Non-combination and Not-groundlessness

Let’s begin with non-combination, the terminal middle road. We would rightly be alarmed if such a teaching were interpreted to mean that a people can’t change while remaining itself.⁹⁰ That caution applies to all peoples, but no one seriously contends that settler peoples can’t

⁸⁸ Nokomis once said to me, “The Anishinaabe way of life and mainstream laws. Those are the same to me. Those are the ways that you need to try to follow in the right way.” Teaching of elder Bessie Mainville (14 June 2015) via telephone. As I understood her teaching, nokomis’ point wasn’t to collapse the difference between Anishinaabe and settler lifeways, but rather, to assert that each is just that: a distinct lifeway. Second I understood her to mean that as pathways to proceed along, there are right and wrong ways of following each. Having said this, I must acknowledge nokomis’ extraordinary tolerance for missteps (see Aaron Mills, “Driving the Gift Home” (2016) 33:1 Windsor YB Access Just 167 at 169-170) and her ethic of openness to settler peoples (see Aaron Mills, “Nokomis and the Law in the Gift: Living Treaty Each Day” in Kiera L Ladner and Myra J Tait, eds, *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal* (Winnipeg: Arbeiter Ring Publishing, 2017) 17 at 24-25).

⁸⁹ Kiera Ladner, “Proceed With Caution: Reflections on Resurgence and Reconciliation” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) ch 8 [Ladner, “Proceed With Caution”] at 261. See also Susan M Hill, *The Clay We Are Made Of: Haudenosaunee Land Tenure on the Grand River* (Winnipeg: University of Manitoba Press, 2017) [Hill, *The Clay We Are Made Of*] at 86.

⁹⁰ Kayanesenh Paul Williams, *Kayanerenkó:wa: The Great Law of Peace* (Winnipeg: University of Manitoba Press, 2018) [Williams, *Kayanerenkó:wa*] at 139-140.

change. On the contrary, ‘innovation’ is a liberal buzzword. The question in the settler context is always about how, not whether, to change. However the same assumption doesn’t always hold regarding indigenous peoples, so I express the next set of comments in respect of them.

A romantic ideal of cultural purity can’t be allowed to police what is and isn’t authentic to any indigenous people.⁹¹ Such an approach simply avoids the awful mess⁹² of contemporary indigenous identity, by allowing fundamentalism to vilify difference. Renowned Anishinaabekwe artist Daphne Odjig expressed my view, too, when she roundly rejected such fundamentalism, saying “We are a living people and a living culture. I believe we are bound to move forward, to experiment with new things and develop new modes of expression as all peoples do. I don’t intend to stay in the past. I don’t feel like no museum piece.”⁹³

Taken more seriously than perhaps she intends, I think Odjig invites us to rethink the application of concepts like authenticity and fundamentalism to culture. If I’m right, the stakes of her intervention are enormous, because those concepts are vital to evaluations of how the persons who inhabit culture experience change. The political and material consequences of those evaluations go directly to the bounding and partitioning of community, the sorting of who belongs and how.

Odjig insists on *both* change *and* continuity of culture. This is hardly revolutionary. A common script provides that a culture in all its vastness (including as expressed through works of art) can be both traditional and contemporary—in the case of Odjig, both Anishinaabe and cubist/surrealist—if it has porous boundaries. This seems a useful development as a stand against fundamentalism. But that stand is untenably weak if we fail to pose the question it necessitates: what remains of culture? If there are no clear boundaries hemming culture *in*, then there are also no stable reference points by which community members might let culture *out*. There’s no way for community to constrain the course of cultural change in any direction.

On this view of the both/and imperative, culture becomes a radically individual context. With community’s removal from culture’s foundations, the vacancy is filled with individual difference and individual subject position thus becomes culture’s new fundament.⁹⁴ This routing

⁹¹ Indigenous fundamentalism is a concern John Borrows has visited time and again throughout his works: John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: UTP, 2007) [Borrows, *Recovering Canada*] at 76 and especially at 147; Borrows, *CIC* at 147 and especially at 8,116-117; Kegedonce, *Drawing Out Law* at xiii. Borrows opens *Freedom & Indigenous Constitutionalism* confronting this worry, saying “In my view, there is no timeless trait, characteristic, custom, or idea that is categorically fundamental to being Indigenous”, adding, “It is misleading to claim that Indigenous societies possess an unalterable central essence or core. This is what I label false tradition”, and another couple lines further down the first page, adding “This book considers conceptions of tradition rooted in fundamentalist views about the immutable nature of Indigenous people and their societies.” John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: UTP, 2016) [Borrows, *Freedom & Indigenous Constitutionalism*] at 3. See also page *Ibid.* at 103.

⁹² Borrows offers a poetic turn on this point in John Borrows, “Maajitaadaa: Nanaboozhoo and the Flood, Part 2” in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiiik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) ix.

⁹³ Bonnie Devine, *The Drawings and Paintings of Daphne Odjig: A Retrospective Exhibition* (Ottawa: Publications Division, National Gallery of Canada, 2007) at 31, 48.

⁹⁴ I have in mind the subject position one occupies within identity categories like species, race, class, gender, ability, settlement, and sexual orientation. All that these subject positions *necessarily* share is a common experience of power. Thus while they represent *collective identities*, without more they aren’t *communities*. Their members frequently want something more of one another and form intentional communities (whether economic, political, social, ecological, professional, etc.). Note that intentional communities are defined by shared interests. In contrast, ethnonationhood, faith tradition, and indigenous peoplehood (such as Anishinaabe, Dene, or Oneida peoples) share common epistemological-cosmological-ontological commitments. This is the distinction which I take Odjig to want

of fundamentalism / triumph of individual difference then comes at considerable cost and it's not clear to all that celebration is in order. As countless scholars and activists have shown, some subject positions enjoy more power than do others. Governance over political community (and perhaps also political community itself) arguably becomes the prize of a will-to-power, as now overt white nationalist and settler supremacist advocacy on Mikinaakominis suggests.

This is an uneven view of how to address the challenge of cultural change. It's a species of both/and which accepts that community is a necessary casualty of openness.⁹⁵ It seems to me rather that the best approach will be one which strives to overcome the tension between fundamentalism and the negation of community, and not one which simply prefers either end.⁹⁶

This, I think, is the task Odjig presents. Doubtless, she cares a great deal about individual subject position and its attendant identity politics, but the communal emphasis of her assertion that "we are a living people and a living culture" has her also preserving a sense of culture *as community*. Odjig walks a path which leads away from the fundamentalism of a narrow, inflexible conception of culture, but which also declines to shunt its followers into the radical individualism demanded by anti-essentialism followed through to its logical conclusion.

On such a path it would seem that cultural change is indeed ceaseless, but (and this is a critical 'but') *not groundless*.⁹⁷ It's this claim of not-groundlessness that I find remarkable. To return to my central metaphor, for both indigenous and settler lifeways, there's a wrong way to place the next rock.⁹⁸ But this insight begs a question: if culture consists in something, *in what?*

I don't believe that cultural purity and its attendant temporal stasis is what the RRTFMS elders or the *aadizokaanag* who placed the petroforms at Tie Creek want. I doubt whether, for them, the pathways representing distinct indigenous and settler lifeways are defined by their substance *at all*, much less by *unchanging* content. On the contrary, I suspect the elders and ancient ones have generally always embraced the best of what other societies might contribute to our wellbeing.⁹⁹ One of the best examples of Anishinaabe substantive openness I know of is

to preserve. The worry is that the radical individualism of identity politics (community in the first sense) might serve to undermine the possibility of indigenous peoplehood (community in the second sense). When I use the word 'community', I mean the second sense only.

⁹⁵ See Umeek (E. Richard Atleo), *Tsawalk: A Nuu-chah-nulth Worldview* (Vancouver: UBC Press, 2004) [Umeek, *Tsawalk*].

⁹⁶ Glen Coulthard develops an argument effectively demonstrating the narrowness of such an approach. Insofar as anti-essentialists position "the state as a natural and uncontested arbiter in struggles for recognition", their projects embed indigenous peoples "within the racialized and patriarchal structure of colonial domination that their claims for cultural recognition posit as unjust and illegitimate." Coulthard, *Red Skin, White Masks* at 102. That is, they rely on essentialism in order to defeat it.

⁹⁷ Elder Harry Bone offers an example of the idea that cultural change is ceaseless but not groundless when he says: My grandmother used to tell me "there are a few teachings that you need to remember." One is who we are as people, our languages and where we come from. We should never forget who we are and at the same time we should understand the English language and where the Whiteman came from. You have to create a balance between these two people. Know who you are as a person but also understand what the world is also about. Doris Pratt, Harry Bone, & The Treaty and Dakota Elders of Manitoba (2014), *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 [Pratt et al, *Untuwe Pi Kin He*] at 113.

⁹⁸ Robert Clifford mounts a similar argument, where *CELÁNEN* serves as the ground upon which *WSÁNEĆ* law may change. Robert YELKÁTFE Clifford, "*WSÁNEĆ* ('The Emerging People'): Stories and The Re-emergence of *WSÁNEĆ* Law" in Brenda Gunn & Karen Drake, eds, *Redefining Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre) [Forthcoming, 2019] ch 4 [Clifford, "The Emerging People"] at 84, 85.

⁹⁹ Consider, for instance, change within the structure and content of pow-wow: Anna Hoefnagels, "The Dynamism and Transformation of 'Tradition': Factors Affecting the Development of Powwows in Southwestern Ontario" (2007) 29:1-2 *Ethnologies* 10; Sandra Goodsky, "The Grand Entry Ceremony of an Ojibwe Traditional Pow-wow"

bwaanidewe'igan, the big/dance drum. Our elders often associate it with the very heart of community,¹⁰⁰ yet it came to us from the Dakota!¹⁰¹ So the introduction of *bwaanidewe'igan* was an acceptable rock placement, even though it came entirely from without.¹⁰² How might we account for this kind of both/and?

in Anita Chisolm & Guyneth Cardwell, eds, *Teaching American Indian Culture in the Classroom: Lessons for K-12 and Higher Education* (9th Annual National American Indian Cultural Curriculum Development Workshop, Indian Institute, University of Oklahoma, 17-21 July 1989) at 28.

¹⁰⁰ Some elders, knowledge-keepers and drum-keepers I've listened to have simply asserted this point, while others have gone on to suggest a linguistic connection between 'ode' (heart), odena (community site), and dewe'igan (drum). From these associations they say that the drumbeat sounds the heart of the community, which is why it leads in all important community events. I understand that linguists don't always accept the validity of these associations.

¹⁰¹ Teaching of anonymous elder #1 (3 May 2015) via telephone; Interview of elder Fred Kelly by Commissioner Loretta Ross, "Episode 11: The Anishinaabe in Treaty 3 with Elder Fred Kelly" on *Let's Talk Treaty*, Treaty Relations Commission of Manitoba, online: <<http://www.trcm.ca/multimedia/lets-talk-treaty/>> [Interview of elder Fred Kelly by Commissioner Loretta Ross, "Episode 11"]; *Restoule v Canada*, Transcript of elder Fred Kelly at 2914-2915; Thomas Vennum Jr, *The Ojibwa Dance Drum: Its History and Construction*, Smithsonian Folklife Studies Number 2 1982 (Washington, DC: Smithsonian Institution Press, 1982) at 44-46; Frances Densmore, *Chippewa Music, Vol 2*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 53 (Washington: Government Printing Office, 1913) at 143-144; Ruth Landes, *Ojibwa Sociology* (New York: Columbia University Press, 1937) [Landes, *Ojibwa Sociology*] at 113; Bruce White, "Honoring Wiyaka Sinte Win / Tail Feather Woman and her Vision", online: MinnesotaHistory.net <http://www.minnesotahistory.net/?page_id=882>. Elders in Treaty #3 have often told me that the Big Drum came to us from the Dakota.

¹⁰² This may be different for eastern Anishinaabeg, but within Treaty #3 the same might even be argued of tobacco! While today we often use a kind of *nicotiana* as tobacco, before we had trade access to it, we used red willow as our tobacco. Teaching of elder Bessie Mainville (Neyaashing / the Point Park) 10 December 2016); Teaching of anonymous elder #1 (30 May 2015) via telephone [Anonymous elder #1 (30 May 2015)].

3. From Indigenous Law to Indigenous Legality

a. Legality as Quadripartite Analytic

The answer I give to the question with which the previous chapter closed is *legality*, although I'm not using that word in the conventional sense in which legal theorists have typically debated it. I'm interested in looking not only at why such and such a normative proposition is or isn't *good* law, but also and more foundationally at how a community comes to have a concept of *what law is* and a view of *its purposes*. The answers, I've proposed, will explain why we must choose *either* an indigenous path *or* a settler one, and not some combination of the two.

I begin with the conundrum of how to place the pathway rocks which remain, without slipping into the fundamentalism Daphne Odjig enjoins us against. I draw a distinction (upon which much of my larger argument turns), between substance and logic. My argument is quite simple: a people can change while staying the same when we see that the substance of culture always exists within a particular logic. The trick is to realize that the logic isn't also substantive. Mapped to legality, 'substance' becomes law, and 'logic', constitutionalism. Taken together then, law isn't groundless: it never ceases changing, but its change is always from within a constitutional logic, which is rooted firm.

Second, I mount an argument that indigenous (or rooted) law, like all law, has an analytic order internal to it. If we fail to apprehend the relationship between rooted constitutionalism and rooted law, the analytic order is precisely what's missed. The stakes in disclosing a constitutional logic, then, are enormous. The balance of the chapter considers the consequences of failure to do so, which I call the problem of 'constitutional capture'.

To begin, I suggest legality is a structure comprised of four analytic categories organized in progressive levels: lifeworlds→lifeways→legal traditions→law. The internal relationships between the four levels allow for cultural (including aesthetic, legal, etc.) change to be constant without ever being groundless. I unpack my conception of legality, the *legality tree*, in chapter four. But to understand why the Three Paths Prophecy Petroform disallows a pathway between indigenous and settler lifeways, we need only understand something narrow about the first two levels of legality, *lifeworlds* and *lifeways*. These obviously aren't terms I've coined, but I deploy them in particular ways that need explaining.

By 'lifeworlds' I refer to distinct ways of knowing and being in the world, or as Anishinaabe scholar (and now elder) James Dumont has put it, of "seeing the world" and of participating in the world seen.¹⁰³ A lifeworld is set out in a creation story; creation stories disclose unique epistemological-cosmological-ontological systems, which I'll call *ECO-systems*. I use the terms 'lifeworld' and 'ECO-system' interchangeably throughout.

Narrative *lifeworlds* become constituted as *lifeways*. That is, in my usage 'lifeways' are coterminous with constitutionalism.¹⁰⁴ To be certain, constitutionalism isn't a haphazard process. A narratively-grounded ECO-system constitutes persons as community through a particular *logic* manifest within a particular *structure* (with social, economic, political, spiritual, ecological and legal aspects). Thus if lifeworlds are the narrative analytic category of legality, lifeways exist as

¹⁰³ James Dumont, "Journey to Daylight-Land: Through Ojibwa Eyes" (1976) 8:2 Laurentian University Rev 31 [Dumont, "Journey to Daylight-Land: Through Ojibwa Eyes"].

¹⁰⁴ See also Williams, *Kayanerenkó:wa* at 6, 15, 137.

legality's logical-structural level.¹⁰⁵ The statement bears repeating: *neither lifeworlds nor lifeways are substantive*. Rather, they're the narrative and logical-structural contexts in which substance lives and changes; through which ceaseless change continually becomes itself.¹⁰⁶ I can't sufficiently emphasize the importance of this distinction to my argument: this concept of a 'constitutional logic' is what my argument for incommensurability turns upon.

The significance of such an approach is readily seen. Law—and more generally, the substance of culture—exists in a state of constant flux, but the range of its possible change is both empowered and constrained by the three levels below, each of which is progressively more fixed. Again, I explain this in detail in chapter four, but for our immediate purpose what matters is that law, like all other substantive aspects of a culture, may undergo constant change while constitutionalism—the logic and structure of community given by a particular creation story—continues from one day to the next almost entirely unchanging. The unchanging constitution serves as the boundary for perpetual change in law¹⁰⁷: a people can *both* change *and* stay the same.¹⁰⁸ Dave Courchene Sr., President of what was then the Manitoba Indian Brotherhood, asserted this not-groundless account of cultural change in 1971:

¹⁰⁵ When I say that constitutionalism refers to how persons *constitute* themselves as peoples, I mean to centre the distinct logics and corollary structures through which this movement develops. Without this specification, it might be said that my use of 'constitutionalism' is so over-inclusive as to empty it of meaning. It might seem that wherever *any* kind of community exists, constitutionalism exists. As such, communities defined only by common interests would be 'constitutional' communities. I mean to set off any community which has neither its own logic nor its own correlate structure. This definition is meant to sever intentional communities parasitic on liberal constitutionalism (that is, which function *through* rather than *over* social contract and citizenship) from its ambit.

¹⁰⁶ 'Cosmology' and 'axiology' speak of different things and the purpose of the legality tree is lost if we let them be conflated. Yet the issue is a tricky one. Most elders I know describe ECO-system commitments in the language of 'values' or 'principles' at least some of the time. One must therefore listen carefully to *how* the words are used. For instance, I think Haudenosaunee jurist Paul Williams and I mean the same thing when he writes of Haudenosaunee law, "While the principles behind its architecture remain constant, inevitably the processes and relationships that sustain it will evolve as society changes. There is a strong sense that the law and the peace are constantly being made, and are not ever going to be completed". Williams, *Kayanerenkó:wa* at 4; see also *Ibid.* at 138, 419.

Similarly, in a quotation I later use, grandmother Sherry Copenace speaks of "all of our values, all of our ways of being". Grandmother Sherry Copenace (24 June 2018). In other teachings I later quote from, I believe elders Harry Bone, Stephen Augustine, and Dave Courchene may be using the term 'values' in the much broader sense of ECO-system commitments. Perhaps the best example I know of this discursive phenomenon is an essay by William Asikinack, in which he speaks of "our people's values (world-view or cosmology)", "Anishinabe value-systems (cosmology)", and "the value system (world-view or cosmology) of the Anishinabe people". William Asikinack, "Anishinabe (Ojibway) Legends through Anishinabe Eyes" in Olive Patricia Dickason, ed, *The Native Imprint: The Contribution of First Peoples to Canada's Character, Volume 1: to 1815* (Athabasca: Athabasca University Educational Enterprises, 1995) 93; see also *ibid* at 100.

¹⁰⁷ Kayanesenh Paul Williams writes "While the possibility—even necessity—of change is built into the architecture of the Great Law, that architecture itself provides a framework, a set of constant principles to ensure that change is consistent, careful, and conducted so that the certainties are maintained. The Longhouse can be extended, but only in ways consistent with its existing architecture." Williams, *Kayanerenkó:wa* at 139; citation omitted.

¹⁰⁸ In Kenneth M Morrison, *The Solidarity of Kin: Ethnohistory, Religious Studies, and the Algonkian-French Religious Encounter* (Albany: State University of New York Press, 2002) [Morrison, *The Solidarity of Kin*] I find among the most persuasive arguments I know for this claim. Albeit through the lens of Religious Studies, Morrison carefully shows how Algonkian and French (what he sometimes generalizes to 'Euramerican') lifeworlds differed at the time of contact. On the basis of their pronounced lifeworld difference, he argues that 'conversion' woefully (and ethnocentrically) misrepresents the nature of cultural adaptation amongst eastern Algonkian peoples throughout the period of religious encounter. Algonkian peoples adapted considerably to the introduction of Catholicism in their world, but always within the logic of their own ECO-systems. In consequence, their lifeworld survives today and it's a failure of the academy (he's particularly critical of James Axtell) not to have taken it seriously. See especially *ibid* ch 8. See also Sioui, *For an Amerindian Autohistory* at 22.

Long before the whiteman came, we were adapting our ways to adjust to our changing environment. For had we not, we would have died as people, many centuries ago.

But we adapt in our ways and not in anyone else's. We will make our own lives. And our young will assure us of that.¹⁰⁹

To better appreciate how this sense of a 'bottom' to culture avoids the reciprocal problems of essentialism and the negation of community, it may be helpful to observe how the distinction between legality's substance and logical-structural analytic categories maps to a distinction we might draw between kinds of fundamentalism. What we might call 'substance-fundamentalism' obtains when a particular set of substantive commitments are represented as unchanging (or as undemocratically changing), such that community members are bound by a commitment they had no say over and which they have no ability to change. To the extent an indigenous person asserts that indigenous law is unchanging or undemocratically changing, he or she is properly called fundamentalist.

What we might call 'foundations-fundamentalism' suggests rather that there's a foundation which legitimates change and thus against which the authenticity of a norm is to be evaluated—and that foundation is unchanging. To the extent that the purported foundation is itself substantive, then this is simply a more sophisticated substance-fundamentalism and is dismissible on just the same grounds.

My argument is that where, rather, the foundation is logical-structural, then decrying it is like protesting the tyranny of gravity. As a ubiquitous phenomenon, there's no space outside of a lifeway.¹¹⁰ The relevant question is whether one's conscious of the lifeway she inhabits, and if so, transparent about it. As James Tully explains, until exposed to a lifeway one experiences as radically different, it can be difficult to see one's own,¹¹¹ which is too easily "experienced as necessary rather than contingent, constitutive rather than regulative, universal rather than partial".¹¹² Jeremy Webber¹¹³ and John Borrows each take up the way in which this risk presents in law. Borrows says "It is only too easy to detach the common law from its cultural context, especially when common law culture seems almost invisible as it corresponds with the values shared by a wide portion of society."¹¹⁴ Sarah Morales put this point memorably, saying that the responsibility of an indigenous law researcher isn't only to attend to her unanswered questions, but also to her unquestioned answers.¹¹⁵

At stake in the substantive/logical-structural difference is the distinction between a *reproduction*: a copy of something old, the pursuit of which truly is to live in the past, and a

¹⁰⁹ Manitoba Indian Brotherhood, News Release, "Address by Chief Dave Courchene, President, Manitoba Indian Brotherhood, at Treaty Centennial Commemorations, Lower Fort Garry, Manitoba, August 2 1971" (2 August 1971) [Manitoba Indian Brotherhood, "Address by Chief Dave Courchene"] at 2-3.

¹¹⁰ Robert YELKÁTTE Clifford, "WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)" (2016) 61:4 McGill LJ 755 [Clifford, "WSÁNEĆ Legal Theory"] at 761.

¹¹¹ Tully, *PPNK 1* at ch 1, 35; Tully, *Strange Multiplicity* at 109-110.

¹¹² Tully, *PPNK 1* at ch 1, 32. See also Hon Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (paper delivered at Indigenous Legal Orders and the Common Law, Vancouver, November 2012), Paper 2.1, Continuing Legal Education Society of British Columbia materials, 2012 [Finch, "The Duty to Learn"] at 2.1.5 (para 23).

¹¹³ Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 579 [Webber, "The Grammar of Customary Law"] at 582.

¹¹⁴ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: UTP, 2007) [Borrows, *Recovering Canada*] at 16.

¹¹⁵ Morales, "Locating Oneself in One's Research" at 147.

revitalization: the nurturing of new life within an existing logical-structural (and in our case, specifically constitutional) mode. Leanne Simpson is particularly helpful here:

We do not need to “go back” to “hunting with bows and arrows,” but we do need to practice ways of being and living in the world that are profoundly Nishnaabeg. It also means that there is a diversity of ways of being within a Nishnaabeg value system that encompasses being Nishnaabeg. For me, that means that there isn’t a single way of being Nishnaabeg. Rather, there is a set of processes, values, and philosophies embedded in our language and culture that one needs to embrace in order to live as Nishnaabeg. When viewed through a cultural lens, Biskaabiiyang is far from promoting an essential Nishnaabeg identity; instead, it promotes a diversity of political and cultural viewpoints within the Nishnaabeg worldview. There are many good ways to be Nishnaabe, but those ways are constructed and exist within our knowledge and our language.¹¹⁶

This is also why I believe Borrows’ has it exactly right when he claims of indigenous law that “There must be adaptation to change, but this must occur *within a context that* respects our grandparents’ good teachings”.¹¹⁷ The point isn’t that the substance of our elders’ teachings is timeless and thus ought to be reproduced in our generation. Rather, it’s that their teachings emanate from a distinct logical-structural context, and our apprehension of and participation in that logic and its correlate structure allows us to keep their teachings vital today.¹¹⁸

I hope that in drawing the distinction between a revitalization and a reproduction, my insistence on unchanging logical-structural contexts isn’t misconstrued as a form of pan-indigenism. I agree with Leanne Simpson: there are many ways of walking a rooted path. I mean only to reject the hegemonic assumption that liberal lifeways adequately accommodate all difference and are thus universally appropriate constitutional contexts for all societies.¹¹⁹

My view is that pan-indigenism certainly is abhorrent, but that it characterizes claims that erase or elide substantive difference between distinct indigenous peoples.¹²⁰ And as for legality’s substantive level—law/leaves—my view is that it’s constantly changing. Thus even absent liberal constitutional imposition, indigenous law would have changed dramatically from how it stood in, say, the 1700s. I look to the past to excavate¹²¹ an alternative constitutional *logic*—and we have no reason to imagine that if empowered once more, it should be less relevant than contractarian constitutionalism today. Given the reality of the Anthropocene and the dire need to arrest global warming, we seem to have reason to consider whether it might be more practical.

In sum, the distinction between substance and logical-structural analytic categories of legality, and the location of belonging in the latter relatively fixed category, is an answer to the both/and problem of cultural change within one people. Odjig can paint however she likes and

¹¹⁶ Simpson, *Dancing on Our Turtle’s Back* at 52-53.

¹¹⁷ Borrows, *CIC* at 279; emphasis added.

¹¹⁸ Bernadette M. Friedmann-Conrad helpfully canvasses some of the literature in support of this claim in Bernadette M. Friedmann-Conrad, *Eavesdropping on the Atisokanak: A Hermeneutical Interpretation of Selected Anishinaabe (Ojibway) Oral Traditions* (Germany: VDM Verlag Dr Müller GmbH & Co.KG, 2010) [Friedmann-Conrad, *Eavesdropping on the Atisokanak*] at 5-6.

¹¹⁹ Pierre Clastres wrote “It is not a scientific proposition to determine that some cultures lack political power because they show nothing similar to what is found in our culture. It is instead the sign of a certain conceptual poverty.” Pierre Clastres, *Society Against the State: The Leader as Servant and the Humane Uses of Power Among the Indians of the Americas* (New York: Urizen Books, 1977) [Clastres, *Society Against the State*] at 10.

¹²⁰ Larry Chartrand, “Eagle Soaring on the Emergent Winds of Indigenous Legal Authority” (2013) 18 *Rev Const Stud* 49 [Chartrand, “Eagle Soaring”] at 51-52.

¹²¹ Darlene Johnston, “Welcome Address” (2007) 6:1 *Indigenous LJ* 1.

remain Anishinaabekwe because nothing about her claim to belonging turns on her substantive articulation of culture.¹²²

Note especially the unique significance of constitutionalism within legality: the Three Paths Prophecy Petroform is focussed on distinct indigenous and settler lifeways (and not creation stories, legal traditions, or laws) for a particular reason. While I take that culture finds its first cause in a creation story, it's the logic and structure of belonging rendered by that story which constitutes community; which is critical to the integrity of peoplehood.

i. Constitutionalism and Legality Difference

Now the grounded 'both/and' which this view of legality allows must be deployed to the larger problem of reconciliation across distinct peoples. It must explain why a merged indigenous-settler lifeway, in particular, must be a choice between each kind of lifeway and not some sort of combination of them. That is, it must justify the claim of lifeways incommensurability.

The answer turns on the critical analytic category, constitutionalism. The merged path can't represent either a compromise between (negotiation) or a fusion of (hybridity) indigenous and settler lifeways because both approaches necessarily contemplate constitutional translation. But if constitutionalism is the logic and structure of how members of a people belong to one another, then translation is a coherent expectation if and only if legality pluralism obtains between the distinct constitutional orders. If, rather, the circumstance is one of legality difference, then the respective constitutional orders are not *only* different, but are different *in kind* and the prospect of constitutional translation is incoherent. One may be able to translate distinct *content* across common logics, but translating across distinct logics just makes no sense: a logic is by definition the thing through which sense is made. Death awaits the spirit of those traveling the negotiated or hybrid paths between lifeways because eventually these travelers realize that in mixing content from distinct lifeways, they're allowing one of them to serve as the ground upon which substantive difference across all of them is taken up. And in that moment of abstruse translation's sudden disclosure, the journey abruptly ends. The traveller realizes she was never really there, has been stepping along another path all along, flickers, and is gone.

The bulk of this dissertation is an effort to establish this point in the case of indigenous and settler peoples. Legality difference, not legality pluralism, obtains between what I call the rooted legality of indigenous peoples, and the liberal legality of settler interlopers. I thus take the Three Paths Prophecy Petroform as instructive of the urgent need for all who want to engage with indigenous law to understand indigenous constitutional orders (and more generally, rooted legalities), so that we might understand what it's like to actually live within those worlds. Only then can we make an informed choice as between indigenous and settler pathways as we

¹²² Anishinaabe political theorist Heidi Kiwetinewinewin Stark, in reasoning through an *aadizookaan*, presents among the most vivid illustrations I know of how substantive difference fails as belonging's sorting tool: Heidi Kiwetinewinewin Stark, "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada" (2012) 36:2 AIQ 119 [Stark, "Marked by Fire"]. In perhaps the most critical passage, Stark explains that "no nation can or has survived without undergoing constant change. The Anishinaabe, like the hare, would retain their preexisting political formations and practices yet would also be marked by their engagement with other nations, namely, the United States and Canada." *Ibid* at 124. As I read her, it's *always* the case that we're substantively marked by others, yet the fact of our being other-marked in no way inauthenticates a people's collective sense of self, which resides in its underlying "political formations and practices". Stark applies her claim to Anishinaabe-United States treaty encounters and finds a great deal of evidence for the persistence of Anishinaabe (she uses the language of "nationhood") in the face of intended state transformation.

contemplate future rock placement. Before turning to that however, it will be helpful to consider more fully why centring legality is a useful way of taking up the overarching purpose of this dissertation: to understand how indigenous systems of law work, and how they could transform indigenous-settler relationships.

b. Purposes in Centring Legality

i. Political

There are two kinds of outcomes I hope might follow from my efforts to draw a distinction between kinds of legality. The first and most important is political. I hope my intellectual contribution supports a practical one that equipped with a viable alternative to Canadian law, indigenous persons and citizens of Canada will have a new tool to assist in the work of ending settler supremacy and replacing it with a non-violent alternative.¹²³ As the previous section explained, at the level of theory I hope to travel much of the distance towards this goal by shifting the dialogue around indigenous normativity from indigenous law to indigenous legality. But this leaves open the practical question of what should follow.

To this end, the need for a *viable* indigenous alternative to Canadian law and constitutionalism is crucial.¹²⁴ I'm frequently asked by indigenous service providers whether and how indigenous law can be useful in their work today. Their aspiration to apply indigenous law in practice is what drives (and often, limits) their interest in understanding any possible legal theory which makes sense of it.

This emphasis on contemporary practice is just what should be expected. John Borrows once wrote of the orientation to contemporary use that "If indigenous traditions are not regarded as useful in tackling contemporary concerns and recognized as applying in current circumstances, then they are nothing but the dead faith of living people."¹²⁵ Professors Val Napoleon and Hadley Friedland wisely caution that assertions of indigenous law which aren't usable, either because they're underdetermined or because they fail to attend to contemporary realities, are merely aspirational statements or critiques.¹²⁶

These are pressing concerns which none may safely ignore. However my not-groundless argument suggests they stand as but one end of a tension. I'm sensitive to a concern that with indigenous legalities in view, it seems possible to revitalize indigenous law in a way which is usable without being constitutionally viable. Anishinaabe literary theorist Scott Richard Lyons

¹²³ A great many Anishinaabeg (and in particular, many elders) have no need of what I'm doing. They already practise Anishinaabe legality each day. Because it's so thoroughly internalized, they don't think of it as legality (or for that matter, as theory), but rather as being themselves. See also Hill, *The Clay We Are Made Of* at 2.

¹²⁴ Demonstrating that indigenous systems of law are just as viable as are common law and civil law systems is a central concern of Larry Chartrand. See for instance Chartrand, "Eagle Soaring" at 53-55.

¹²⁵ Borrows, *Recovering Canada* at 147.

¹²⁶ Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 [Napoleon & Friedland, "An Inside Job"] at 740; Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance", in Markus D. Dubber and Tatjana Hörnle, eds, *Oxford Handbook of Criminal Law* (Oxford University Press, 2015) 225 [Napoleon & Friedland, "Indigenous Legal Traditions: Roots to Renaissance"] at 239; Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism, Ius Gentium: Comparative Perspectives on Law and Justice* 17 (Springer Netherlands, 2013) 229 [Napoleon, "Thinking About Indigenous Legal Orders"] at 240, 243-244.

reminds us that “Utility is linked to vision”.¹²⁷ The question of what justifies a claim to the practicability of a legal theory isn’t necessarily reducible to the immediacy of its usability, but rather is a function of one’s purposes. If those purposes are to create indigenous law *within* Canada’s constitutional order and perhaps even *as* what Canadian judiciaries and legislatures could recognize as Canadian law, then immediate usability is indeed imperative.¹²⁸ However, if one’s purpose is to revitalize not only indigenous systems of law, but also indigenous legalities, then the immediate availability of common law analytics won’t at all be useful.¹²⁹ On the contrary, they’ll be an incoherent means of articulating indigenous law.¹³⁰

ii. Intellectual

1. Analytic Clarity and Transparency

My second intended outcome is the intellectual one seeking analytical clarity and transparency in the revitalization of indigenous systems of law today. Because I aim to impart an initial sense of a distinct legality with a unique analytics of its own, I’m working to develop a theory beneath possible theories of indigenous law; a (sub-theory) ground from which theories of law may grow, not a particular legal theory entering the field of contention. However in the earth below we find further contention and the fact of additional unseen contention below is just my point. There are not only diverse theories of law, but also diverse grounds from which theories of law might generate. The stakes involved in one’s choice amongst legalities truly matters, because the grounds below both empower and constrain the field of possibility for what one imagines law is and ought to be, and how one thinks about these things.¹³¹

If scholars choose to take up the work of generating theories of law from within a rooted conception of legality, I would hope to see the full range of progressive and conservative theories of law which characterize theoretical debates within a liberal conception of legality develop.¹³² I

¹²⁷ Scott Richard Lyons, *X-Marks: Native Signatures of Assent* (Minneapolis: University of Minnesota Press, 2010) [Lyons, *X-Marks*] at 86.

¹²⁸ For instance, see Napoleon, “Thinking About Indigenous Legal Orders” at 243, 245; Val Napoleon, “Argumentation Across Legal Orders and Time Travel” (paper delivered at Indigenous Legal Orders and the Common Law, Vancouver, November 2012), Paper 6.1, Continuing Legal Education Society of British Columbia materials, 2012 [Napoleon, “Argumentation Across Legal Orders”] at 6.1.1.

¹²⁹ 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* (Portland: Hart Publishing, 2009) 315 [Zuni Cruz, “Law of the Land”] at 317.

¹³⁰ Although he writes about philosophy generally and not legal theory in particular, I believe there’s an analogue here to a distinction that Anishinaabe philosopher Dale Turner draws between two types of indigenous intellectual projects. Turner writes, “The first project focuses on indigenous ways of doing philosophy, whereas the second calls for doing European Philosophy *as an indigenous person*.” Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: UTP, 2006) [Turner, *This Is Not a Peace Pipe*] at 100; emphasis in original, citation removed. The incoherence consists in the effort to achieve the ends of the first kind of project through the means of the second. Clearly Turner is right that there’s no reason why indigenous persons ought not to be involved in the second kind of project (*ibid*), but one hardly hopes to articulate a unique indigenous legality through a European conception of law and its attendant institutions, legal processes, and analytical frameworks.

¹³¹ Robert YELKÁTFE Clifford, “Listening to Law” (2016) 33:1 Windsor YB Access Just 47 [Clifford, “Listening to Law”] at 57.

¹³² I’m drawing here on the distinction between concept and conception which Rawls drew with respect to justice, and Dworkin, with respect to law, in which concepts are taken to be broad, mutually intelligible, shared understandings, and conceptions are particular (and often competing) accounts which seek to further specify the

admire the brilliance of H.L.A. Hart, Lon Fuller, Ronald Dworkin, Martha Nussbaum, and many others within what is commonly taken as the legal theory canon on syllabi throughout institutions of common law legal education, but I don't seriously engage them in this study because I find the considerable difference presented within their debates idiosyncratic to liberal legality. But I hope that with respect to rooted conceptions of law, my work might help to encourage the same kind of rigour and contestation that these giants have offered up within the analytic world they know.

For me, this is the most pressing point for the field of 'indigenous legal traditions' today.¹³³ We have now a robust tradition of critical reflection within this field of study.¹³⁴ Yet it seems to me that the analytical work is still getting started.¹³⁵ One analytical approach seeks to liken indigenous stories to case law within the common law tradition, and thus to analyze them through its case method. This was the approach taken in the trailblazing work of Karl Nickerson Llewellyn and Edward Adamson Hoebel,¹³⁶ and of Max Gluckman,¹³⁷ Paul Bohannan¹³⁸ and so many other legal anthropologists who followed Llewellyn and Hoebel's lead.¹³⁹

John Borrows built on this approach in two brilliant articles early in his career.¹⁴⁰ He applied the case method and a modified IRAC (Issue, Rule, Application, and Conclusion) legal

general understanding. See John Rawls, *A Theory of Justice*, revised ed (Cambridge, Mass: The Belknap Press of HUP, 1999) [Rawls, *A Theory of Justice*] at 5, 8–9, and Ronald Dworkin, *Law's Empire* (Cambridge, Mass: The Belknap Press of HUP, 1986) [Dworkin, *Law's Empire*] at 93-96. Thus if the concept 'legality' can be taken to mean the system of relationships which produces lawfulness, I mean to explore two distinct conceptions (liberal and rooted) thereof.

¹³³ Two helpful guides to secondary literature on indigenous law include Michael Coyle, "Indigenous Legal Orders in Canada - A Literature Review" (2017) Law Publications; Kerry Sloan, "A Global Survey of Indigenous Legal Education and Research" (Access to Justice and Reconciliation Project, 2013).

¹³⁴ Some examples include Val Napoleon, "Thinking About Indigenous Legal Orders"; Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, Faculty of Law, Common Law Section, 2007) [unpublished]; Napoleon & Friedland, "Indigenous Legal Traditions: Roots to Renaissance"; Clifford, "Listening to Law"; Morales, "Locating Oneself in One's Research".

¹³⁵ Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford University Press, 2009) 195 [Christie, "Indigenous Legal Theory"] at 195. See also Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 [Friedland, "Reflective Frameworks"]. Dr. Friedland organizes the existing analytical approaches differently than I proceed to, and readers should benefit from her perspective.

¹³⁶ Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

¹³⁷ Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (Manchester: Manchester University Press, 1955).

¹³⁸ Paul Bohannan, *Justice and Judgment Among the Tiv* (London: OUP, 1957).

¹³⁹ While enormously influential, the case method approach has also proven deeply controversial. Reviews of 20th century legal anthropology recount a polarizing debate in which one side argued that the use of western legal concepts and tools to articulate indigenous systems of law, for which they are foreign, is ethnocentric. For some, the case method is among the tools in contention. See for instance Max Gluckman, "Limitations of the Case-Method in the Study of Tribal Law" (1972-1973) 7 Law & Soc'y Rev 611; John M Conley and William M O'Barr, "A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology" (2004) 29:1 L & Social Inquiry 179; John M Conley & William M O'Barr, "Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law" (1993) 27:1 Loy LA L Rev 41 [Conley & O'Barr, "Legal Anthropology Comes Home"]; Laura Nader, ed, *Law in Culture and Society* (Chicago: Aldine, 1969); Francis G Snyder, "Anthropology, Dispute Processes and Law: A Critical Introduction" (1981) 8:2 British J of L & Soc'y 141 [Snyder, "Anthropology, Dispute Processes and Law"]; Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" (2001) 7:1 The J of the Royal Anthropological Institute 95 [Moore, "Certainties Undone"].

¹⁴⁰ John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629 [Borrows, "With or Without You"]; John Borrows, "Living between Water and Rocks: First Nations, Environmental Planning

analysis to Anishinaabe *aadizookaanan*¹⁴¹ and in so doing took the first steps towards a contemporary indigenous law analytics. Borrows considers what he takes to be a wide range of substantive similarity between indigenous stories and case law¹⁴² and a difference: the inherent openness of the oral tradition to change.¹⁴³ Importantly, he acknowledges that “the stories have been translated and stylized to make them appear more similar to the Common law form”¹⁴⁴ but argues that translation across forms is consistent with the narrative device of the trickster.¹⁴⁵ In recent years (and without reliance on the trickster, although sometimes with recourse to it), this approach has been considerably expanded by Professors Val Napoleon and Hadley Friedland.¹⁴⁶

A second analytical approach is perhaps less tied into common law analytics in that it doesn’t claim an analytical equivalence between indigenous stories and case law yet is still aimed squarely at a common law judiciary. This ‘linguistic’ approach is forwarded by Anishinaabe scholar and Judge Matthew Fletcher, who argues that certain terms in *anishinaabemowin* can be deployed as general constitutional or legal principles to structure how particular kinds of cases are read judicially.¹⁴⁷ Fletcher is already at work deploying such an approach in his judicial role on various tribal court benches.¹⁴⁸

A third analytical approach may be still less invested in common law analytics in respect of its ends, since it envisions no particular form of institutional uptake. It proposes to identify distinct categories of kinds of legal matters from indigenous stories. However it retains common

and Democracy” (1997) 47:4 UTLJ 417 [Borrows, “Living Between Water and Rocks”]. It should be noted that unlike the legal anthropologists, who worked with stories alleged to have occurred within time memorial, Borrows applied the case law method to Anishinaabe *aadizookaanan*.

¹⁴¹ In both instances, he wrote of the importance of using multiple, intersecting stories with this method. See Borrows, “Living Between Water and Rocks” at 455; Borrows, “With or Without You” at 651; Borrows, *Recovering Canada* at 16.

¹⁴² Borrows, “With or Without You” at 647-648. Borrows also acknowledges the possibility of deep substantive difference at *ibid* at 649.

¹⁴³ *Ibid* at 648.

¹⁴⁴ Borrows, “With or Without You” at 653.

¹⁴⁵ *Ibid*.

¹⁴⁶ Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished]; Friedland, “Reflective Frameworks”; Val Napoleon et al, *Mikomosis and the Wetiko* (Indigenous Law Research Unit, 2013); Val Napoleon & Hadley Friedland, “Gathering the Treads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions (2015-2016) 1:1 Lakehead LJ. 16; Napoleon & Friedland, “An Inside Job”; Napoleon & Friedland, “Indigenous Legal Traditions: Roots to Renaissance” at 225.

¹⁴⁷ Matthew LM Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (2007) 13 Mich J Race & L 57 at 94-95. Borrows presents a similar appeal (although one aimed directly at lawyers in the exercise of their professional responsibility, not judges in the act of deciding cases) in John Borrows, “Seven Gifts: Revitalizing Living Laws Through Indigenous Legal Practice” (2016-2017) 2:1 Lakehead LJ. 2 [Borrows, “Seven Gifts”] at 7.

¹⁴⁸ See for instance *Spurr v Nottawaseppi Huron Band of the Potawatomi* (21 February 2012), Huron Potawatomi Tribal Court 12-005APP (Supreme Court for the Nottawaseppi Huron Band of the Potawatomi); *Raphael v Grand Traverse Band of Ottawa and Chippewa Indians* (21 May 2014), 13-2189-CV-CV (Tribal Judiciary for the Grand Traverse Band of Ottawa and Chippewa Indians); *Cholewka v Grand Traverse Band of Ottawa and Chippewa Indians* (14 October 2014), 2013-16-AP, 2007-73-CV-CV (Tribal Appellate Court for the Grand Traverse Band of Ottawa and Chippewa Indians); *Rangel v Pokagon Band of Potawatomi Indians* (14 October 2014), 13-002-AP (Pokagon Band of Potawatomi Indians Court of Appeals). The first case cited here I already had; my knowledge of the other three comes from Matthew LM Fletcher, “Indinaakonigewinaan – Toward an Anishinaabe Common Law” (14 April 2018), online: *Indigenous Law Association at McGill Blog* <<https://indigenous-law-association-at-mcgill.com/2018/04/14/254/>>.

law commitments¹⁴⁹ in the means by which it does so: it proceeds to organize the stories through analytics which include a conception of law-as-rules, rights discourse, an orientation towards interpretive legal principles for application to rules, and the normative primacy of established procedures for generating and modifying rules (for instance, tracking H.L.A. Hart's concept of secondary rules).¹⁵⁰ To the best of my knowledge, Professor Friedland has led this approach,¹⁵¹ and her work has been acknowledged by Borrows for inspiring a contribution of his own.¹⁵²

I hope to contribute to this body of work on indigenous law analytical frameworks, but in a way which, while always responsive to contemporary needs, doesn't depend upon common law analytics for its function. Rather, I hope the analytical framework I introduce is respectful not only of indigenous law, but also of indigenous legality.¹⁵³ My argument that one must *learn how to learn* indigenous law—that one must first learn how an indigenous people's constitutional order works before she can understand its system of law—necessitates a limit to my exercise of creativity in choosing a starting point. It requires the concession that my role as researcher doesn't endow me with the creative license to freely develop any analytical framework that I think will best articulate how a particular indigenous system of law could work. Rather, every system of indigenous law, like every system of law generally, already has an analytics intrinsic to it, one shaped by and necessarily internal to the unique legality (and especially, constitutional order) which creates and sustains it. This understanding constrains my creative license from thoughtful invention of what could be to guided discernment of what actually and already is (which statement of purpose is of course no guarantee that my articulation will get it right).

Maori scholar Leonie Pihama seems to share the emphasis I'm placing on indigenous analytics. In a passage that captures so much of what I've sought to communicate here, she says:

Kaupapa Maori theory is a theoretical framework that ensures a cultural integrity is maintained when analyzing Maori issues. It provides both tools of analysis and ways of understanding the cultural, political, and historical context of Aotearoa. A fundamental premise upon which Kaupapa Maori theory is argued is that in order to understand, explain, and respond to uses for Maori there must be a theoretical foundation that has been built from here, from Papatuanuku, not from the building blocks of imported theories. Kaupapa Maori theory provides such a foundation.¹⁵⁴

¹⁴⁹ Professors Napoleon & Friedland describe their use of this kind of legal analysis as one of two "adapted common law tools" (the other one being the case method). Napoleon & Friedland, "An Inside Job" at 733-734.

¹⁵⁰ HLA Hart, *The Concept of Law*, 2nd Ed (New York: OUP, 1997) [Hart, *The Concept of Law*] at V.

¹⁵¹ Hadley Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (UTP, 2018).

¹⁵² John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 [Borrows, "Heroes"].

¹⁵³ This fourth approach to indigenous law analytics might be thought of as the ECO-systems approach (the view from its analytical starting point), or perhaps the legality approach (the bird's eye view of its analytics).

¹⁵⁴ Leonie Pihama, "Asserting Indigenous Theories of Change" in Joanne Barker, ed, *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005) 191 [Pihama, "Asserting Indigenous Theories of Change"] at 200. Pihama, too, is careful to establish that her *not-groundless* approach to Maori cultural change isn't fundamentalist. Thus she continues:

It is necessary to acknowledge that Kaupapa Maori theory is not a theoretical framework that provides answers by following a set recipe. Where there are recognizable elements within a Kaupapa Maori theory, as it is presently being defined, these are not seen to be deterministic or exclusive. This is not an attempt to close or define the parameters of Kaupapa Maori theory in a way that would prevent those who draw upon Kaupapa Maori theory having the ability to be flexible and adaptable to the ever changing contexts of Maori collectively, and whanau, hapu and iwi, as distinct units. *Ibid.*

Anishinaabe political theorist Heidi Kiiwetinepinesiik Stark and Saulteaux scholar Gina Starblanket also emphasize the need to recognize indigenous analytics in law and politics. In a meditation on indigenous forms of relationality, they argue that indigenous ways of relating to various kinds of others “provide alternatives to the Western natural and social sciences and have an important emancipatory dimension as they liberate us from the need to engage Western sources, institutions, and concepts in constituting ourselves politically. They promote strategies that help us think about law and politics in ways that are autonomous from Western philosophical foundations.”¹⁵⁵

A rigorous analytics is of obvious and vital importance to any theory and practice of indigenous law. But it’s vital also to the question of power. This point bears particular emphasis because of its subtlety. If in our efforts to present an analytical framework for an indigenous people’s system of law, we decline to advert to the unique legality of which that system of law forms part, don’t we run the risk of suggesting that the system of law we wish to articulate has no analytical framework intrinsic to it, and thus that extrinsic analytical frameworks may be freely imported and deployed to articulate it? If so, what risks attend such an erasure?¹⁵⁶

A reflex may suggest indifference or even opposition to this worry because the free application of extrinsic lenses of analysis is what’s always done, what should be done, and what inter-/multi-/trans-/disciplinary works are rightly celebrated for. We should bring insights from one field of knowledge or way of understanding a matter to bear upon another. But this assertion isn’t contrary to my point. Rather, it begs it. Extrinsic insights are helpful precisely for the reason that they allow for new creative possibilities within an established analytical order. They don’t purport to create the world anew with each application; rather, they highlight new interpretive possibilities for the world which already is. Thus there exists a rich diversity of theories of liberalism, of common law jurisprudence, and of the nature of rights-claims at law, but each such intervention claims to reinterpret and thus to reform an established analytical order. None presumes license to simply ignore an existing analytics and to import an extrinsic one oblivious of it. A primary but often unrecognized task, then, is to appreciate the established analytical order with which one necessarily enters into dialogue through any act of intended reformation.

The necessity of adverting to an existing analytical order is even more urgent where the impulse for change is oriented towards transformation: the replacement of the established order. Borrows alerts our attention to the fact that “Indigenous peoples do not want to see their own legal norms and decision-making processes obscured or extinguished through their interaction with other legal systems”¹⁵⁷ and James Youngblood Henderson explains how it happens:

¹⁵⁵ Gina Starblanket & Heidi Kiiwetinepinesiik Stark, “Towards a Relational Paradigm – Four Points for Consideration: Knowledge, Gender, Land, and Modernity” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) ch 5 [Starblanket and Stark, “Towards a Relational Paradigm”] at 194.

¹⁵⁶ In his study of Algonkian adaptation to French Catholicism, Kenneth M. Morrison argues:

The concept of conversion is a dehumanizing reification that overlooks, denies, and dismisses the Algonkians’ historical agency. Conversion claims that Native Americans came to agree with pervasive and aggressive critiques of their lifeways. Conversion denies that either pre- or post-contact Native American life had or has systemic and intellectual integrity. Morrison, *The Solidarity of Kin* at 161.

If we drop Morrison’s religious framing for a legal one, replacing “conversion” with “translation”, doesn’t the same worry hold?

¹⁵⁷ John Borrows, “Introduction: Challenging Law” in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2018) 1 [Borrows, “Introduction: Challenging Law”] at 1.

The translation of First Nations jurisprudence and rights in common or civil law categories often brings with it a corruption, which favours the hardened prejudices against First Nations jurisprudence. In most translation processes, courts have to violate the fundamental assumptions and premises of First Nations jurisprudence, in order to maintain fidelity to the essential characteristics and patterns of common law jurisprudence. Any translation of First Nations jurisprudence into the common or civil law traditions thus transforms First Nations jurisprudence.¹⁵⁸

No one can plausibly claim to excise content from one analytical order and transplant it into a foreign one without also accounting for the violence of such a translation. Rather, the analytics of the existing order must be acknowledged, an argument made, and power accounted for, before transformative change might claim justification for its act of translation. We shall need to know what has been lost within that act, and not just in respect of the new meanings given to transplanted content, but also in terms of the deeper ethical stakes regarding the possibility of colonial reinscription on indigenous constitutionalisms and legalities. In sum, we shall need an explanation as to how such an act of translation, no matter how well intentioned, differs in its effects from colonial violence to indigenous lifeways.¹⁵⁹

2. Disclosure of ‘Constitutional Capture’

My argument about the violence of translation across legalities different in kind directs careful attention to how we represent and account for difference between systems of law. Legal pluralism and law and society approaches to legal theory have done extraordinary work in pushing comparative law dialogue back from the nature of determinate norms to the underlying processes of their generation and modification (and in the case of critical legal studies, their representation).¹⁶⁰ In theorizing law and legal pluralism, they’ve frequently highlighted

¹⁵⁸ James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, 2006) at 120.

¹⁵⁹ When faced with this problem in its 1996 *Van der Peet* decision (*R v Van der Peet*, [1996] 2 SCR 507 [*R v Van der Peet*]), the Supreme Court of Canada rejected such an approach. Instead of openly confronting the problem of translation across constitutional orders, Lamer CJC, for the majority, accepted that “when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (*ibid* at para 30) and also “that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures”. *Ibid* at para 31. Thus we had “communities” and “societies” yet still not *polities*: as Lamer saw it, whatever kind of social organization we enjoyed lacked a constitutional quality which would have generated legitimate political authority. Instead of assigning to reconciliation the task of coordinating distinct constitutional orders, the work of aboriginal and treaty rights jurisprudence was said to be “the reconciliation of the *pre-existence* of aboriginal societies [observe how constitutionalism has been erased] with the *sovereignty* of the Crown.” *Ibid*; emphasis added. So the *moral force* of indigenous peoples’ prior presence is to be compared with the *sovereignty* of settler society’s political community.

I’m also mindful of McLachlan CJC’s statement in *Haida Nation* that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511; 2004 SCC 73 at para 20. However, the discursive shift to “Aboriginal sovereignty” in the context of treaty rights is a sleight of hand, for again the Court offers no analysis or acknowledgment of Haida constitutionalism, in consequence of which, predictably, the term “sovereignty” does no analytical work. I would argue that an invocation of indigenous sovereignty which empties it of content is a retrograde movement.

¹⁶⁰ A seminal text is Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul, 1978). Among the most thoughtful treatments I know on this topic is Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167 [Webber, “Legal Pluralism and Human Agency”]. Webber observes that while pluralists dutifully attend to difference across legal contexts, within any given legal context they

informality, diversity, dynamism, interactivity and more generally, a deep concern with social context in how law is created and sustained.¹⁶¹ Their respective theoretical and methodological contributions have transformed how many think about lawfulness today.

Yet for all their considerable innovation, it isn't clear that these contributions can account for what seems to me a problem of *constitutional capture*—what Gordon Christie has called a liberal “snare”—that rooted legalities disclose.¹⁶² In one of his clearest explanations, Christie challenges the power-obliviousness of the braiding metaphor so often used to characterize the perceived strength of legal pluralism:

If we began this exercise by imagining that the Canadian state and its courts engage in braiding laws the way we might imagine a single person braids a rope out of materials on hand, we would then have to begin with the notion the state has control over Indigenous law. To think of the state as having control over Indigenous law is, however, to think of Indigenous law as being bits and pieces, constituting no more than articulated rules and principles. This effectively removes Indigenous law from the landscape. There can only be such a thing as Indigenous law if there are Indigenous legal and political authorities, those entities that determine the nature and functioning of legal orders under contemplation. To cut away the possibility these legal and political authorities exist and exercise their authority through their laws and policies is to move directly into a world where the colonial project has been completed.¹⁶³

I call the violence-of-translation problem ‘constitutional capture’ because, as I’ve argued above, in a world of legality difference it’s at the level of constitutions (i.e. logical-structural difference) where translation goes awry. Thus I would supplement Henderson’s account of the problem above with a vital addition: “the essential characteristics and patterns of common law jurisprudence” of which he speaks derive from liberal constitutionalism operating below. While I appreciate the necessity of pushing considerations of legality from determinate laws (substance) down to legal processes and the interactivity which characterizes their practice (form and procedure), I aim to disclose its insufficiency. We must push much further down still.

tend to presume relative normative homogeneity. He contends this is a serious error: the reality is rather that “Law is never simply given. It is always made against a background of disagreement”. *Ibid* at 195. Because he foregrounds the ubiquity of internal *disagreement*, legal theory, for Webber, must emphasize the social processes through which (necessarily provisional) agreement is reached.

¹⁶¹ See for instance, John Griffiths, “What Is Legal Pluralism?” (1986) 24 J Leg Pluralism & Unofficial L. 38; Sally Engle Merry, “Legal Pluralism” (1998) 22:5 Law & Soc’y Rev 869; Moore, “Certainties Undone”; Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375.

¹⁶² Gordon Christie, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions” (2007) 6 Indigenous LJ 13 [Christie, “Culture, Self-Determination and Colonialism”] at 14-18. See also Mary Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 6 Can Hum Rts YB 3 [Turpel, “Aboriginal Peoples and the Canadian Charter”]; Patrick Macklem, “Indigenous Peoples and the Ethos of Legal Pluralism in Canada” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: UTP, 2016) ch 1; Darlene Johnston, “Aboriginal Rights and the Constitution: A Story within a Story?” in Denis N Magnusson & Daniel A Soberman, eds, *Canadian Constitutional Dilemmas Revisited* (Kingston: Institute of Intergovernmental Relations, 1997) 131 [Johnston, “Aboriginal Rights and the Constitution: A Story within a Story?”] at 132, 135, 139, 145, in which Johnston, using the language of Professor Michael McDonald, says that Canada allows indigenous peoples to tell a ‘story within a story’: their rights must be articulated within Canada’s constitutional framework.

¹⁶³ Gordon Christie, “Indigenous Legal Orders, Canadian Law and UNDRIP” in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2017) 48 at 49; citation removed.

This is a challenge Jeremy Webber takes up in his remarkable essay, “The Grammar of Customary Law”, in which he argues that every pragmatic/functionalist account of law is dependent upon a normatively-laden “legal culture” for its meaning and thus its use. Webber’s careful argument has provided considerable inspiration for my own. However, for two reasons I haven’t adopted it. First, it seems to me that Webber and I disagree about how to construe the levels of legality beneath legal processes. Once more, for me neither lifeworlds nor lifeways are substantive; rather they identify the narrative and logical-structural levels of legality, respectively.¹⁶⁴ Second and directly connected, I worry that Webber’s notion of legal ‘grammars’ is insufficiently specific. The ambiguity it accepts means that it fails to identify constitutional capture and thus the deepest form of settler supremacy: violence to indigenous lifeways.

We *must* specify that legal processes are empowered and constrained by the constitutional orders (again: logic and structure) which generate and authorize them. Legal pluralists make much of the diverse social contexts of law and of distinct ‘legal cultures’. But for many indigenous peoples, the utility of such terms and any analysis which turns on them remains unclear. Sally Falk Moore observed that “culture is simply a label denoting durable customs, ideas, values, habits, and practices. Those who treat law as culture mean that law is a particular part of that package, and that the combined totality has internal systemic connections.”¹⁶⁵ In other words, those who speak of ‘legal cultures’ tend to reduce culture to substance. Even careful attention to interactive, diverse, adaptive and informal legal processes will fail to account for at least some forms of law if we imagine that such processes all generate from within a common kind of constitutionalism. Specifically, they’ll fail to adequately account for a plurality of systems of law where constitutional difference between legalities obtains.¹⁶⁶ Appeals to ‘social contexts’, ‘legal cultures’, or ‘legal traditions’¹⁶⁷ intended to account only for substantive difference may inadvertently finesse this crucial point.

¹⁶⁴ For greater certainty, nowhere in this dissertation do I refer to creationist or to constitutional axiology. On the contrary (and as I explain in more detail in the next section), for me constitutionalism speaks *only* of the logic and structure of community. On such a minimalist view of constitutionalism, axiology (constitutional values) forms part of constitutional *law*—a distinct level of legality. I see lifeworlds in the same fashion: I use creation stories *only* to draw out an ECO-system. I don’t articulate values or principles (axiology/substance) derived from creation stories. It thus seems to me that any description of such a minimalist conception of creation stories as substantive is wrong. But even if I’m mistaken, such a description still seems pointless. Since there’s no space outside of an ECO-system, the move to describe ECO-systems as substantive simply allows substance to swallow the whole of difference, rendering it meaningless. On such a view, even liberalism is a deeply substantive form of constitutionalism.

¹⁶⁵ Moore, “Certainties Undone” at 96.

¹⁶⁶ I expand upon this argument in chapter 7 at section (c)(ii).

¹⁶⁷ In an often referenced passage, John Merryman uses ‘legal traditions’ in the nebulous sense I’m describing, which fails to distinguish *the way in which* law is part of culture, and which thus lacks analytical usefulness. For Merryman, a legal tradition:

is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective. John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd Ed (Stanford: Stanford University Press, 2007) at 2.

4. The Legality Tree

In this chapter I fully introduce my theoretical framework, the legality tree. Its purpose is to enable comparative legality. My primary ambition in so doing is to demonstrate what I call the ‘universal legalities fallacy’. It says that an evaluation as to the lawfulness of a given law is only coherent (though still not necessarily sound) when rendered within the same kind of legality which produced it. Extrinsic judgments may be valid only under conditions of legality pluralism; judgments across legality difference trigger the fallacy.

To appreciate this argument, one needs to understand how the tree works. As a simple tool, I’ve meant for it to operate in two dimensions. One is vertical. I present the four-part macro structure of a tree and explain how each part conditions the range of possibility for the parts above. I then analogize to legality and I look closely at the work each of the four aspects of legality performs. I want readers to appreciate that for all its differences and however alien it may seem, rooted legality is doing the very same thing that liberal legality is: explaining how creation stories yield up constitutional orders, how these in turn authorize unique legal processes and institutions, and finally, how these legal traditions ultimately produce a unique conception of law. That is, law is legitimate where the ascending conditions of its empowerment and constraint internal to its own legality hold fast.

The other dimension is horizontal. In comparing across legality trees, I want readers to appreciate that although every legality is doing the same thing, each is doing it differently—and perhaps radically so. The particulars of what renders law its legitimacy may vary dramatically from one legality to another.

a. Why Use the Legality Tree

Given the possibility (and as I endeavour to establish, the fact) of legality difference as between indigenous and settler peoples, I can’t proceed to explain an Anishinaabe (or any other rooted) system of law by reference to settler law.¹⁶⁸ That is, my explanation can’t proceed as a mapping from the liberal familiar to the rooted unknown.¹⁶⁹ To do so is to walk the terminal middle path: such a mapping deploys the ECO-system and the logic and structure of one kind of legality in order to express law that was generated within an alternative one, systematically overlooking what’s at stake in the comparison.¹⁷⁰ Constitutional capture occludes legality difference, and with it settler supremacy’s violence to indigenous lifeways.¹⁷¹ This consequence is why vague terms like legal tradition, legal culture, legal sensibility and legal hybridity should be abandoned.

The device of the legality tree seeks to avoid this problem. It posits a general structure of legality to which both liberal and rooted legalities may be mapped, enabling *comparative legality*. In this way, I hope to take seriously Borrows’ demand for legitimacy within indigenous

¹⁶⁸ Chartrand, “Eagle Soaring” at 85.

¹⁶⁹ See Gordon Christie, “Indigeneity and Sovereignty in Canada’s Far North: The Arctic and Inuit Sovereignty” (2011) 110:2 South Atlantic Quarterly 329 [Christie, Indigeneity and Sovereignty] at 339-340, 341-342, 343-344.

¹⁷⁰ See for instance Gespe’gewa’gi Mi’gmawei Mawiomí, *Nta’tugwaqanminen: Our Story: Evolution of the Gespe’gewa’gi Mi’gmaq* (Black Point: Fernwood Publishing, 2016) [Gespe’gewa’gi Mi’gmawei Mawiomí, *Nta’tugwaqanminen*] at 51; Clifford, “WSÁNEĆ Legal Theory” at 787.

¹⁷¹ See Christie, “Law, Theory, and Aboriginal Peoples” (2003) 2 Indigenous LJ 67 [Christie, “Law, Theory, and Aboriginal Peoples”] at 91.

systems of law.¹⁷² In fact, my discussion on rooted legalities takes this urgent demand as its central concern—which necessitates that I attend to the question of constitutional power as I go.

However in proceeding in this way, I'm also mindful of Borrows' caution that "Some theorists and practitioners of Indigenous law believe that they can organize the entire field, much as some Western legal theorists".¹⁷³ Borrows worries that such "grand theorists" work with "first order principles, which may be unrecognizably abstracted from the day-to-day work of law in particular communities" and which may unduly limit options.¹⁷⁴ He adopts an "anti-structuralist approach"¹⁷⁵ in his own work, so as to avoid "foreclosing or automatically shutting down avenues of action".¹⁷⁶ On his view, "each so-called structure and superstructure is a fictional, misleading invention to manufacture certainty out of ambiguity."¹⁷⁷

I hope that my purpose of enabling comparative legality establishes that my approach isn't meant to suggest that anyone needs to think of indigenous (or for that matter, liberal) legality in just the way that I do. On the contrary, rather than suggesting a homogenous approach which closes off creative possibilities, my purpose is to demonstrate just how different each kind of legality is, and that each retains integrity on its own terms.¹⁷⁸ More particularly with regard to the risk of manufactured certainty vis-à-vis indigenous law, I suspect readers will be hard-pressed *not* to appreciate how forcefully I argue that indigenous legality deliberately absents certainty at each level (I go so far as to absent normative determination in rooted law). I anticipate critique for the *lack* of certainty I argue for.

I begin with liberalism, using Canada as my example, to establish that my general structure of legality adequately accommodates what I imagine will be the majority of readers' existing understandings about law, building the credibility of this approach. In this way, I hope to bring readers along when I move to the unfamiliar.

I note, however, that this way of proceeding isn't without risk. Critics of liberalism may object that a tree is an inappropriate way of conceiving of the general structure of legality for which I wish to argue, and disengage. Stronger still, given liberalism's presumptive divide between nature and culture, they may go so far as to suggest that a tree is a misleading metaphor. For the same reason, committed liberals may feel that a metaphor properly suited to rooted legalities is being improperly imposed upon them as a general structure of legality. And perhaps that's precisely to state the heart of this end of the objection: liberals might prefer the metaphor of a 'structure' or a 'framework' over that of a tree because such metaphors more accurately reflect the constructed nature of liberal constitutionalism (and legality).¹⁷⁹

¹⁷² Borrows, *CIC* at 165.

¹⁷³ Borrows, "Heroes" at 811.

¹⁷⁴ *Ibid.*

¹⁷⁵ Borrows, *Freedom and Indigenous Constitutionalism* at 309, n 12.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.* See also *ibid* at 239, n 8.

¹⁷⁸ Clifford, "WSÁNEĆ Legal Theory" at 761, 765; Chartrand, "Eagle Soaring" at 55.

¹⁷⁹ While I appreciate the tension here, it isn't clear to me that it's necessarily so stark. For instance, I say the legality tree represents a general 'structure' of legality. In describing the leaves, branches, trunk and roots of a tree in this way, I clearly don't mean to reserve the term 'structure' for human-constructed objects, like buildings. I think any liberal should be constrained to accept that what she thinks of as 'nature' is replete with structures of different kinds (from plant transpiration and photosynthesis to mammalian skeletal structures to subarctic food webs, to the double helical structure of human DNA). I don't think the same can be said of 'frameworks', however, and for that reason I decline to use that term. Thus I refer throughout to 'analytical frameworks'—a device I or someone else has created to better understand or apply some object, like law—but I don't call law (or constitutionalism, etc.) itself a 'framework'. I thank James Tully for identifying concerns which directly prompted these insights.

The former worry is a serious critique of liberalism and the latter one is an important critique from within it. I hope I treat these concerns seriously. I do take them up, but the question is one of timing. In the interests of genuinely and openly engaging in comparative legality, I've sought to forswear critique until after presenting my descriptive accounts of liberal and rooted legalities, respectively. To that end (and in respect of both ends of the worry articulated), I'm sensitive to the fact that a 'living tree' isn't only *a* constitutional metaphor in Canada, but is the metaphor of central significance which Canadian constitutionalism claims for itself.¹⁸⁰

b. How the Legality Tree Works

Picture a tall, healthy tree. I choose birch, *wiigwaasaatig*. So long as it grows on Mikinaakominis, it really doesn't matter what kind of tree we pick; I choose birch only because Anishinaabeg used to make canoes from it in two spots near my home.¹⁸¹ At the base are thick, twisting anchor roots giving the tree its firm stance, and the complex underground root mass which draws life up from earth. At their upper extremity, the roots unite in a stout trunk. Perhaps it sways in the wind or perhaps it stands patient and still. However you find the mighty trunk, it bears the entire canopy above and all around it. Periodic tatters and uneven lines marking the trunk's outer bark eventually give way to full curves as energetic branches reach upwards, scraping at sun. As they extend further from the trunk, they produce magnificent leaves which explode into vibrant yellow and orange in autumn, before they separate, dance, and settle, a new layer on earth before winter settles in. The details would shift had we picked white pine instead—ridges and resin would replace striations and tatters, and five-needle clusters which may take several years to fall off would replace the annual fall cacophony of wind-rapt leaves—but the quadripartite macro-structure of roots, trunk, branches and leaves would remain.

Of critical importance is the nature of the relationship between each of the four levels, characterized by both empowerment and constraint. In performing their function, the roots both empower and constrain the range of possibility for what the trunk and the levels above it may become. The trunk, in performing its functions of physical integrity and nutrient transport empowers and constrains how the branches and leaves may develop. Finally, in performing its primary function of sunlight accessibility, the branches empower and constrain the range of possibility for the leaves. The relationship existing between each level is thus one of *conditioning*.¹⁸² Through the twinned practices of empowerment and constraint, each level conditions the range of possibility for those above: each is empowered to perform its function,

¹⁸⁰ *Edwards v Canada (Attorney General)*, [1929] JCJ No 2, [1930] AC 124 (JCPC) at 136; *Hunter v Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145 at pp 155-56; *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII), [2004] 3 SCR 698 at paras 22, 29-30; *Reference re Employment Insurance Act (Can.)*, ss 22 and 23, 2005 SCC 56 (CanLII), [2005] 2 SCR 669, at para 9; *Reference re Supreme Court Act*, ss 5 and 6, 2014 SCC 21 (CanLII), [2014] 1 SCR 433, at para 19; *R v Comeau*, [2018] 1 SCR 342, 2018 SCC 15 (CanLII) at paras 33, 52, 83.

¹⁸¹ Teaching of anonymous elder #1 (15 June 2014) Mitaanjigamiing First Nation [Anonymous elder #1 (15 June 2014)]; Teaching of anonymous elder #1 (6 February 2016) Mitaanjigamiing First Nation [Anonymous elder #1 (6 February 2016)]; Teaching of anonymous elder #1 (11 August 2017) Mitaanjigamiing First Nation [Anonymous elder #1 (11 August 2017)]; Teaching of anonymous elder #1 (6 August 2015) via telephone.

¹⁸² I love Rob Clifford's way of putting this point. Quoting from WSÁNEĆ knowledge holder Philip Kevin Paul, he writes "the old people are the song, and we are their echo" and "An echo is *always shaped* by the original voice or song, even while reverberating back—shaped too by the *context* in which it resounds, such as the form of the landscape." Clifford, "The Emerging People" at 84.

within constrained limits. Birch roots can't yield up a resinous trunk; a birch trunk can't empower the apical dominance of pine branches, and birch branches can't produce needles.

Yet within the range of difference that each level allows those above it to express, the possibilities are infinite: the nature of the relationship between levels is unequivocally not one of *determination*. One can't find two identical birch trees, even if they started growing on the same day, from the same parent trees, in the same soil, side by side, with equal access to water, carbon and sunlight, and with equal exposure to beetles, migrating birds, moss and fungi. They'll differ in virtually countless ways, despite their shared conditioning.

As a tree expresses itself with increasing degrees of finitude, the range of possibility it has for doing so is progressively empowered and constrained. While the trunk is subject only to what the roots will bear, the leaves are subject to a range of possibility permitted by the branches, which are conditioned by the trunk, which, finally, is delimited by the roots. The higher up the tree one looks, the greater the degree of variability one finds expressed. Leaves may change with prevailing winds. Roots, however, remain affixed tightly to and in earth. Though they may deepen their reach in time, they're constant. And should the anchor roots be severed, the entire structure will collapse.

I want to suggest that legality functions in just the same way: a series of ascending relationships between four parts of a common structure progressively empowering and constraining one another. And just as one can't understand what a birch tree is or how it works without its four component parts, neither can one understand the legality of any given community without the totality of its four parts in view.¹⁸³ Those parts are creation stories, constitutions, legal traditions, and law. Roots I analogize to creation stories;¹⁸⁴ the trunk to a constitutional order; branches to a legal tradition (which in my narrowed usage refers to the processes and institutions of law generation, modification-interpretation, and destruction), and leaves to laws. Over the next several pages I set out in broad strokes what I believe each level contemplates so that readers will have a guide as I present my account of liberal, and then rooted, legalities in chapters five and six.

At a macro level, creation stories disclose lifeworlds, the ECO-systems which order the world.¹⁸⁵ In James Dumont's lyric phrase, creation stories "make a home out of the world".¹⁸⁶ As Jill Doerfler, Niigaanwewidam James Sinclair and Heidi Kiiwetinepinesiik Stark put it, stories

¹⁸³ Basil Johnston uses a similar metaphor: "In order to master a subject it must be taken in its totality; flower, leaves, stem and roots from its bed." Basil Johnston, "Introduction" in *The Gift of the Stars / Anangoog Meegiwaewinan* (Cape Croker First Nation: Kegedonce Press, 2010) 7 [Johnston, "Introduction" in *The Gift of the Stars*] at 17.

¹⁸⁴ I'm certainly not the only one to have had this idea. For instance, years before me, Jill Doerfler, Niigaanwewidam James Sinclair and Heidi Kiiwetinepinesiik Stark, in their Anishinaabe Studies reader, say "Anishinaabeg stories are roots; they are both the origins and the imaginings of what it means to be a participant in an ever-changing and vibrant culture in humanity." Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiik Stark, eds, "Eko-bezhig Bagijigan: *Stories as Roots*" in *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) at 1 [Doerfler, Sinclair and Stark, "Eko-bezhig Bagijigan: *Stories as Roots*"]. Since in this section introduction the authors refer to both epistemology and worldview, I suspect we have a very similar sense of 'story' in mind. However, since they refer generally to "Stories" and not specifically to 'creation stories', it's possible that they intend instead the poststructural claim that since social construction works through narrative, all stories are creation stories. This would give the roots metaphor an inestimably larger application than I intend, and would redirect its focus.

¹⁸⁵ See also Simpson, *Dancing on Our Turtle's Back* at 40.

¹⁸⁶ Dumont, "Journey to Daylight-Land: Through Ojibwa Eyes" at 39.

“embody ideas and systems that form the basis for law, values, and community.”¹⁸⁷ Robert Clifford seems to have the structuring of legality in mind when he says of creation stories that “Taking WSÁNEĆ stories seriously allows us to begin understanding the broader framework in which WSÁNEĆ law is constituted, thereby approaching the tradition responsibly and on its own terms. Taking time to understand WSÁNEĆ law on its own terms is a foundational step in creating grounds on which to potentially build toward meaningful reconciliation.”¹⁸⁸

Creation stories reveal a great many things about a people and thus might be used in a myriad of ways. Of particular significance for my focus on the constitution of community, creation stories present what I call the *belonging analytic*. It establishes the internal relationships between a conception of persons, of freedom, and of belonging.¹⁸⁹ This is a key concept in my

¹⁸⁷ Doerfler, Sinclair & Stark, “Eko-bezhig Bagijigan: *Stories as Roots*” at 1. The work that indigenous creation stories do for indigenous politics (and though she doesn’t use the word, arguably also for indigenous constitutionalism) is a theme which pervades much of Stark’s work. See for instance Heidi Kiiwetinepinesiiik Stark, “Transforming the Trickster: Federal Indian Law Encounters Anishinaabe Diplomacy” in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiiik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) 259 [Stark, “Transforming the Trickster”] at 262-263; Stark, “Marked by Fire” at 122; Heidi Kiiwetinepinesiiik Stark, “Nenabozho’s Smart Berries: Rethinking Tribal Sovereignty and Accountability” (2013) 2013:2 Mich St L Rev 339 [Stark, “Nenabozho’s Smart Berries”] at 348, 354.

¹⁸⁸ Clifford, “The Emerging People” at 87.

¹⁸⁹ I speak of lifeworlds (creation stories), and of the lifeways (constitutional orders) they generate, but prefer not to speak of cosmopolitics. I have two thoughts on this. First, I appreciate Bruno Latour’s use of Isabelle Stenger’s reinvention of the term ‘cosmopolitics’ to flag that “What is in question ... is the extent to which we are ready to absorb dissents not only about the identity of humans but also about the cosmos they live in” (Bruno Latour, “Whose Cosmos, Which Cosmopolitics?: Comments on the Peace Terms of Ulrich Beck” (2004) 10:3 Common Knowledge 450 at 451). This is a point of extraordinary importance. However, Latour and I appear to differ sharply as to where this insight leads. Latour argues it points towards a universally shared ontology “slowly composed” (*Ibid* at 457; emphasis in original) through comparative, constructivist dialogue in which good constructions slowly outcompete bad ones (*Ibid* at 459). The result of which, in his judgment, is that “we come to live within a common world defined as *naturalism defines it*” (*Ibid* at 458; emphasis added), a development he happily awaits.

Mario Blaser identifies what’s wrong with Latour’s assessment: the progressive, shared understanding is premised on the development of a progressively “common ground” (Mario Blaser, “Is Another Cosmopolitics Possible?” (2016) 31:4 Cultural Anthropology 545 at 565), which sounds ironically like an overlapping consensus.

Second, I’m even less comfortable with Marshall Sahlins’ recent use of “cosmic polities”. He claims:

Even the so-called “egalitarian” or “acephalous” societies, including hunters such as the Inuit or Australian Aboriginals, are in structure and practice cosmic polities, ordered and governed by divinities, the dead, species-masters, and other such metapersons endowed with life-and-death powers over the human population. There are kingly beings in heaven where there are no chiefs on earth. Hobbes notwithstanding, the state of nature is already something of a political state. It follows that, taken in its social totality and cultural reality, something like the state is the general condition of humankind. Marshall Sahlins, “The Original Political Society” (2017) 7:2 HAU: Journal of Ethnographic Theory 91 at 92.

My objection is the same as that which Marc Abélès gives: there’s a world of difference between demonstrating that “metapersons” influence the lives of individuals in indigenous societies (which Sahlins does), and “that these entities are part of a governmental system” (which Sahlins does not). Marc Abélès, “The Virtues of Cosmopolitics”, (2017) 7:2 HAU: Journal of Ethnographic Theory 129 at 131. Odawa writer Andrew Blackbird voiced the point clearly in 1887, writing that “Ottawa and Chippewa Indians”:

believe that there are certain deities all over the lands who to a certain extent govern or preside over certain places, as a deity who presides over this river, over this lake, or this mountain, or island, or country, and they were careful not to express anything which might displease such deities; *but that they were not supreme rulers, only to a certain extent they had power over the land where they presided*. These deities were supposed to be governed by the Great Spirit above. Andrew J. Blackbird, *History of the Ottawa and Chippewa Indians of Michigan; A Grammar of Their Language, and Personal and Family History of the*

dissertation, although it's a simple one. Through it I mean to suggest only that how one thinks about persons directly informs how one construes freedom, and finally that what one takes freedom to mean in turn directly informs how and why one thinks about community and its purposes. In drawing out these internal relationships, the belonging analytic explains *why* belonging in any given community takes the particular form that it does.

As an important aside, worldview, the perspective from within a lifeworld, isn't something one either does or doesn't have. An indigenous worldview is something one can possess in degrees. Babies begin acquiring it in infancy, while extended visitors, adoptees, and previously separated but now returned community members might only begin to acquire it in adulthood.¹⁹⁰ Note that this fact doesn't contradict the Three Paths Prophecy teaching about the middle road. I'm describing the possibility of change between lifeworlds, not of synthesizing distinct lifeworlds together.

The second level of legality is constitutionalism. Jeremy Webber wisely asserts that "a primary role of any constitution—perhaps *the* primary role—is not to limit collective action but to enable it."¹⁹¹ I share Webber's shift in emphasis from constraint to enablement, but I think about community somewhat differently. To emphasize the importance of collective action to constitutionalism seems to me to assume that we must be speaking about government. If that's right, I worry the assumption that government is *necessary* for constitutionalism narrows its boundaries too much.

Building on the belonging analytic, I argue that to speak of constitutionalism all we *need* to be speaking of is the establishment of a positive social order which secures the freedom of its members. That requires *governance* to be sure, but it isn't clear that it requires *government*. In my view, stripped to its bare essentials constitutionalism means nothing more than persons practising governance together (which entails a notion of community) to secure their freedom. If this is so, then all constitutionalism requires is a logic of belonging which respects its

Author (Ypsilanti, MI: The Ypsilantian Job Printing House, 1887) [Blackbird, *History of the Ottawa and Chippewa Indians*] at 14; emphasis added.

Religious Studies professor Kenneth M Morrison would probably locate Sahlins' error in his use of the term "metapersons". Following A Irving Hallowell, Morrison, in his outstanding study of eastern Algonkian-French religious encounter, observes that while Algonkian peoples certainly recognize what might be called 'metahumans', a great many of these beings are properly *persons* in the usual sense: "Without positing the existence of greater and lesser beings in the world, Algonkians recognized that various beings embodied and expressed power in negative and positive ways. Algonkians apprehended religious, cultural, and historical meaning not in some abstract notion of cosmic order, but in the emergent, purposeful, intersecting, and sometimes conflicting actions *of persons*." Morrison, *The Solidarity of Kin* at 163; emphasis added. If "metapersons" are in fact *just* persons, then talk of communities "ordered and governed by divinities" is deeply mistaken. Rather, the frequently dramatic difference in power between humans and non-human persons is to be accounted for through the logic of their entanglement in relations of *mutual aid* (which I go on to study in detail). Morrison explains:

Algonkian religious thought emphasizes reciprocity between persons, and especially human responsibility. Described in myth as constructive sharing, reciprocity shapes daily life in the give-and-take of every sort of ritual. If the category "power" differentiates personal entities who otherwise share the same manner of being, then the category "gift" becomes the central ethical trajectory of Algonkian religious practice. Positive, powerful others share; negative, powerful others withhold. *Ibid* at 160-161.

Now we need not accept Morrison's framing of these dynamics in the discourse of religion, and in fact if we consider them in the context of relationships between persons more generally, they offer a clear account of what Blackbird understood and what Sahlins seems not to have.

¹⁹⁰ See for instance Morales, "Locating Oneself in One's Research" at 156. As I explained in the introduction, this was also my experience.

¹⁹¹ Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Portland: Hart Publishing, 2015) at 59.

community's vision of freedom (i.e. which follows from its belonging analytic), and a correlate structure through which to practise it.

Indeed, the rooted conception of constitutionalism I present in chapter six is one without government. Social cooperation is sufficiently coordinated through the constitutional logic of mutual aid, exercised through its correlate structure, kinship. In the result, empowered Anishinaabe communities don't *need* collective action (government) to exercise governance and thus to sustain freedom.

This explanation is meant to unpack my earlier assertion that a narratively-grounded ECO-system constitutes persons as community through a particular *logic* manifest within a particular *structure*, and the resulting statement that constitutionalism exists as legality's logical-structural level. Here I want to introduce one of the most important terms in my dissertation, what I've called the *constitutional logic analytic*.

Whereas the belonging analytic explains *why* belonging takes the particular form that it does within a given community, the constitutional logic analytic specifies *how*, for that community, belonging works. It consists of three steps: *extension*, *reception*, and *response*. The story a community tells of its constitution will necessarily account for individuals reaching out to others for the purpose of community creation and continuity (extension); a reception of these offers amongst other possible community members (reception), and their manner of response which follows (response). Clarifying the particulars of distinct constitutional logics is thus of singular importance for meaningful comparisons across liberal and rooted constitutional modes.

Seeing constitutionalism in this way, as the logic of belonging and its correlate structure, clarifies that constitutionalism is an act: something done, not something had. And it's something we do again and again and again. Distinct communities do it in a remarkable variety of ways.

For many certainty-privileging societies, constitutionalism involves the formality and expressed intention of negotiated founding documents, which are said to mark the transition from a disordered and radically individualistic free-for-all (what social contract theorists call 'a state of nature'¹⁹²) to political community. For such societies, to speak of constitutionalism is necessarily to speak of *political* community. A critical function of 'constitutions', then, is to circumscribe legitimate governmental action: constitutions (frequently, written constitutions) are the higher laws which constrain governmental action to law, ensuring the government doesn't break the belonging analytic which undergirds its legitimacy. While written constitutions may seem to present constitutionalism more in the sense of something had than of something done, even written constitutions are 'living' in a narrow sense, insofar as they remain perpetually open to interpretation and allow for robust citizen participation in public life.

Though perhaps counterintuitive for and less understood by many readers, for many contingency-preferring societies¹⁹³ the constitution of community is arguably still more complicated (even though less centralized). For such societies, in one sense community always already is; there's no distinctly *political* formation story and no centralized government which higher laws must keep from breaking the belonging analytic. Yet in another sense, community is always becoming, a constellation of countless pieces, the shifting connections between which are

¹⁹² For those without a political theory background, a helpful resource on the state of nature is James (Sákéj) Youngblood Henderson, "The Context of the State of Nature" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (UBC Press, 2000) 11.

¹⁹³ I take the tension between certainty and contingency to be a challenge for the production, sustainability, and enforcement of law within all societies. Given the level of complexity involved, no society is ever truly internally consistent with respect to this tension, but each nonetheless strives towards its preferred balance.

affirmed anew, time and again, through ongoing practices of belonging. As I explain below, this adds significant complexity to constitutionalism because neither the community's territorial boundaries nor its membership boundaries are even provisionally settled.

As the third level of legality, legal traditions are the assemblage of processes and institutions a society uses to generate or adopt, interpret and modify, and destroy law. This is a much narrower use of the term than is conventional. While authors define legal tradition in diverse ways, they all tend to emphasize a deep sense of the social context of law. While taking their point, I suggest their appeals to social context are generally unable to account for constitutional capture.

The first ground for objection I've already offered: definitions like John Merryman's (see footnote 167) reduce 'legal traditions' to culture and thus don't distinguish what's analytically significant about the cultural context of law. It isn't clear what analytical value is added through use of the term. Worse, its imprecision fails to identify the risk of constitutional capture.

Second, definitions of legal tradition such as H. Patrick Glenn's mean social context in a substantive sense,¹⁹⁴ reducing commensurability to communicability.¹⁹⁵ In privileging substance, Glenn systematically overlooks the logic-substance distinction centrally at issue in my argument, which explains the remarkably strong stance he takes against incommensurability.¹⁹⁶ The result, again, is that the risk of constitutional capture goes unrecognized.¹⁹⁷

Third, Martin Krygier defines 'legal tradition' in respect of three features: pastness, authoritative presence, and transmission.¹⁹⁸ The move Krygier makes to which I object is to define the second feature in respect of the first: "the past of law, as of every tradition, is not simply part of its history; it is an authoritative significant part of its present."¹⁹⁹ Here we come to the most critical distinction between what is conventionally meant by 'legal tradition' and my use of the term. The point can't be fully apprehended until after the rooted law section and the discussion on traditionalism in chapter eight, section (a)(ii), but it will be worth introducing it now. The central purpose of having foregrounded constitutional logics in my analysis of legality is to locate authority within *it*, and *not* within pastness. Of course I ascribe considerable value to pastness in rooted legal traditions, but I hope the law section makes clear that the value of pastness in rooted legal institutions and processes doesn't consist in binding authority.

Finally, then, my narrowed usage of 'legal tradition' tracks my reading of John Borrows' use of it. Borrows begins with the often-quoted John Merryman passage I find unhelpful (for it seems to say nothing more than that law is culture),²⁰⁰ but he quickly specifies a narrower and more technical meaning: each legal tradition "has its own distinctive methods for development and application" of law.²⁰¹ I read this to say that 'legal tradition' refers to the *howness* of law, including (and this point gets tremendous emphasis in Borrows' work) the sources of its

¹⁹⁴ H Patrick Glenn, *Legal Traditions of the World, Fifth Edition* (Oxford: OUP, 2014) [Glenn, *Legal Traditions of the World*] at 13-16; *ibid* at 43 ("traditions must still persuade by their content, which cannot be confused with their means of transmission"); H Patrick Glenn, "Legal Traditions and *Legal Traditions*" (2007) 2 J Comp L 69 [Glenn, "Legal Traditions and *Legal Traditions*"] at 71; Patrick Glenn, "A Concept of Legal Tradition" (2008) 34 Queen's LJ 427 at 431.

¹⁹⁵ Glenn, *Legal Traditions of the World* at 47.

¹⁹⁶ *Ibid* at 45-49, especially at 47; Glenn, "Legal Traditions and *Legal Traditions*" at 75, 77.

¹⁹⁷ Andrew Halpin frames his critique differently, but it works to the same effect. See Andrew Halpin, "A Rejoinder to Glenn" (2007) 2 J Comp L 88 at 90-91.

¹⁹⁸ Martin Krygier, "Law as Tradition" (1986) 5:2 Law & Philosophy 237 at 240.

¹⁹⁹ *Ibid* at 245.

²⁰⁰ Borrows, *CIC* at 7.

²⁰¹ *Ibid* at 8.

authority. On this view, the term ‘legal tradition’ seems to speak of the processes and institutions of law generation and management.

Many liberal societies strive to separate the processes and institutions of law from other social spheres so that law might act independently of economic, political, cultural and spiritual considerations. Even in classically liberal communities this rigid separation is never actually achieved, but it’s a deeply held aspiration because other social spheres are taken as substantive impositions on law’s impartial work, introducing bias and uncertainty. Thus within such a society one doesn’t ordinarily speak of a court as a mixed-purpose social site, one aspect of which is legal. Rather, we would conventionally speak of courts as expressly legal sites (in which we expect expressly legal judgment from the bench), and only then acknowledge that in different ways and to different degrees (in large part depending on the species of liberalism at issue), other social spheres often find ways, or are invited, in.

The rooted communities I introduce in chapter six are unlike this. For them, legal traditions are an aspect of comprehensive and inseparable practices and bodies of knowledge. Such communities are characterized by what Marcel Mauss famously called ‘total social phenomena’,²⁰² in which “all kinds of institutions are given expression at one and the same time – religious, juridical, and moral, which relate to both politics and the family; likewise economic ones”.²⁰³ For these communities, there are no legislatures or courts existing as specified sites of law production or interpretation. Rather, it will ordinarily be the case that legal traditions serve the ends of multiple social spheres equally and at once. For the sake of clarity I continue to speak of such institutions and processes as ‘legal’ traditions, but what I’m really highlighting is the legal aspect of a mixed-purpose institution or process. Given its recognition outside of the interior British Columbia and Northwest Coast indigenous communities who practise it, the feast (which outsiders more generally know by its Chinook term, potlatch) is perhaps a too-frequently used point of reference here, but if this is so it’s because of how effective an example it is.²⁰⁴

A second layer of complexity is that some societies have multiple legal traditions operating at once. Canada, for instance, is formally bi-juridical: with respect to public law, Canada recognizes the common law tradition, with its unique processes and institutions, throughout its borders. However with respect to private law, Québec has both a substantive code²⁰⁵ and a procedural code²⁰⁶ which follow the civil law tradition.²⁰⁷

Finally, the fourth level of legality is law. My definition of law is necessarily broad, as I intend for it to hold across societies with radically different lifeworlds, lifeways and legal traditions. The purpose of law is to coordinate social interaction commensurate with the conception of freedom internal to the legality of which it forms part, such that community remains viable for its members. Law promotes some actions, prohibits others, and presents still others simply as possibilities. It accomplishes these various ends by empowering particular

²⁰² Marcel Mauss, *The Gift: the Form and Reason for Exchange in Archaic Societies* in WD Halls, trans, (WW Norton & Company, Inc, 2000) [Mauss, *The Gift*] at 3, 79. See also Bronislaw Malinowski, *Crime and Custom in Savage Society* (New York: Harcourt, Brace & Company, Inc, 1926) [Malinowski, *Crime and Custom*] at 22 (considering the simultaneous economic, ceremonial, and legal aspects of exchange).

²⁰³ Mauss, *The Gift* at 3.

²⁰⁴ See Antonia Mills’ masterful work, Antonia Mills, *Eagle Down Is Our Law: Witsuwit’en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) [Mills, *Eagle Down Is Our Law*], especially at ch 2, ch 4, ch 5.

²⁰⁵ *Civil Code of Québec*, CQLR c CCQ-1991, <<http://canlii.ca/t/530p0>> retrieved on 2017-11-16.

²⁰⁶ *Code of Civil Procedure*, CQLR c C-25.01, <<http://canlii.ca/t/53gvj>> retrieved on 2019-06-22.

²⁰⁷ Borrows argues that indigenous legal traditions ought to be (and in fact, already are) included as well, and thus that Canada is a multi-juridical political community: Borrows, *CIC* at 23, 107, ch 5.

forms of normative interaction (often claims presented to one another) with force. *Which* particular forms of claim and *what kind* of force transforms a general normative claim into a specifically legal one varies across legalities.

For many societies which place a high value on normative certainty, law takes the form of rules. Rules are focussed on behaviour in an immediate sense: they express what one must, must not, or may *do* and they establish consequences for wrongful actions. Societies whose constitutional tilt is more towards contingency seek to condition behaviour at some remove, both in the form of law's expression and in its enforcement. Such societies are often focussed on how its members should *be*, such that they choose to behave in socially desirable ways.²⁰⁸ I explore these distinctions in detail below. For all societies, internal to law's purpose of coordinating social interaction is conflict management. No matter how a society is constitutionally oriented, conflict is an inevitable aspect of social interaction and law has to make it manageable.²⁰⁹

Just as roots lead eventually to leaves, the four components of legality are arranged in relationships of progressive empowerment and constraint. In mapping these relationships we shall be setting out the pathway that legitimacy follows through legality, and will thus be taking up Borrows' concern with the recognition of legitimacy in indigenous law.²¹⁰

A lifeworld both constrains and empowers a lifeway. It allows for some variation between possible constitutionalisms, but little: a constitutional order is limited by the story that creates, sustains, and justifies it. A constitutional order likewise empowers and constrains a legal tradition, although there's considerably more room for movement here. Legal processes and institutions may vary considerably in object, scope and means within a given constitutional order. The limit on their possible variability is that while a constitutional order never determines a necessary given set of processes and institutions as *the* legitimate ones, all legal processes and institutions must be reconcilable to the constitutional logic and structure beneath and at the centre of the legal tradition. Any legal traditions which cannot be so reconciled are illegitimate. Finally, a legal tradition in turn empowers and constrains law. Likewise, law is only legitimate if reconcilable to the processes and institutions beneath it (including those which specify how law may come from other communities).

At the apex of the legality tree, law experiences the highest degree of change within the set of relationships that structure legality. Borrows identifies law's contingency when he says that "Law is not just an idea; it is a practice. Law helps us find ways of organizing decision making to regulate our actions and resolve our disputes in an authoritative manner. However, what constitutes authority, organization, regulation, and resolution are open questions."²¹¹ While two Anishinaabe communities may have nearly identical creation stories²¹² and highly similar constitutional logics and structures, they may also have law which differs considerably. Likewise, where communities have markedly different creation stories, that difference will be

²⁰⁸ While I explore this difference in detail, Heidi and Kekek Stark summarize it in taking up a Nanabozho story. They write that in confronting his problem, Nanabozho was thinking "of the larger world of relationships outside the world of courts and congresses, instead focusing on a relationship of laws and ethics and right behavior toward one another. He wanted us not to focus on *who* had authority to make decisions, but instead to consider *how* we might act." Heidi Kiiwetinepinesiik Stark & Kekek Jason Stark, "Nenabozho Goes Fishing: A Sovereignty Story" (2018) 147:2 *Dædalus* 17 [Stark & Stark, "Nenabozho Goes Fishing"] at 24; emphasis in original.

²⁰⁹ Val Napoleon, "Behind the Blockades" (2010) 9:1 *Indigenous LJ* 1 at 14; Napoleon, "Thinking About Indigenous Legal Orders" at 239.

²¹⁰ Borrows, *CIC* at 165.

²¹¹ John Borrows, "Indigenous Law, Lands, and Literature" (2016) 33:1 *Windsor Y B Access Just v at v*.

²¹² Zuni Cruz, "Law of the Land" at 315-316.

amplified as it travels upwards through their respective legalities such that the distinct conceptions of law each ultimately expresses aren't cognizable to one other.

Here then is the central argument. The quality of lawfulness—and more deeply, of legitimacy, to return to Borrows' concern—is necessarily internal to each society.²¹³ Lawfulness can be understood only in respect of a given society's law living within the series of nested relationships which constitute its legality. A state of non-lawfulness exists not when one society's law fails to meet another's (usually purportedly objective and universal) criteria for lawfulness, but rather when there's a deviation from the ascending conditions of empowerment and constraint—that is, legitimacy—internal to its own legality. To practise and to judge lawfulness then, one must always learn the local system within which law exists as such.²¹⁴

This is how the metaphor of the legality tree enables comparative legality, which assists in identifying what I call the *universal legalities fallacy*. Most of the denial of indigenous law I encounter has the structure of a simple syllogism. It (1) purports to identify a feature definitive of lawfulness *simpliciter* (particular processes, institutions, etc.); (2) identifies that the indigenous society at issue lacks the privileged feature(s), and thus (3) concludes that what has been held out as indigenous law isn't law at all.²¹⁵ It might be ethics or worse, mere custom ('worse' because custom in the sense such critics intend it implies the absence of an internal logic altogether, instead appealing strictly to repetition through time for normative force²¹⁶), but it is not law.

Comparative legality allows us to see that such perspectives mistake their idiosyncratic conception of law as the general concept of law which arbitrates, rather than instantiates, cultural difference and therefore against which all claims to lawfulness must be measured. This is the universal legalities fallacy.²¹⁷

²¹³ *Ibid* at 321-322.

²¹⁴ Borrows, *CIC* at ch 3; Borrows, "Living Between Water and Rocks"; Chartrand, "Eagle Soaring" at 53, 70.

²¹⁵ Borrows, "Introduction: Challenging Law" at 2-3.

²¹⁶ For a critique that this usage of 'custom' is mistaken, see Tully, *Strange Multiplicity* at 61. In recent works, Kirsten Anker has explained that at least in indigenous contexts, the customary is necessarily normative. See Kirsten Anker, "Law as Forest: Eco-Logic, Stories and Spirits in Indigenous Jurisprudence" (2017) 21 *Law Text Culture* 191; Kirsten Anker, "Postcolonial Jurisprudence and the Pluralist Turn: From Making Space to Being in Place" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge: CUP, 2017) ch 12. See also Webber, "The Grammar of Customary Law"; Napoleon, "Argumentation Across Legal Orders" at 6.1.6; Napoleon & Friedland, "Roots to Renaissance" at 226.

²¹⁷ Benjamin Berger's work on religion and Canadian constitutionalism is helpful in demonstrating this point. See Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 *Can JL & Jur* 245.

5. Liberal Legalities

In this chapter I map liberal legality through the legality tree, attending in turn to each of its four component parts. My hope is that my mapping will reflect the understanding of law familiar to most readers (even if only informally and even unknowingly), such that the legality tree earns their trust. Once again, the purpose of the legality tree is to show how each part both empowers and constrains the range of possibility for the parts above; the critical thing to understand then isn't just the work that each part does, but also how together they form a coherent whole. Finally, after an opening remark laying bare my position vis-à-vis liberalism and two preliminary notes, I proceed in my descriptive account as best I can without critique. Readers should take nothing from this approach beyond a belief in the need to present an object of inquiry in the most charitable spirit one knows how before critiquing it.

I begin by acknowledging my deep moral disagreement with liberalism as a system for constituting and regulating community. I've already argued that an effect of liberal constitutional imposition on Mikinaakominis is violence to indigenous lifeways, and I hope it's now clear how colonial violence to the roots of indigenous legalities may be translated upwards to indigenous law, suppressing and massively damaging it. Importantly, settler supremacy's violence to indigenous lifeways isn't a consequence of the regrettable policies of any particular elected administration or of the decisions of any bench of judicial appointees; I've argued rather that it's the consequence of the fact of Canadian liberal constitutionalism itself.

Yet my rejection of liberalism is based in more than its impact on indigenous peoples. By the midpoint of chapter seven, I've tried to establish that the philosophical core of liberalism is inherently violent to Earth, and thus to the conditions of life as such. This will doubtless strike some as an unmeasured and high-minded aspiration. I don't mean to be glib in offering it. I'm hopeful that although certainly not all will be persuaded by my argument, all might at least appreciate that I haven't spoken thoughtlessly even if I've done so wrongly.

Despite the profundity of my reservations, I appreciate why liberalism has a religious importance for so many. If we accept the dichotomy that persons must be either autonomous or heteronomous—self-ruled or ruled by others—I'd surely be a liberal too.²¹⁸ I see the devastation wrought by communism, fascism, and ethnonationalism in the 20th century and I see ethnonationalism's contemporary resurgence from within liberal communities. Yet the binary is false. For this reason, in addition to conventional academic charity, I try to present liberalism in the best light I can, and hopefully in a way that committed liberals may be willing to claim as their own. Of course, they'll be the judges of that.

Before starting to examine the liberal legality tree, I suspect two justificatory notes will be worth considering. The first seeks to justify the particularity of my approach to disclosing liberal legality. The story I proceed to tell heavily emphasizes individual autonomy, negative liberty, and contractarianism, and these may strike some as strange choices for a story intended to represent liberalism in its great diversity. I expect these choices will require some explanation if liberals are to bother with what I have to say. The second (and much shorter) justificatory note seeks to explain why a liberal legality story is of unique value to indigenous persons.

I'll begin the first note by simply acknowledging that there's great diversity internal to liberalism and ideas within liberalism thus vary considerably.²¹⁹ For this reason, no liberal is

²¹⁸ See Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press Limited, 2000) [Ignatieff, *The Rights Revolution*] at 23.

²¹⁹ See Christie, "Law, Theory and Aboriginal Peoples" at 74.

likely to feel *adequately* represented in this chapter. They aren't supposed to. The story I tell is far too thin. My purpose, rather, is to tell a story so general and minimalist that all liberals might agree that while it isn't their story, it *necessarily underlies* the story they would prefer to tell.

My emphasis on what necessarily underlies diverse liberalisms is critical, for without it one might read the story I tell as the story of classical liberalism. That would be a serious misreading. Classical liberalism distilled to its core commitment takes that it's *sufficient* for a just community to protect the self-determination of its members in only the thinnest sense: their negative liberty. My sense is that many, indeed a majority, of contemporary liberalisms don't share this view. However, I do think they all share a foundational (i.e. ECO-system) commitment to negative liberty. The difference, then, is as follows. Although my liberalism story emphasizes the individual autonomy of persons, negative liberty, and contractarianism—liberalism's belonging analytic (unpacked in the next section)—it does so on the understanding that these commitments are *necessary*, but depending on the liberalism at issue, *not necessarily sufficient* for a functioning liberal community.

We can look to communitarian²²⁰ and relational autonomy theorists²²¹—variant liberal schools of thought which many would argue differ most dramatically from classical liberalism—for evidence of the soundness of this view. In his famous essay, “Atomism”, Charles Taylor offers numerous formulations of the communitarian view of the constitutive nature of persons and of a correlate conception of freedom which has regard for one's need to belong to community.²²² One succinct such expression is “the free individual or autonomous moral agent can only achieve and maintain his identity in a certain type of culture”.²²³

Yet Taylor seems unequivocal that his intervention is meant to operate *in addition to*, not *in lieu of*, individual autonomy and negative liberty. For instance, he asserts “The greatest bigot or the narrowest xenophobe can ponder whether to have Dover sole or Wiener schnitzel for dinner. What is truly important is that one be able to exercise autonomy in the basic values of life, in one's most important commitments.”²²⁴ And likewise, “All choices are equally valid; but they must be *choices*. The view that makes freedom of choice this absolute is one that exalts choice as a human capacity. It carries with it the demands that we become beings capable of

²²⁰ A detailed exploration of the distinction between these two philosophical traditions is beyond the purview of this dissertation. A classic text canvassing the liberal-communitarian dialogue is Shlomo Avineri & Avner de-Shalit, eds, *Communitarianism and Individualism* (New York: OUP, 1996) [Avineri & de-Shalit, *Communitarianism and Individualism*]. Although I believe each of these thinker rejects the communitarian label, classic communitarian texts are taken to be Alasdair MacIntyre, *After Virtue*, 2nd Ed (Notre Dame: University of Notre Dame Press, 1984) [MacIntyre, *After Virtue*]; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: HUP, 1989), and Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

²²¹ A work of unique importance is Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Toronto: OUP, 2013) [Nedelsky, *Law's Relations*]. Other works include Catriona Mackenzie and Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: OUP, 2000); Jocelyn Downie and Jennifer J Llewellyn, eds, *Being relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012). Although he doesn't use the term ‘relational autonomy’ to characterize the political conception of indigenous collective self he argues for, it also seems to be the sense in which Borrows intends the term ‘interdependence’ in his argument for ‘autonomous and interdependent’ indigenous citizenship in Canada. See generally Borrows, *Recovering Canada* at ch 6. Specific usages can be found at pages 150, 152, 153, 157 and in the anecdote of the bird's nest at page 161.

²²² Charles Taylor, “Atomism” in *Philosophy and the Human Sciences: Philosophical Papers 2* (New York: CUP, 1999) ch 7 [Taylor, “Atomism”] at 191, 204, 205, 206, 207, 209.

²²³ *Ibid* at 205.

²²⁴ *Ibid* at 204.

choice, that we rise to the level of self-consciousness and autonomy where we can exercise choice”.²²⁵ As for the preservation of negative liberty, he adds “The kind of freedom valued by the protagonists of the primacy of rights, and indeed by many others of us as well, is a freedom by which men are capable of conceiving alternatives and arriving at a definition of what they really want, as well as discerning what commands their adherence of their allegiance.”²²⁶

In the result, Taylor’s communitarianism seems less a robust alternative to classical liberalism, and more a re-visioning of it which seeks to disclose and address what he regards as a critical absence in classical liberal thought (the necessity of community to individual autonomy), and thus to constrain its individualistic excess. In fact, the reason he would have preferred me to use ‘atomistic’ instead of ‘individualistic’ in my summation is precisely because his intervention aims to preserve the moral significance of individual autonomy; he just wants us to rethink its conditions of possibility and thereby to practise a politics which gives community its due.

Jeremy Webber’s work on the agonistic character of political community is also insightful here. His communitarian intervention targets the third aspect of liberalism’s belonging analytic, for which I’ve used the classical liberal language of contractarianism. Webber understandably rejects this term, preferring instead to use consent.²²⁷ And indeed, his attack on contractarianism is devastating. I’ll return to his terminological preference shortly, however first to my central purpose: Webber, too, seems to intend for his intervention to correct, and not to replace, classical liberalism’s commitments to individual autonomy and negative liberty.

Webber acknowledges that “The language of consent is popular precisely because it is widely accepted that political legitimacy does involve, in some measure, the will or adherence of the community’s members.”²²⁸ He likewise asserts that “At the very least, consent forces us to strive for individuals’ and groups’ willing adherence to community; it is not content with the sheer imposition of political authority”²²⁹ and that consent “draws our attention to the role of human agency in the constitution and preservation of political society.”²³⁰ Webber goes further still, recognizing also the powerful role of individual autonomy *in fact* in Canadian constitutionalism: “All the legal traditions represented on Canadian territory—Aboriginal, civil law and common law—have been shaped by conceptions of individual autonomy and, especially in Aboriginal legal orders, the autonomy of families, villages, clans and houses. A concern for individual freedom is woven in the very fabric of many areas of law”.²³¹

Relational autonomy theorists also seem committed to rehabilitating, and not replacing, individual autonomy and negative liberty. In her remarkable achievement, *Law’s Relations*, Jennifer Nedelsky says “It once mattered to me to sharply distinguish my relational approach from liberalism.”²³² She continues:

²²⁵ *Ibid* at 197.

²²⁶ *Ibid* at 204.

²²⁷ Jeremy Webber, “The Meanings of Consent” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) [Webber, “The Meanings of Consent”] 3.

²²⁸ *Ibid* at 25.

²²⁹ *Ibid* at 8.

²³⁰ *Ibid* at 8.

²³¹ Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Portland: Hart Publishing, 2015) at 176-177.

²³² Nedelsky, *Law’s Relations* at 86.

I can now see, however, that I share with most of Anglo-American liberalism a belief in the infinite and equal worth of every individual. The commitment to equality that underlies liberal theory (however contested its precise form) underlies my approach as well. So does the sense that the distinctness of each individual matters, and the value of each individual should never be subsumed under some aggregate—whether family, community, or nation.²³³

In another instance, she's perhaps even more direct about these retained commitments:

For most people raised in liberal societies, the deep attachment to freedom takes its meaning and value from the presupposition of humans' self-creating nature. That is freedom's deepest purpose: the institutions of freedom are for enabling that capacity (as well as for protection against violence). No one among the feminists or communitarians is prepared to abandon freedom as a value, nor, therefore, can any of us abandon the notion of a human capacity for creation in the shaping of one's life and self.²³⁴

It's important for our purpose of comparative legality to observe that for both of these traditions 'interdependence' means rehabilitating how one conceives of autonomy, rather than grounding the self in another concept entirely.²³⁵ They offer accounts of the self which strive to balance the value of self-rule they wish to preserve with the reality of social embeddedness they want to take seriously. On the one hand then, I want to defend the liberal story I tell by reference to decidedly non-classical liberalisms which seem nonetheless to share it (and which then have considerably more to say).

However in the case of Canada's unique liberal legality and its interaction with indigenous peoples, I also want to defend my minimalist liberalism story in respect of constitutional practice. In Canadian constitutionalism, negative liberty has been not only *retained*, but also *prioritized* over the unique constitutional interests of indigenous peoples.

I suspect that this relationship holds as against minority groups in Canada generally and thus that despite persuasive communitarian insistence on the theoretical co-primordiality of individuals and community, and of relational autonomy theorists' insistence on the constitutive nature of autonomous persons, group rights in Canada aren't justified this way in practice. Constitutional reality in Canada seems much closer to Michael Ignatieff's more conventional liberal view that "Communities are valuable to the degree that they articulate individual goals and aspirations, to the degree that they allow individuals to accomplish goals they could not accomplish alone. Group rights—to language, culture, religious expression, and land—are valuable to the degree that they enhance the freedom of individuals."²³⁶

James Tully is convinced this view holds as a general pattern. He presents a typology of four tiers of citizenship rights and duties that exist in modern liberal societies: (1) civil liberties; (2) liberties to participate; (3) social and economic rights; (4) minority (including indigenous) rights.²³⁷ He demonstrates how each tier is circumscribed by the "established priority"²³⁸ of those

²³³ *Ibid*; citation removed.

²³⁴ *Ibid* at 121. There are so many spots where Nedelsky acknowledges retention of these commitments. See for instance *ibid* at 7, 46, 55, 120-123, 123.

²³⁵ For a general comment on the communitarian case in this regard, see Paul van Seters, "Law, Society, and the Search for Community" in Robert A Kagan, Martin Krygier & Kenneth Winston, eds, *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Lanham: Rowman & Littlefield Publishers, Inc, 2002) ch 22 at 386-387.

²³⁶ Ignatieff, *The Rights Revolution* at 23-24.

²³⁷ Tully, *PPNK* 2 ch 9 at 250-255. See also James Tully, "Rethinking Human Rights and Enlightenment: A View from the Twenty-first Century" in Kate E Tunstall, ed, *Self-Evident Truths? Human Rights and the Enlightenment*

above it. Thus minority and indigenous rights, at the bottom of this ordinal ranking, are only given effect *in practise* to the extent that they don't push up against civil liberties—"the liberty of the moderns"—at the heart of which is "the modern liberty to participate in the economic sphere and not to be interfered with": negative liberty.²³⁹

Lacking Ignatieff's and Tully's sweeping knowledge of diverse, contemporary forms of liberalism, I constrain myself to the Canadian case.²⁴⁰ But I'm convinced that, at least vis-à-vis indigenous peoples, the criticism holds. And my point is just this: for the purposes of expecting internal consistency from Canadian liberalism—that is, to take Canadian liberalism seriously on its own terms—it's sufficient for the purposes of demonstrating the priority of negative liberty in Canada to have shown only that the ordinal ranking applies in the case of indigenous peoples.

To many, the Court's consistent and progressive liberalization of the section 35 jurisprudence is plain in the case law.²⁴¹ One of the most telling passages in Supreme Court reasoning is found in the Court's *Gladstone*²⁴² decision. Speaking for the Court, Lamer CJC deploys the justificatory force of liberalism's public-private divide (and by implication, the negative liberty of individual citizens) to constrain the application of aboriginal rights:

Because...distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable."²⁴³

Perhaps most importantly, the tension was squarely at issue in the *Kapp*²⁴⁴ case, in which the Supreme Court of Canada seems to have indirectly settled it in favour of negative liberty.²⁴⁵

For all of these reasons, it seems right to me to insist on the essential character of individual autonomy and of negative liberty for liberalisms generally and Canadian liberalism in particular, and thus to centre these ECO-system features in the minimalist liberalism story I tell.

With the discussion on individual autonomy and negative liberty concluded, I can finally return to my continued use of contractarianism, to round out this preliminary note explaining my presentation of liberalism's belonging analytic. Given (1) Webber's forceful critique of the viability of social contract as an account of consent, and (2) the fact that consent seems to be the more general way to cast the question of belonging in respect of individual autonomy (and that I wish to appeal to liberals across their diversity), some might wonder why I've continued to describe the third step of liberalism's belonging analytic as contractarianism.

(New York: Bloomsbury Academic, 2012) 3 at 16, where Tully suggests that freedoms guaranteed under international law instruments—including those of indigenous peoples *qua* indigenous peoples—are also subject to this ordinal ranking of kinds of rights.

²³⁸ *Ibid* at 254.

²³⁹ Tully, *PPNK* 2 ch 2 at 250-255.

²⁴⁰ Whether the ordinal ranking of rights holds against minorities generally in Canada is an investigation well beyond the ambit of my study, although I'm certainly interested in the answer.

²⁴¹ For a comprehensive analysis of this phenomenon, see Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: UTP, 2019).

²⁴² *R v Gladstone*, [1996] 2 SCR 723.

²⁴³ *Ibid* at para 73, affirmed in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 161.

²⁴⁴ *R v Kapp*, 2008 SCC 41.

²⁴⁵ *Ibid* at paras 64–65, [2008] 2 SCR 483. See especially Justice Bastarache's forceful dissent on precisely this point: *ibid* at paras 78, 109, 110.

The answer lies in what I take to a fatal defect in the alternatives put forward. Webber explains that for communitarian theories of consent, “‘consent’ is more amorphous, more grounded in practice or in history – not necessarily the product of a conscious, decisional exercise of the will.”²⁴⁶ He expands his meaning: “‘Communitarian theories’ see individuals and their communities as coexisting, as co-primordial if you will, and perceive ‘consent’ as inhering in a particular relationship between them.”²⁴⁷

What the account from shared history and practice fails to provide for consent is the *genesis* of political community. To the extent that the question of the ongoing justification of political authority can be separated from the justification of its original acquisition, it seems to me that the account of consent from shared history and practice is, as Webber argues, roundly superior to that of contract. However, there’s one group of community members for whom such a separation is impossible, for whom it stands as an unjustifiable conceit—and precisely on grounds of shared history and practice.

Indigenous peoples refuse to allow our own constitutional orders—including the unique histories and cultural practices they’ve empowered and sustained—to be erased from living memory. Indigenous and settler peoples living in what’s now called Canada haven’t always had a shared community and a shared language in which to disagree about cultural practice, and as I’ve sought to explain, in many ways we *still* don’t. Especially at the justificatory stage, this fact can’t be erased: *we do not consent*.

At least from my own indigenous standpoint, any effort to justify Canadian political authority without regard to the existence of already robust indigenous constitutional orders is a form of violence. I worry then that the specific sense in which communitarians mean community—a state which in some respect however thin reflects the consent of all—simply presumes constitutional capture as a *fait accompli*. Where indigenous peoples are involved, I’m concerned to understand how the argument for construing consent in respect of shared history and cultural practice gets going. I’m concerned, in particular, whether something like Tom Flanagan’s argument for prescription (long-continued possession—which Flanagan expressly acknowledges abandons its *moral* claim to justification)²⁴⁸ might play a role.

Thus I sustain the language of contractarianism, even though I fully accept each of Webber’s critiques of it, because it’s a form of consent which at least does indigenous peoples the honour of requiring (whether in fact or only in theory) a genesis point for settler political community. To be sure, it’s a point which we robustly reject—and, thereby, which insists that we be seen as the constitutional communities we are.

Now some may feel that having put the point so strongly, I’ve abandoned my stated mission of presenting the best and most open account of liberalism I can, and have instead allowed my interests in anti-colonialism to frame my account of *what liberalism is*. I certainly see that indigenous peoples benefit from construing liberalism’s foundations in the way I have. However, I take it as equally obvious that such an approach risks alienating liberals rather than enticing their agreement. It seems to me a *prima facie* losing strategy, which I hope thus warrants the charitable inference that I’m not trying to manipulate readers into agreement.

On the contrary, in identifying the challenge that indigenous peoples pose to consent, I’ve sought to advert to what I’ve long taken as the single most difficult problem liberals must face in

²⁴⁶ Webber, “The Meanings of Consent” at 12.

²⁴⁷ *Ibid.* See also *ibid* at 25.

²⁴⁸ Tom Flanagan, *First Nations? Second Thoughts*, 2nd Ed (Montreal: MQUP, 2008) [Flanagan, *First Nations? Second Thoughts*] at 60-61.

justifying liberal constitutionalism to *all* of its members. And this is just my point: liberals must face this challenge, else their accounts don't hold. Thus rather than presenting an account of liberalism which unabashedly serves my own interests, I'm trying to present a view of liberalism which serves the interests of committed liberals, by taking their view of political community seriously and on its own terms.

To my knowledge, contractarian liberalism is the only liberalism which mounts a serious attempt—an attempt which it can be said engages indigenous peoples as constitutional communities—to face the challenge of indigenous difference. Of course, the case must still be made that contract has in fact led to indigenous consent (which reality I deny), but on the contract account at least consent doesn't erase the fact of indigenous difference: we haven't always been one political community, and it's thus incumbent on Canadians to justify not only the ongoing exercise of their political sovereignty, but also how they acquired it.

Finally, for any liberals with misgivings about this distillation of their complex tradition, I take roughly the same approach with mutual aid in chapter six.²⁴⁹ One can best understand rooted legalities (like liberal ones) by apprehending the ECO-system logic which animates them and in particular, how the rooted belonging analytic shapes them across their diversity.

My second preliminary note is much shorter. A second justification for beginning with a particular take on liberalism's belonging analytic regards what value indigenous community members reading this dissertation might take from it. In ordinary discourse, many of us routinely deploy terms such as 'assimilation', 'colonization', and for some of the elders I know, 'white man's ways'; terms taken to imply structural and programmatic violation of indigenous autonomy and even the erasure of indigeneity as such. But I rarely—if ever—hear community members who aren't university students or graduates use the words 'liberal' or 'liberalism' in similar contexts, even though Canadian constitutionalism is a liberal iteration and Canada's current Prime Minister leads the Liberal Party of Canada.

I suspect the absence of these terms in ordinary indigenous discourse is evidence of a lack of understanding of the ideas and practices (and more foundationally, the ECO-system) they represent. I worry that this lacuna has a powerful and decidedly negative impact on indigenous legal and political projects today and on our ability to imagine how we might relate to settler Canadians beyond the status quo. If we wish to do so, we must first understand how liberalism works: recall, the imposition of liberal constitutionalism over already existing indigenous constitutionalisms is settler supremacy's third form of violence, violence to indigenous lifeways. Without understanding the terms of its operation, we'll only ever engage settler supremacy's violence to indigenous persons and peoples. To move beyond the status quo then, it's necessary but woefully insufficient to decry assimilation. Elder Harry Bone explains:

That is why I say, every time we deal with government, not only do we [have to] know our own history, our own languages but you also have to understand where the government is coming from. How their policy is created, how their laws were made, how their constitution was made, where were those things coming from. If you don't understand, there can never be balance or reconciliation, so you have to understand them as well; otherwise one group is going to dominate.²⁵⁰

²⁴⁹ I say only 'roughly' the same approach because in having to conceptualize it myself, I've sought the added focus of centring (looking closely, but importantly, not exclusively) on a particular indigenous people.

²⁵⁰ Elder Harry Bone 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) [Hyslop et al, *Dtantu Balai Betl Nahidei*] at 37; square bracket in original.

Thus I hope this dissertation might help to put ‘liberal’ and ‘liberalism’ in common circulation amongst interested indigenous community members. Insofar as that goes, clearly we don’t need to understand Dworkin, Rawls, Nussbaum, Kant, etc. We don’t need expertise in distinguishing between particular liberal visions; the goal isn’t to make community members into political theorists. We need a basic fluency in the liberal lifeworld and the attendant liberal legality that exercises such extraordinary control over our lives and our law. Without it, we might proceed to confront only the first and second of settler supremacy’s violences, and thus pursue a liberal vision of freedom even as we struggle to free ourselves from colonialism’s hold. For the limited but urgent purpose of understanding liberal lifeworld, a general and minimalist story that diverse liberals would accept is sufficient.

Here then is an attempted liberal mapping of the legality tree. I proceed through this story as discussed: through each of its four parts, roots to leaves.

a. Liberal Creationism

It will be prudent to begin by clarifying my notion of ‘liberal creationism’ as it’s a notion to which many liberals will surely object, and it hardly makes sense to begin by putting off folks I mean to persuade. As I’ve explained in the first preliminary note, the effectiveness of liberalism, by its own standards, turns on a deep commitment to negative liberty. The prospect of ‘liberal creationism’ may thus strike its adherents as a provocation. I don’t mean by this term to signify the presence of a narrative that imposes substantive commitments upon liberals generally. I mean, rather, that liberalism tells a story which makes meaning of the world, such that it becomes possible to place such heavy moral weight on one’s freedom from the interference of others. Liberalism has an ECO-system through which it operates.

Michael Sandel thus explains that liberalism “is something more than a set of regulative principles. It is also a view about the way the world is, and the way we move within it”²⁵¹ and he notes that it turns on a particular vision of persons.²⁵² The Royal Commission on Aboriginal Peoples likewise observed of Canadian constitutionalism that “The Charter is not a value-free document, however, but represents a particular vision of the relationship between the individual and governments”²⁵³ and “The Charter’s vision of the relationship between the individual and the collectivity is specific and relates to ideals that are not necessarily shared universally.”²⁵⁴

To assert that liberalism tells no story in *this* sense is to claim that it operates without a conception of persons, freedom, or belonging, which is simply incoherent. In speaking of liberal creationism, I honour the fact that liberalism *values* neutrality in a way that few if any other kinds of legality do, but it has no deeper claim *to* neutrality than does any other. Again, ECO-systems manifest difference at a foundational level, and cannot be justified except by reference to a creation narrative.

For the purposes of a study of legality, the salient ECO-system feature is the belonging analytic; I thus proceed through its three distinct components. At the centre of liberal lifeworld is a view of individual human autonomy as self-rule. Today we more commonly use ‘self-

²⁵¹ Michael J Sandel, “The Procedural Republic and the Unencumbered Self” (1984) 12:1 Political Theory 81 [Sandel, “The Procedural Republic and the Unencumbered Self”] at 83.

²⁵² *Ibid.*

²⁵³ Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Canada Communication Group, 1996) [RCAP, *Bridging the Cultural Divide*] at 258.

²⁵⁴ *Ibid.*

determination' and 'self-governance' to express this notion of having control over one's own ideas, actions and goals. The capacity for such control over one's self is said to presuppose a certain form of rationality. It emerged from the Enlightenment as a dominant epistemological paradigm in the West and in western ontologies it's frequently taken as a necessary condition for personhood. Only beings who *think* in the right way are able to form self-determined goals (for instance, because they require future-oriented representational states) and act in pursuit of their attainment. Those unable to do so are, from a conventional liberal standpoint, not rational. As such, they're incapable of the self-direction that autonomy requires.

Humans alone make the list. Other kinds of beings such as animals, plants, mountains, whirlwinds and the earth itself are thought to act only in accordance with their fear, hunger, instinct etc. (or are not considered agents at all) and are identified as non-persons. The fact that autonomy is intimately tied up in (indeed, is definitive of) the fundamental dignity of persons is one of its critical features. It's this fact which, all else being equal, makes it inviolable.

This foundational belief in the inviolability of the autonomy of persons structures the liberal vision of freedom, which is defined in respect of two principles. One is *liberty*, the capacity of persons for free choice, which I introduced in my first preliminary note. If autonomy is the state of possessing one's own thoughts and goals, liberty is the capacity to try to realize them in action. The other principle is *equality*: the principle that the autonomy of each member of the community is to be valued the same (which may or may not mean *treated* the same). When these two principles are respected, autonomy will be unimpaired, and persons, thus, free.

This vision of freedom in turn structures the liberal vision of belonging. Again, humans alone possess the form of rationality that permits free choice and which allows them to recognize the equal moral value of one another. All other orders of beings are non-autonomous and thus unfree, and perhaps more importantly, don't respect the autonomy of persons. For this reason, the world beyond political community is one of inherent disorder and lawlessness. Equally compelling, in a pre-political state (whether real or imagined), persons have no way of ensuring that each respects the autonomy of all. Persons who, by nature or by chance, find themselves with the ability to expand their own freedom at the expense of others', may do so.

Because of the problem of the inherent disorder and lawlessness of the world, liberals have powerful motivation to create and to sustain political communities. They wish to create the conditions that allow for *just* relationships. Justice, in this sense, means that the problem just identified is foregrounded: the autonomy of each will be secured against the actions of all, and transgressors will be made to account for their actions. The question of course is how to set up such a state of affairs.

The answer is conditioned by the liberal vision of freedom. The liberty principle requires that each person have a say, and the equality principle requires that what each says demonstrates the same value for the autonomy of all. If it doesn't, it fails the freedom test and is dismissed as antithetical to the purpose of political community: securing conditions of justice. The imperative to respect both of freedom's conditions renders the *logic* of the dialogue a kind of 'social contract': diverse community members share their respective views, as each tries to settle on terms that all can abide. It renders the *structure* of the ongoing dialogue as common *citizenship* within a *state*: each community member belongs in the same abstract way and to the same degree (citizenship) to the intentional, ideal community (the state) contracted into being. The critical feature of the 'contractarian' model of belonging is thus *consent*. Consent connects bargaining agency back through free choice all the way to the autonomous nature of persons. It reflects

liberty's "I choose" and equality's limit on one's choosing, respecting (and exercising) the self-rule of all citizens.

In this brief creation narrative, I've sought to draw out the liberal belonging analytic: the internal relationship between (1) the nature of persons (individually autonomous), (2) the nature of freedom (liberty + equality), and (3) the nature of belonging (contractarianism), which together constitute the salient features of the liberal lifeworld. I hope my story is sufficiently open and charitable to account for the broad spectrum of internal liberal difference and thus to earn the support of committed liberals. Beyond this minimalist story, liberals disagree on just about every point, and in each of the analytic's three components.

One perennial debate regards how autonomy works. Classical liberals have an atomistic conception of the self, individuals are only self-ruling under conditions of radical independence. All else being equal,²⁵⁵ every obligation to others or experience of power-over by others which hasn't been chosen impairs one's autonomy. I've already observed that this ontological view of individual selves has been challenged by various camps.

Freedom, too, presents fertile grounds for internal disagreement amongst liberals. A central debate regards how best to conceive of, or more softly, what to emphasize within, the liberty principle. Jeremy Bentham drew a distinction between 'positive' and 'negative' liberty, which was developed analytically by Isaiah Berlin.²⁵⁶ I've already introduced that negative liberty means freedom *from* the interference of others. Positive liberty means freedom *to* some good said to be necessary for self-rule. A second but equally central debate regards the equality principle, and it tracks a similar distinction. 'Formal' (or 'procedural') equality means that all community members must be *treated* the same. 'Substantive' equality requires only that all community members be afforded the same *consideration*. From such a standpoint, it will sometimes be the case—for instance, where some form of disadvantage exists—that individuals must be treated differently in order to be treated equally. A third, contentious debate regards disagreement over the relative weighting of the liberty and equality principles.

Liberals also disagree over how to think about the nature of belonging. The original line of 'contractarian' theorists told stories about humans contracting into political communities from an imagined state of nature.²⁵⁷ However as I've already indicated, today it's common for liberals to simply take political community as a given, and to instead seek justification only for the ongoing exercise of its authority. Thus some liberals aren't concerned with whether the social contract actually happened or whether it's merely a useful intellectual device for maintaining belonging.²⁵⁸ Others, like Webber, don't accept that contract is the right frame for belonging, whether in fact or in theory (although I've questioned how, in its absence, they purport to have obtained indigenous consent).

²⁵⁵ A second line of often contentious debate amongst liberals regards the moral agency of persons in contexts of impaired rationality, such that a person cannot direct his own thoughts and goals.

²⁵⁶ Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (OUP, 1969).

²⁵⁷ Thomas Hobbes and JCA Gaskin, ed, *Leviathan*, (New York: OUP, 2008); John Locke and CB Macpherson, ed, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, Inc, 1980); Jean Jacques Rousseau, *On the Social Contract* in Donald A Cress, trans, *The Basic Political Writings* (Indianapolis: Hackett Publishing Company, Inc, 1987) 141.

²⁵⁸ John Rawls expressly disclaimed telling such a story (Rawls, *A Theory of Justice* at 10, 14) but was clear that his theory of justice is based on the notion of contract: *ibid* at xii, xviii, 10, 14 (and in many other places throughout). He replied to critics that his contractarian revival is "political not metaphysical". John Rawls, "Justice as Fairness: Political not Metaphysical" (1985) 14:3 *Philosophy & Public Affairs* 223.

I hope this digression into internal liberal difference serves to reinforce my central point. These wide-ranging internal disagreements between diverse kinds of liberals presuppose a minimalist ECO-system starting point, liberalism's belonging analytic, which informs all of them. Now we turn to how it shapes liberal thought about constitutionalism.

b. Liberal Constitutionalism

To apprehend a constitutional order one must understand its logic. For liberal communities, that logic is of a social contract. Thus in a liberal constitutional context, the constitutional logic analytic (again, *extension* → *reception* → *response*) takes the particular form of *offer* → *acceptance* → *internal correspondence*. 'Offer' refers to the moment when each member says (or is imagined to have said) to the others, "I will consent to form/sustain a political community with you on the following conditions". 'Acceptance' refers to the moment when each accepts (or is imagined to have accepted) the terms of the others, consenting to enter the community negotiated for.

The third step is absolutely critical: the consent of each is offered *for* the consent of all, hence *internal correspondence*. Consent reflects an internal relation—a correlation of *direct reciprocity*—between offer and acceptance.²⁵⁹ The internal nature of the exchange will condition the liberal conception of law: it's why obligations stand correlative to rights, and thus obligation-bearers in a relation of direct reciprocity to right-bearers.

As a species of contract, liberal political community is a standing agreement between community members. There are literally 'terms' of union and especially in our contemporary era, they're increasingly formalized in a written document externalized as 'a' constitution. The notion of constitution-as-contract has the unique quality of having always provisionally *settled* the question of how community members belong to one another²⁶⁰ ('provisionally' because of the perennial questions of interpretation and amendment). Because of the resulting stakes, interpretive debates are often rancorous. This provisional closedness is the constitutional point in a line certainty follows throughout liberal legality, from the inviolability of individual autonomy up to the conception of law-as-rules.

The next question is what kind of structure a contractarian constitutional logic renders community. Since liberalism is the dominant constitutional tradition in the western world today, many scholars have explained and analyzed far more effectively than I ever could.²⁶¹ I proceed then simply to identify some of the most critical structural features. These include: the state as the form of political community and the separation of its powers into executive, legislative, and judicial branches of government; citizenship as the abstract and merely stipulated quality of belonging the state ascribes to its members; a sovereign who serves as the state's executive head and administrator and who serves as the will of the citizenry. This limit on the sovereign's agency, which precludes self-serving and arbitrary action, is secured by the rule of law.

Critically, the three branches of state government are vested with the sole and specifically *coercive* authority necessary to ensure compliance with the terms of union. Citizens are forbidden from enacting justice themselves. The state may impair the autonomy of non-

²⁵⁹ Lon L Fuller, *The Morality of Law*, revised ed (New Haven, CT: YUP, 1969) [Fuller, *The Morality of Law*] at 23.

²⁶⁰ Tully, *Strange Multiplicity* at 135.

²⁶¹ Like many students I learned about liberalism in a piecemeal way. As points of entry, I found introductory readers helpful before moving onto the texts of individual authors' comprehensive treatments. Two helpful starting points were Avineri & de-Shalit, *Communitarianism and Individualism* and John Christman, *Social and Political Philosophy: A Contemporary Introduction*, 2nd Ed (Routledge: 2017) (I read the first edition, from 2002).

compliant citizens through monetary penalties, through injunctions or prohibitions curtailing their freedom to act in particular ways, and in more serious cases, even through incarceration. In some liberal societies, the sovereign's monopoly on violence includes the authority to impose death on citizens for flagrant violations of the contract.

Another important feature of liberal communities is that the dialogue between citizen and state is structured as democracy. Recall the vital role that consent plays in constituting liberal political community. Through the freedom of citizens to vote and to run for office, the consent of the governed is given contemporary effect. Indeed, some liberals might say that representative democracy is the perpetual present tense of consent, although it isn't without its challenges. Perhaps the best known is the risk of majoritarian rule that representative democracy runs. The high potential for the non-regard of minority citizens' interests is one of the reasons that liberal democracies concern themselves with checks and balances. One way this is done is by vesting rights directly in citizenship (I expand upon the notion of 'rights' in the law section below).

Finally, a definitive feature of both the logic and the structure of liberal constitutional orders implicit in the foregoing is a carefully policed public-private sphere divide meant to safeguard the conditions of belonging the contractees-become-citizens consented to (or are imagined to have done).

The sphere of public autonomy consists of governance and community life, and accordingly disallows both sovereign and citizen actions which would violate the negative liberty of any citizen. Since conceptions of the good are legion, governments must exercise extraordinary caution when they bring substance into public life. Classical liberalism takes a categorical stance on this worry, requiring (in theory, if not in practice) that substantive law be abjured from public life; its public sphere's field of action is constrained to procedure. Public proceduralism is frequently supported with a constitutional statement of citizens' fundamental rights and freedoms as against their governments.

Conversely, in the sphere of citizens' private lives, substantive freedom reigns. The private autonomy of each leaves her free to pursue whichever goals she takes to be good (the liberty principle), subject to the limit that the realization of those goals not impair the negative liberty of any other citizen (the equality principle).

Constitutional guarantees of private substantive freedom are supported by robust contract and property regimes. Together these have empowered a sense of competition and progress which liberals frequently claim with great pride, and extraordinary emphasis is placed on private autonomy today. Indeed, many have discursively marked a constitutional shift, beginning in the 1980s, from what seems to them to be the ascendance of the private autonomy of persons in the 'developed' (formerly, 'first') world over the public autonomy of persons in the 'developing' (formerly, 'third') world as the *neoliberal* era. This discursive shift attempts to track the fact that Liberalism's robust tradition of private autonomy has allowed that corporations are persons, and then through trade deals enabled by legal reforms, has empowered the spread of corporate action (and concomitantly, of soft governance) globally.²⁶² I don't know anybody who contends today that governance is exhausted by formal (public) governmental action.

²⁶² The gentle way I've put my point here may raise the eyebrows of some. To be sure, I'm deeply critical of this turn in the liberal world order and of the entire teleological discourse of 'development' which serves to justify it. However the purpose of this exercise is to enable comparative legality, and that goal is best served if, as far as is possible, I avoid engaging in critique as I describe it.

We find this set of structural features reflected in the Canadian constitutional context.²⁶³ The *Constitution Act, 1867*²⁶⁴ presents the architecture of a state: an intention to form government²⁶⁵; its separation into executive, legislative, and judicial branches²⁶⁶; the power for the sovereign to tax and collect revenues from citizens in order to exercise these functions²⁶⁷ and a federalist division of powers.²⁶⁸ The Canadian state is democratic, providing for elected (i.e. responsible) parliamentary government over established electoral divisions.²⁶⁹

Part I of the *Constitution Act, 1982*,²⁷⁰ the *Canadian Charter of Rights and Freedoms*, sets out the great public-private divide, establishing procedural protections in the form of a statement of citizens' fundamental rights and freedoms. The liberty principle is given effect through fundamental freedoms,²⁷¹ democratic rights,²⁷² mobility rights²⁷³ and legal rights.²⁷⁴ The equality principle is also given constitutional status.²⁷⁵ The Supreme Court of Canada has openly referred to the *Charter* (or perhaps to Canadian constitutionalism generally after the advent of the *Charter*) as "the new social contract".²⁷⁶

Canada also protects the private autonomy of its citizens by way of unwritten constitutional conventions. It has inherited the (albeit now heavily modified) common law of Britain and the British tradition of the rule of law.²⁷⁷ As a result of this genealogy, contract is a centrally important device in organizing and fulfilling Canadians' private lives, and property and contract law regimes (now frequently statutory) work together to create a robust legal infrastructure for free markets, all of which has private autonomy at its centre.

Some may accept all of this, but nonetheless object to my claim that this structure reflects the contractarian constitutional model I've outlined insofar as Canadian constitutionalism affords unique rights to particular groups of persons. They may point to the *Constitution Act, 1982*'s provision for official language rights,²⁷⁸ minority education rights,²⁷⁹ and to the entirety of Part

²⁶³ In addition to the foregoing, there's an excellent discussion on the constitutional structure of Canadian liberalism in *Reference Re Secession of Quebec* [1998] 2 SCR 217 at paras. 49-82.

²⁶⁴ *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.

²⁶⁵ *Ibid* at preambular paragraphs 1, 3.

²⁶⁶ *Constitution Act, 1867* at Part III ("Executive Power"), Part IV ("Legislative Power"), and Part VII ("Judicature").

²⁶⁷ *Constitution Act, 1867* at s 53, Part VII ("Revenues; Debts; Assets; Taxation").

²⁶⁸ *Constitution Act, 1867* at the initial Whereas clause, at s 17, at Part V ("Provincial Constitutions") and Part VI ("Distribution of Legislative Powers").

²⁶⁹ *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 at s 40 and adjoining schedules.

²⁷⁰ *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["CCRF"].

²⁷¹ *Constitution Act, 1982* at s 2.

²⁷² *Ibid* at ss 3-5.

²⁷³ *Ibid* at s 6.

²⁷⁴ *Ibid* at ss 7-14.

²⁷⁵ *Ibid* at s15.

²⁷⁶ *Vriend v Alberta*, [1998] 1 SCR 493 at para 135 (Iacobucci J writing for the majority).

²⁷⁷ In *Re Manitoba Language Rights*, [1985] 1 SCR 721 the Court observed that "The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power." *Ibid* at 748. The Court continued, "Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life." *Ibid* at 749.

²⁷⁸ *Ibid* at ss 16-22.

²⁷⁹ *Ibid* at s 23.

II, *Rights of the Aboriginal Peoples of Canada*²⁸⁰ as evidence that Canada has wrongly privileged the positive liberty of some over the negative liberty of others. They might also highlight the “four foundational constitutional principles” the SCC identified in the *Quebec Secession Reference*²⁸¹: “federalism, democracy, constitutionalism and the rule of law, and respect for minority rights”²⁸² (emphasis added) in support of such an argument.

The soft response to this line of critique is that one can construe autonomy such that it depends on community for its realization. Reasonable persons could thus consent to allow for carefully circumscribed substantive difference in public life, bringing this view in line with contractarian orthodoxy. Will Kymlicka’s arguments in this vein have been influential in the Canadian context.²⁸³ However the far more damning response is James Tully’s argument already canvassed that *in practice* minority and indigenous rights are prohibited from impairing the negative liberty interests of Canadians generally. Thus while Canada certainly isn’t *classically* liberal, Canadian constitutionalism easily fits within the broad, inclusive liberal story I’ve told.

c. Liberal Legal Traditions

Recall that by ‘legal traditions’ I mean the assemblage of processes and institutions a society uses to generate or adopt, interpret and modify, and destroy law. For liberal communities, as for all others, the constitutional order beneath both empowers (legitimizes and presents conceptual resources for) and constrains (limits what counts as legitimate processes and institutions, and the field of possible action for any given process or institution) a legal tradition.

Today there are two dominant legal traditions, common law and civil law, within the liberal world. They have distinct genealogies which have resulted in distinctive procedural and institutional differences. However, they aren’t freestanding and we must consider them in the context of the legality tree that holds them. In contemporary liberal democracies the creative potential of these ancient and powerful lineages has been constrained by the interpretive boundaries of liberal constitutionalism. Gordon Christie explains:

When we turn our gaze to the law in Canada we witness an institution built on a bedrock of liberal values and principles, with legal theorizing, both descriptive and internally prescriptive, centred around liberalism. This is understandable, given that Canada is a liberal democracy. But liberal values and principles are so pervasive and all-encompassing they often escape attention: descriptive theorists fail to acknowledge that the law they aim to describe promotes liberal ideals and principles, and prescriptive theorists, by and large, begin with a liberal stance, calling the law into question on the basis of its fit with their particular articulation of liberalism.

Concepts of rights, freedom and autonomy are so all-pervasive it can be said that the political morality of liberalism supplies the language of everyday legal discourse.²⁸⁴

²⁸⁰ *Constitution Act, 1982*, at Part II.

²⁸¹ *Reference Re Secession of Quebec* [1998] 2 SCR 217.

²⁸² *Ibid* at para. 49. See also paras 32, 55-82.

²⁸³ Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press, 1989) [Kymlicka, *Liberalism, Community and Culture*]; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1996) [Kymlicka, *Multicultural Citizenship*] 84.

²⁸⁴ Christie, “Law, Theory and Aboriginal Peoples” at 72; citation removed.

Tully, too, has carefully shown how today these legal traditions are circumscribed by liberal (or what in his more expansive framing he calls ‘modern’) constitutionalism.²⁸⁵ The relevance for our purpose is that the arc of liberal legality travels across common law and civil law differences.

In liberal societies, legal traditions reflect the constitutional separation of powers. The legislative branch of government draft bills which must survive debate between elected officials before becoming law. Legislatures have the advantage of carefully and methodically drafting laws to meet particular aims. Conversely, the judicial branch of government is by nature reactive. In the common law tradition, courts develop case law, constrained by interpretive doctrines, in response to individual matters coming before them. Both legislative and judicial actors hail from a class of professional elites (jurists), whose training begins with formal legal education.

The executive branch of government includes all administrative proceedings and decision-making: the work of tribunals and ministerial decisions, including the creation of regulations as enabled by legislative acts. The democratic principle allows for robust civil society action. Citizens are free to engage the executive order directly for legal action or for legal reform through protests, letter-writing, meetings with their representative in government, etc. However, direct action has its limits. Police officers, crown (or state) prosecutors, bailiffs, and others are the aspect of the executive branch empowered to exercise violence over citizens, where necessary, to enforce conformity with the terms of union.

Finally, that formal legal education serves as a condition of possibility for legislative and judicial action means that law schools should be regarded as a vital component of the liberal constellation of legal traditions.

For a liberal legal tradition to function in accord with the contractarian constitutionalism authorizing it, it must operate *impartially*. Those occupying the legal institutions and running the legal processes of a liberal legality are expected to conform to the impartiality standard. Judges²⁸⁶ and administrative decision-makers who fail to do so are called activist; elected officials who fail to do so are accused of cronyism and conflicts of office; police officers who fail to do so are accused of racial and other forms of profiling; legislators and legal educators who unduly privilege or oppress members of identifiable communities are also accused of bias.

Because of how closely the Canadian context reflects this account of liberal legal traditions, there’s just one point that merits mention and it has already been raised. Canada consists of both a common law tradition inherited from Britain and existing throughout Canada, and a civil law tradition inherited from New France, which governs private law matters in the province of Québec. Despite considerable overlap in processes and institutions, there remain important differences between them.²⁸⁷ Yet these differences are manageable for the reason that each legal tradition’s operability is constrained by their shared constitutional order beneath.

d. A Liberal Conception of Law

Each kind of liberal legal process and institution has a form of legal expression unique to itself. Legislatures produce bills which may become acts; courts produce decisions which become case law; ministers make executive decisions and direct the drafting of regulations, while tribunals produce decisions. In each case, law is paradigmatically expressed as *rules*. Lon Fuller famously

²⁸⁵ Tully, *Strange Multiplicity* at 36-37.

²⁸⁶ Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006) ch 3.

²⁸⁷ Rosalie Jukier, “The Impact of Legal Traditions on Quebec Procedural Law: Lessons From Quebec’s New Code of Civil Procedure” (2015) 93:1 Canadian Bar Review 211.

defined law as “the enterprise of subjecting human conduct to rules.”²⁸⁸ That law should *mean* rules is generally taken today as axiomatic, even though one might insist that law isn’t *just* rules, and emphasizes instead legal reasoning, legal process, and human relationships.²⁸⁹

There’s good reason for this. Rules have particular qualities which certainty-privileging societies require. First, law *must* have the abstract and generalized form of rules if it’s to respect the consent conditions which make liberal political community possible. Abstraction and generality are what a morally autonomous self, a contractarian constitutionalism and an impartial legal tradition require. If law were expressed in a concrete and particularized form—which is to say, if law were deeply substantive—then many wouldn’t see their agreement reflected within it and those whose negative liberty was adversely affected by the substantive imposition would be right to challenge its legitimacy.

Second, at least in their classic form rules are disjunctive. Ronald Dworkin explains: “Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”²⁹⁰ In some instances, notably with respect to legislative acts and regulations, rules simply serve the end of efficient social coordination. The example of which side of the road all are to drive on is famously given.²⁹¹ However in all cases where the freedom of persons is at stake (in respect of either its liberty or equality conditions), rules take the unique form of *rights*. Rights regard freedom in that they represent interests to which persons are *entitled*. A person might be deserving of certain entitlements by virtue of her status as a person, as a citizen, or because it’s the very thing she has bargained for, but in all cases, a right gives effect to the notion of *desert* internal to her autonomy.²⁹²

Rights thus apply the disjunctive quality of rules to the dignity of persons. This is why Michael Ignatieff says “Codes of rights are about defining the minimum conditions for any life at all.”²⁹³ While liberal legal theorists differ in their ideas about *which* conceptions of liberty and

²⁸⁸ Fuller, *The Morality of Law* at 74. It wasn’t always so. Observe the stark contrast with Malinowski in his study of Trobriand law: “The true problem is not to study how human life submits to rules—it simply does not; the real problem is how the rules become adapted to life.” Malinowski, *Crime and Custom* at 127.

²⁸⁹ See generally, Roderick Alexander MacDonald, “Everyday Life and Everyday Law” in *Lessons of Everyday Life* (Montreal & Kingston: MQUP, 2002) at 3-12. MacDonald famously drew attention to the implicit law of everyday social contexts. However, he was unequivocal that even here he has in mind law-as-rules, the project of which is justice. Thus he saw law as “a regime of rules and relationships”; as “the means of relationships discovered and nurtured under a just framework of rules.” *Ibid* at 12.

²⁹⁰ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: HUP, 1978) [Dworkin, *Taking Rights Seriously*] at 24.

²⁹¹ Dworkin, *Law’s Empire* at 145.

²⁹² Group rights would seem to complicate this claim. However even though groups aren’t persons, group rights operate through the conventional *logic* of individual rights. *This logic is what I mean to emphasize*. Consider aboriginal rights in Canada’s constitution. The case law establishes that aboriginal rights are vested in unique aboriginal groups, *understood as autonomous units*. Rights-claims sourced in these rights present as demands upon all others (whether settler society, the Crown, or other aboriginal groups) in the usual way, and these others bear direct reciprocal duties in the usual way. Where aboriginal rights might impose upon duty-bearers in a way the law considers unusual, the doctrine of infringement intervenes and limits the right. This doctrine develops progressively in *R v Sparrow*, [1990] 1 SCR 1075; *R v Van der Peet*; *R v Gladstone* [1996] 2 SCR 723, and *Delgamuukw v British Columbia* [1997] 3 SCR 1010. Additionally, it’s not only *possible*, but is *ordinarily the case* that an aboriginal rights-claim issues through the action of individual members of the group holding it, *acting in their individual capacity*. One is hard pressed not to draw the inference that individuals of the group are bearers of the right.

A second complication is that liberal systems of law distinguish between ontological persons and fictive legal ‘persons’, such that entities like corporations acquire the legal capacities of persons. Here again however, although the *identity* of the bearer isn’t an individual human, the *logic* of the claim proceeds as if it were.

²⁹³ Ignatieff, *The Rights Revolution* at 22.

equality best protect those minimum conditions (and thus how to construe rights), they generally agree *that* the relevant conditions are those which safeguard the dignity of autonomous persons. As such, a rights-claim doesn't request or invite; it demands.²⁹⁴ Others receive these demands (whether for action or inaction) as corresponding obligations. Alisdair MacIntyre explains:

the claim that I have a right to do or have something is a quite different type of claim from the claim that I need or want or will be benefited by something. From the first—if it is the only relevant consideration—it follows that others ought not to interfere with my attempts to do or have whatever it is, whether it is for my own good or not. From the second it does not. And it makes no difference what kind of good or benefit is at issue.²⁹⁵

From an outsider's perspective, demand may seem a perverse normative language, but it doesn't want for internal integrity. Since all autonomous persons (humans, citizens, contractees, etc.) are rights-bearers, all share equally in the culture of reciprocal demand. Note how strongly that integrity is tied into normative *certainty*. Because it has the form of a demand, if successful, rights claims trump competing claims of other sorts, establishing their normative dominance and with it, relative certainty.²⁹⁶ Again, the corollary to a right isn't an informal responsibility that prompts consideration, but a formal obligation that compels compliance.

Finally, the direction of a duty-bearer's compliance tracks the third feature of liberalism's constitutional logic analytic, internal correspondence. All else being equal, the immanence of the relation between right-bearer and duty-bearer requires that if you impose upon my autonomy, the remedy law provides will inure to me: the reciprocity that unites obligations with rights is not only mandatory, but also *direct*. For reasons beyond the scope of this dissertation to canvass, the situation differs for criminal harms. Yet criminal cases nonetheless observe a principle of direct reciprocity. The 'debt' incurred through criminal wrongdoing is 'repaid' to society and not to the victim, because it's society generally which is said to have received injury from it.

The work law expects of citizens then is to respect rules, whether mandatory or permissive. Of course, while rights-claims are oriented to certainty, they don't guarantee it in any

²⁹⁴ Tom L Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy*, Third Ed (United States: McGraw-Hill, 2001) at 265.

²⁹⁵ MacIntyre, *After Virtue* at 67.

²⁹⁶ Dworkin, *Taking Rights Seriously* at xi. See also Leif Wenar, "Rights as Trumps" (9 September 2015), online: *Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/entries/rights/#5.1>> at s 5.1, "Rights as Trumps". The account of rights-as-trumps is contested. See Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (OUP, 2011) ch 2 ("Rights as Trumps and the Quest for Certainty"). The adequacy of the account of rights-as-trumps is challenged on multiple grounds—as too ineffective, as counter-majoritarian and thus anti-democratic, or as representative of an atomistic individuality that fails to account for the social constitution of the self and thus which fundamentally misunderstands the subjectivity of rights-bearers. Yet as a rule, none of these challenges appears to seriously question the trump as the *nature* of rights' claims amongst those who continue to prefer or defend its privileged status amongst forms of normative claim. A notable exception (doubtless, there are others) is the four-step rights-claim analytic presented by relational autonomy theorist Jennifer Nedelsky. For her refutation of rights-as-trumps, see Nedelsky, "Reconceiving Rights as Relationship" (1993) 1:1 *Review of Constitutional Studies* 1 at 7-11, and Nedelsky, *Law's Relations* at 244-247.

More salient, however, is that as routine normative practice, rights are invoked as intended trumps by citizens in liberal democracies like Canada. Courts daily vindicate litigants who have proceeded in their case on a belief that, in Dworkin's words, "a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them." Dworkin, *Taking Rights Seriously* at xi. That is, the negative liberty of persons serves as a trump on policy goals. As Nedelsky insists, in the Canadian case, s. 1 of the *CCRF* must be acknowledged as a limit on the trump-authority of individual autonomy, but it's rarely invoked in practice.

particular instance. In cases where conflict arises from the purported impossibility of rule compliance and in cases of disagreement over the proper interpretation of what compliance requires, the work of law (at this point, ordinarily offloaded to a class of professional elites) is to favorably characterize prevailing rule understandings and then to match the facts at issue to a favorable interpretation. While a court may modify the relevant framework of expectations going forward, it will decide the immediate matter in one party's favour; certainty will prevail.

At the level of leaves, Canada is a model of liberal legality. It accepts the Fullerian notion that law *means* subjection to rules,²⁹⁷ even if they're rules which (for instance) provide for mandatory mediation of the conflict at issue instead of its direct resolution through a rule-driven and rule-settled adversarial process. Further, Canada articulates some of those rules, arguably the most important ones, as rights. For instance, the Supreme Court has said:

In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *Big M Drug Mart Ltd.*, *supra*, at p. 336.²⁹⁸

That concludes my liberal legality story. My study was as brief as possible, because I engaged liberal legality only for instrumental reasons. I hope that if readers found the legality they know faithfully represented through the legality tree, they might be better able to appreciate the legality of rooted communities mapped through the same metaphor. I'm also hopeful that this exercise might help to make the terms 'liberal' and 'liberalism' more accessible to indigenous community members. With these efforts completed, I now turn to my considerably more detailed exploration of rooted legalities.

²⁹⁷ *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 750.

²⁹⁸ *R v Van der Peet* at para 18.

6. Rooted Legalities

This chapter is the heart of my dissertation. It proceeds as the previous chapter, except that owing to the dearth of research giving indigenous law a close analytical treatment, I've put far more into it.²⁹⁹ No introduction could meaningfully represent its sweeping 125 pages. Rather, I offer a brief introduction at the beginning of each of the four parts of the rooted legality tree it canvasses, so readers don't lose the forest in such a close examination of the tree.

Anishinaabe elder Harry Bone says "We are all part of the land and we are responsible for the land. Our histories and connection to the land define us as people. The Elders shared stories about our relationships, responsibilities, and movement on the land."³⁰⁰ In this section I develop a way of thinking about law which centres humanity and law immanently *within* the land above, below, and all around us. This radically different way of imagining law can also be articulated through the legality tree. While the roots, trunk, branches and leaves differ considerably from those of the liberal legality tree just explored, the relationship of progressive empowerment and constraint between each part remains the same. However, the nature of legitimacy changes: rooted law, to be legitimate, must be reconcilable to a different sort of legal tradition, a different sort of constitutional order, and a different sort of creation story. If this section succeeds in its aims, it should eliminate the pretense of the universal legalities fallacy.

In examining rooted legality, I focus heavily on my own people, the Anishinaabeg. Such a focus is important because rooted legalities differ from one another, too. However I also frequently draw examples from other indigenous legalities, to represent the breadth of reach of rooted legality.³⁰¹ In doing so, I'm not claiming that rooted constitutionalism is workable for other indigenous communities (although I hope the cumulative force of these many examples suggests such a possibility). More work is needed here and I hope this dissertation invites it.

Finally, as I develop my account of rooted legality, I do my best to attend to Borrows' "Challenges and Opportunities in recognizing Indigenous Legal Traditions".³⁰² These are matters of extraordinary importance for work in this field; nobody wanting to take indigenous law seriously may ignore them. In introducing the legality tree I've already spoken at length to legitimacy, which serves as its framing device. As I proceed, I take up Borrows' remaining concerns, which regard the equality, accessibility, intelligibility and applicability of indigenous (in my case, more generally 'rooted') law.³⁰³

²⁹⁹ One truly remarkable work is Williams, *Kayanerenkó:wa*. Another is James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, 2006) ch 4.

³⁰⁰ Harry Bone (Giizis-Inini) in 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) [Linklater et al, *Ka'esi Wahkotumahk Aski*] at 57.

³⁰¹ I've so often heard elders reflect, as Patronella Johnston does, that:

Among the different tribes, the ceremony varies, but it has the same meaning. Similarities of thought and belief give Indians from all over North America a feeling of kinship with one another. Where I work we have many different kinds of native people, but to each other we are all "native people." There is no separation into Cree, or Micmac, or Ojibwa, or Mohawk. It doesn't matter. Rosamond M Vanderburgh, *I am Nokomis, Too: The Biography of Verna Patronella Johnston* (Don Mills, ON: General Publishing Co Limited, 1977) [Vanderburgh, *I am Nokomis, Too*] at 188.

See also Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (North York: UTP, 2009) [Alfred, *Wasáse*] at 250.

³⁰² Borrows, *CIC* at ch 6.

³⁰³ *Ibid* at 138.

a. Rooted Creationism

The first part of this section provides the ECO-system context for an Anishinaabe belonging analytic. It draws out the relationship between three key concepts. The first of these is *miinigowiziwin*, the notion that Creator's bestowal of sacred gifts to each being renders an order inherent in creation. Communities which flourish do so because they apprehend and follow its logic. I call this insight the 'humility thesis'. It's what enables a transition from Creator's ordering of earth community through sacred gifts to a much more general (and even mundane) practice of gift-ordering—a giftway—in which humans feature centrally.

The second part of this section focuses on the rooted belonging analytic, in which persons are 'radically interdependent', freedom takes the form of 'co-creativity', and persons belong to one another through 'mutual aid'. Two preliminary points are worth mentioning. The first is to draw attention to the particular ways in which each aspect of the analytic is internally related to the next, and how the end point, mutual aid, likewise sets up the constitutional logic analytic in the next section. The second point is simply for readers to go slow. Rather than building backwards from my western legal education, this is an effort to truly build a rooted (and in particular, Anishinaabe) law analytics 'from the ground up'. For readers unfamiliar with the centrality of gifts to indigenous legality, it may be an adjustment.

i. *Miinigowiziwin* and Creation's Order

At the root of every indigenous account of creation I know is a deep sense of cosmological giftedness.³⁰⁴ Our creation stories present all that creation holds as a gift worthy of our respect, in need of our gratitude. Gifts are the base elements from which creation grows³⁰⁵; it's in a literal sense that we may say "we live in a world made of gifts".³⁰⁶ I suspect that every indigenous society has a way of describing the gift-ordering of the world,³⁰⁷ often attributed to the Creator fulfilling its vision.³⁰⁸ For the Anishinaabeg, it's *miinigowiziwin*.³⁰⁹ Elder Dave Courchene, of

³⁰⁴ Ignatia Broker, *Night Flying Woman: An Ojibway Narrative* (St. Paul: Borealis Books, 1983) [Broker, *Night Flying Woman*] at 54; Linda LeGarde Grover, *Onigamiising: Seasons of an Ojibwe Year* (Minneapolis: University of Minnesota Press, 2017) [Grover, *Onigamiising*] at 142; Harold Cardinal & Walter Hilderbrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2010) [Cardinal & Hilderbrandt, *Treaty Elders of Saskatchewan*] at 10-12; Williams, *Kayanerenkó:wa* at 31; NWAC, "Native Women's Association of Canada" (1989) 10:2/3 Canadian Woman Studies 133 [NWAC, "Native Women's Association of Canada"] at 134.

³⁰⁵ Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) [Johnston, *Ojibway Heritage*] at 11-12

³⁰⁶ Robin Kimmerer, "Returning the Gift" (2014) 7:2 Minding Nature 18 [Kimmerer, "Returning the Gift"].

³⁰⁷ Umek, *Tsawalk* at 39; Cardinal & Hilderbrandt, *Treaty Elders of Saskatchewan* at 10-11, 78; Williams, *Kayanerenkó:wa* at 10; Rauna Kuokkanen, "Láhi and Attáldat: The Philosophy of the Gift and Sami Education" (2005) 34 J Indigenous Educ 20.

³⁰⁸ Johnston, *Ojibway Heritage* at 12; George Copway, *Recollections of a Forest Life or, the Life and Travels of Kah-ge-gah-bowh* (London: C. Gilpin, 5, Bishopsgate Street Without, 1851) at 4-5; Elder Doris Pratt in Linklater et al, *Ka'esi Wahnkotumahk Aski* at 109; Thomas Peacock and Marlene Wisuri, *Ojibwe Waasa Inaabida: We Look In All Directions* (Minnesota Historical Society Press, 2002) [Peacock & Wisuri, *Ojibwe Waasa Inaabida*] at 74; Gidigaa Migizi (Doug Williams), *Michi Saagiig Nishnaabeg: This Is Our Territory* (Winnipeg: Arbeiter Ring Publishing, 2018) [Gidigaa Migizi, *Michi Saagiig Nishnaabeg*] at 13.

³⁰⁹ The elders Council of Weechi-it-te-win Family Services gives "Miinigoziwin" (the same word in another dialect) as "a spiritual gift from Creator." Elders Council of Weechi-it-te-win Family Services with Sherry Copenace, *Cultural Protocols Booklet: Inakonigewin (Sacred and Spiritual Instructions, Laws)* (Weechi-it-te-win

Sagkeeng First Nation, explains “There’s a word that we use in our language that refers to gift. And they say, ‘*miinigowiziwin*’. ‘*Miinigowiziwin*’ means that each and every one of you have been given and been blessed with a gift that has come from the higher source of power, that our people have always acknowledged, and we say ‘the Great Spirit’ and ‘the Great Mystery’.”³¹⁰

When I asked nokomis about it, she explained that *miinigowiziwin* refers to gifts that come from the Creator, and that “We have been given all the gifts that we need for life.”³¹¹ Grandmother Sherry Copenace, of the Ojibways of Onigaming, also shared this teaching with me. In offering her understanding of “the gifts we’ve been given as Anishinaabe peoples”,³¹² she said her great uncle taught her “everything you need to know is here.”³¹³ Another elder in my circle is from Mitaanjigamiing, a nearby community on Koojijing Zaaga’igan. He shared that the Creator gifted each unique people with different things and different ways to follow, and that this is part of *miinigowiziwin*.³¹⁴ On other occasions, he has said *miinigowiziwin* means “all that Creator gave you”³¹⁵ and “something given to you either by the elders or some people will say it’s spirit that gives it to you.”³¹⁶ His reference to elders seems to fit with the interpretive role assigned to elders in a comment elder Harry Bone offered on *miinigowiziwin*:

Miinigowiziwin covers all of the gifts given by creator. This includes land, culture, language, values, teachings and history. Miinigowiziwin is the word that the Elders used when discussing the laws the Creator gave to the people. What we have been given is the interpretation. These laws and original instructions are gifts from the Creator on how to live in harmony and balance with all other creation.³¹⁷

That last sentence reveals the inherent order and lawfulness that characterizes rooted accounts of creation, which, in a legal casting, we can thus revise as *creation’s order*.³¹⁸ Many

Family Services, 2019) [Elders Council with Copenace, *Cultural Protocols Booklet*] at 12. Even for so serious a topic, Anishinaabeg often deploy humour in their pedagogies. I adore elder Anna C Gibbs’ / Waasabiikwe’iban’s approach to teaching about *miinigowiziwin* in her story, “The Legend of the Turtle”. See Anna C Gibbs, “Enaadizookaazod Mikinaak” / “The Legend of the Turtle” (2010) 7:2 Oshkaabewis Native J 82. [Gibbs, “The Legend of the Turtle”].

³¹⁰ Dave Courchene Jr, Address at A Town Hall for Environmental Law, The Legitimacy Project: Building Better Environmental Laws, Centennial Hall, University of Winnipeg, 9 November 2016) [Courchene, Address at A Town Hall for Environmental Law].

³¹¹ Teaching of elder Bessie Mainville (25 October 2015) Couchiching First Nation [Elder Bessie Mainville (25 October 2015)]. Maureen Matthews, too, defines “miinigoowizi” as “Be bestowed a divine gift.” Maureen Matthews, *Naamiwan’s Drum: The Story of a Contested Repatriation of Anishinaabe Artefacts* (Toronto: UTP, 2016) [Matthews, *Naamiwan’s Drum*] at 272; see also 259. Hallowell’s informant, Kīwītē, appears to use the concept when he says, “God (Mānitu) was the creator and owner of everything, of all that we see growing. We must thank him for life (*pinadaziwin*). He loves us and will help us.” A Irving Hallowell, *The Spirits of the Dead in Salteaux Life and Thought* (London: Royal Anthropological Institute of Great Britain and Ireland, 1940) at 41 (emphasis in original; Hallowell’s “*pinadaziwin*” is the same word I represent as ‘bimaadiziwin’).

³¹² Grandmother Sherry Copenace (24 June 2018).

³¹³ *Ibid.*

³¹⁴ Teaching of anonymous elder #1 (6 June 2016) Mitaanjigamiing First Nation. The sense of the word as Scott Richard Lyons received it from elder George Goggeye has a similar sense. See Lyons, *X-Marks* at 86-87.

³¹⁵ Teaching of anonymous elder #1 (25 October 2015) Mitaanjigamiing First Nation.

³¹⁶ Teaching of anonymous elder #1 (6 July 2015) via telephone.

³¹⁷ Pratt et al, *Untuwe Pi Kin He* at 27. There’s a beautiful correspondence between elder Bone’s explanation of *miinigowiziwin* here and Sara Mainville’s in Sara Mainville, “Treaty Councils and Mutual Reconciliation Under Section 35” (2007) 6:1 Indigenous LJ 141 [Mainville, “Treaty Councils and Mutual Reconciliation”] at 177.

³¹⁸ See also Williams, *Kayanerenkó:wa* at xi, 344.

indigenous people describe one kind of indigenous law³¹⁹ as original instructions.³²⁰ This kind of indigenous law is often called sacred, spiritual, eternal, or Creator's law, the great law, etc.³²¹ To the sacred bestowal of gifts expressed in '*miinigowiziwin*', it adds the injunction to know and to

³¹⁹ John Borrows presented a highly influential typology of indigenous law in Borrows, *CIC* ch 2. It includes an account of sacred and natural law. Borrows identifies an extensive list of examples of sources of indigenous law in Kegedonce, *Drawing Out Law* at xii-xiv, and in Borrows, "Heroes" at 821-823.

³²⁰ 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; Oren Lyons, "Spirituality, Equality, and Natural Law" in Leroy Little Bear, Menno Boldt & J Anthony Long, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: UTP, 1989) 5 [Lyons, "Spirituality, Equality, and Natural Law"] at 6; Harry Bone et al, *The Journey of the Spirit of the Red Man: A Message From the Elders* (Trafford Publishing, 2012) [Bone et al, *The Journey of the Spirit of the Red Man*] at 19, 20; Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 98-101; Borrows, *CIC* at 242; Hill, *The Clay We Are Made Of* at 23; Deborah McGregor, "Honouring Our Relations: An Anishinaabe Perspective on Environmental Justice" in Julian Agyeman et al, eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) [McGregor, "Honouring Our Relations"] at 32; Aimée Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)" in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2018) 53 [Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi"] at 59.

³²¹ Teaching of elder Harry Bone (16 June 2018) Winnipeg, Manitoba [Elder Harry Bone (16 June 2018)] (speaking of sacred law and natural law); Johnston, *Ojibway Heritage* at 13 (speaking of "The Great Laws of Nature"); Randy Councillor with Art Przybilla, *Ojibwe Tales: Stories of the Ojibwe People* (Jacksonville, IL: 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 2014) (teaching about "*Enendegwad*, the Law of the Orders"); Courchene, Address at A Town Hall for Environmental Law (explaining "Ogichi Tibaakonigewin, the Great Binding Law of the Great Spirit"); 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) [Kelly, "Reconciling Sovereignties"] (teaching about four orders of law, near the foundation of which is "*Kagakiwe Inaakonigewin*" or sacred law); Fred Kelly in *Restoule v Canada*, Transcript of elder Fred Kelly at 2933-2935 (again teaching about "Kaagigiwe Inaakonigewin"); Leon Jourdain, "Pazaga'owin / Reclaiming Our Wings: Transition to Nationhood (Kenora: Grand Council Treaty #3, 2000 [unpublished]) [Jourdain, "Pazaga'owin"] at 15 (referring to the "Sacred Law of the Creator" and "Eternal Law"); Sylvia McAdam / Saysewahum, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (Saskatoon: Purich, 2015) [Saysewahum, *Nationhood Interrupted*] at 38 (explaining that "*manitow wiyinikêwini* means Creator's laws"; emphasis in original); Harry Bone (Giizis-Inini) in Hyslop et al, *Dtantu Balai Betl Nahidei* at 19, 173, 175 (teaching of "*Gagiige-Onaakkonigewinan* (eternal law)" as the foundation of law); Fred Kelly in James Cote, Elmer Courchene and William G Lathlin with contributions by the Council of Elders, *Gakina Gidagwi'igoomin Anishinaabewiyang — We Are All Treaty People: Treaty Elders' Teachings Volume 4* (Treaty Relations Commission of Manitoba & Assembly of Manitoba Chiefs Secretariat, 2016) [Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang*] at 41-43, 45, 48, speaking of "Manidoo inaakonigewin", translated into English text as "Creator's law"; 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> [Oshoshko Bineshiikwe et al, "Ogichi Tibakonigaywin"]; Bone et al, *The Journey of the Spirit of the Red Man* at 20 ("Laws of Creator"; "Great Binding Law"); Aimée Craft, *Anishinaabe Nibi Inaakonigewin Report* (University of Manitoba Centre for Human Rights Research and Public Interest Law Centre, 2014) [Craft, *Anishinaabe Nibi Inaakonigewin Report*] at 12-14 (expressing several formulations); Sylvia McAdam (Saysewahum), *Cultural Teachings: First Nations Protocols and Methodologies* (Saskatoon: Saskatchewan Indian Cultural Centre, 2009) [Saysewahum, *Cultural Teachings*] at 8; Pratt et al, *Untuwe Pi Kin He* at 32-33 (Nehetho elder D'Arcy Linklater sharing "Kihche'othasowewin—the Great Law of the Creator"); Osennotion and Skonaganleh:rá, "Our World" (1989) 10:2-3 Canadian Woman Studies 7 [Osennotion and Skonaganleh:rá, "Our World"] at 11 ("We have a law that came from the creator"; the KAIANERE'KO:WA"; "the Great Law of Peace"); Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi" (throughout).

use the gifts given.³²² Giizis, the sun, is perhaps the clearest exemplar: our Grandfather rises and follows his arc each day, offering life-giving light and warmth. His work is a shining example of *natural law*, which is how most of Creation takes up sacred law.³²³ It refers to the fact that the non-human orders of Creation (plants, animals, swimmers, moon, mountains, prairies, rivers, etc.) know and follow their original instructions: they share their gifts.³²⁴ Natural law is the grounding with which the Anishinabek Nation (the PTO) opened its 1980 declaration: “The Creator placed all things on this Island. He directed that we should all live together in harmony. The birds, the fish, the animals and the plants, like ourselves, shared to survive.”³²⁵

Clearly, ‘law’ in the sense of an injunction to know and to use the sacred gifts one has been given isn’t ‘law’ in what will for many readers be the more familiar sense of provisionally determinate norms. From a liberal standpoint, the word ‘law’ in the sacred and natural senses here deployed is improper because it’s too vague to proscribe behaviour. Perhaps unsurprisingly, the elders seem to deploy sacred and natural ‘law’ more in the sense of the epigram to this chapter: a path one is to follow.³²⁶ Anishinaabe elders from Manitoba say, “The First Nations in Manitoba have a unique understanding of the world that is based on the concept of giftedness—*miinigoowiziwin*. Our people know that an individual is in the right place, in the right time, for the right reason, and that he or she is gifted with purpose. You are taught how to use these gifts by the Creator over time.”³²⁷ That’s to say, *miinigowiziwin*’s sacred gifting *is* a path. The important thing to know, then, is how to walk it.

³²² Observe the speeches of Oshawana and Petrokeshig in Denys Delâge, Helen Hornbeck Tanner & Pierre Chazelle, “The Ojibwa-Jesuit Debate at Walpole Island, 1844” (1994) 41:2 *Ethnohistory* 295 [Delâge et al, “The Ojibwa-Jesuit Debate at Walpole Island, 1844”]; Linda Akan, “Pimosatamowin Sikaw Kakeequaywin: Walking and Talking—a Saulteaux Elder’s View of Native Education” (1999) 23:1 *Can J Native Educ* 16 at 18.

³²³ See Oren Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights” in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: UTP, 1988) [Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights”] 19; Cote et al, *Gakina Gidagwi’igoomin Anishinaabewiyang* at 57 (Dakota elder Doris Pratt, Duzahan Mani Win, speaking); Grand Council of Treaty No. 9, “Grand Council of Treaty no. 9” (1981) 4:5 *Ontario Indian* 20 [Grand Council of Treaty No. 9, “Grand Council of Treaty no. 9”] at 20. I note the disagreement of Henderson, Benson & Findlay, who take a strictly phenomenological view of natural law: the Mikmaw “sacred order is not a cosmological order; it is the result of millennia of field observations and direct experience by their ancestors.” James (Sákéj) Youngblood Henderson, Marjorie L Benson & Isobel M Findlay, eds, *Aboriginal Tenure in the Constitution of Canada* (Carswell Thomson Professional Publishing, 2000) [Henderson, Benson & Findlay, eds, *Aboriginal Tenure in the Constitution of Canada*] at 413.

³²⁴ See Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights” at 20. Anna C Gibbs story cited above about Mikinaak (the snapping turtle) is focussed on just this point. At the time of creation, Mikinaak declines every gift Creator offers, saying he wouldn’t make use of it. Finally, Creator bestows a passive gift on Mikinaak—the gift of foresight, which explains Mikinaak’s role in the jiisikaan (shake tent). Gibbs, “The Legend of the Turtle”.

³²⁵ Union of Ontario Indians, “From the Anishinabek (the Ojibway, Ottawa, Potawatomi and Algonquin Nations) To the Parliament of the Dominion of Canada” (December 1980) 3:12 *Ontario Indian* 18 [Union of Ontario Indians, “To the Parliament of the Dominion of Canada”] at 19.

³²⁶ In sharing his pipe teaching with me, elder Harry Bone did just that. He described the first of the pipe’s seven directions, sacred law, as a path to the Creator. Teaching of elder Harry Bone (8 January 2017) Winnipeg, Manitoba [Elder Harry Bone (8 January 2017)]. I note also that Haudenosaunee scholars Susan Hill and Paul Williams both describe the Great Law of Peace as a path one is to follow. See, respectively, Hill, *The Clay We Are Made of* at 289 and Williams, *Kayanerenkó:wa* at 1, 266.

³²⁷ Pratt et al, *Untuwe Pi Kin He* at 41. This is the understanding shared with me by my elders in the Boundary Waters area. The divine bestowal of gifts *miinigowiziwin* refers to are accompanied by responsibility, namely the responsibility to learn to use the gifts in a good way. This can be overwhelming! In the context of dreams, Nehetho elder D’Arcy Linklater says “Sometimes the young people get scared by these gifts but it is because they do not understand that the gift was passed to them by the Creator and their ancestors. We need to remind them that they

1. The Humility Thesis and the Giftway

Nokomis says “That’s what I heard growing up, ‘when you got a gift, pass it on.’”³²⁸ Walking the path of *miinigowiziwin* means that from the cosmic order of sacred gifts creation provides, we draw out a general ethos of giftedness for our daily lives. This means that in addition to our sacred gifts and unique gifts, we share our often-ordinary gifts of knowledge, skill, labour, and material goods.³²⁹ It means centring gift as a *way* of being in the world: of walking a *giftway*.

I’ve often heard elders describe how we may do so in either of two ways. Some present their understandings in terms of Creator (centring sacred law), while others centre Earth in their teachings (and thus natural law). But since natural law flows directly from sacred law, there are no analytical stakes in one’s preference; while each presents a different emphasis, they’re really just different ways of saying the same thing.

Consider the first approach, which we might call *Creator’s way*. Turtle Lodge elders share their understanding that “*Kizhay Manitou* gave all of us gifts to share with each other, to take care of the Earth and all life”.³³⁰ Anishisinaabekwe scholar Dr. Linda LeGarde Grover similarly explains: “We understand that everything in our lives has been provided by the Creator, that these blessings have made us rich, *and that of course the Creator wants us in turn to be generous with each other.*”³³¹ Basil Johnston emphasizes the cultural normalization of this latter point, saying “No finer tribute could have been paid to anyone than to have said of them, ‘He is a kind man,’ ‘She is a kind woman,’ for offering to the widow food, to the stranger shelter, and to the unwell medicine and care.”³³²

This Creator-modelled, open-generosity way of walking through life is what Anishinaabeg call *kizhewaatziiwin*. Grandmother Sherry Copenace shared with me that:

They say all of our values, all of our ways of being are within the circle of *gizhewaatziiwin*. It could be that *gizhewaatziiwin* is to be a being of love, kindness, compassion, all of that. And that could be, maybe you being caring, maybe sharing, respectful, humble, all of those, all of that,

have gifts to help the people, help the land, help creation, and they should not be scared.” Linklater et al, *Ka’esi Wahkotumahk Aski* at 11. Such an understanding necessarily builds in a role for individual agency.

For another perspective, see Matthews, *Naamiwan’s Drum*. Matthews was given a different understanding about the relation between divine gifting and appropriate action at the right time. She defines “*Miinigoowizi*” as “divine gift bestowed, divine intervention in one’s destiny”, and explains that “In the discussion about volition, -*goowizi* is used within a verb to convey the idea that I was being used by a divine power and was not in fact capable of initiating any actions outside this carefully managed destiny as follows: *gii-inenimigoowizi ji-noojitood o’owe*, **gifted by divine power with sufficient standing** to do something at the crucial moment. To underline this implication about the actual source of power, they would use a metaphorical construction, saying that *mii a’awe aabajichigan*, he/she (animate) is the tool (animate), a collaborator but not at all in charge.” *Ibid* at 260; emphases (both italic and bold script) in original.

³²⁸ Teaching of elder Bessie Mainville (19 October 2016) via telephone.

³²⁹ See for instance ³²⁹ Oren Lyons, “Our Mother Earth” in Barry McDonald, ed, *Seeing God Everywhere: Essays on Nature and the Sacred* (World Wisdom, Inc, 2003) ch 6 [Lyons, “Our Mother Earth”] at 105.

³³⁰ Oshoshko Bineshiikwe et al, “Ogichi Tibakonigaywin”.

³³¹ Grover, *Onigamiising* at 142; emphasis added. Elder Fred Kelly offers a similar message, saying that the knowledge upon which his credibility as an elder turns is “intended for other people, not for self-aggrandizement, not for my own self-conceit, but to give to other people. That is what the whole thing is all about in terms of the sacred law”. *Restoule v Canada*, Transcript of elder Fred Kelly at 2908.

³³² Johnston, “Think Indian” at 186. See also Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights” at 22.

when you're expressing *gizhewaatiziwin*. And it goes right back to that spiritual being named Gizhe Manido.³³³

Nokomis' explanation of *kizhewaatiziwin* was remarkably similar. She strongly emphasized love in the specific sense of kindness and sharing.³³⁴ Then she offered a longer explanation:

Gizhe'aatiziwin is tender loving kindness no matter who it is. You're brought up that way, to be kind to other people, and listen and listen carefully. So I guess by someone recognizing the person as a kind, good, sharing person. So in turn you try to be...you do want to return the favour, that kindness has been shown to you. You show that you care. You take time to listen. Take time to talk about things. I guess that's what comes to mind when I hear that word.³³⁵

Elder Fred Kelly also teaches about "'Kizhewaadiziwin', the way of the Creator"³³⁶, which "includes the seven grandfather teachings, the seven laws of creation",³³⁷ one of which is love. However elder Kelly pointedly clarifies that "I don't mean love here in the English romantic sense. I am talking about love in the sense of connection, the attachment to one another as human beings, and also kindness, being kind to other peoples, and sharing, sharing with other peoples, sharing what we have got, to the extent that we can give."³³⁸ Basil Johnston, too, seems to have this meaning in mind. For him, "Gizhaudiziwin" means "Kindness, generosity, benevolence, charity, from Gizhauh - warm".³³⁹ Finally, for elder Dave Courchene "*Kizhay Ottiziwin*" means:

To be a living being of kindness. To be a living being that walks and lives a peaceful way of life. To have *kizhay ottiziwin* is to be able to live, and to act, and to express yourself from the heart. *Kizhay ottiziwin*. *Kizhay ottiziwin* is rooted from the word 'Kizhay Manito', which means the creator. So essentially, when we talk about *kizhay ottiziwin* is that we are to walk in the spirit of the Creator.³⁴⁰

³³³ Grandmother Sherry Copenace (24 June 2018).

³³⁴ I think it's common for Anishinaabeg, at least from the Boundary Waters, to construe love in respect of sharing and giving as opposed to an overwhelming sense of positive emotion directed at some object. For instance, two of my community members explain that "Love – *zaagi-idiwin* – *zheewenidiwin* is to care and cooperate well with others. Love is working toward harmony through kindness and sharing." Estelle Simard & Shannon Blight, "Developing a Culturally Restorative Approach to Aboriginal Child and Youth Development: Transitions to Adulthood" (2011) 6:1 First Peoples Child & Family Rev 28 at 37. In much the same vein, Basil Johnston taught Borrows "that love, like a river, should carry sustenance. It should continually flow to sustain those around us. Its currents should be strong and lay down layers of nourishment, as the forces of life course through us and strengthen others. He said that love is about the free flow of support to others, which should be strongest where it meets others. It allows us to fortify those who gather around us." John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) ch 2 [Borrows, "Earth-Bound"] at 54.

³³⁵ Teaching of elder Bessie Mainville (4 July 2018) Couchiching First Nation [Elder Bessie Mainville (4 July 2018)].

³³⁶ *Restoule v Canada*, Transcript of elder Fred Kelly at 2867, 2934.

³³⁷ *Ibid* at 2916.

³³⁸ *Ibid*. On the first page of the glossary referenced at 2803 and 2945 as Exhibit K, Elder Kelly defines "Kizhewadiziwin" as "generosity".

³³⁹ Basil Johnston, *Ojibway Language Lexicon for Beginners* (Ottawa: Minister of Indian and Northern Affairs Canada, 1978) [Johnston, *Ojibway Language Lexicon*] at 63.

³⁴⁰ Dave Courchene, "Kizhay Ottiziwin" (26 January 2016), online: *CBC Unreserved* <<http://www.cbc.ca/player/play/2682653573>>. Speaking at greater length, elder Courchene explained to me that: You take the teaching that we have that's expressed by the eagle, *gizhe'aatiziwin*. You know, like Gizhe Manitoo—*gizhe'aatiziwin*. What that is rooted in is Gizhe Manitoo. That we have, must reflect and be like

The other way to think of the giftway is in the more proximate sense of the earth and of natural law. In this way of thinking, in following the giftway we mimic the earth.³⁴¹ Elder Harry Bone explains that “*Kihche’othasowewin* (natural law) was provided to us to ensure that we continue to act in accordance with our environment.”³⁴² This is also a central point in much of John Borrows’ scholarship.³⁴³ In a characteristic passage, he says “Anishinabek law also has force when it accords with the earth’s biological rhythms and where individuals and communities recognize and abide by its order.”³⁴⁴ This earth mimesis means that in addition to ‘Creator’s way’, the giftway can also be called *the earthway*. Marie Battiste and James (Sa’ke’j) Youngblood Henderson describe it when they say that indigenous “knowledge is the expression of the vibrant relationships between the people, their ecosystems, and the other living beings and spirits that share their lands. These multilayered relationships are the basis for maintaining social, economic, and diplomatic relationships—through sharing—with other peoples.”³⁴⁵

Thus I contend that ‘Creator’s way’, ‘the earthway’ and ‘the giftway’, are terms which may be used interchangeably. Anishinaabe elder Lawrence Smith voices the dynamic I’ve heard so many elders share when he says “It’s the Creator’s gift, the land, and the resources of this land. He gave us those gifts to use, from the universe to our Mother Earth and the water that flows around her.”³⁴⁶ I use all three formulations throughout this dissertation, but I tend to prefer speaking of *creation’s way*, because I think it necessarily refers both to Creator and to Earth. In taking elder Smith’s point, when I use ‘creation’, I mean to centre neither on Creator, nor on earth, but rather on the link between them: the relation of Creator-through-earth. There are so

the Great Spirit is. To bring love into this world. Because we were all given that sacred responsibility as humanity. Every human being at the beginning of their own creation and being allowed to walk on the earth. That was an agreement that the elders say we made with the Creator when the Creator said, ‘help me, as human beings, to bring fulfillment to the vision I had of life.’ And we say, well, what is that? ‘I want you to bring love into the world that I’ve created. That’s your duty and responsibility.’ Teaching of elder Dave Courchene Jr (24 February 2018) Sagkeeng First Nation [Elder Dave Courchene Jr (24 February 2018)].

At another point in our conversation, elder Courchene framed his teaching of *kizhewaadiziwin* in respect of kindness (at still another point not reproduced here, he drew out the relationship between love and kindness): “And my grandmother had said, and I always tried to honour that teaching... ‘You must live your life in kindness’, she said, ‘because that is how you’ll enjoy life. That is how you’ll receive the benefits of life itself, by showing kindness. Even to those who judge you, even to those who gossip about you, even those that condemn you’, she said.’ ... ‘Ignore that, and learn to be yourself. Walk the steps of kindness.’” *Ibid.*

³⁴¹ Among the best studies of this notion I’ve seen is Kiera L Ladner, “Governing Within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance” (2003) 70 *Studies in Political Economy* 125 [Ladner, “Governing Within an Ecological Context”]. See also Williams, *Kayanerenkó:wa* at 132-133; Simpson, *Dancing on Our Turtle’s Back* at 91.

³⁴² Hyslop et al, *Dtantu Balai Betl Nahidei* at 173; italic script in original. See also Linklater et al, *Ka’esi Wahkotumahk Aski* at 48, 123 (elder Harry Bone speaking).

³⁴³ See for instance, Borrows, *Freedom & Indigenous Constitutionalism* at 221, n 45; John Borrows, “Outsider Education: Indigenous Law and Land-based Learning” (2016) 33:1 *Windsor YB Access Just 1* [Borrows, “Outsider Education”] at 13.

³⁴⁴ Borrows, *CIC* at 240. My sense is that the “also” in this passage signifies Borrows’ view that the earth is but one source of Anishinaabe (and generally, indigenous) law, and not an essential aspect of its underlying framework: *ibid* at 28 (more generally see 28-35).

³⁴⁵ Marie Battiste and James (Sa’ke’j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd., 2008) [Battiste and Henderson, *Protecting Indigenous Knowledge and Heritage*] at 42. See also Henderson, Benson & Findlay, eds, *Aboriginal Tenure in the Constitution of Canada* at 406, and Simpson, “Land as Pedagogy”.

³⁴⁶ Linklater et al, *Ka’esi Wahkotumahk Aski* at 13.

many examples of elders drawing out this relationship.³⁴⁷ Perhaps the clearest expression I know comes from Turtle Lodge's *Great Binding Law*: "Kizhay Manitou put spirit in Mother Earth and all of life. We come from the spirit world and flow through the Earth. We will all return to the spirit world and to the Earth when our journey on Earth has been completed."³⁴⁸ However one represents law in the sense of the giftway, the central point is that one is necessarily describing how to walk within the order inherent in creation.

I call the injunction to live within creation's order the *humility thesis*. It's the link empowering us to make the move from *miinigowiziwin*'s specific, sacred gifts to the general and ordinary gifts constitutive of creation's way. Stan McKay, a Fisher River Cree, expresses it beautifully when he says "Living on the earth in harmony with the creation, and therefore the Creator, means moving in the rhythm of the creation. It means vibrating to the pulse of life in a natural way without having to 'own' the source of the music."³⁴⁹ In one of my favorite sentences ever written, healer Ron Geyshick explained his apprehension of this point: "It was the thunderbird who told me not to be a winner".³⁵⁰ This teaching transformed Geyshick's outlook on individual accomplishment, such that looking back on his life, he could say:

So I never cared what I did to put bread on the table. When I was a young boy growing up, we survived by trapping. Then I worked as a dock boy for a while. I worked on construction, building cottages for five seasons. And I was a guide for nineteen years, until ten years ago, when I got the job as Caretaker at the elementary school. It didn't matter to me at all what I did to feed my family.³⁵¹

While Geyshick was blessed with particular sacred gifts as a healer, here he's describing a general *way of life* he adopted, the giftway, in which he committed himself to offering up much more mundane gifts, like his labour, to meet his family's needs. Elder Ed Onabigon voiced the same commitment when he said "It shows me that I'm on the right track when I can make a difference in people's lives ... just caring for people and sharing with them, sharing whatever I have with them that'll help to make their day."³⁵²

On a community scale, not needing to own Creation's music means that rather than choosing an ideal (such as justice) around which to organize ourselves as political community,

³⁴⁷ For instance, elder Dave Courchene explains that "The most that we can do is feel in our heart the greatness of this Great Spirit. And we feel it! And how do we feel it? We feel it through the land. Because everything that is on the land is an expression of this unconditional love that our Great Spirit is. In the most simple and profound way, our elders encourage us and say 'if you want to hug the Creator, go and hug a tree.' And that is a profound truth." Courchene, Address at a Town Hall for Environmental Law. Elder Ken Courchene says "But that is what I depend on what was left to us by the one who is in charge of us, the Creator. Where we believe in; *where life flows from this garden from the Creator*." Pratt et al, *Untuwe Pi Kin He* at 28. Stan McKay says "We understand that the Great Spirit moves through all of life, and is the 'Cosmic Order.' 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: House of Anansi Press, 1992) [McKay, "Calling Creation into Our Family"] at 29, 31. See also Anishinaabe elder Francis Nepinak, Giiwedinanang, in *ibid* at 84, and Anishinaabe elder Ezra Bouchie in Hyslop et al, *Dtantu Balai Betl Nahidei* at 167-168.

³⁴⁸ Oshoshko Bineshiikwe et al, "Ogichi Tibakonigaywin".

³⁴⁹ McKay, "Calling Creation into Our Family" 28, 31.

³⁵⁰ Ron Geyshick, "About Winning" in Ron Geyshick with Judith Doyle, *Stories of An Ojibway Healer: Te Bwe Win / Truth* (Toronto: Impulse Editions, 1989) 157 [Geyshick, "About Winning"] at 157.

³⁵¹ *Ibid* at 158.

³⁵² Edward Onabigon, "Elder's Comments" in Roger Neil, ed, *Voice of the Drum: Indigenous Education and Culture* (Brandon, MB: Kingfisher, 2000) 282 [Onabigon, "Elder's Comments"] at 283; ellipsis in original.

rooted societies strive simply to fit into the lawful, ordered, earth community which always already is.³⁵³ For greater certainty, constituting community as a reproduction of the earthway in which one is immanently rooted means annihilating any pretense of a nature/culture divide.³⁵⁴

I found many formulations of this point. For elder Fred Kelly, “that’s why the Anishinaabeg were following the Creator’s law. He did not follow his own creation, like that king and the king’s employees”.³⁵⁵ For Nehetho Elder D’Arcy Linklater, “our role is not to subdue but to learn how to interact so that we can try our best to accommodate (nuheputhehiwewin) ourselves to the existing relationships and the interdependence. According to our Nehetho world view mankind’s interests are not to be placed above those of any other part of creation.”³⁵⁶ For chief Potts, “The earth grows and we grow from it”.³⁵⁷ For Borrows, “at a primary level human society is a subset of the ecosphere.”³⁵⁸ A fuller articulation of the earthway reproduction point, one which presages how earthway reproduction informs rooted constitutionalism, is offered by Oren Lyons, who says that indigenous peoples:

survived by recognizing, then adjusting to the rhythms of the lands and waters where they live. They survived by learning from the life there and fitting into and coexisting with the life there, with respect and gratitude. Taking only what they needed and sharing what they had. They became part of the symbiotic relationships that formed the community of life that is the base of procreation.³⁵⁹

Still others have been sure to specify that indigenous earthway reproduction includes indigenous law.³⁶⁰ For instance, elder Harry Bone states that “Our laws don’t separate nature from law”³⁶¹ and Peter Kulchyski, Don McCaskill, and David Newhouse explain their understanding that “human law is a reflection of natural law, and all the structures, customs, and ways of life of Aboriginal society grew out of this central understanding.”³⁶²

Scott Richard Lyons draws the central ideas of this section together in a tightly knit argument about Anishinaabe ‘culture’. Lyons argues a nature/culture divide hasn’t developed for Anishinaabeg for the reason that *Anishinaabemowin* contains no such concept as culture.³⁶³ The words which from an English perspective might most obviously be taken to speak of culture all

³⁵³ Peacock & Wisuri, *Ojibwe Waasa Inaabida* at 74; Stark & Stark, “Nenabozho Goes Fishing” at 18; Gespe’gewa’gi Mi’gmawei Mawiom, *Nta’tugwaqanminen* at 68.

³⁵⁴ Dennis H McPherson & J Douglas Rabb, *Indian From the Inside: A Study in Ethno-metaphysics*, Occasional Paper #14 (Thunder Bay: Centre for Northern Studies, Lakehead University, 1993) [McPherson & Rabb, *Indian From the Inside*] at 100.

³⁵⁵ Cote et al, *Gakina Gidagwi’igoomin Anishinaabewiyang* at 42.

³⁵⁶ D’Arcy Linklater, “Nehetho Customary Law Principles” (on file with author) [Linklater, “Nehetho Customary Law Principles”] at 3.

³⁵⁷ 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: House of Anansi Press Limited, 1992) 199 [Potts, “Growing Together From the Earth”] at 200.

³⁵⁸ Borrows, *Recovering Canada* at 31. See also *ibid* at 34 and 53, discussing the embeddedness of humanity in nature, and Borrows, *CIC* at 243-244.

³⁵⁹ Oren Lyons, “Foreward” in Michael Greenlar, *Kokom Lena of the First Nation Algonquin* (Michael Greenlar, 2017) 10 at 10.

³⁶⁰ Williams, *Kayanerenkó:wa* at 132.

³⁶¹ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 46.

³⁶² Peter Kulchyski, Don McCaskill & David Newhouse, eds, *In the Words of Elders: Aboriginal Cultures in Transition* (Toronto: UTP, 1999) at xvi.

³⁶³ Lyons, *X-Marks* at 84-85.

have meanings which are oriented towards the production of *more life*³⁶⁴ (as opposed, for instance, to perfection³⁶⁵ or any particular vision of a good life). His review of Anishinaabe vocabulary culminates in the following observation about the word, ‘bimaadizi’, by which he means to establish that an Anishinaabe conception of culture *is* the humility thesis. As such, Lyons’ argument stands as a full answer to Anishinaabe nature/culture non-division. He says:

Bimaadizi is used to describe the general state of someone being alive, and it possesses connotations of movement that can be understood in a physical sense. Consider the cognates: *bimaashi* means to be blown along, *bimaadagaa* to swim effortlessly as if carried by the current, *bimaada’e*, to skate, and *bimaawadaaso*, to move along with a group like a school of fish. This flowing sense of living in rhythm with others, of going along with the ebb and flow of nature, never swimming upstream or cutting against the grain, suggests that *anishinaabeg* are to live and move in concert with the rhythms of the natural world.³⁶⁶

There’s great resonance here with a teaching grandmother Sherry Copenace shared with me, which collapses the nature/culture divide: “So if we say ‘bimaatiziwin’, which is life, it’s implied in there that life is already good. You don’t need to add ‘mino’.”³⁶⁷ In emphasis of her point, she repeated “It’s already implied in there that life is good.”³⁶⁸ In liberal parlance, life *is* the good. To clarify any possible interpretive confusion, grandmother Copenace specified that *bimaatiziwin* is “all encompassing”³⁶⁹: “It’s not only our physical life, it’s our spirit, our emotion, our mind and our body. But it’s also our life *in relation to creation*.”³⁷⁰ And finally, “It’s my life *with everything around me*.”³⁷¹ *Bimaatiziwin*, then, is inherently good for the reason that it’s creation’s own culture: creation’s way.

In a remarkable passage, Nuuchah-nulth scholar and knowledge-keeper Umeek articulates this same understanding from his perspective, including the notion that life is the good, that this notion can be expressed either in respect of Creator or in respect of earth, and the clarification that ‘life’ means all of creation:

Good may then be defined as those spiritual principles or values consistent with the character of creation, of Qua-ootz, Owner of Reality. Some of the principles or values survive today as *hahuuppa* (teachings). In both a literal and metaphorical sense, these teachings have come down

³⁶⁴ *Ibid* at 87. See also Onabigon, “Elder’s Comments” at 285 (“Everything is given to us to sustain life”) and Kāgigē Pinasi (John Pinesi (also Penessi, Penassie)), “The Scattering of the Animals and the Regulation of Nature” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden: EJ Brill, Limited, 1917) 406 at 409 (Nanabozho saying “So, therefore, have I now finished the creation of everything from which the people will derive life”). Compare also with Umeek’s statement: “The natural law, whereby giving is synonymous with life and not giving is synonymous with death”. Umeek (E. Richard Atleo), *Principles of Tsawalk: An Indigenous Approach to Global Crisis* (Vancouver, UBC Press, 2011) [Umeek, *Principles of Tsawalk*] at 152; see also 166.

³⁶⁵ Basil Johnston, “I’m Glad God Is Not Perfect” in *Think Indian: Languages Are Beyond Price* (Cape Croker Reserve: Kegdonce Press, 2011) at 15.

³⁶⁶ Lyons, *X-Marks* at 87-88; emphasis in original.

³⁶⁷ Grandmother Sherry Copenace (24 June 2018).

³⁶⁸ *Ibid*.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid*, emphasis added.

³⁷¹ *Ibid*, emphasis added. Hallowell, too, declined to use the prefix ‘mino-’, saying “It is within this web of ‘social relations’ that the individual strives for *pīmādīāzwin*.” A Irving Hallowell, “Ojibwa Ontology, Behaviour, and World View” in Jennifer S H Brown & Susan Elaine Gray, eds, *Contributions to Ojibwe Studies: Essays, 1934-1972* (Lincoln: University of Nebraska Press, 2010) [Hallowell, “Ojibwa Ontology, Behaviour, and World View”] ch 27 at 561.

to people from Qua-ootz either directly through spiritual experiences or indirectly through the teachings of nature. For example, nature teaches that *heshook-ish tsawalk* (everything is one) through the now apparent interrelationship between each life form and the air, water, and land.³⁷²

Lyons' final move is to identify the fact that all of the terms he's reviewed and their cognates are verbs (although they can be made into nouns).³⁷³ As such, there's greater fidelity to the *sense* of the words translated into English if one speaks of Anishinaabe "culturing", and not Anishinaabe culture.³⁷⁴ "Culturing", he concludes,

Would mean producing more life, living in a sustainable manner as part of the flow of nature—and never separate from it, because any claim to live divorced from nature would probably be taken as a sign of mental illness, like someone who has "gone Windigo" or become a cannibal. *More life* is the goal of Ojibwe culturing, *anishinaabe bimaadizi*, and it is the goal of nature itself, so how could it be otherwise?³⁷⁵

It's no surprise then to find such a perspective taken up at the community level. For instance, the very first paragraph of the *Stewardship Guide for Leech Lake Lands*³⁷⁶ reads:

The Anishinaabe world view is that humans did not weave the web of life; rather we are merely a strand in the web of life. We are in kinship with all other creations. We have a profound responsibility to protect this kinship so that we may all live harmoniously. Because of our great dependence on and connectedness to all other beings, we are obligated to conduct ourselves accordingly to protect ourselves and future generations.³⁷⁷

The question which remains is what the analytics of earthway reproduction look like, which is the question of what particular form the belonging analytic takes within a rooted legality. Each of the next three subsections maps out one of its parts.

ii. Persons

Elder Jim Dumont asserts "As human beings we best appreciate the value of kindness/caring when it is applied to the category of 'persons'. Personhood then is central to the quality of being-in-the-world. All that is created consciously cares about the harmony and well-being of life; all things are regarded as 'persons' or relatives."³⁷⁸ From a rooted standpoint, personhood is a concept which serves as a natural link between the giftway and community.

I describe this encompassing, rooted conception of persons as 'radically interdependent'. Interdependence is a concept academics frequently claim of indigenous personhood. So, too, is

³⁷² Umeek, *Tsawalk* at 38.

³⁷³ Lyons, *X-Marks* at 88. This is probably why my two main elders, when they express 'Anishinaabe ways of life' in English, often choose 'Anishinaabe'chigewin'—an Anishinaabe way of doing things—over other terms that express the notion of a system of thought, belief or ethos, or even the concept of relationality.

³⁷⁴ Lyons, *X-Marks* at 88.

³⁷⁵ *Ibid.*

³⁷⁶ Dawn Buzay et al, eds, "Stewardship Guide for Leech Lake Lands" (Leech Lake Band of Ojibwe and University of Minnesota Extension, 2011).

³⁷⁷ *Ibid* at 4.

³⁷⁸ James Dumont & RA Antone, *What Was Never Told Curriculum* (Ontario: Tribal Sovereignty Associates, 1997) [Dumont & Antone, *What Was Never Told*] at 18.

individual autonomy, which leaves the relationship between the two personhood concepts unclear. I use the descriptor ‘radically’ to distinguish my use of interdependence from more common meanings which, in different ways, claim it *and* individual autonomy.

1. What Radical Interdependence Is

Interdependent personhood in the rooted sense I intend isn’t a gloss on individual autonomy or on heteronomy. For rooted communities, the agentive emphasis is on neither the individual self (as in liberal communities) nor the collective self (as in socialist or social conservative ones), but on the *link* connecting persons to one another, whether as individuals or as groups. After asserting her connection to her community, Neyaashiinigmiing, Anishinaabe scholar Darlene Johnston explains “My identity as an individual is inextricably *linked* to my participation in and commitment to this community.”³⁷⁹ We’re link people.³⁸⁰

It might be simplest to begin with what this doesn’t mean. Being ‘link people’ means giving pride of place neither to individual nor to group interests. According to *Anishinaabemowin* teacher Patricia Ningewance, Anishinaabe legends teach that “To be proud of one’s individual worth was not a good virtue; one had to be part of the larger unit in order for survival.”³⁸¹ I think this orientation of “being part of” is an excellent way to put the point, because although Ningewance singles out individualism, her comment denies priority to either end of the tension. Basil Johnston emphasizes the non-priority of collectivism in one of his stories about a bird migration. In an exchange between loon (who is trying to be leader) and blue-bird, loon asserts “The well being of all comes first. I have to consider the general good”, to which blue-bird retorts “The general good has killed almost all of us.”³⁸²

Mohawk scholar Patricia Monture said of this tension that “Individual rights exist within collective rights and the rights of the collective exist in the individual. Any hierarchical ordering (that is, giving a preference to either the individual or the collective nature of rights) of either notion will fundamentally violate the culture of Aboriginal peoples”.³⁸³ Another Mohawk scholar, Taiaiake Alfred, seems to share this view: “Indigenous thought is often based on the notion that people, communities, and the other elements of creation coexist as equals—human beings as either individuals or collectives do not have a special priority in deciding the justice of a situation.”³⁸⁴

How about what being a link person does mean? Nehiyaw elder Stan Cuthand advises, “Know your relatives and you will know who you are.”³⁸⁵ Being a link person means that I *am*

³⁷⁹ Johnston, “Aboriginal Rights and the Constitution: A Story within a Story?” at 131-132; emphasis added. Johnston’s paper is a defense of section 35 group rights, but I mean to emphasize her way of self-understanding, which clearly doesn’t privilege groups *over* individuals.

³⁸⁰ See Robert A Williams, Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Routledge, 1999) [Williams Jr, *Linking Arms Together*]; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: UTP, 2014) [Asch, *On Being Here to Stay*] at 118-133.

³⁸¹ Patricia Ningewance, *Gii-Nitaa-Aadisooke, Ojibwe Legends from Lac Seul, told by Christie Ningewance* (Mazinate Inc., 2018) 13.

³⁸² Johnston, *Ojibwa Heritage* at 63.

³⁸³ Patricia A Monture-Okanee, “The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice” (1992) 56 Sask L Rev 237 [Monture-Okanee, “The Roles and Responsibilities of Aboriginal Women”] at 256-257.

³⁸⁴ Taiaiake Alfred, “Sovereignty” in Joanne Barker, ed, *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005) 33 [Alfred, “Sovereignty”] at 48.

³⁸⁵ Saysewahum, *Cultural Teachings* at 33.

my relationships. While I have the qualities (and associated power assignments) of being indigenous, white-passing, male, cis-gendered, heterosexual, abled and middle-class, and even though I expressed these descriptors as objects of the gerund, “being”, none of them speaks to *who* I am. I am my relationships: grandson, son, nephew, younger brother, cousin, clan member, *wiigidemaagan*, father, uncle, neighbour, drum carrier, student, teacher, and Koojijiwinini³⁸⁶, to name just a few. On the best of days, an elder has called me *oshkaabewis*, helper, as well. Nokomis teaches of the importance of midwives and grandmothers at birth, emphasizing that the newborn is to be told, “I am your grandmother and you are my grandchild” and she connects this statement with the formation of the infant’s identity.³⁸⁷

That ‘we are our relationships’ is why introductory protocol for Anishinaabeg and so many other rooted peoples invites us to identify in respect of our families, clans, teachers, territories, treaties, and medicine societies in the first exchange of new encounter. It’s no accident that the anticipated disclosure regards one’s relational, not one’s embodied, subject position. This is the critical point: to understand rooted legalities, one must think of persons³⁸⁸ as the sum of their (changing) relationships, not as independent actors in the world. This is why Leanne Simpson can refer to “the web of kinship relations”³⁸⁹ that Kwezens “is composed of”.³⁹⁰ Note well: not *has* or *enjoys*, but *is composed of*. To clarify any doubt, I mean this claim in the thickest sense: outside of rooted relationship, *I am not a person*.

Yet this is only a first step. Understanding radical interdependence is a more complicated endeavour than merely appreciating that rooted peoples privilege the link between subjects, and that personhood exists in respect of lived relationships. We must also appreciate that those relationships, constitutive of creation’s order, involve countless other-than-humans: plants, animals, spirits, and physical beings like rocks or rivers. Many such beings are often considered persons.³⁹¹ Indeed, “any concept of *impersonal* ‘natural forces’ is totally foreign to Ojibwa thought.”³⁹² They possess intelligence and volition,³⁹³ and they are agentive³⁹⁴ (as Hallowell put

³⁸⁶ William W Warren, *History of the Ojibway Nation*, Collections of the Minnesota Historical Society Vol 5 (Saint Paul, MN: Minnesota Historical Society, 1885) [Warren, *History of the Ojibway Nation*] at 84. In Warren’s orthography, “Ko-je-je-win-in-e-wug”. It means ‘the people of Koojijing’. Warren situates their village on Rainy Lake. Today there are several Anishinaabe communities on the lake, including my own, Couchiching First Nation.

³⁸⁷ Teaching of elder Bessie Mainville (19 August 2013) Couchiching First Nation [Elder Bessie Mainville (19 August 2013)]. Nokomis repeated this teaching the following year (Elder Bessie Mainville (17 June 2014)) and the year after that (Teaching of elder Bessie Mainville (24 November 2015) Couchiching First Nation).

³⁸⁸ For greater certainty, I do mean persons *simpliciter*, and not just legal persons. This truth extends even to my name. My mother named me Aaron James Mills. She chose ‘Aaron’ and ‘James’, and ‘Mills’ follows Canadian legal convention. However my true name, Waabishki Ma’iingan (White Wolf), wasn’t chosen for me. Rather, I was born into it. It was disclosed in a vision and (critically for our purposes) it refers to a *manidoo* with whom I stand in relation. Thus in an ontological sense, not just in a legal sense, I am not me without that other.

³⁸⁹ Simpson, “Land as Pedagogy” at 8.

³⁹⁰ *Ibid*.

³⁹¹ Hallowell, “Ojibwa Ontology, Behaviour, and World View”; Kimmerer, “Returning the Gift” at 21; Broker, *Night Flying Woman* at 54, 56, 57; Ogimaagwanebiik / Nancy Jones, “Trees” in H James St Arnold & Wesley Ballinger, eds, *Dibaaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013) 106 [Jones, “Trees”] at 110 (para 33). Wendy Makoons Geniusz, “Preface” in Mary Siisip Geniusz, *Plants Have So Much to Give Us, All We Have to Do Is Ask: Anishinaabe Botanical Teachings* (Minneapolis: University of Minnesota Press, 2015) xiii; Dumont & Antone, *What Was Never Told* at 24.

³⁹² Hallowell, “Ojibwa Ontology, Behaviour, and World View” at 544.

³⁹³ *Ibid* at 550.

³⁹⁴ Blackbird, *History of the Ottawa and Chippewa Indians* at 11-12; Borrows, *CIC* at 243; Borrows, “Earth-Bound” at 52; Onabigon, “Elder’s Comments” at 286; Chartrand, “Eagle Soaring” at 68.

it, for any given event, “*Who* did it, *who* is responsible, is always the crucial question to be answered”³⁹⁵). Anishinaabe scholar Deborah McGregor, Canada Research Chair in Indigenous Environmental Justice, explains this in a wonderfully clear passage:

We have to rethink what the terms *we* and *our* mean in [Anishinaabe] context. Environmental justice includes our relationships with each other, including all plants and animals, the sun, the moon, the stars, the Creator, and so on. It is necessary to move beyond the human-centred approach to one of understanding, accepting, enacting, respecting, and honouring relationships with all of Creation.³⁹⁶

This considerably complicates the picture of rooted personhood, but it allows us to draw out a critical insight: since we’re link people, and since many of our linkages are to animal, plant, mountain and *manidoo* persons, *they* form part of who *we* are³⁹⁷: “Because we are a part of Creation, we cannot differentiate or separate ourselves from the rest of the earth”.³⁹⁸ This is why, for instance, Verna Patronella Johnston shares that “Indian people don’t go around cutting trees down for nothing, and they don’t go out and kill animals for sport, only when they need food. They are very conscious that they are a part of the world; they don’t separate themselves from nature. They are part of the land. The land is their mother.”³⁹⁹ Anishinaabekwe storyteller Ignatia Broker is more succinct: “Our life and the life of our Animal Brother is one.”⁴⁰⁰ For Umeek, “respect translates into recognition that the self is part of a greater whole and that this means that it must be considered a part of the self of each plant, animal, and life form within the natural environment.”⁴⁰¹ Stan McKay voices the point in a particularly strong way, emphasizing the impossibility of expressing non-union: “Our identity as creatures in the creation cannot be expressed without talking about the rest of creation, since that very identity includes a sense of the interdependence and connectedness of all life.”⁴⁰² But to my mind, Potawatomi plant ecologist Robin Kimmerer’s articulation is the most striking, since she expresses the point at a definitional level: “There was a time, not so long ago, when to be human *meant* knowing the names of the beings with whom we cohabit the world.”⁴⁰³

All of which is to say *that* radical interdependence describes the interdependence that rooted persons share in respect of their relational identities. Hopefully this is enough to establish just how far removed radical interdependence is from the common liberal usage of ‘interdependence’, which specifies the socially constitutive nature of individual autonomy. It also differs from the equally common neoliberal usage of ‘interdependence’, which refers narrowly to the fact of the inextricably intertwined material conditions of the lives of persons and peoples, and thus the central importance of economic exchange.

³⁹⁵ Hallowell, “Ojibwa Ontology, Behaviour, and World View” at 558; emphasis in original.

³⁹⁶ McGregor, “Honouring Our Relations” at 33.

³⁹⁷ Williams, *Kayanerenkó:wa* at 2.

³⁹⁸ Linda Clarkson et al, *Our Responsibility to the Seventh Generation: Indigenous Peoples and Sustainable Development* (Winnipeg, International Institute for Sustainable Development, 1992) at 4. See also Onabigbon, “Elder’s Comments” at 285.

³⁹⁹ Vanderburgh, *I am Nokomis, Too* at 182. Johnston is describing her sense of Anishinaabe lifeway. Today many of us would clarify that not *all* Anishinaabeg follow it; many now walk a different (often liberal, capitalist) path.

⁴⁰⁰ Broker, *Night Flying Woman* at 57.

⁴⁰¹ Umeek, *Principles of Tsawalk* at 160.

⁴⁰² McKay, “Calling Creation into Our Family” at 29.

⁴⁰³ Kimmerer, “Returning the Gift” at 20 (emphasis added).

This latter difference is perhaps most clearly seen when we turn to our relationships with other-than-humans. Since other-than-humans are subjects with whom we have relationships, not objects which we may treat as resources,⁴⁰⁴ transfer between us takes the form of gift offer and reception, not unilateral extraction.⁴⁰⁵ Kimmerer draws on our starting concept, *miinigowiziwin*, to explain. “In Potawatomi, we speak of the land as *emingoyak*: that which has been given to us. In English, we speak of the land as ‘natural resources’ or ‘ecosystem services,’ as if the lives of other beings were our property.”⁴⁰⁶ With a touch more colour, she adds, “The world seems less like a shopping bag of commodities and more like a gift when you know the one who gives you the aspirin for your headache. Her name is Willow; she lives up by the pond.”⁴⁰⁷

2. How Radical Interdependence Is Sustained

What we haven’t yet said is *how* radical interdependence is sustained, but the two Kimmerer quotations in the paragraph immediately above already begin to provide an answer. Radical interdependence harkens back to *miinigowiziwin* and the gift-ordering of the world: “*Kizhay Manitou* gave all of us gifts to share with each other.”⁴⁰⁸ Sharing is the key word here. Each of us was given certain gifts and not others; none of us was given all of the gifts we would need to be self-sustaining. Radical interdependence arises from the simple fact that each of us has need of gifts we don’t possess. Some of those needs are material, but a great many of them are spiritual, emotional, and intellectual.⁴⁰⁹

An Anishinaabe *aadizookaan* illustrates the point. In this one, animals have forgotten that they exist through radically interdependent relationships and have begun behaving as if autonomous (and unconstrained by a social contract), pursuing their self-interest oblivious to the needs of others. Soon there’s only one rose left, which provides the pressure point for all to recall that they live in a circle of gift-need interdependencies. In Randy Councillor’s telling, a poignant exchange of the moment of realization is as follows:

‘But I must have my honey,’ responded Bear after Bee finished. ‘If I don’t have my honey, I will not sleep the winter away. And if I don’t sleep the winter away, I will not be able to find nuts and berries for they will be buried under the snow. And if I cannot eat nuts and berries, I will have to eat some of you, my brother animals, to survive the winter that surely will come.’⁴¹⁰

⁴⁰⁴ Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Sumach Press, 2008) at 180; Clifford, “The Emerging People” at 86, 89; Clifford, “WSÁNEĆ Legal Theory” at 791.

⁴⁰⁵ There’s a good description of this perspective in Menno Boldt & J Anthony Long, “Tribal Philosophies and the Canadian Charter of Rights and Freedoms” in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: UTP, 1988) 165 [Boldt & Long, “Tribal Philosophies and the Canadian Charter of Rights and Freedoms”] at 166.

⁴⁰⁶ Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants* (Minneapolis: Milkweed Editions, 2013) [Kimmerer, *Braiding Sweetgrass*] at 383.

⁴⁰⁷ Kimmerer, “Returning the Gift” at 21.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Lena Jerome Nottaway, “Creation Co-existence: The Algonquin Human Creation Story as Told by Lena Jerome Nottaway” in Michael Greenlar, *Kokom Lena of the First Nation Algonquin* (Michael Greenlar, 2017) 11 at 12.

⁴¹⁰ Randy Councillor with Art Przybilla, “The Great Law” in *Ojibwe Tales: Stories of the Ojibwe People* (Jacksonville, IL: Lake States Interpretive Association, 2004) [Councillor & Przybilla, “The Great Law”] 27, 28.

In another telling, Mary Siisip Geniusz expressly connects the moral agency of the being who serves as the first cause (*waabooz*—rabbit) of the disappearance of the roses to his gift role within creation's order:

They [the animals generally] probably would have killed Waabooz, but *Makwa*, Black Bear, rose up on his hind legs, swaying side to side, and growled, 'All right! Drop the waabooz! I don't like him much either, but Creator must have had some purpose for him, or Creator wouldn't have bothered creating him.'⁴¹¹

That is, to invoke the notion of original instructions is to presumptively recognize that each depends on all: *waabooz*' gift isn't irrelevant; we can't simply move on without it. This is a point indigenous peoples have voiced again and again. Deborah McGregor says "All beings of Creation are interdependent; we are related and we all have special gifts to contribute to the process of Creation."⁴¹² Ignatia Broker's artful turn of phrase is that when you share your gifts with others, the Creator "gives a larger sharing by your hand."⁴¹³ Leroy Little Bear puts the point squarely in terms of humans: "Renewal ceremonies, the telling and retelling of creation stories, the singing and resinging of the songs, are all humans' part in the maintenance of creation."⁴¹⁴ Anishinaabe chief Gary Potts gives perhaps the richest description of the matter when he explains of his community's struggle that:

The Teme-Augama Anishnabai were caught between the timber industry and the environmentalists. The logging companies wanted to create a desert of our motherland (though the loggers themselves just wanted to put food on the table for their families). The environmentalists, on the other hand, wanted to create a zoo of our motherland.

It was a real dilemma for us and highlighted the need for everyone to understand that the land is a living thing in itself. The land grows because of the living things that interact and return to the earth and decay and support new life. Environmentalists need to know that you can't freeze land. You can't fence it off and say, "This is the way it's going to be forever." It's just impossible. By doing this you are also depriving yourself of human interaction with non-human life in a way that still allows the land to sustain itself.⁴¹⁵

Potts' emphatic reminder that humans are always already part of creation necessitates a final adjustment to how we describe creation's intrinsic lawfulness: creation's order now becomes *the creative order*, to reflect that humans, too, are causal agents of creation's turning.

Now we have what we need to draw out the missing connection between the first point, the *whatness* of radical interdependence (radical interdependence is the relationally-defined state of personhood that obtains between link peoples) and the second point, the *howness* of radical interdependence (radical interdependence is sustained through a complex exchange of gifts).

⁴¹¹ Mary Siisip Geniusz, "The Year the Roses Died" in Wendy Makoons Geniusz, ed, *Plants Have So Much to Give Us, All We Have to Do is Ask: Anishinaabe Botanical Teachings* (Minneapolis: University of Minnesota Press, 2015) 13, 14.

⁴¹² McGregor, "Honouring Our Relations" at 32.

⁴¹³ Broker, *Night Flying Woman* at 56.

⁴¹⁴ Little Bear, "Jagged Worldviews Colliding" at 78.

⁴¹⁵ 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, ON: House of Anansi Press, 1992) 35 [Potts, "The Land Is the Boss"] at 35-36.

The connection is simple. ‘Relationship’ is just what we call the patterned behaviour of gift offer and reception between subjects. Thus when noko tells a newborn grandchild “I am your grandmother and you are my grandchild”, she’s saying ‘this is the set of responsibilities I have towards you; trust in it; these are the gifts I offer to you; accept them’. ‘Grandmother’ is simply the name we give to a particular patterned distribution. The same goes for Ignatia Broker’s statement that animals are our brothers. The challenge when encountering a rooted people, then, is to identify which responsibilities are internal to which relationships.

iii. Freedom

Thus far I’ve addressed the *what* and *how* of a rooted conception of persons. But I expect that will be wasted effort if we don’t also have an understanding of *why* it should matter. The belonging analytic says it matters because how we think about persons structures how we think about freedom. To that end, I observe that the *aadizookaan* of the last rose discloses a critical insight regarding the moral status of persons. Within rooted societies, the basis of respect for persons isn’t dignity or any similarly abstract notion thought to express something of fundamental value to autonomous individuals. Rather, respect for persons turns on the capacity of persons for *creative contribution*.⁴¹⁶ Leanne Simpson helps to explain what this means:

When I think back to the pre-colonial lives of my ancestors, the most striking thing about the way they lived is that they were constantly engaged in the act of creating: making clothes, food, shelter, stories, games, modes of transportation, instruments, songs and dances. They created circumstances to commune with the implicate order, and also created the new generation of Nishnaabeg, based on bringing out their personal gifts and creativity. Creating was the base of our culture. Creating was regenerative and ensured more diversity, more innovation and more life.⁴¹⁷

That last sentence is critical: *in sharing one’s gifts, one is contributing to creation itself*. If the “intentional, interactional system”⁴¹⁸ we call the creative order is a changing assemblage of gifts, then to the extent that persons participate in giving their gifts and in receiving those of others, they’re literally *co-creators*. It’s no disrespect to the Creator to say so. On the contrary, it’s the very thing Creator’s original instructions were intended to establish. This is how trusted, significant and sacred each of us is.

All of this points towards a rooted conception of freedom. If freedom is the state of being that obtains when one’s personhood is respected, then for radically interdependent persons it will have to mean something like *co-creativity*. Co-creativity consists in one’s capacity to gift and to be gifted, and thus might be shorthand as ‘free gift’, and not ‘free choice’.

Note, then, a critical feature in which co-creativity differs from autonomy (and specifically, liberty). ‘To gift’, unlike ‘to choose’, requires an other. A rooted conception of

⁴¹⁶ Compare with Paul Kahn, “On Humanities and Human Rights” in Peter Brooks & Hilary Jewett, eds, *The Humanities and Public Life* (New York: Fordham University Press, 2014) 116, 120-122. Note that Kahn uses creative contribution in the discursive sense of interpretation, not in the political sense of constitution. Second, he deploys creative contribution in the service of dignity, not as an intrinsic grounding for moral agency.

⁴¹⁷ Simpson, *Dancing on Our Turtle’s Back* at 92. See also Leanne Betasamosake Simpson “Centring Resurgence: Taking on Colonial Gender Violence in Indigenous Nation Building” in Kim Anderson, Maria Campbell & Christi Belcourt, eds, *Keetsahnak: Our Missing and Murdered Indigenous Sisters* (Edmonton: University of Alberta Press, 2018) ch 13 [Simpson “Centring Resurgence”] at 215.

⁴¹⁸ Morrison, *The Solidarity of Kin* at 29.

freedom is experienced—and can only be experienced—*through* and *for* others, which is to say in relationship.⁴¹⁹ This is merely to track the internal relationships comprising the rooted belonging analytic: co-creativity flows logically from radical interdependence. Thus Borrows explains that “In Anishinaabe tradition, freedom can be characterized by healthy interdependencies, with the sun, moon, stars, winds, waters, rocks, plants, insects, animals and human beings. Freedom is holistic and does not just exist in an individual’s mind. It is much more than a product of an individual’s will; it is lived.”⁴²⁰

It’s entirely consistent then for Elder Dave Courchene to explain that a through-and-for conception of freedom is grounded and grounding in the earthway: “When you are able to walk the spirit of the teachings⁴²¹ is when you become truly free, it is then that you receive the full support of the universe, and the forces of the Earth itself. There is no struggle, but rather catching the natural rhythm of the Earth. You become a part of the land. You become the land.”⁴²² One of elder Courchene’s teachings helps to illustrate what it means to conceive of freedom as something one can only live through and for others:

Wisdom – Represented by the **Beaver** – is about using the gift the Great Spirit gave each of us to serve, and build a strong family, community and Nation. Our gifts do not belong to us as individuals, but belong to all the people, to serve the good of the Nation. If the beaver did not use his gift to build, his teeth would grow long and he would die. Similarly if we do not use our gifts in a good way for the benefit of the Earth and the brothers and sisters of our nations, we too would die spiritually, and experience the negative consequences of natural law.⁴²³

Note how elder Courchene’s teaching pivots from earth to earthway. Many Anishinaabeg have unpacked co-creativity in the earthway-reproducing context of their communities. For instance, using the example of vision quests, Anishinaabe ethnographer Helen Agger explained that “Each successfully completed vision journey imbued the entire community with strength and security”⁴²⁴ and that her grandparents’ generation still regularly followed “the practice of acquiring special power as it was applied to benefit others.”⁴²⁵ My elder from Mitaanjigamiing, too, teaches that although visions come to individuals, they are received for others too.⁴²⁶ Basil Johnston offers a fuller explanation of freedom ‘through and for’, saying:

⁴¹⁹ Compare with James Tully’s notion of civic freedom, which is “*of and in* participation, and *with* fellow citizens”: Tully, *PPNK* 2 ch 9 at 272. While they don’t expressly connect their relational conception of the self to a vision of freedom, Jennifer J Llewellyn and Jocelyn Downie say “The human self ... is constituted *in and through* relationship with others”: Jennifer J Llewellyn & Jocelyn Downie, “Introduction” in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) at 1, 4.

⁴²⁰ Borrows, *Freedom and Indigenous Constitutionalism* at 6; citation removed.

⁴²¹ Elder Courchene has seven specific teachings in mind here, which come from the earth: Nii Gaani Aki Inini / Leading Earth Man (Dave Courchene), “Sharing Indigenous Knowledge on Survival in Times of Climate Change” (Public address delivered at Assembly of Manitoba Chiefs’ Elders & Traditional Knowledge Holders forum, *Sharing Indigenous Knowledge on Survival in Times of Climate Change: “A Sacred Relationship to the Land”*, Turtle Lodge, Sagkeeng First Nation, Treaty 1, 18 November 2016). Online: TurtleLodge.org <<http://www.turtlelodge.org/wp-content/uploads/2016/11/Sharing-Indigenous-Knowledge-on-Survival-in-Times-of-Climate-Change-Turtle-Lodge-Nov18.2016.pdf>> [Courchene, “Sharing Indigenous Knowledge”]; see also Bone et al, *The Journey of the Spirit of the Red Man* at 21-27.

⁴²² Courchene, “Sharing Indigenous Knowledge” at 7.

⁴²³ *Ibid* at 6; emphasis in original.

⁴²⁴ Agger, *Following Nimishoomis* at 80.

⁴²⁵ *Ibid* at 81. See also Morales, “Locating Oneself in One’s Research” at 164.

⁴²⁶ Anonymous elder #1 (15 June 2014).

The community had a duty to train its members 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 its capacity. The stronger the man, the stronger the community; and it was equally true that the stronger the community, the firmer its members.⁴²⁷

The next question is how to generate and sustain co-creativity. I suggest it has two core attributes, which provide the answer: *grace* and *equality*.

1. Grace

Once more, although none of us created the earth, we've been trusted—and stronger still, instructed—to recreate it through the offering of our gifts each day,⁴²⁸ and in so doing we become co-creators. Reciprocally, the gifts of our countless co-creators enrich and sustain our own lives. Albeit absent its intended Christian casting, this earth-modeled benevolent reciprocity seems to reflect the heart of what *grace* is about.⁴²⁹ I don't mean grace literally of course, whether in its cause (divine benevolence) or in its effect (human blessings and salvation), but I think it's the closest word in English to the concept I'm after and that it's not so far off.⁴³⁰

Living in a state of grace isn't a small matter. In many instances, offering our gifts requires considerable *sacrifice*. Sometimes these are small acts and other times our sacrifices are just about crippling. But in all cases, sacrifice, through grace, is integral to co-creativity.⁴³¹ This leads to an insight of unprecedented importance for rooted peoples and it's one which cuts sharply against the grain of liberal expectation: it will often be the case that *the demands of others serve to set me free*. This is why Kimmerer can delight in being asked by the earth to give. Chief Gary Potts of the Teme-Augama Anishinabai on Bear Island explains how sacrifice supports co-creativity, reminding us to remain always as link people living within the earthway:

The land is the boss. The Teme-Augama Anishinabai have always had to hold ourselves back from what we could do with the land, for the benefit of the land and the non-human life on the land, because if you destroy the linkages on that land, then you're destroying something that has evolved over thousands of years. How are you going to excuse yourself for doing that? How are you going to replace it?

⁴²⁷ Johnston, *Ojibway Heritage* at 70. Compare with Marie Battiste's description of Mikmaq society: "Each person, whether male or female, elder or youth, has a unique gift or spark and a place in Mikmaq society. Each person has a complementary role and function that enables the allied families to flourish in solidarity. In every generation, each person must find his or her gifts, and each person also needs the cumulative knowledge and wisdom of the community to survive successfully in a changing environment." Marie Battiste, "Nikanikinútmaqñ" in James (Sákéj) Youngblood Henderson, ed, *The Mikmaq Concordat* (Halifax: Fernwood Publishing, 1997) 13 [Battiste, "Nikanikinútmaqñ"] at 18.

⁴²⁸ Hill, *The Clay We Are Made Of* at 17.

⁴²⁹ I often conjure the image of Hoke holding Daisy's fork when I reflect on this *earthly* sense of grace. Despite the obvious social and economic inequality which characterizes their relationship, and the imperiousness which Daisy sustains unto her end, this image seems to capture an altogether different sense of freedom—one which Hoke has always had and Daisy never known. See *Driving Miss Daisy*, 1989, DVD (The Zanuck Company, 1989).

⁴³⁰ In Anishinaabemowin, I would say 'zhawenjigewin': a way of loving or pitying others by giving of oneself.

⁴³¹ This is why it makes sense for elder Courchene to speak of "Learning to give of yourself in the way the Creator meant you to be to serve your humanity and your people." Elder Dave Courchene Jr (24 February 2018).

Once you know what the land can accommodate and you accept that the land is boss, you're at peace with yourselves because you are in harmony with your natural environment.⁴³²

Wonderful for Kimmerer and Potts, some will say, but what about oppression enabled in the name of sacrifice? After all, sometimes radical interdependence has rooted persons using (and even consuming) one another. This is obviously true (think of hunting and gathering), yet I don't see it as a challenge to the capacity of radical interdependence to support freedom. For the instrumental use that rooted persons sometimes make of one another is never made as of *right*, but rather as of *relationship*. Even as we use others, we regard them as persons with inherent interests, not as resources that exist strictly for our benefit.⁴³³ Thus when humans honour animals and plants and meet the conditions of their recreation, these others often offer themselves up as gifts.⁴³⁴ There are countless instances of this dynamic recorded in indigenous peoples sacred stories and in elders' teachings.⁴³⁵ Perhaps the clearest and most direct examples I've come across have been offered by Anishinaabekwe elder Nancy Jones, whose community is just a half hour drive east of my own.⁴³⁶

Vitally, that the demands of others may serve to set us free reveals a reciprocal function of grace. In addition to the humility of sacrifice, grace calls us to acknowledge and communicate our own needs. We must recognize our frailties, limitations and weaknesses, and seek aid in respect of the absences they render us. Umeek has a wonderful way of articulating this aspect of grace, as an injunction of the creative order: "The Nuu-chah-nulth teach that, if people don't ask

⁴³² Potts, "The Land Is the Boss" at 35.

⁴³³ This relationship is sustained even after a non-human has been worked into some sort of tool, with consequences for how it can be created and used. Teaching of anonymous elder #1 (23 August 2013) Mitaanjigamiing First Nation [Anonymous elder #1 (23 August 2013)]; Teaching of anonymous elder #1 (23 March 2015) via telephone; Teaching of anonymous elder #1 (12 December 2015) Mitaanjigamiing First Nation [Anonymous elder #1 (12 December 2015)]; Teaching of anonymous elder #1 (10 January 2016) Mitaanjigamiing First Nation; Anonymous elder #1 (6 February 2016); Teaching of anonymous elder #1 (30 March 2018) Fort Frances, Ontario [Anonymous elder #1 (30 March 2018)].

⁴³⁴ The Boundary Waters Anishinaabeg teachings I was given provide that I should offer tobacco, explain my need, and where I know it, sing the appropriate song. In many cases, there are additional protocols specific to the recreation conditions of the particular kind of being I'm asking to sacrifice itself. My elder from Mitaanjigamiing explained to me that when you kill an animal, you must respect it throughout the harvesting process. For deer, you take an organ that is similar to and located near its liver (the elder didn't know the word for the organ in English and chose not to say it in *Anishinaabemowin*) and place it in a clean place. For Moose you take the bell from their neck. For bear you take a bone under its tongue. Teaching of anonymous elder #1 (6 February 2017) Mitaanjigamiing First Nation [Anonymous elder #1 (6 February 2017)]. This also includes disposal of the animal's remains. For some animals, particular parts must be returned to its habitat. Teaching of anonymous elder #1 (15 June 2015) via telephone. My elder explained that if you don't show respect for the animal, the spirit animal governing it will make future hunts unsuccessful. Anonymous elder #1 (6 February 2017). One day I was driving noko and I home from a ceremony at Onigaming where she was giving berry fast teachings. We came upon a fisher (*ojiig*) that had been killed. I pulled over, carried it into the bush, and put tobacco down. Noko explained that the boss fisher spirit would be happy with me. Teaching of elder Bessie Mainville (29 May 2018) Highway #71 between Onigaming First Nation and Rainy River First Nations.

⁴³⁵ Nancy Tuner does an outstanding job of representing this understanding across indigenous groups. See Nancy J Turner, *The Earth's Blanket: Traditional Teachings for Sustainable Living* (Vancouver: Douglas & McIntyre Ltd., 2007) [Turner, *The Earth's Blanket*] at 81-84. See also Dianne Hiebert & Marj Heinrichs with the Kitchenuhmaykoosib Inninuwug, *We Are One with the Land: A History of Kitchenuhmaykoosib Inninuwug* (Rosetta Projects, 2007) [Hiebert et al, *We Are One with the Land*] at 49.

⁴³⁶ Ogimaagwanebiik / Nancy Jones, "Animals" in H James St Arnold & Wesley Ballinger, eds, *Dibaaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013) 92 [Jones, "Animals"]; Jones, "Trees".

for help when they need it, they are not kind. Asking for help when one needs help is to affirm the unity of creation; not asking for help when one needs help is contrary to wholeness.”⁴³⁷

Finally, there’s the fact that grace is the result of sustained hard work. It requires one to know what her gifts are⁴³⁸; to develop and use them⁴³⁹; to be able to identify and communicate her needs⁴⁴⁰, and to develop proficiency in identifying both the gifts⁴⁴¹ and needs⁴⁴² of others. Indigenous stories from time immemorial, such as Anishinaabe *aadizookaanan*, are replete with episodes of a character getting one of these points wrong. There are countless examples; my citations here identify only one or two stories illustrative of each point.

2. Equality

The second attribute of co-creativity is equality. Clearly each kind of person—whether walleye, Biboonike (the Wintermaker), tamarack, or Anishinaabe—has unique gifts, which vary considerably in power and in scope. Yet it would be impossible to count how often I’ve heard elders share messages like Nehetho elder D’Arcy Linklater’s that “The plants and animals gave our people all their gifts in exchange for respect.”⁴⁴³

Equality is about having respect for all persons because each is a co-creator⁴⁴⁴, which is a sacred responsibility to carry. This is the point that although he devoured all the roses, *Waaboos* couldn’t simply be eliminated. Umeek explains that “In this worldview, each person was to be respected because of his or her association with Qua-ootz, Owner of Reality, Creator of All. This respect was extended to all life forms for the same reason. A translation of this respect into the practice of living is that each life form, each individual person, must be allowed to be whatever Qua-ootz intended.”⁴⁴⁵ After considering the gifts of many different animals, Basil Johnston, too, teaches that “No one is more important than any other. They are all born equal, all have some purpose in furthering creation, Kitchi-Manitou’s work.”⁴⁴⁶

⁴³⁷ Umeek, *Principles of Tsawalk* at 152; see also 140.

⁴³⁸ Basil Johnston, “The Gift of the Stars / Anungoog Gauh Meenikooying” in *The Gift of the Stars / Anungoog Meegiwaewinan* (Cape Croker First Nation: Kegedonce Press, 2010) [Johnston, “The Gift of the Stars”] 19; Kāgigē Pinasi (John Pinesi (also Penessi, Penassie)), “Nanabushu and the Woodpecker” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 423.

⁴³⁹ Elder Bessie Mainville (25 October 2015). See also Basil Johnston, “Seagull” in *The Gift of the Stars / Anungoog Meegiwaewinan* (Cape Croker First Nation: Kegedonce Press, 2010) 37 [Johnston, “Seagull”].

⁴⁴⁰ Cecilia Sugarhead, “The Dog and the Squirrel” in John O’Meara, ed, trans., *Ninoontaan / I Can Hear It: Ojibwe Stories from Lansdowne House Written By Cecilia Sugarhead* (Winnipeg: Algonquian and Iroquoian Linguistics, 1996) 43.

⁴⁴¹ Johnston, “The Gift of the Stars” at 20.

⁴⁴² Councillor & Przybilla, “The Great Law”; Kāgigē Pinasi (John Pinesi (also Penessi, Penassie)), “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 [Pinesi, “The Mink and the Marten”].

⁴⁴³ Linklater, “Nehetho Customary Law Principles” at 2.

⁴⁴⁴ In the Nancy Jones story referred to two paragraphs above, elder Jones directly links the gift that each animal offers with its expectation of respect by humanity. Jones, “Animals”.

⁴⁴⁵ Umeek, *Tsawalk* at 56.

⁴⁴⁶ Johnston, “Thou Shalt Honour Earth Mother” 145 at 146. Elder Dave Courchene similarly states “Every living entity was given purpose and meaning.” Courchene, Address at A Town Hall for Environmental Law. Finally, elder Fred Kelly offers another comparable teaching: “You never suppose or presuppose your superiority over anybody. And in the eyes of the Creator, we are equal”. *Restoule v Canada*, Transcript of elder Fred Kelly at 2917.

No matter how great or small the gifts one carries, they're part of the vision the Creator called into being⁴⁴⁷; each gift is necessary to meet an instruction under sacred law.⁴⁴⁸ George Copway shared the following teaching, which he received upon his initiation into the Midewiwin Society⁴⁴⁹: "There is not a flower that buds, however small, that is not for some wise purpose. There is not a blade of grass, however insignificant, that the Indian does not require. Learning this, and acting in accordance with these truths, will work out your own good, and will please the Great Spirit."⁴⁵⁰ Finally, elder Dave Courchene teaches about humility that "**Humility** – Represented by the **Wolf** – is about showing gratitude for life received, never overstepping the natural laws of Mother Earth. Humility is to know that not one of us is ever above or below our fellow human beings. We are all equal in the eyes of the Great Spirit."⁴⁵¹

What all of these teachings appear to be sharing is that we don't distribute respect in degrees; all who are respected are respected entirely.⁴⁵² It isn't for us to evaluate the intrinsic worth of another's gifts. In the Anishinaabe *aadizookaan* of the flood, it's the muskrat who finds a fistful of earth with which to recreate the world, when the larger, physically more powerful animals failed. In Omushkego storyteller Louis Bird's telling of "Chakapesh Snares the Sun," after the weasel, squirrel, and mouse fail to sever the strand of hair keeping the sun caught in a snare, the tiny shrew is the one to set it free, returning day to creation.⁴⁵³ The measure of one's creative contribution isn't a function of his power. Co-creativity requires all gifts.

But this doesn't get us very far. Does it suggest that a rooted conception of equality means formal equality? I say it doesn't. Within co-creativity, what respectful treatment means in any given instance is ultimately a kind of *proportionality* analysis. Hallowell writes "One of the prime values of Ojibwa culture is exemplified by the great stress laid upon sharing what one has with others. A balance, a sense of proportion must be maintained in all interpersonal relations and activities."⁴⁵⁴ Basil Johnston begins to unpack what this means: "Some glean more from their observations, others less, but each one in proportion to his talents. What one person understands of what he sees or hears is not to be belittled, demeaned, or ridiculed."⁴⁵⁵ Speaking of humans (and critically, highlighting the fact of difference internal to distinct groups), he says:

There was another aspect to the nature of man. In scope and depth and breadth, every man was very different; some were gifted; others possessed lesser powers. Still each was obligated to seek in his own capacity, his purpose not outside himself, but within his innermost being. And because each man was differently endowed, every man attained a different vision; each fulfilled his vision as he and not someone else understood it.⁴⁵⁶

⁴⁴⁷ Lyons, "Spirituality, Equality, and Natural Law" at 6.

⁴⁴⁸ Johnston, *Ojibway Heritage* at 11-13.

⁴⁴⁹ Copway, *Traditional History and Characteristic Sketches* at 169.

⁴⁵⁰ *Ibid* at 175.

⁴⁵¹ Courchene, "Sharing Indigenous Knowledge" at 6.

⁴⁵² Kimmerer, "Returning the Gift" at 22.

⁴⁵³ Louis Bird, "Chakapesh Snares the Sun" in Susan Elaine Gray, ed, *The Spirit Lives in the Mind: Omushkego Stories, Lives, and Dreams* (MQUP, 2007) 29, 35. For the Teme-Augama Anishinaabe it's the "Beaver-mouse": orator unknown with Aleck Paul, "Snaring the Sun" in FG Speck, ethnographer, *Myths and Folk-Lore of the Timiskaming Algonquin and Timagami Ojibwa* (Ottawa: Government Printing Bureau, 1915) 69.

⁴⁵⁴ Hallowell, "Ojibwa Ontology, Behaviour, and World View" at 561.

⁴⁵⁵ Johnston, "Thou Shalt Honour Earth Mother" at 148.

⁴⁵⁶ Johnston, *Ojibway Heritage* at 119.

More complicated still, in many cases our gifts vary over time.⁴⁵⁷

In the result, those with greater gifts are generally expected to offer more; those with lesser gifts generally aren't required to offer as much. Each is respected, then, for rising to its contributory role in creation, not evaluated against an objective standard. So long as each gives in proportion to his gifts (and reciprocally, accepts in proportion to his needs), he'll be respected.⁴⁵⁸ Note that this is a very different analysis of proportionality than something like a gift/need ratio. Again, respect is only distributed in wholes.

This rooted conception of equality is necessarily rough. However that isn't ordinarily perceived as a problem in a society which, in the perennial balancing act, privileges contingency over certainty. Respect isn't supposed to be a science and roughness is all it allows for.⁴⁵⁹

3. Free Gift and Free Choice: Co-creativity and Individual Difference

Even if one accepts what I've so far argued about rooted creationism, a worry might naturally linger about the space for individual difference. Those with liberty-tuned sensibilities may struggle to understand Kimmerer's statement that "The premise of Earth asking something of me makes my heart swell"⁴⁶⁰ or more generally that because of the integrality of sacrifice to co-creativity, A is only possibly, not necessarily, rendered unfree by the imposition of B's petition for her gift. However it may be that B's petition is just the sort of 'imposition' that serves as a condition of possibility for A's freedom. If so, it isn't properly characterized as an imposition, even though it narrows A's range of choice. If I'm most free when my relations are empowered to share their gifts, and having their needs met is a condition of their empowerment, then my freedom is greatest when my capacity for choice is constrained by their needs. Where free agency is understood in respect of free gift, not free choice, *I still matter*.⁴⁶¹

Borrows' articulation of this point is that "a person possesses liberty within themselves *and their relationships*."⁴⁶² He uses the word *dibenindizowin* to describe his Anishinaabe conception of freedom which emphasizes free choice *within the context of one's relationships*. For instance, he explains that stories about Nanabozho:

illustrate the complex nature of *dibenindizowin* worked out through his relationships with other beings. Nanaboozhoo cannot do whatever he wants, because his actions are always constrained in some way. At the same time, he has a wide range of options for living a good life because of his ability to transform himself and those around him through their interactions. In other words, Nanaboozhoo is free, even *as real-world relationships both facilitate and constrain the scope of his actions*.⁴⁶³

⁴⁵⁷ *Ibid* at 110.

⁴⁵⁸ Unknown orator with Aleck Paul, "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 [Unknown orator, "Nenebuc Transforms the Bear"].

⁴⁵⁹ I'm clearly working with a very different conception of equality here than what one finds, for instance, in Canadian law. However, I hope it's clear that I take Borrows' injunction that equality between persons is essential for indigenous law (see Borrows, *CIC* at 150-155). I also hope that although my rooted conception of equality shifts the meaning of terms like 'discrimination' and 'unequal treatment', it remains clear that rooted societies take equality seriously. See also chapter 8, section (b)(ii)(2)(b).

⁴⁶⁰ Kimmerer, "Returning the Gift" at 18.

⁴⁶¹ Lyons, "Our Mother Earth" at 103-104.

⁴⁶² Borrows, *Freedom & Indigenous Constitutionalism* at 6; emphasis added, citation removed. See also *ibid* at 13.

⁴⁶³ *Ibid* at 7; emphasis added.

Thus, while grace differs starkly from liberty, it strives neither to eliminate nor even to degrade the significance of individual free choice.⁴⁶⁴ Once more, co-creativity is not collectivist. Rather, it faithfully tracks the fact of our being link people, which means its emphasis is on the relation *between* subjects (whether they be individuals or groups). In fact, individual free choice is imperative to the integrity of rooted freedom.⁴⁶⁵ The gifts that each of us contributes to the circle of community must be practised and developed, and this requires a sustained and very active commitment, on two fronts.

a. Individual Free Choice Regarding Self

The first regards free choice in respect of oneself. Grace is a choice we're each asked to make time and again.⁴⁶⁶ Without the majority of us making the choice a majority of the time, there'd be neither the stunning diversity of gifts nor the incredible amount of gifts circulating which the creative order needs to keep spinning. Many of us would have our needs unmet. Lacking what we need, our ability to share our gifts would become unreliable or altogether impossible and we would fail to practise co-creativity. Significant levels of unfreedom have a cascading and catastrophic impact on the viability of rooted community. Thus while the broadest possible scope of one's capacity for free choice isn't the definition of a rooted conception of freedom, the continuity of rooted community is nonetheless vitally dependent upon a robust and protected capacity for individual free choice.

The critical difference is that for rooted subjects, individual free choice operates as a function of Creation's way, such that it no longer points toward liberty.⁴⁶⁷ Elder Fred Kelly offers what for liberals might be a striking and perplexing statement: "I believe personally that the Creator gave us and gave me breath and gave me reason and gave me freedom and gave me will, the four precious gifts that I use to this day to know that there is a Creator and that Creator is not mean. That Creator is kind."⁴⁶⁸

Basil Johnston, too, takes up the question of individual free choice consistent with the earthway. One way he does so is by reference to earth teachings. Thus he teaches that:

Robins, as did their kin and kind, came and went as they pleased; they left their perches and returned when they pleased. No master commanded them where, when or how to build their nesting places. It was they, and no other, who decided where, when and how *to carry out what Kitchi-Manitou had intended them to do*. Robins are free, as are other creatures.⁴⁶⁹

⁴⁶⁴ I realize that Borrows makes his point in respect of liberty. *Ibid* at 6, 7, 13, 17 and 218, n 21. But given the space he affords relational constraints on the field of one's action, I don't think he means 'liberty' in a liberal sense.

⁴⁶⁵ Joanna Macy & Chris Johnstone, *Active Hope: How to Face the Mess We're in without Going Crazy* (Novato, CA: New World Library, 2012) [Macy & Johnstone, *Active Hope*] at 92-93.

⁴⁶⁶ Geyshick, "About Winning".

⁴⁶⁷ See Umeek, *Principles of Tsawalk* at 166-167 on corporations.

⁴⁶⁸ *Restoule v Canada*, Transcript of elder Fred Kelly at 2895; see also 2911-2912. Compare also with Elder Bone's statement that as part of "human law, we are given a voice, the language. But there's a number of things we're also given: observation, to think and to analyze. Because our job is supposed to be to speak to the Creator, on behalf of mother earth, and the animals. *That's why you're given these gifts.*" Elder Harry Bone (16 June 2018); emphasis added. Elder Bone's comment seems to make plain that the gifts which comprise intellectual independence aren't meant to serve the end of individual autonomy, but rather of creation's wellbeing.

⁴⁶⁹ Johnston, "Thou Shalt Honour Earth Mother" at 145; emphasis added. Two pages later, Johnston offers a restatement: "To our ancestors it was self evident that all creatures were born equal and free to come and go and fulfill their purposes as intended by Kitchi-Manitou." *Ibid* at 147.

We've already explored (and Johnston again reminds us⁴⁷⁰) that what Gizhe Manidoo intended the robins to do, their original instructions, is to share their gifts. So Robins enjoy free choice *with respect to how to share their gifts*. As with elder Kelly, this context for individual free choice has nothing to do with liberty and everything to do with grace. It's imperative to observe that Johnston's application of co-creativity to robins includes their ability to secure conditions which enable grace: for instance, the building and defending of a home.⁴⁷¹

b. Individual Free Choice Regarding Others

The second front of sustained individual free choice regards our careful attention to others. There's a word in *Anishinaabemowin* which represents this aspect of grace's relationship with free choice, which has no ready English translation: *pabamiziwin*.⁴⁷² Grandmother Sherry Copenace says "*Pabamiziwin* is like [she pauses and redirects her thought, emphasizing the difficulty with translation here]. The only English way I could say that, it's like, it's *your* responsibility to be involved."⁴⁷³ I was fortunate to have grandmother Copenace expand her thoughts on *pabamiziwin* so thoroughly, and even to draw out its tension with (negative) liberty:

The way I understand, it was *all* our responsibility, for everything. Nothing was secret, nothing was confidential. 'Cause if we seen somebody struggling, we needed, it was our responsibility to help and support in some way, not to let them flounder. You know? It wasn't to [grandmother Copenace pauses and redirects her thought], it was to support people.

So I always struggled when they said 'oh, there's that non-interference'. Cause when we think of it in such a different way, like non-interference, we didn't ever get in the way of anybody's journey, but if we seen them struggling, then it was our responsibility to offer support or something and it was up to them whether they said yes or no. We just didn't stand by and watch everything bad happen to somebody....And it wasn't because we were nosy or anything. It's just, how would we know if we needed to help somebody? We just didn't let anybody struggle, like how we do now.⁴⁷⁴

After a brief exchange, grandmother Copenace continued, emphasizing that the purpose of acting in accordance with *pabamiziwin* is "not to be interfering or telling people what to do, but you made a gesture of how you possibly could help, and it was still up to that person whether they said yes or no. But it was in an authentic and genuine way. And *natural* way. It was natural."⁴⁷⁵ In concluding her thoughts, she once more drew out the tension between negative liberty and the responsibility to offer aid: "Today they use it for you not to be interfering, but really I think that's the way it was meant to be, is for us to be [grandmother Copenace pauses], that it was *our* responsibility."⁴⁷⁶

⁴⁷⁰ *Ibid* at 147.

⁴⁷¹ *Ibid* at 146.

⁴⁷² Basil Johnston defines "Pabaumaendum" as "He (she) minds, cares". Johnston, *Ojibway Language Lexicon* at 69.

⁴⁷³ Grandmother Sherry Copenace (24 June 2018); emphasis grandmother Copenace's.

⁴⁷⁴ *Ibid*; the ellipsis omits my response and a joke.

⁴⁷⁵ *Ibid*. I'd be remiss if I failed to note the connection to the earthway here.

⁴⁷⁶ *Ibid*. In respect of grandmother Copenace's comment about contemporary usage of '*pabamiziwin*', I've occasionally seen it translated as 'jurisdiction', which connects in an obvious way with her concern about conflation with non-interference. See for instance "babamisiwinin" in, Maria Seymour, trans & Kenora Community Legal Clinic, *A Glossary of Legal Terms (English/Ojibway)* (1984) [Seymour, *A Glossary of Legal Terms (English/Ojibway)*] at 4.

The Ojibway and Cree Cultural Centre's *Political Terminology Glossary*⁴⁷⁷ also assigns a sense of active responsibility to this word, giving "gibabaamisiwininaan" for "onus", and describing it as "Another way of saying responsible."⁴⁷⁸ An example illustrative of this respectful intervention is found in this Cree hunter's explanation of the tension between individual choice and co-creativity; the exercise of individual free choice, vis-à-vis others, within the giftway:

We try to respect our hunting rights. But if somebody's hunting too much people will sometimes approach that person and ask: "Do you necessarily have to hunt this much?"

If he's hunting for somebody else then we can see a reason. But if he's just going out pleasure hunting, people in the community kind of approach that guy and tell him not to hunt too much.

We can't stop him from hunting, but we try to make him look at our rights.⁴⁷⁹

Nokomis' teachings on *pabamiziwin* very much support grandmother Copenace's, and in particular her emphasis on the responsibility of individuals to get actively involved in the welfare of others. Statements of hers to this effect include that *pabamiziwin* is "about whatever it is that you need to do."⁴⁸⁰; "In a community, there's a group that has their own duties to do. Like a member of a group has a special gift of doing this, that's a job this person has a special gift of doing this to make things work well, *pabamiziwin*."⁴⁸¹; "There was people paying attention to those not behaving well. One of them might have a gift of knowing what to do with this person. They would put him out on an island."⁴⁸²; "Someone who keeps doing wrong things—like maybe stealing—there's always someone taking care of that in the community."⁴⁸³ Both grandmothers clarified that *pabamiziwin* is carried by and applies to all members of one's community, not just to one's own family members.⁴⁸⁴

In an *aadizookaan* about the robin, Johnston⁴⁸⁵ and others⁴⁸⁶ explore these limits, at least as regards grace vis-à-vis one's parents. In the *aadizookaan* of the robin, a young boy has

⁴⁷⁷ John Paul Jacasum, ed, *English, Cree, Oji-Cree, and Ojibway Political Terminology Glossary* (Timmins: Ojibway and Cree Cultural Centre, 2005) [Jacasum, *Ojibway Political Terminology Glossary*].

⁴⁷⁸ *Ibid* at 56.

⁴⁷⁹ An unattributed "young Cree hunter" in Paul Driben et al, "No Killing Ground: Aboriginal Law Governing the Killing of Wildlife among the Cree and Ojibwa of Northern Ontario" (1997) 1:1 *Ayaangwaamizin: The International Journal of Indigenous Philosophy* 90 [Driben et al, "No Killing Ground"] at 104.

⁴⁸⁰ Elder Bessie Mainville (2 December 2015).

⁴⁸¹ *Ibid*.

⁴⁸² *Ibid*.

⁴⁸³ *Ibid*.

⁴⁸⁴ *Ibid*; Grandmother Sherry Copenace (24 June 2018).

⁴⁸⁵ Johnston, *Ojibway Heritage* at 128.

⁴⁸⁶ Pinesi (narrator) & William Jones (recorder), "He Who Over-dreamed" in Truman Michelson, ed, *Ojibwa Texts, Part II*, Publications of the American Ethnological Society edited by Franz Boas, Vol. 7 (New York: G.E. Stechert & Co, Agents, 1919) at 307; Pinesi (narrator) & William Jones (recorder), "Stories About Fasting Youths" in "Ojibwa Tales from the North Shore of Lake Superior" (1916) 29:113 *J of American Folklore* 368, 388; Mrs. Exavier Commanda / Pe-da-bi-no-quah, "Pee-nah, the Partridge" in Col G E Laidlaw, "Ojibwa Myths and Tales" (1922, New Series) 1:1 *Wisconsin Archaeologist* 34; Joe Yellowhead / Shaw-woon-day-skung, "The Story of the Robin (Origin of the Robin)" in Col G E Laidlaw, "Ojibwa Myths and Tales" (1922, New Series) 1:1 *Wisconsin Archaeologist* 37; Angeline Williams, Leonard Williams (ed, trans) & John D Nichols (ed), *The Dog's Children: Anishinaabe Texts Told by Angeline Williams* (University of Manitoba Press, 1991) 24; Jane Johnston Schoolcraft, "The Origin of the Robin" in Robert Dale Parker, ed, *The Sound the Stars Make Rushing Through the Sky: The Writings of Jane Johnston Schoolcraft* (Philadelphia: University of Pennsylvania Press, 2007) 163; Jacques LePique, "The Robin" in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques*

reached an age to embark on his vision quest. However the passage he achieves isn't into adulthood. One of his parents (in the vast majority of tellings, his father) pressures him to forego food and water for as many days as is necessary for the power he obtains to surpass all others. But the father's insistence is about his own need to have the most impressive son, a need not grounded in the earthway. The son over-fasts, sustaining grace, regardless.

The conclusion shows grace gone awry. The boy teeters on death but is spared by accepting a gift unlike any he or his father had imagined. To survive, the end of the boy's fast sees him transformed not into a man, but into a robin. This *aadizookaan* is an admonition against parents who impose individual choices outside of the earthway (and perhaps in pursuit of liberty) on their children. Perhaps still more interesting is what it says about the agency of youth in figuring the line between conditions which enable grace and which overreach it. My personal understanding is that although the boy is good, he isn't a model for good conduct, and robin songs now remind us that although radically interdependent persons don't have negative liberty, there's an urgent need for us to carefully and responsibly choose which gifts to share and when.

The role of responsibility in structuring one's practice of freedom through and for others gains definition and significance in chapter six, section (d), when this discussion turns to a rooted conception of law. However, it's worth emphasizing now the centrality of responsibility in co-creativity because it helps to draw out the connection to *miinigowiziwin*, and thus the contrast with (in particular, negative) liberty. Borrows says that *dibenindizowin* "implies that a free person owns, is responsible for, and controls how they interact with others"⁴⁸⁷ and that "As Indigenous peoples, we cannot just theorize our way to freedom - we must act well in the world. We must more fully and responsibly own, relate to, and control how we interact with others."⁴⁸⁸ Anishinaabekwe professor Maya Ode'amik Chacaby likewise explains that:

the only way that we can be free, that we can change what we have—that violence, is to go back to fulfill those responsibilities that we have inherited from Creation. It's not like in English [where] freedom means to be free from obligation. That's not what it is in Anishinaabemowin. It's *dibenindizowin*: to have all the means necessary to fulfill one's responsibilities, as your Clan, as whatever you are in the world.⁴⁸⁹

The *aadizookaan* of the robin also identifies a second way Johnston takes up individual free choice within the giftway: the specific context of *gii'igoshimowin*, the vision quest. In a story he tells, Chejauk interprets Weegwauss' vision. At one point Chejauk says of visions generally that "With the vision, existence becomes living; the youth is no longer young. He has now a freedom which only he and no other can exercise and fulfil. It is his own. *Yet his freedom and independence must be consistent with his communities' laws and codes and with the great*

LePique, 1893-1895 (Wayne State University Press, 1994) 89. Although predictably versions differ, each retains the central theme of transformation from boy to robin as a means of avoiding a situation in which the boy lacks the freedom to pursue his own ends and fulfil his own vision in the face of parental expectation.

⁴⁸⁷ Borrows, *Freedom and Indigenous Constitutionalism* at 7.

⁴⁸⁸ *Ibid* at 17.

⁴⁸⁹ Kim Anderson et al, "Epilogue: Sitting in with Sisters" in Kim Anderson, Maria Campbell and Christi Belcourt, eds, *Keetsahnak: Our Missing and Murdered Indigenous Sisters* (Edmonton: University of Alberta Press, 2018) 305 [Kim Anderson et al, "Epilogue: Sitting in with Sisters"] at 315; square brackets in original. The violence Chacaby refers to regards missing and murdered indigenous women and girls.

laws that govern the world.”⁴⁹⁰ Soon after he reiterates his point, but adds a significant complication: “While men and women contend with the struggles in the physical order, they must live out their visions. They must follow the path of life as is prescribed in the visions. In so doing they must observe the laws of the world and the customs of the community.”⁴⁹¹ He makes the former point more emphatic still: “a man or woman must not allow another to interfere with his vision. The vision must remain inviolate.”⁴⁹²

So Johnston presents an enigma: the vision must remain inviolate, yet it must contradict neither the law of the community nor the law of the earth—natural law. But are these conflicting demands necessarily contradictory? Johnston says no: “At times, laws, customs, and codes may appear to bridle and restrain the vision and bind the freedom of the individual. But the conflict is only apparent. General world laws and codes and customs are wide enough to allow a person sufficient scope for the exercise of his freedoms and for his growth.”⁴⁹³

How might this be? I believe we already have the answer. The contradiction stands only when individual free choice—here, one’s capacity to pursue his or her vision—is understood as *liberty*. Where, rather, it exists within *co-creativity*, the conflict is indeed only apparent. For ‘world laws’ establish the giftway, community laws are local disclosures of the giftway, and individual visions bestow gifts to be shared within both at once.⁴⁹⁴

In closing this section, I recognize that this comment on the importance of individual choice to a rooted conception of freedom doesn’t resolve the tension created when an individual’s preferred choice pulls against his co-creative gift exchange responsibilities. Some liberal critics are unlikely to be mollified by my ready reply that persons with a rooted subjectivity never consider that their capacity for individual choice *should* be so important as to compete with their capacity for relational gifting. I think this result unfortunate, because in having introduced a rooted conception of freedom within the belonging analytic, I’ve been unequivocal that a rooted conception of freedom makes sense only in the context of a rooted conception of persons. To the extent that critics insist that rooted persons are unfree *for want of liberty*, they would seem not to be engaging with my argument.

4. From the Roots

There’s a statement I discovered at the start of my PhD, which struck me like thunder and which has helped to drive the whole project forward. It’s by former chief Gary Potts. I believe it draws out the relationship between the rooted conception of persons and of freedom I’ve explained here and it suggests how these first two aspects of the rooted belonging analytic (radical interdependence and co-creativity, respectively) shape the nature of rooted belonging. Vitally, it does so from the roots:

I remember once coming across an old white pine that had fallen in the forest. In its decayed roots a young birch and a young black spruce were growing, healthy and strong. The pine was returning to the earth, and two totally different species were growing out of the common earth

⁴⁹⁰ Johnston, *Ojibway Heritage* at 115; emphasis added. See also Leanne Simpson, “Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships” (2008) 23:2 *Wičazo Ša Review* 29 [Simpson, “Looking after Gdoo-naaganinaa”] at 33.

⁴⁹¹ Johnston, *Ojibway Heritage* at 116.

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ See for instance Umeek, *Tsawalk* at 56-58.

that was forming. And none was offended in the least by the presence of the others because their own identities were intact.⁴⁹⁵

iv. Belonging

Creation provides, renews, and provides again. Additionally, we're each gifted with the capacity to develop unique talents and abilities. It seems that both inside and out, we've been given all that we need to live *bimaadiziwin*.⁴⁹⁶ Yet still we struggle to walk within the earthway. We face a relentless constitutional conundrum: though the gifts are actual, *bimaadiziwin* is merely potential. To manifest it, we need to exercise co-creativity in a way that effectively coordinates gifts and needs throughout our community.⁴⁹⁷ But consider what a herculean task this is, given the messiness and imperfection of human, animal, plant, and spirit life as each of us struggles to balance our interests with those of others. How to do so is anything but obvious.

Recall the humility thesis. Earth community (the ecosphere) always already is; the task for rooted communities is thus to sort out how best to fit into the creative order. Whatever a community may think that looks like, it reproduces an understanding of the earthway's local dynamics. The critical insight is the necessary implication that rooted communities, like the earth, are forever being constituted. Belonging is active and contingent: always becoming.⁴⁹⁸ Belonging is thus something one lives, not something one has. The question is 'how?'

The nature of persons as radically interdependent creators sets up freedom in respect of mutual creative contribution. The question that belonging poses is thus appears twofold: (1) what does mutual creative contribution look like as a shared, ongoing activity, and (2) how does it coordinate gifts and needs throughout the community? The answer to this two-part question will explain how each of us can live a good life, together. The answer I propose is that rooted communities constitute themselves in networks of *mutual aid*.⁴⁹⁹ In *anishinaabemowin*, the word

⁴⁹⁵ Potts, "Growing Together From the Earth" at 199.

⁴⁹⁶ There are many sources on this topic. Because it takes the form of an introductory journey, readers unfamiliar with the concept may find this a helpful starting place: Lawrence W Gross, "*Bimaadiziwin*, or the 'Good Life,' as a Unifying Concept of Anishinaabe Religion" (2002) 26:1 Am Indian Cult Res J 15.

⁴⁹⁷ Pinesi, "The Mink and the Marten".

⁴⁹⁸ Elder Fred Kelly explains this quality of Anishinaabe constitutionalism, saying, "That's what our sacred law means, or if you will, call it a constitution. It means, *kagakiwe inaakonigewin*, means that sacred law and anything that is sacred to us is eternal. So it's ongoing." Interview of elder Fred Kelly by Commissioner Loretta Ross, "Episode 12: The Anishinaabe in Treaty 3 with Elder Fred Kelly (Part II)" on *Let's Talk Treaty*, Treaty Relations Commission of Manitoba, online: <<http://www.trcm.ca/multimedia/lets-talk-treaty/>> [Interview of elder Fred Kelly by Commissioner Loretta Ross, "Episode 12"]. I cross-referenced the spelling of the words in *Anishinaabemowin* ("*kagakiwe inaakonigewin*") with my notes from a lecture elder Kelly delivered at McGill's Faculty of Law (Fred Kelly, "Reconciling Sovereignties: Combining Traditional Law and Contemporary Western Law to see Truth and Reconciliation," public lecture presented at McGill Faculty of Law, Moot Court (NC DH 100, 21 September 2015) and the cross-referenced section of that note includes a footnote where I commented that I verified the spelling of all terms in *Anishinaabemowin* with elder Kelly's slides.

Heidi Stark's way of putting the point is as follows: "The creation story did not cease at a particular moment for Anishinaabe. Our continued interaction with creation – in all her forms – continues to generate stories that teach us how to be in the world." Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remediating the Rights(s) Relationship" in John Borrows and Michael Coyle, eds, *The Treaty Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: UTP, 2017) ch 9 [Stark, "Changing the Treaty Question"] at 261.

⁴⁹⁹ The notion that mutual aid is what sustains indigenous societies is set out in Peter Kropotkin's remarkable work, *Mutual Aid: A Factor of Evolution* (London: William Heinemann, 1904) at ch 3. I use Kropotkin's term but take many departures from his analysis. I acknowledge the significance of his extraordinary contribution.

for this idea is *wiidoookodaadiwin*⁵⁰⁰ and I believe rooted peoples all share some version of it.⁵⁰¹

Elder James Dumont's expression of the concept helpfully positions it in relation to radical interdependence and co-creativity, as the final step of the belonging analytic: "The most suitable application of this attitude of caring, within an environment that continually strives for harmonious life and well-being, is that of *sharing*. This is called 'cooperative co-existence' - i.e., recognizing the interdependence and interrelatedness of all of life, all 'persons' strive to relate with one another within an ethic of sharing, generosity, collective/communal consciousness, mutuality and harmonious interaction."⁵⁰²

I suggest that understanding of mutual aid is facilitated through an analytic with two formulations, which together present the logic of rooted constitutionalism. However, before exploring them we must first develop some basic insights about rooted constitutionalism, so as to foreground its genesis in the earthway.

⁵⁰⁰ The University of Minnesota's online *Ojibwe People's Dictionary* gives "Wiidoookodaadiwin" as "mutual help or assistance, helping others". University of Minnesota, *The Ojibwe People's Dictionary*, online: <<http://ojibwe.lib.umn.edu/>>. Nichols & Nyholm give "wiidoookodaadiwag/wiidoookodaadi" as "they help each other". John D Nichols & Earl Nyholm, *A Concise Dictionary of Minnesota Ojibwe* (Minneapolis: University of Minnesota Press, 2009) [Nichols & Nyholm, *A Concise Dictionary of Minnesota Ojibwe*] at 118. The Fond du Lac reservation's community college gives "Wiidoookodaadiwin" as "The Place Where We Mutually Help Each Other". Fond du Lac Tribal and Community College at the unnumbered 'Summary' page, 136, 157. *Higher Learning Commission Accreditation Self-Study Report* (Fond du Lac Tribal and Community College, 2015), online: <<https://fdltcc.edu/wp-lib/wp-content/uploads/2015/02/Self-Study-Report-2015.pdf>>.

Bishop Baraga's definition provides that the term applies to peoples as well as to persons. He gave "Widokodadiwin" as "mutual help, association, alliance." Frederic Baraga, *A Dictionary of the Ojibwe Language, Explained in English* (Cincinnati, 1853) [Baraga, *A Dictionary of the Ojibwe Language*] at 412. The Ojibway and Cree Cultural Centre's Political Terminology Glossary does the same, deploying "wiidokodadiwin" within its definition of "Political Confederacy". Jacasum, *Ojibway Political Terminology Glossary* at 58. For further sources, See Mitaanjigamiing First Nation, *Manito Aki Inaajimowin* (unpublished) at 5 ("wiikodoodadiwin"), Nancy Jones, Gordon Jourdain and Rose Tainter, with Anton Treuer & Keller Paap, eds, *Ezhichigeyang: Ojibwe Word List* (Hayward, WI: Waadookodaading Ojibwe Immersion Charter School, 2011) [Jones et al, *Ezhichigeyang*] at 69 ("wiidoookodaadiwin") and Johnston, *Ojibway Language Lexicon* at 95 ("Weedokaugaewin").

⁵⁰¹ See for instance Gespe'gewa'gi Mi'gmawei Mawiomi, *Nta'tugwaqanminen* at 119; Denys Delâge, *Bitter Feast: Amerindians and Europeans in Northeastern North America, 1600-64*, trans by Jane Brierley (Vancouver: UBC Press, 1993) [Delâge, *Bitter Feast*] at 53 ("Giving was the key to the Huron social universe"), 63 ("social order and peace were regulated by the rule of giving"); Williams, *Kayanerenkó:wa* at 132-136 (generally), 133 ("Mutual aid is part of Haudenosaunee society, not just a philosophy of its government"), 134 ("Helping one another' is a fundamental concept of the Kayanerenkó:wa, and also a fundamental concept of Haudenosaunee society"); Umeek, *Principles of Tsawalk* at 166 ("Thus, reciprocal gift giving and assisting one another became a law"); Clifford, "WSÁNEĆ Legal Theory" at 785 ("they each (the WSÁNEĆ and the TETÁĆES) have a series of *mutual responsibilities in relation to one another*."), 791; Morales, "Locating Oneself in One's Research" at 155 ("the importance of our legal principles of sharing and respect, teaching us that we are all interdependent and that we must look after one another"); "One important teaching, which forms the basis of our *snu'wuyulh*, is *hw'uywulh* or sharing. *Hw'uywulh* provides the basis for developing protocols with our relatives and non-relatives in the Coast Salish world." Sarah Morales, "Stl'ul Nup: Legal Landscapes of the Hul'qumi'num Mustimuhw" (2016) 33:1 Windsor Y B Access Just 103 [Morales, "Stl'ul Nup: Legal Landscapes of the Hul'qumi'num Mustimuhw"] at 122; citation removed; Nancy Sandy, "*Stsqey'ulécw Re St'exelcenc* (*St'exelcenc* Laws From The Land)" (2016) 33:1 Windsor Y B Access Just 187 [Sandy, "*Stsqey'ulécw Re St'exelcenc*"] at 212 ("Law is also directed towards sharing"); Robert Lovelace, "Prologue. Notes from Prison: Protecting Algonquin Lands from Uranium Mining" in Julian Agyeman et al, eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) ix [Lovelace, "Prologue. Notes from Prison"] at xviii ("Communities computed their own needs and portioned out resources with a sustainable logic that insured an equitable share for everyone. Equity was not a moral question; it was an assurance of mutual benefit and protection").

⁵⁰² Dumont & Antone, *What Was Never Told* at 19; emphasis in original.

b. Rooted Constitutionalism

This section centres on the rooted constitutional logic, mutual aid. I present it in two formulations (one positive: gift→gratitude→reciprocity; the other negative: need→responsibility→reciprocity). In the first part of this section, I explore each formulation and identify that each presupposes the other. I then spend considerable time developing the point that within mutual aid communities, reciprocity is circular. Given how deep a challenge this concept often is for liberals to understand, I suspect it warrants the attention.

In the second part I look at how mutual aid is structured into the lives of community members through kinship. Structural anthropology has heavily emphasized the marriage-structuring role of kinship, but what I'm interested in is how each kind of kinship relation specifies the mutual aid analytic in a particular way. I look in particular at brothers and fathers, and then I look at how the kinship structure is extended metaphorically to various kinds of persons (including to non-humans), locating them in networks of mutual aid. The kinship discussion culminates in an examination of the boundaries of rooted constitutional orders. I make the case that mutual aid communities are bounded only through the thickness gradient of members' lived relationships. Amongst other phenomena, this accounts for the intensity of belonging at village sites and the thinness of it at peripheries, and also for the patterned aggregations and dispersals of the Anishinaabe annual round.

This section closes with an examination of a particular conception of harmony, which I argue replaces justice as the ultimate end of rooted community. It's defined not as the absence of conflict, but rather as the openness of mutual aid interactivity which supports more life.

To begin, recall that elders often describe the order inherent in creation in the language of 'law', with a descriptor such as 'spiritual', 'eternal', 'Creator's', or 'great binding', preceding it. In offering these names, I believe the elders are identifying their respective understandings of the *systems* from within which dynamic indigenous-authored law emerges, rather than determinate indigenous laws. For instance, in offering a pipe teaching, Elder Harry Bone says:

First, it is pointed to the Creator, then the land. When he puffs that pipe, he's representing all the people. Our laws come from those directions. Where did we come from? The Creator. That's the first law. He said that as long as you remember those directions you will understand our laws. They are what bind us as people and it describes our journey through life. But I don't want to be too descriptive; to me it captures a whole framework.⁵⁰³

That each of these formulations of the creative order should be cast as *law* makes sense because they are in a sense the sources of indigenous law.⁵⁰⁴ But I think the systems the elders are describing are also properly, and perhaps better, understood as constitutional orders⁵⁰⁵ for the

⁵⁰³ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 14. For those wanting to begin to understand elder Bone's framework, he expands upon it in Pratt et al, *Untuwe Pi Kin He* at 113, 114 and in Hyslop et al, *Dtantu Balai Betl Nahidei* at 36-39. Compare also with Bone et al, *The Journey of the Spirit of the Red Man* at 19-20, 28-35.

⁵⁰⁴ Like so many students I know, I've been greatly assisted by Borrows' typology of indigenous law. Borrows, *CIC* at ch 2. As I read him, Borrows presents sacred law in two senses. The first is substantive: as a source of law unto itself, and thus as a species of legal rule. *Ibid* at 25. The second use seems to me logical-structural: "as foundational to the operation of other laws." *Ibid*. Napoleon seems to share the first view of sacred law. Napoleon "Thinking About Indigenous Legal Orders" at 233. As for myself, I think the second sense represents a brilliant insight, and it's this view of sacred law that my work means to further develop.

⁵⁰⁵ Kiera Ladner's work already establishes a discourse of distinct 'indigenous constitutionalism'. See for instance, Kiera L Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 CJPS 923 at 936; Kiera L

reason that they're presented as the necessary logical-structural contexts for understanding our law.⁵⁰⁶ This may be what Elder Allan White is expressing when he says, "*Inaakonigewin* is the source of our law, it is Great Binding Law. If you don't understand it, you will not understand our laws."⁵⁰⁷ The community of Migisi Sahgaigan (Eagle Lake First Nation) also appears to use the terms 'sacred' and 'natural' law to draw out the relationship between constitutionalism and law in its remarkable resource law:

Our duties and responsibilities were passed down by the Creator through Manitou Inaakonig'ewin - the sacred laws and teachings that the Anishinabe follow. Manitou Inaakonig'ewin are natural laws - those of the universe. These unwritten laws are meant to guide our actions and decisions and Bimi'onitizowin - the way we govern ourselves. We draw on these laws as part of Inaakonig'ewin - laws made by and for the people.⁵⁰⁸

Sometimes elders and knowledge keepers have gone further, drawing an express equivalence between sacred law and constitutionalism. For instance, what is today Nishnawbe Aski Nation explains that "The guiding principles or the constitution of our Indian law, was written into the leaves, the trees, the lakes, the streams, the rocks, the sun, the moon and clouds by the finger of the Great Spirit, and made ever fresh to us by the four winds as they breathed upon us daily."⁵⁰⁹ It's the same in Treaty #3. Leon Jourdain, then-Grand Chief of Grand Council Treaty #3, said in his vision statement for Treaty #3 Anishinaabeg that "Our Constitution comes from the Sacred Law of the Creator which the Elders refer to as '*Kagigewe Inakonigawin*' which effectively translates to *Eternal Law*. It is the law that governs all life in the Universe to which we are absolutely and intrinsically connected."⁵¹⁰ Onondaga spiritual leader Sidney Hill (Tadodaho) says "We have the Law, the Constitution of the Haudenosaunee. This is the spiritual law that has protected us up to this time."⁵¹¹

Ladner, "Understanding the Impact of Self-Determination on Communities in Crisis" (2009) 5:2 J of Aboriginal Health 88; Kiera L Ladner, "Indigenous Governance: Questioning the Status and the Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights" Research Paper for the National Centre for First Nations Governance (15 September 2006) at 3; Kiera Ladner, "(Re)creating Good Governance—Creating Honourable Governance: Renewing Indigenous Constitutional Orders" (Paper Presented at the Annual Conference of the Canadian Political Science Association, Ottawa, 27-29 May 2009) [unpublished]; Kiera L Ladner, "Take 35: Reconciling Constitutional Orders" in Anna May Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) ch 11 [Ladner, "Take 35"]. See also Williams, *Kayanerenkó:wa* at 137.

⁵⁰⁶ Grandmother Sherry Copenace presented an Anishinaabe analytic doing just this at McGill Law, during a presentation with elder Harry Bone. Sherry Copenace, untitled presentation on Anishinaabe inakonigewin, McGill University Faculty of Law, 5 February 2019. Professor Aimée Craft, too, presents an Anishinaabe law analytic that situated human law within sacred law, where sacred law is understood to be part of the essential context of human-made law, and not an alternative substantive source of laws: Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi" at 58-60.

⁵⁰⁷ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 14.

⁵⁰⁸ Migisi Sahgaiganing Anishnaabeg, *Migisi Sahgaigan Maa 'a Chi Totaa-Aki Declaration: Migisi Sahgaiganing Anishnaabeg Inaakonige'onan*, Part 1 (16 April 2012 at Migisi Sahgaiganing) [*Migisi Sahgaigan Maa 'a Chi Totaa-Aki Declaration*] 1; emphasis (bold script, italic script, and capital letters) removed.

⁵⁰⁹ Grand Council of Treaty No. 9, "Grand Council of Treaty no. 9" at 20; see also pages 24, 25.

⁵¹⁰ Jourdain, "Pazaga'owin" at 15.

⁵¹¹ Sidney Hill, "Message from Chief Sidney I. Hill, Successor to Chief Leon Shenandoah" in Paul AW Wallace, *The Iroquois Book of Life: White Roots of Peace* (Santa Fe, NM: Clear Light Publishers, 1994) at 16.

Elder Bone has shared with me parts of the pipe teaching he starts to tell in the quotation above, calling it a “framework” and in at least one instance, our Anishinaabe “constitution”.⁵¹² Elder Fred Kelly, too, refers to the Anishinaabe “constitutional framework”⁵¹³, saying:

Our traditional constitution, if you were to accept as proposition which I accept as fact, that we did have a supreme law since time immemorial, which for lack of a better term and we translate into the English language means ‘constitution’ because it is the supreme law of the people. Ours is oral, that is it is unwritten, it is spiritual, it is sacred, and the sacred in that, the sacred and the spiritual are fused, are as one. It is sovereignty, nationhood, governance and jurisdiction manifest.⁵¹⁴

On other occasions he has been equally express about the equivalence between sacred law and constitutionalism, saying “We were governing according to our own laws, and those laws came from the Creator, and our ancestors. And that is the supreme law; that is a sacred constitution”,⁵¹⁵ and “That’s what our sacred law means, or if you will, call it a constitution.”⁵¹⁶

i. Mutual Aid: The Logic of Rooted Constitutionalism

Recall that on my account, a constitutional logic can be understood in respect of a tripartite analytic of *extension* → *reception* → *response*. Different societies map to this analytic in unique ways. For liberal political communities, I suggested that the contractarian model of belonging renders the constitutional logic analytic as *offer* → *acceptance* → *internal correspondence*. The response is ‘internal’ in that it corresponds directly to the offer extended. Thus in a social contract, each citizen’s agreement to abide by the terms is offered for the agreement of each other citizen. For rooted legalities, constitutional logic is arguably more complicated. Because of the constitutional contingency intrinsic to the humility thesis, mutual aid has two analytics: a positive formulation for when a community member is presented with a gift, and a negative formulation which begins instead with a need.

1. The Positive Analytic: Gift → Gratitude → Reciprocity

The positive formulation of mutual aid is *gift* → *gratitude* → *reciprocity*⁵¹⁷ and as a way into understanding it, I’d like to focus on an episode in one of Basil Johnston’s stories. In the critical scene, Johnston recounts:

⁵¹² Elder Harry Bone (8 January 2017).

⁵¹³ Comments of Elder Fred Kelly, *As Long as the Sun Shines: AFN-Canada Treaty Implementation Conference*, Draft Conference Report (Teachers Credit Union Place, Saskatchewan, Treaty No. 6 Territory, 27 March 2008) 104 [Kelly, Comments at *As Long as the Sun Shines*] at 108.

⁵¹⁴ *Ibid* at 109; see also pages 110-111.

⁵¹⁵ Interview of elder Fred Kelly by Commissioner Loretta Ross, “Episode 11”.

⁵¹⁶ Interview of elder Fred Kelly by Commissioner Loretta Ross, “Episode 12”.

⁵¹⁷ I can’t overstate how much I’ve benefited from being in dialogue with James Tully during his enormously creative period following his turn to Gaia citizenship in the closing chapter of *PPNK 2*. The *gift* → *gratitude* → *reciprocity* analytic features, often centrally, in much of the considerable body of work he’s produced in recent years. As will be obvious in this section, I’ve learned so much from this scholarship. See James Tully, “Reconciliation Here on Earth” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) ch 3 [Tully, “Reconciliation Here on Earth”]; James Tully, “A View of Transformative Reconciliation”

Bear gave one berry to each of his neighbours that stood near him. So many berries did the bear give out to everyone that called out, “Give me one” that his container should have become empty. But it didn’t. It remained always full. Bear gave and gave until every insect, bird, animal and fish had received a berry. Still, his container was as full as it was before.⁵¹⁸

Clearly, bear is exceptionally generous in offering up her gift to others. Basil Johnston observes of indigenous peoples generally that “Even more honoured than was courage, resourcefulness, fortitude and other traits was generosity.”⁵¹⁹ For many of us, the notion that the more one gives, the more one has, flies in the face of logic; the story seems to require a step back from all reasonable expectation of cause and effect. Umeek’s statement that “a generous person is never without the necessities of life” simply makes no sense.⁵²⁰

The insight critical to cracking the secret of the ever-full bowl, however, is to realize that the offended logic belongs to another kind of story. In a liberal narrative, it’s a zero-sum truth that the more an autonomous person gives, the less he necessarily has. This is why rational actors, the characters in such a story, pursue (and are expected to pursue) their own self-interest. But where persons are radically interdependent, *the fact of the recipient* is just as vital to the reality of a gift as is its donor. Writing in another context, Kimmerer solves the riddle, drawing on the fact of the bowl’s many recipients, which, vitally, include the berries:

How do we refill the empty bowl? Is gratitude alone enough? Berries teach us otherwise. When berries spread out their giveaway blanket, offering their sweetness to birds and bears and boys alike, the transaction does not end there. Something beyond gratitude is asked of us. The berries trust that we will uphold our end of the bargain and disperse their seeds to new places to grow, which is good for berries and for boys. They remind us that all flourishing is mutual. We need the berries and the berries need us. Their gifts multiply by our care for them, and dwindle from our neglect. We are bound in a covenant of reciprocity, a pact of mutual responsibility to sustain those who sustain us. And so the empty bowl is filled.⁵²¹

(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, “A View of Transformative Reconciliation”]; James Tully, “On Gaia Citizenship” (Mastermind Lecture, University of Victoria, 20 April 2016) [Tully, “On Gaia Citizenship”]; James Tully, “Life Sustains Life” (Heyman Centre Series on Social and Ecological Value, with Jonathan Schell & Akeel Bilgrami, Columbia University, 2 May 2013); James Tully, “Transformative Change and Idle No More” (Indigenous Peoples and Democratic Politics, First Peoples’ House, University of British Columbia, 1 March 2013); James Tully, “On the Significance of Gandhi Today” (Perspectives on Gandhi’s Significance Workshop, Reed College, 16 April 2016) [Tully, “On the Significance of Gandhi Today”]; James Tully, “Deparochializing Political Theory and Beyond: A Dialogue Approach to Comparative Political Thought” (Winter 2016) 1 J of World Philosophies 51 [Tully, “Deparochializing Political Theory and Beyond”]; James Tully, “Two Ways of Being Colonial: Guest and Settler” (*On Studying and Overcoming Colonization and Decolonization: The Workshop on Colonization and Decolonization*, University of British Columbia, 12 April 2017); James Tully, “Life Sustains Life 1: Value: Social and Ecological” in Akeel Bilgrami, ed, *Nature and Value* (Columbia University Press, 2019); James Tully, “Life Sustains Life 2: The ways of re-engagement with the living earth” in Akeel Bilgrami, ed, *Nature and Value* (Columbia University Press, 2018); James Tully, “On Resurgence and Transformative Reconciliation” in Nancy Turner, ed, *Plants, People and Places: the Roles of Ethnobotany and Ethnoecology in Indigenous Peoples’ Land Rights in Canada and Beyond* [under review at MQUP] ch 23.

⁵¹⁸ Johnston, “Seagull” at 38. See also Basil H Johnston, “Plants” in *Honour Earth Mother / Mino-audjau* *Mizzu-kummik-quae* (Cape Croker Reserve: Kecedonce Press, 2003) 37 at 45-47.

⁵¹⁹ Johnston, “Think Indian” at 186.

⁵²⁰ Umeek, *Tsawalk* at 129.

⁵²¹ Kimmerer, *Braiding Sweetgrass*, at 382.

The reception of gifts freely offered, “gifts we have neither earned nor paid for”,⁵²² sustain one’s freedom, moving him to gratitude. The experience of gratitude in turn moves one to an expression of thanksgiving for the gift.⁵²³ Elder Gidigaa Migizi (Doug Williams) reminds us that *miigwech*, the Anishinaabe word for thanksgiving, is *literally* an acknowledgement of a gift (from the cognate *miigiwe*, “the act of giving”)⁵²⁴, linguistically situating one within the analytic. This gift-acknowledging experience of gratitude in turn yields a reciprocal gifting. Elder Florence Paynter, Ozhaashko-Bineshikwe, illustrates this analytic when she says that:

This is what the Anishinaabe did all the time was feasting; giving thanks.

Giving thanks for his life; giving thanks for his gifts and the pipe was used to give thanks along with the tobacco.⁵²⁵

“Our culture is a culture of gratitude”⁵²⁶ says elder Dave Courchene. But if gratitude serves as our primary mover, then exchange isn’t a contract: a freely offered gift moves openly and without compulsion.⁵²⁷ The expression of thanksgiving and the reciprocal gift issue from an internal movement (feeling ‘called’ to thanksgiving and reciprocation), which means there’s wide scope for agency here. Helen Agger captures this sense of internal movement, and the attendant exercise of agency required to respond to it, when she articulates mutual aid’s positive formulation: “the people of Namegosibiing acknowledged the rejuvenating ability of the land as another priceless gift, and for that too, they were thankful. Their sense of gratitude nurtured a deeply held respect that guided their every day activities.”⁵²⁸

Thus the bowl, in a mutual aid society, remains full for the reason that gifts beget gratitude, which begets thanksgiving and reciprocation: return gift.

⁵²² Kimmerer, “Returning the Gift” at 18.

⁵²³ Elder James Dumont offers a clear, fulsome and accessible explanation of the work that a thanks giving does in Ontario, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl, 1st Sess, No 178 (30 May 2016) at 9631 (James Dumont).

⁵²⁴ Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 33.

⁵²⁵ Pratt et al, *Untuwe Pi Kin He* at 43.

⁵²⁶ Courchene, Address at A Town Hall for Environmental Law.

⁵²⁷ Reading Mauss during my LLM had a profound impact on my thought and I honour his contribution to the West’s effort to apprehend ‘gift societies’. However I take considerable distance from much of the cannon since developed, which casts the gift (1) in an economic frame, and (2) within a progress narrative which sees it as diagnostic of an early state of social development. Additionally, Mauss (and thus Derrida and others who followed him) misunderstood how force operates in gift exchange, generating the false claim that a return gift need be a counter-gift. See Mauss, *The Gift*. Derrida famously formulated a reply in Jacques Derrida, Peggy Kamuf, trans *Given Time: I. Counterfeit Money* (University of Chicago Press, 1992). Finally, Mauss didn’t appreciate how the gift, as an organizing feature of indigenous societies, replicates the logic of the creative order. His treatment unmoors the gift from earth, which is what allows it to be treated primarily as a form of economic ordering.

Dr. Rauna Kuokkanen, a Sami scholar, has deadly aim on these points in an essay of singular importance on the logic of the gift, which ought to be a central point of reference amongst contemporary scholars of gift theories. See Rauna Kuokkanen, “The Gift as a Worldview in Indigenous Thought” in Genevieve Vaughan, ed, *Il Dono/The Gift: A Feminist Analysis* (Rome: Meltemi editore, 2004) 81 [Kuokkanen, “The Gift as a Worldview in Indigenous Thought”]. Kuokkanen’s Sami theory of the gift reappears in the first chapter of her book on the gift: Rauna Kuokkanen, *Reshaping the University: Responsibility, Indigenous Epistemes, and the Logic of the Gift* (Vancouver: UBC Press, 2007) [Kuokkanen, *Reshaping the University*] at 32-43. Kuokkanen explains, “In reciprocity as practised in terms of indigenous worldviews, gifts are not given primarily to ensure a counter gift later on, but to actively acknowledge kinship and coexistence with the world”. *Ibid* at 38.

⁵²⁸ Agger, *Following Nimishoomis* at 87.

One further point about reciprocal gifts needs to be made, namely *who* refills the bowl, but we need first to fill out the logic of mutual aid communities before taking that up.

2. The Negative Analytic: Need→Responsibility→Reciprocity

We should have an idea of life within a rooted constitutional order skewed to the romantic if we considered how community is sustained only when a gift offering begins an interaction between community members. The reality is that interactions begin just as often with the presentation of a need. In older Anishinaabe discourse, this was often expressed, in English, as a petition for “pity”.⁵²⁹ Treaty records and petitions are shot through with this word.

An example of its use to solicit aid may prove helpful. On July 18th 1695, the Governor General of New France, the Count de Frontenac whom indigenous peoples called Onontio, held audience with numerous indigenous leaders.⁵³⁰ After two Anishinaabe *ogimaag* spoke, Tioskatin⁵³¹, a Dakota representing 22 Dakota communities, addressed the Count, imploring his pity.⁵³² Kinship, the constitutional idiom the following address deploys (in this instance, the situating of the parties as father and as child, respectively), is explained below. For immediate purposes, to understand how the solicitation of aid factors centrally into this address, readers need understand only that it’s the responsibility of fathers to meet the needs of their children.

The Chief of the Scioux, before speaking, spread out a beaver robe, and laying another with a tobacco pouch and an otter skin over that, commenced weeping very bitterly, saying, Have pity on me! After consoling him somewhat, he dried his tears and said—All the Nations had a Father who afforded them protection, all of them have Iron [the implements of war]; that is every [sic] necessary. But he was a bastard in quest of a Father; he is come to see him and begs that he will take pity on him.

[....]

It is not, he continued, on account of what I bring that I hope he who rules this earth will have pity on me.⁵³³ I learned from the Sauteurs [western Anishinaabeg] that he wanted for nothing; that he was the Master of the Iron; that he had a big heart into which he could receive all the nations. This has induced me to abandon my people to come to seek his protection and to beseech him to receive me among the number of his children. Take courage. Great Captain, and reject me not; despise me not, though I appear poor in your eyes.⁵³⁴

⁵²⁹ “Pity” in an Anishinaabe sense lacks condescension. Baraga renders “Jawéndjige, (nin)” as “I have mercy or pity, I practise charity, I bestow a benefit” [“nin” means ‘I’: first person singular conjugation]: R R Bishop Baraga, *A Dictionary of the Otchipwe Language, Explained in English, Part I: English-Otchipwe* (Montreal: Beauchemin & Valois, 1880) at 167. Nichols & Nyholm define “zhawenjige” as “be merciful, be kind-hearted, have pity” and “zhawenim” as “bless someone, pity someone”: Nichols & Nyholm, *A Concise Dictionary of Minnesota Ojibwe* at 124. Basil Johnston defines “(w)Zhawaendjigae” as “He (she) is merciful, pitying, benevolent, compassionate”: Johnston, *Ojibway Language Lexicon* at 63, and the prefixes “Zhaw, zhawae” as “Kind, kindness, pity, compassion, charity, sympathy”: *Ibid* at 129. The Ojibwe People’s Dictionary has ‘zhawenjige’ as “s/he is merciful, is kind-hearted, has pity”: University of Minnesota, *The Ojibwe People’s Dictionary*, online: <<http://ojibwe.lib.umn.edu/>>. Appeals for pity are appeals for aid. See Copway, *Traditional History and Characteristic Sketches* at 73.

⁵³⁰ “Narrative of the most remarkable Occurrences in Canada. 1694, 1695.” in EB O’Callaghan, ed, *Documents Relative to the Colonial History of the State of New York, Vol. 9* (Weed, Parsons and Company, 1855) [O’Callaghan, “Narrative of the most remarkable Occurrences in Canada”] 594, 609.

⁵³¹ De la Potherie, “IX Lettre” in *Histoire de l’Amerique Septentrionale, Vol 4* (Paris: Chez Nyon fils, 1753) 1 at 31.

⁵³² O’Callaghan, “Narrative of the most remarkable Occurrences in Canada” at 610.

⁵³³ Tioskatin here clarifies that he’s not seeking brotherhood, a relation of roughly equal and open exchange.

⁵³⁴ O’Callaghan, “Narrative of the most remarkable Occurrences in Canada” at 610.

I often hear elders and knowledge-keepers using this term, ‘pity’, today, especially in contexts of prayer and ceremony when we humble ourselves in an invocation for aid. In his remarkable text, *History of the Ojibway Nation*⁵³⁵, Anishinaabe writer William Warren explains why:

Ke-che-mun-e-do (Great Spirit) is the name used by the Ojibways for the being equivalent to our God. They have another term which can hardly be surpassed by any one word in the English language, for force, condensity, and expression, namely: Ke-zha-mune-do, which means pitying, charitable, overruling, guardian and merciful Spirit ... It is derived from Ke-zhawaud-e-se-roin, meaning charity, kindness—Ke-zha-wus-so expressing the guardian feeling, and solicitude of a parent toward its offspring, watching it with jealous vigilance from harm; and Shah-wau-je-gay, to take pity, merciful, with Mun-e-do (spirit).⁵³⁶

From an Anishinaabe standpoint then, it’s a wonderful thing to be in need of pity. The bare fact of need is not to be lamented but celebrated: needs are vital and necessary for a good life.⁵³⁷ In fact, to honour the humility thesis, and thus to live within the earthway, acknowledging our needs is essential (recall the sacrifice aspect of co-creativity). For outside of conditions of rough gift-need equilibrium, a rooted society would spiral out of balance. Umeeek explains that:

The Western dictum that “it is better to give than to receive” is potentially misleading from a Nuu-chah-nulth perspective because an emphasis upon giving may lead one to consider receiving irrelevant or unimportant. In the traditional Nuu-chah-nulth view, both are of equal importance. Giving is completely dependent upon receiving, and receiving is completely dependent upon giving. There is balance and harmony here.⁵³⁸

As the generation and distribution of gifts exceeds need—as humility is set aside and positive feedback loops are allowed to flourish⁵³⁹—gifts will generally cease to exist as gifts, transforming into needs, collectively diminishing the prospect of *bimaadiziwin*. Think of the problems created by a landfill site, ecological imbalance owing to over-predation, or a child spoiled by having always been made the centre of attention.⁵⁴⁰

Mutual aid’s negative formulation is expressed as *need* → *responsibility* → *reciprocity*. A need is to be met with a sense of responsibility⁵⁴¹ to the needs-bearer, which in turn gives way to beneficent action (what kind of action specifically and how one knows whether she ought to take

⁵³⁵ Warren, *History of the Ojibway Nation*.

⁵³⁶ *Ibid* at 64. In today’s double-vowel orthography, the first name is more commonly rendered as ‘Gichi Manidoo’, and the latter as ‘Gizhe Manidoo’.

⁵³⁷ Which is of course not to pass judgment on how one should feel in any particular instance of need! It would be silly to suggest one should feel all gratitude, all the time.

⁵³⁸ Umeeek, *Tsawalk* at 39; see also 129.

⁵³⁹ Tully, “Reconciliation Here on Earth”; Tully, “On Gaia Citizenship”.

⁵⁴⁰ Driben *et al* are helpful here in explaining why Anishinaabe and Cree economies don’t function in respect of a supply-and-demand logic: Driben *et al*, “No Killing Ground” at 102-103.

⁵⁴¹ As with mutual aid’s positive formulation, the acceptance step of the analytic is organized within distinct forms of relationship. My responsibility in respect of a need I’m presented with is defined, in large part, by the nature of my relationship with its bearer. This is taken up in detail in chapter 6, section (d)(i)(2)-(3). In broad strokes, rooted persons could say of responsibility that “We have begun to talk about government as *we* understood it—in the form of *responsibility*: that we have responsibilities for the earth, for the water, for all of our relatives, on and in it, and equally, they have responsibilities”. Osenntion and Skonaganleh:rá, “Our World” at 12; emphasis in original.

it is the subject of chapter six, section (d), the law section).⁵⁴² One of Basil Johnston's stories culminates in a poignant dialogue between a boy and his grandmother on precisely this point, that needs must be met with a sense of responsibility to share one's gifts.⁵⁴³ Southwind is a young boy who yearned for a gift. However he struggled to recognize when his gift (a water lily) came, and how to act responsibly in respect of it. Amongst other sources of confusion, he expected to be his own gift's beneficiary. Finally he recognizes the water lily for the gift it is, takes it, uses it, and heals his grandmother's illness. The story closes with this exchange:

Some months later Southwind and his grandmother were standing on the knoll studying the stars. He said to her, "No'okomiss, the flower gift that I received; it was really meant for you, wasn't it?"

"In a way it is. But it was meant for everybody. But that's the way all human gifts are."⁵⁴⁴

Both as an elder and as a committed helper, Edward Onabigon also carried the teaching that one holds gifts for others. He said, "I had one dream in which I knew I had permission to start using the pipe. The hand-drum, the traditional big drum, the water drum here—they're all gifts I carry now. Not for me, but these gifts are carried for the community and to make the circle strong."⁵⁴⁵ Johann Georg Kohl, a German travel writer, cast the imperative to share with those in need much more dramatically in his study of Lake Superior Anishinaabeg:

As a universal rule, next to the liar, no one is so despised by the Indians as the narrow-hearted egotist and greedy miser. The Indians might possibly give a murderer or other sinner the seat of honour in their lodges, but a man known as a "sassagis" (mean man) must sit at the doorway. As long as a man has anything, according to the moral law of the Indians, he must share it with those who want; and no one can attain any degree of respect among them who does not do so most liberally.⁵⁴⁶

Hallowell likewise explained of the Berens River Anishinaabeg that "In Ojibwa culture there are no incentives for individuals to try and surpass their fellows in the accumulation of material goods. On the contrary, no one is expected to have much more than anyone else except temporarily. Any accumulation of goods is considered to be evidence of personal greediness, which is abhorred."⁵⁴⁷ Likewise at Mishkeegogamang:

Francis Muckuck remembers a time when sharing was second nature: 'when a person experienced some misfortune, another person who had more fortune and therefore, more food, would go over and give some food to that less fortunate person to help out. That's how people lived in the old days. They lived very well. They looked after one that was less fortunate. If a person had poor clothing, a richer one did not hesitate to give him clothes to wear. No one

⁵⁴² In what he calls, "advice given by our fathers", George Copway provides a long list of examples of appropriate responses to different sorts of needs. See George Copway, *The Life, History, and Travels, of Kah-ge-ga-gah-bowh* (Albany: Weed and Parsons, 1847) [Copway, *The Life, History, and Travels, of Kah-ge-ga-gah-bowh*] at 40-41.

⁵⁴³ Johnston, "The Gift of the Stars".

⁵⁴⁴ *Ibid* at 21.

⁵⁴⁵ Onabigon, "Elder's Comments" at 284.

⁵⁴⁶ Johann Georg Kohl, *Kitchi-Gami: Wanderings Round Lake Superior* (London: Chapman and Hall, 1860) [Kohl, *Kitchi Gami*] at 66. Compare with Johnston, "Seagull".

⁵⁴⁷ Hallowell & Brown, *The Ojibwa of Berens River* at 91.

thought anything of it. The old women gave each other clothes to wear. That's why things went well long ago, because they fended for each other."⁵⁴⁸

Basil Johnston is emphatic in rejecting selfishness, saying that for Anishinaabeg, "at the root of all wrong-doing is selfishness"⁵⁴⁹; "For our ancestors selfishness is the mother of all ill-will and wrong-doing that besets society",⁵⁵⁰ and even that "Men and women, who think of themselves first to last, are not fit to be part of the community. Outcasts they deserve to be, deserving of whatever punishment the world pronounces and inflicts upon them."⁵⁵¹

Yet apprehending the imperative to share one's gifts with those in need is only a first step in living responsibly. Responsibility requires not only that one share when able, but that one enables himself to share. In explaining how the hunting training he received as a youth contributed to his formation as a community member, George Copway discloses this anticipatory aspect to the responsibility to meet others' needs with one's gifts. He recalls: "Many a lecture I received when the deer lay bleeding at the feet of my father; he would give me an account of the nobleness of the hunter's deeds, and said that I should never be in want whenever there was any game, and that many a poor aged man could be assisted by me."⁵⁵²

Seen from one perspective then, 'responsibility' might seem an onerous imposition.⁵⁵³ Yet Kimmerer explains how, consistent with co-creativity, the presentation of a need isn't necessarily an imposition. She notes that from a Western standpoint, "Naming responsibility is often understood as accepting a burden, but in the teachings of my ancestors, responsibilities and gifts are understood as two sides of the same coin. The possession of a gift is coupled with a duty to use it for the benefit of all."⁵⁵⁴ I recently experienced this in my own life. Before Graydon was born, Meg and I decided we'd like to raise him in a *tikinaagan* (cradleboard). I asked elder Harry Windigo of Mitaanjigamiing to teach me how to make one. He happily agreed, but explained that once I learn, I become responsible for supporting those who ask me to teach them.

It should be clear enough now that both formulations of the mutual aid analytic connect as halves of a single constitutional logic; the viability of each presumes the viability of the other. It follows that rooted community members don't ordinarily get exercised when presented with a need. The reason, as Kimmerer artfully explains through the example of pow wow, is that:

In a culture of gratitude, everyone knows that gifts will follow the circle of reciprocity and flow back to you again. This time you give and next time you receive. Both the honor of giving and the

⁵⁴⁸ Marj Heinrichs & Diane Hiebert with the people of Mishkeegogamang, *Mishkeegogamang: The Land, the People & the Purpose* (Rosetta Projects, 2009) [Heinrichs et al, *Mishkeegogamang*] at 180.

⁵⁴⁹ Johnston, "Introduction" in *The Gift of the Stars* at 13.

⁵⁵⁰ *Ibid* at 12.

⁵⁵¹ *Ibid*. See also 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.

⁵⁵² Copway, *The Life, History, and Travels, of Kah-ge-ga-gah-bowh* at 27.

⁵⁵³ We can see clearly here just how much at variance responsibility is with obligation, and thus rooted normativity with liberal. Invoking Kant, Michael Ignatieff sums up the latter, saying, "The basic intuition of rights talk is that each of us is an end in ourselves, not a means to an end." Ignatieff, *The Rights Revolution* at 24. The trick with radical interdependence is to see how one can opt out of Kant's radical individualism without being shunted to the other pole of his (false) binary. The basic intuition of responsibility talk is that each of us is both a means to others' ends and an end in ourselves, that normative interaction is thus therefore messy, but that this messiness is navigable since our roles as means and as ends are reconcilable to the earthway.

⁵⁵⁴ Kimmerer, "Returning the Gift" at 23.

humility of receiving are necessary halves of the equation. The grass in the ring is trodden down in a path from gratitude to reciprocity. We dance in a circle, not in a line.⁵⁵⁵

3. Circular Reciprocity

Finally then, we can return to the critical point of *who* fills the berry bowl. Kimmerer's observation that ceremony is shaped as a circle helps to disclose that within the earthway, beginning meets end. For the rooted, there's no progress.⁵⁵⁶ Ours is a life of recurrence; the direction of growth is a wide arc that finds its way humbly back to itself.⁵⁵⁷ A critical feature of mutual aid, in either of its aspects, is that the reciprocal gift need not return to the original donor: the interaction need not be one of *direct* reciprocity. Once I was expressing my gratitude to nokomis for all I'd received from our community and from her especially. Towards the end of the conversation, I asked if she had any thoughts on how I might give back. She knew immediately what she wanted to say: support the young parents in the community. They have lots of struggles and big ones are drugs and alcohol. They need help to get education. Second, she said I could help community members to know their history.⁵⁵⁸

Neither suggestion calls for a counter-gift; nokomis wanted nothing for herself. She would have me gift folks I haven't necessarily benefited from, and at the very least, whom I haven't benefited from directly. We don't gift in anticipation of having our own immediate or future needs met; we gift to meet the needs of others and we simply trust⁵⁵⁹ that they'll reciprocate in turn.⁵⁶⁰ Hence Hallowell's observation amongst the Saulteaux⁵⁶¹ that "A spirit of mutual helpfulness is manifest in the sharing of economic goods and there is every evidence of cooperation in all sorts of economically productive tasks."⁵⁶²

⁵⁵⁵ Kimmerer, *Braiding Sweetgrass*, at 381.

⁵⁵⁶ Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 96.

⁵⁵⁷ See for instance Williams, *Kayanerenkó:wa* at 6.

⁵⁵⁸ Teaching of elder Bessie Mainville (19 January 2016) Couchiching First Nation.

⁵⁵⁹ For an exploration of the role of trust in rooted communities (he would say communities with a high degree of 'collective continuance'), see Kyle Whyte, "Critical Investigations of Resilience: A Brief Introduction to Indigenous Environmental Studies & Sciences" (2018) 147:2 *Dædalus* 136 [Whyte, "Critical Investigations of Resilience"]; Kyle Powys Whyte, "Food Sovereignty, Justice, and Indigenous Peoples: An Essay on Settler Colonialism and Collective Continuance" in Anne Barnhill, Mark Budolfson & Tyler Doggett, eds, *The Oxford Handbook of Food Ethics* (New York: OUP, 2018) ch 16 [Whyte, "Food Sovereignty, Justice, and Indigenous Peoples"].

⁵⁶⁰ Hallowell observed among Berens River Anishinaabeg that "a reciprocal principle is operative. If I have more than I need today I share it with you, because I know that you, in turn, will share what you have with me tomorrow." A Irving Hallowell & Jennifer SH Brown, ed, *The Ojibwa of Berens River, Manitoba: Ethnography Into History* (United States: Harcourt Brace Jovanovich College Publishers, 1992) [Hallowell & Brown, *The Ojibwa of Berens River*] at 91. See also Hyslop et al, *Dtantu Balai Betl Nahidei* at 160-161; Ininew Elder Flora Beardy speaking.

Although see Malinowski, *Crime and Custom* for a version of mutual aid which doesn't entirely accord with this view. Malinowski's account of Trobriander law contemplates primarily direct reciprocity between agents and a vastly greater degree of self-interest amongst them than does my Anishinaabe-dominant account. For his logic of mutual aid—in his language, a "system of mutualities" (*Ibid* at 23) defined by a "give-and-take principle" (*Ibid* at 47; see also 26, ch VIII), see *Ibid* at 20-21, 23, 31-32, 41 (arguably the best articulation), 47-48, 55, 58, and 67. The divergent emphasis on self-interest (and thus on direct reciprocity) is seen in *Ibid* at 30, 32, 58, 67, 68, and at 22, 26, 32, 40, 48, respectively.

⁵⁶¹ For Hallowell, the ethnonym 'Saulteaux' refers to Ojibweg, not to Nakawēk. He refers to "the Lake Nipigon Saulteaux"; Lake Nipigon is north of the middle of Lake Superior. A Irving Hallowell, *Culture and Experience* (Philadelphia: University of Pennsylvania Press, 1955) [Hallowell, *Culture and Experience*] ch 15 at 280.

⁵⁶² *Ibid* at 278. See also Hallowell & Brown, *The Ojibwa of Berens River* at 91-92.

Recall that the purpose of community, from a rooted perspective, is to experience freedom through gifting and thus to achieve *bimaadiziwin*. Nothing about this goal requires direct reciprocal exchange between community members. On the contrary, the attainment of a good life should be facilitated through the involvement of intermediaries, which is indirect—or better yet, circular—reciprocity.⁵⁶³ Thus return gifts aren't counter-gifts: they need not flow backwards, but can move sideways or forwards, too. They return not to the donor, but to the circle from which they were called. This has two obvious sorts of distributional implications. The first is temporal, which Umeek insightfully characterizes:

Allow a china cup to slip from your hands, and the law of gravity ensures that it shatters on the marble floor. The difference between the china-cup experience and the act-of-generosity experience is timing. In the former the outcome is immediate, while in the latter the act of reciprocity may be delayed and not necessarily or apparently empirically connected to the initial act of generosity.⁵⁶⁴

The second implication regards the identities of donors relative to recipients. Basil Johnston illustrates the flexibility of reciprocity in this context:

Realizing that he had been delivered from the edge of death by the fox, the man was greatly moved. He felt bound to show his gratitude in some tangible way. The fox assured him that no requital was required. Nevertheless the hunter persisted. How might he, the hunter, perform some favour on behalf of the fox?

Not only was there no need, the fox explained, there was nothing that the man could do for the fox; there was not a thing that the fox needed or desired of human beings. However, if it would make the man happier, the fox suggested that the man might feed him should he ever have need.

Nothing would please the man more than to perform some good for his deliverer; it was the least that he could do for a friend who had done so much.

Some years later the hunter shot a little fox who had been helping himself to the family storage. As the man drew his knife to finish off the thief, the little fox gasped, "Don't you remember?"⁵⁶⁵

While circular reciprocity introduces enormous agency into the unending business of constitutionalism, it allows for each member to benefit from an infinitely wider array of gifts and donors.⁵⁶⁶ Thus to return to the hanging question of who fills Bear's berry bowl, it turns out that

⁵⁶³ My meaning roughly follows the logic of Sahlins' concept of 'pooling' as "*a system of reciprocities*" (Marshall Sahlins, *Stone Age Economics* (Chicago: Aldine-Atherton, Inc., 1972) at 188; italics in original), but I can't share his term because of his claim that it requires centralized redistribution via chieftainship to work (*Ibid* at 189-190). Sahlins is right to claim that what he calls pooling requires a "social boundary", but not that it requires a "social center" (*Ibid* at 189). Nor does my use of indirect reciprocity map to Sahlins' "generalized reciprocity" (*Ibid* at 193). Once more, one feature of Sahlins' term is ill-fitting; in this case, that exchange remains dyadic, confined to parties A and B of the initial exchange (*Ibid* at 194). Rauna Kuokkanen uses the language of "circular reciprocity" and this is the best term I've found. See Kuokkanen, "The Gift as a Worldview in Indigenous Thought" at 89, 90.

⁵⁶⁴ Umeek, *Tsawalk* at 130.

⁵⁶⁵ Johnston, "Is That All There Is?" at 60.

⁵⁶⁶ See for instance Ozaawaagosh / Leon 'Boycee' Valliere, "Why the Anishinaabe Way of Life is Valued" in H James St Arnold & Wesley Ballinger, eds, *Dibaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013) 42 [Ozaawaagosh, "Why the Anishinaabe Way of Life is Valued"] at 46 (para 37).

so long as Bear offers his berries, *we all* fill his bowl, which is why no one member can be represented as doing so.

Except *not quite*. Looking to Anishinaabe authorities, I've drawn on elders' teachings (Bone, Copenace, Courchene Jr., Dumont, Gidigaa Migizi, Kelly, Mainville, Onabigon, Ozaawaagosh), stories (Johnston, LePique), autoethnography (Copway, Warren), ethnography (Agger), community documents, (Grand Council of Treaty No. 9, Jourdain, Migisi Sahgaiganing Anishnaabeg) ethnoecology (Kimmerer), and scholarly analysis (Craft, Whyte) as well as archival material (O'Callaghan), letters (de la Potherie) language material (Baraga, Nichols & Nyholm) travel writing (Kohl), and also a host of non-Anishinaabeg scholarly analysis (Driben, Hallowell & Brown, Kuokkanen, Mauss, Sahlins, Tully, Umek, Williams) to tell a mutual aid story *that* culminates in circular reciprocity. Shortly we'll proceed to unpack *how* circular reciprocity works, but first we need to complicate the story, which isn't actually so tidy.

One of the pieces which on first view seems not to fit with the circular reciprocity argument I've mounted⁵⁶⁷ is Edward S. Rogers' important ethnographic study of the Weagamow

⁵⁶⁷ There's another ethnography which doesn't fit, Ruth Landes' study of Anishinaabeg at Manitou Rapids, but for two reasons I've declined to give it the serious treatment I've afforded Rogers. First, it's inconsistent on the question of gift reciprocity. She describes a "ruthless individualism" (Landes, *Ojibwa Sociology* at 87) regarding property, which she purports to codify. *Ibid* at 87-88. Perhaps the most striking of the nine principles she articulates is number 3: "The individual is under no obligations to share property with anyone; except that certain material necessities must be shared with wife and immature children." *Ibid* at 88. This statement directly contradicts most of what she's said in parts 2 and 3. So what does she mean when she says that persons related by kin or by gens assist one another? If not support and mutual aid, then what exactly is the "kindness which is insisted upon as the primary attitude among relatives" (*Ibid* at 13)? It's unclear. As Aimée Craft reminds us, in an Anishinaabe context, "Kindness is equated with care for others". Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing Ltd., 2013) [Craft, *Breathing Life Into the Stone Fort Treaty*] at 89. Umek similarly explains:

It is good to be constant reminded of the Nuu-chah-nulth teaching always to be friendly toward others. This teaching is more than an encouragement to smile at strangers or to shake hands when introduced to someone today. It means that, in practice, if someone comes to visit in your home, you are encouraged to be hospitable. Usually this will mean putting on the tea or coffee between mealtimes or serving a full meal at mealtimes. Umek, *Tsawalk* at 38.

Kindness *means* giving of oneself.

One possible explanation for the contradiction is that Landes has an idea of 'property' so narrow as to remove it from the logic of 'gift' altogether, rendering her discussion of property agnostic as to whether the giftway serves as a logic of community at Manitou Rapids. But Landes seem to have eliminated this possibility:

Unlike their neighbours to the south and west, the Canadian Ojibwa have only a feeble development of the characteristic American forms of hospitality and gift exchanges. There are no such obligations even between parents and children. Friends, friendly relatives and namesakes exchange gifts informally in a light-hearted spirit and irregularly. This is optional, and done privately by an individual when there is a food surplus or certain food delicacies, or upon distant visits. The recipient is placed under no specific obligation, but only under the generalized one of behaving kindly to the donor. No one refuses a gift, and nothing is entailed by the acceptance. Landes, *Ojibwa Sociology* at 141-142, citations removed.

This is a wonderful description of circular reciprocity, and Landes has missed it entirely. This recognition failure reflects her deeper failure to identify radical interdependence. The entire property section of Landes' text is plagued with confusion. She seems to be reacting to the absence of coercive authority—for some unarticulated reason, in the specific context of wrongful uses of property—and then to misconstrue persuasive authority as non-authority, drawing the false inference of unconstrained individualism. Surely the greatest evidence of her deep confusion lies in principle 9 (I present principle 8 first, since principle 9 refers back to it):

8. Services can be secured only by payment. Sometimes close relatives are not paid, though ultimately a 'gift' return is made.

(Round Lake) Anishinaabeg.⁵⁶⁸ Rogers *does* want to specify who fills the bowl. His central statement on and qualification of gift reciprocity at Weagamow is:

Where a gift is made a return is expected, but the type of return and the time when it should take place vary with the particular individuals involved. The more distant the two people are in geneological [sic] connection, space and friendship, the more immediate and concrete should be the return gift.⁵⁶⁹

So as a starting point, Rogers asserts that return gifts *are* counter-gifts.⁵⁷⁰ However both the type of counter-gift and the time of counter-gifting is a function of the relationship (and specifically, the formal kinship—Rogers has only human-human interactions in mind) between the donor and recipient. Thus on Rogers' analysis, the qualification on reciprocity consists of three variables: the type of counter-gift, the time of counter-gifting, and the relationship which structures the range of acceptable variability for each of the first two factors.

With respect to type, he says, "In some cases no specific return gift is expected. Instead the recipient is duty bound to aid the giver whenever necessary with no thought of an equal exchange."⁵⁷¹ Similarly, with respect to time, he says, "On the other hand, within the community, although a return gift is usually expected, it may in many cases be delayed for a longer period of time."⁵⁷² He offers ethnographic examples of both claims.

For both *type* of counter-gift and the *time* of counter-gifting, the nature of the relationship at issue serves to blunt the force of expectation, which instead of standing as *absolute*

9. Negotiations with the supernatural are accomplished in identical terms, by a payment of tobacco; whose fumes as well carry the 'spirit' of any payment that has been paid to a visionary for the use of the supernatural that has blessed him." *Ibid* at 88.

That Landes so profoundly misunderstood something of such immense significance to Anishinaabeg is truly stunning given how skilled her study is until the property discussion. It's confusing that an ethnographer could complete her task with Anishinaabeg without developing an understanding of how tobacco offerings function and the work they do. One would expect her to have been immediately confronted with its unique importance.

The second and more serious reason I decline to take Landes' view here seriously is that it can't be reconciled with teachings that come from Manitou Rapids. I have two traditional teachers, both of whom just happen to have been born at Manitou Rapids, and who have lived near it all of their lives. Landes Manitou Rapids fieldwork was conducted in 1932 and 1933. *Ibid*, unnumbered Acknowledgments page (facing page 1). Nokomis was born at Manitou Rapids two years later, and lived there until she was 19. She has spent her life since then only a 40 minute drive away and has visited Manitou Rapids frequently throughout. My other teacher was born at Manitou Rapids in 1934. When he was a child he moved to Mitaanjigamiing, perhaps an hour away. I've driven both of these elders to Manitou Rapids for community events and to visit with other elders. Their teachings on the giftway couldn't be tortured into Landes' account of ruthless individualism.

⁵⁶⁸ Edward S Rogers, *The Round Lake Ojibwa*, Occasional Paper 5, Art And Archaeology Division, Royal Ontario Museum, University Of Toronto (Ontario Department of Lands and Forests, 1962) [Rogers, *The Round Lake Ojibwa*]. C71, C72.

⁵⁶⁹ *Ibid* at C71.

⁵⁷⁰ In what he calls "the rule of giving", Denys Del  ge also describes return gifts in seventeenth century Huronia as counter-gifts. Del  ge, *Bitter Feast* at 52-53. In so doing, he invokes Mauss expressly. *Ibid* at 53. However, Del  ge's expression of the notion is confusing: "the receiver owed the giver a gift. The number of transactions did not matter; the spirit embodied in the gift must, in one form or another, return to its original home. *The gift must come full circle.*" *Ibid*; emphasis added. It's peculiar to draw the metaphor of a circle for direct reciprocity, but perhaps the phrase 'to come full circle' simply means 'to return', and not that the path of return is circular, indirect.

⁵⁷¹ Rogers, *The Round Lake Ojibwa* at C71. Basil Johnston presents an example of this qualification extended to human-animal relationships in the "The Man, The Snake and The Fox", which appears in Johnston, "Is That All There Is?" at 59-60.

⁵⁷² Rogers, *The Round Lake Ojibwa* at C71.

expectation, becomes a function of *the degree of relatedness* between donor and recipient. Thus we might think that Rogers has overstated his own rule. Rather than holding that return gifts are *ordinarily and presumptively* reducible to counter-gifts, he might more accurately have said that as the relationship between a recipient and his donor thins to the point that the recipient nears (or stands beyond) the boundary of his donor's circle of community, *then* his responsibility to return a gift becomes a responsibility to counter-gift.

Such a reading of Rogers' study seems reconcilable with my argument, given the proviso that the circle in circular responsibility represents community. This is just as I intend. Recall elder Onabigon's statement that "The hand-drum, the traditional big drum, the water drum here—they're all gifts I carry now. Not for me, but these gifts are carried *for the community and to make the circle strong*."⁵⁷³ Similarly, recall the first sentence which set up the metaphor of the ever-full bowl: "Bear gave one berry to each of his *neighbours* that stood near him."⁵⁷⁴ I would insist on one carve-out to the circle-of-community-as-limit proviso, however, else I worry the humility thesis—the fact that all rooted communities are local disclosures of a shared earth community—has been set aside. All else being equal, where someone's in dire need, I shall do my best to meet her urgent needs, even if she stands beyond my community in what I take to be the proximate, governing sense. Fortunately, Rogers' account also describes just such an exception: "Gifts are also made to non-kin with no expectation of immediate return when the recipient is in dire need of aid."⁵⁷⁵

Some objectors may remain unconvinced. They might feel that my characterization of Rogers' analysis, which instead of reducing all return gifts to counter-gifts, tries to place counter-gifts at one end of a degree-of-relatedness spectrum of return gifts, fails because it doesn't go far enough. In particular, they may be concerned that in addition to accounting for the type and timing of counter-gifts, my interpretation of Rogers' work needs, but fails, to account for the fact that he insists that return gifts be directed towards the original donor (i.e. a relation of direct reciprocity). As such, critics might accept my view of Rogers' work, yet still say that in the sense which matters most, for the Weagamow return gifts remain counter-gifts.

First, Rogers simply doesn't advert to indirect reciprocity. This might be because he didn't observe it at Weagamow, but it might also be because for some unarticulated reason, he chose not to attend to it. One would have more confidence had he spoken to its absence. But let us assume that he made no such exclusions. I think a full answer to the objection is that Rogers' purpose and mine are entirely different. Rather than trying to present the logic of mutual aid, he's offering a descriptive account of it in action, in a context of colonial imposition.

Rogers states, "The giving of gifts is perhaps the most common way in which goods change hands, although it is suspected that the practice has decreased since former days."⁵⁷⁶ He notes the advent of "buying and selling",⁵⁷⁷ saying, "Almost everything seems to be capable of transfer on the basis of money and each item has its price (Table 64) [not reproduced]. Most exchanges on the basis of money are made between non-kin. Only in the case of trade goods do kin pay in money."⁵⁷⁸ In a telling passage, he observes, "Only in the case of a very few non-kin, remote kin, and distant neighbors was a return gift made immediately, in this case either of food

⁵⁷³ Onabigon, "Elder's Comments" at 284; emphasis added.

⁵⁷⁴ Johnston, "Seagull" at 38; emphasis added.

⁵⁷⁵ Rogers, *The Round Lake Ojibwa* at C72. It must be noted, however, that he goes on to add, "In this case it is explicitly stated that the recipient at some later date will aid the donor when in need." *Ibid.*

⁵⁷⁶ *Ibid* at C71.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid* at C72.

or money.”⁵⁷⁹ Thus we can see that at the time of Rogers’ study, not only had monetary (i.e. strictly transactional, direct) exchange become a legitimate form of exchange at Weagamow, impacting on the integrity of gift exchange *externally*, but also and more critically, it had already impacted directly *within* practices of gift exchange, too.⁵⁸⁰

Finally, I have one comment for anyone who might think it stereotyping or romantic of me to suggest that colonialism is a full explanation for the difference between the circular reciprocity which I argue characterizes mutual aid within rooted constitutional orders, and the practice of only direct reciprocity which Rogers observed at Weagamow. I would direct any such concern to an aspect of gift exchange at Weagamow which stands in stark contrast to the story Rogers otherwise tells, yet which fits perfectly with the story I do, and which, strangely, Rogers presents as the closing note to his discussion of gift exchange: “When a moose or caribou is killed distribution to all those in the vicinity is expected regardless of geneological [sic] connection *and whether or not one feels he will get a return gift*.”⁵⁸¹ I would suggest that this unexplained—but apparently imperative—outlier is evidence of a formerly intact *logic* of mutual aid, characterized by circular reciprocity, at Weagamow.

Curious about this transition, I asked my elder at Mitaanjigamiing, then 84, about gift exchange as a way that Anishinaabeg relate to each other. He immediately identified what I was getting at and contrasted it with settlers and transactional market exchange. Speaking of his youth, he said of gift exchange amongst Anishinaabeg that “a long time ago, it was like that all over.”⁵⁸² It was important to him that I understand of the giftway that it’s still like that now—there are Anishinaabeg who continue to relate to one another in that way. It’s just that so many of us are caught up in settlers’ ways, we don’t see it.

However his description parts with Rogers’ account of Weagamow in a critical way. My elder indicated that return gifts were indeed commonplace and frequently accompanied with considerable delay (in the order of months). However, he was absolutely emphatic that a gift is never offered with an *expectation* of return. In fact, he stated expressly that when you give a gift, you don’t say anything about a return. You just give. Perhaps most important in terms of comparison with Rogers’ account of Weagamow, unprompted my elder stated—and repeated—that it was the introduction of money which caused the transition from gift exchange to market transaction exchange in the Boundary Waters part of Anishinaabe-Akiing that he knows.⁵⁸³

This is consistent with Nicolas Perrot’s observation, on the subject of Anishinaabe hospitality to strangers in the late 1600’s, that “They are just as liberal toward those who give them nothing as to those who carry [presents] to them.”⁵⁸⁴ During his 1836-1837 sojourn

⁵⁷⁹ *Ibid*; emphasis added.

⁵⁸⁰ This includes the identification of whom, at the time, counted as kin. Rogers observed:

Individuals who in the past were considered distant kin may not be so termed today. The changes that are occurring emanate from the younger members of the community. They are confused as to proper relationships, marry forbidden kin, much to the horror of the older generation, and in general tend to disregard distant kinsmen. Part of the confusion may be due to youthful ignorance but part certainly indicates a changing situation. *Ibid* at B13.

⁵⁸¹ *Ibid* at C72; emphasis added.

⁵⁸² Anonymous elder #1 (30 March 2018). My elder gave examples, but only for my understanding. Out of respect for those now in spirit, I can’t share them.

⁵⁸³ *Ibid*.

⁵⁸⁴ Nicolas Perrot, *Memoir on the Manners, Customs and Religion of the Savages of North America*, in Emma Helen Blair, ed, trans., *The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes, Vol 1* (Cleveland: The Arthur H. Clark Company, 1911) [Perrot, *Savages of North America*] at 134; square brackets in original.

amongst Anishinaabeg, scientist Joseph N. Nicollet, too, took careful notes of his observations. He characterized Anishinaabe behaviour on the immediate point saying:

He goes forth and collects the fruits of the earth, keeps some for himself, able to enjoy them, and brings some to his fellow man who is in distress. Thus the native says, “I bring you to eat,” not “I give you to eat.” To bring, to present, to offer, to let someone take are so many entries in the primitive Indian vocabulary. To give, to sell, to refuse, to prevent from taking, to make someone pay are words unknown to them.⁵⁸⁵

Now with all of that said, let’s return to how circular reciprocity works. This is a necessarily simple example (again, a major complicating factor is the nature of the relationships obtaining between parties to a gift exchange, which is more properly a subject of chapter six, section (d)(i)(3)). But for illustrative purposes, I think it will have value.

Consider that A gifts B, responding to B’s expressed need. B, moved to gratitude, expresses thanksgiving to A, but reciprocates indirectly, to C. Unless a contract was set up between A and B (although contract isn’t the logic that underlies mutual aid, community members are of course free to engage in contractual relations *within* mutual aid⁵⁸⁶), A likely experiences no unfairness and is content with the result.⁵⁸⁷ B may gift D or E, who may in turn gift Z, but eventually the gift will return to A, and critically, it will do so in a way that meets A’s need, by someone capable of doing so.

In sum, owing to the fact that A to Z are radically interdependent, often it matters not who A gifts; in a *healthy* mutual aid community, her needs will be met regardless. Elder Ed Onabigon expressed that sense of faith when he said, “Just like those trees, look at them, there’s maybe fifty, sixty plants right in front of us. But they’re all connected, they’re all reaching out, and they never have to worry, they’re each doing their job.”⁵⁸⁸ The simple fact that each is offering its gift up into creation is enough for the trees never to have to worry whether they, too, shall be cared for.⁵⁸⁹ Similarly (and continuing to draw on the arboreal sensibility I’ve tried to maintain), Elder Francis Nepinak / Giiwedinanang, says: “When a tree is planted, he too clings to his tree roots. That is what he clings to. And when he looks up to the sky, that is where he starts learning things from. These big trees say, ‘Those of you who are small, take care. As I also continue to live my life, I will be taken care of. You will be looked after.’”⁵⁹⁰

This still leaves an obvious, unresolved matter: how do we know who is in and who is out of the circle within which reciprocity occurs? This is the question of the boundary of rooted community and having an answer is essential for the rigour of a rooted conception of constitutionalism. It’s precisely for that reason that we shall have to defer taking it up until after we’ve considered how mutual aid is actually experienced.

⁵⁸⁵ Joseph N Nicollet & Martha Coleman Bray, ed, *The Journals of Joseph N. Nicollet: A Scientist on the Mississippi Headwaters, with Notes on Indian Life, 1836-1837*, trans by André Fertey (St. Paul: Minnesota Historical Society, 2004 [1970]) at 251.

⁵⁸⁶ See for instance Margaret Shawnoo, “The Oriole” in *Indian Legends of Eastern Canada* (Toronto: Indian Affairs Branch, Education Division, 1971 [1969]) 16.

⁵⁸⁷ Compare with Craft, *Breathing Life Into the Stone Fort Treaty* at 71.

⁵⁸⁸ Onabigon, “Elder’s Comments” at 282.

⁵⁸⁹ Williams, *Kayanerenkó:wa* at 4.

⁵⁹⁰ Linklater et al, *Ka’esi Wahkotumahk Aski* at 23.

ii. Kinship: The Structure of Rooted Constitutionalism

Thus far our constitutionalism discussion has been about the logic of mutual aid. At numerous points I noted but deferred taking up the question of how individual choices about reciprocity within mutual aid are structured. Now I'd like to engage those reservations. The structure of relationality which organizes mutual aid is *kinship*, which places familial assignments upon, and thus relations between, radically interdependent persons.⁵⁹¹ In one sense, this isn't saying anything new. Anyone who is an indigenous person connected to her community or who knows someone who is, who has read any cultural anthropology, or who has explored indigenous studies, knows that kinship is an organizing feature of indigenous communities.

But I'm hoping this *is* saying something novel. For some of us today, our daily experience of kinship remains vibrant and strong. But many of us, including many indigenous persons, understand and practise kinship in a way that lacks real power. From within a liberal constitutional context we treat kinship as subordinate to and supplementary of citizenship. Citizenship does the work of law and governance; kinship does the work of culture, and as such concerns itself solely with private sphere relationships. To the extent we've developed liberal subjectivities, we may not want (or may want but not know how) to confront this displacement.⁵⁹² Yet its impact is catastrophic: it relegates mutual aid to a question of personal choice, which is to obliterate it.

I'm hopeful that in disclosing kinship as a constitutional structure, mutual aid might once more be seen for what it is—a constitutional logic—and thus that rooted societies might once more begin to grow. And I'm not just speaking about indigenous peoples here. Elder Art Solomon warned darkly that a return to mutual aid through practices of kinship is both possible and necessary for all peoples, if indeed we are to survive *as* peoples:

It is imperative that we learn to care and share again, which was our original way, because the only thing that is going to matter is how we relate to each other, and nobody is going to be able to fake it anymore. We'll have to look around at each other and ask who is sister and who is brother? Who is for real?

There were nine previous empires before this one, and where are they now? Gone, that's where.⁵⁹³

⁵⁹¹ In a statement which seems to identify both formulations of reception in the mutual aid analytic, Paul Williams writes that within the Haudenosaunee Great Law of Peace, "Family" meant support, responsibility, and mutual aid." Williams, *Kayanerenkó:wa* at 3. He similarly explained that "Beyond government, traditional Haudenosaunee society is a web of relationships within and between families and clans, creation relations and obligations of mutual aid and support." *Ibid* at 135. Speaking of Hul'qumi'num law, Sarah Morales similarly explains that "kinship was, and still is, the primary means through which the ethics of sharing is exercised". Morales, "Locating Oneself in One's Research" at 152. Elder James Dumont, too, drew a link directly to mutual aid, saying "Kinship ... makes for an appreciation of the world that is cooperative, caring, and interconnected." James Dumont, "Anishinaabe Izhichigaywin" in Lea Foushee & Renee Gurneau, eds, *Sacred Water: Water for Life* (Lake Elmo, MN: North American Water Office, 2010) 13 at 34.

⁵⁹² Nuu-chah-nulth legal scholar Johnny Mack provides a particularly effective analysis of this phenomenon in 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. See also Christie, "Culture, Self-Determination and Colonialism" at 20-22, 25.

⁵⁹³ Art Solomon, "'We have learned patriarchy so well, and we are all hurting and out of balance because of it'" (1992) 2:2 Beedaudjimowin: A Voice for First Nations 21.

It's with very good reason that Basil Johnston claims "Generosity, more than any other quality or means, fostered brotherhood and sisterhood."⁵⁹⁴ As the structure of mutual aid, kinship sets out the relationships through which community members present and receive their gifts and needs. Much of this happens through the actual kinship roles of grandson, daughter, various classes of cousins, older/younger brother or sister, nephew, father, marriage partner, aunt, grandmother, etc.⁵⁹⁵ Importantly, marriage allows kinship to transcend ethnonational barriers. Thus Dakota Elder Doris Pratt explains that through cross-cultural marriage, entire Dakota, Ojibwe, and Cree families became kin.⁵⁹⁶

Each kind of kinship relation specifies the mutual aid analytic in a particular way. For any given kinship role, how gratitude and responsibility shape reciprocity may vary considerably. This is the reason why, as I explained earlier, relationships are of primary significance in how we identify and address one another. Elder Grace Daniels explains that "the old people, they called you by what relations you were; they didn't call you by your name."⁵⁹⁷ She adds, when an "Anishinaabe would talk to a person, he didn't say Harry, he didn't say Alec or Clara or anything like that; he called him how he was related to him, how he was related to that person."⁵⁹⁸ She illustrates: "My younger sibling, my older brother, my youngest sibling, sister-in-law, my partner, and father-in-law. This is how they knew each other. Yeah, respect I guess."⁵⁹⁹ Ruth Landes observed of Manitou Rapids Anishinaabeg that "Proper names are commonly used in addressing offspring. All other relatives should be addressed by terms of relationship, and this is said to be out of considerateness".⁶⁰⁰ She goes so far as to say that children who called older persons or strangers by a personal name earned strong rebuke by "shocked" parents.⁶⁰¹ Nehetho/Ininiw elder Madeline Spence / Niniátiw Mikisiw, too, says:

We have lost how to relate to one another. They have lost how people are related to each other. When I was growing up we were told who we were related to and how we were related.

Some of these people are so closely related. They told us how we should call each individual through relations. Which ones was I very closely related to. Who were our closest relatives out there. That is why I know how I am related to these two men that are sitting here with me right now.⁶⁰²

The question of what responsibilities the Anishinaabeg associate with which relationships regards Anishinaabe law, which I advert to in chapter six at section (d)(i)(3). For our immediate purposes, I note only two forms of relationship. First, fathers bear responsibility for meeting the needs of their children and partners. Second, brotherhood/sisterhood often serves as a kinship ideal, establishing a close connection, allowing for significant flexibility in the scale and the flow of give and take. Landes states of the Manitou Rapids Anishinaabeg that "Siblings look chiefly

⁵⁹⁴ Johnston, "Think Indian" at 186.

⁵⁹⁵ A remarkable paper by Laura Peers & Jennifer SH Brown on the structure of kinship within Anishinaabe families stands out: Laura Peers & Jennifer SH Brown, "'There Is No End to Relationship among the Indians': Ojibwa Families and Kinship in Historical Perspective" (1999) 4:4 *The History of the Family* 529. See also Peacock & Wisuri, *Ojibwe Waasa Inaabida* at 77.

⁵⁹⁶ Hyslop et al, *Dtantu Balai Betl Nahidei* at 133-134.

⁵⁹⁷ Pratt et al, *Untuwe Pi Kin He* at 63. See also Hallowell & Brown, *The Ojibwa of Berens River* at 13.

⁵⁹⁸ Pratt et al, *Untuwe Pi Kin He* at 62.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Landes, *Ojibwa Sociology* at 14.

⁶⁰¹ *Ibid.*

⁶⁰² Pratt et al, *Untuwe Pi Kin He* at 89.

to one another for aid”⁶⁰³ and Edward S. Rogers perceived of the Round Lake Anishinaabeg that “Within Ego’s generation superior-inferior statuses tend to be minimal and de-emphasized. Relationships are characterized by equality, solidarity, mutual aid, and equivalence.”⁶⁰⁴

This second point is especially important given that kinship is metaphorically extended in a number of contexts. Members belonging to the same clan stand as brothers and sisters to one another.⁶⁰⁵ Thus almost anywhere she travels, an Anishinaabekwe can find the level of support she’d receive from a sibling; she need only find someone who shares her clan.⁶⁰⁶ Common clan identity establishes brother-/sisterhood across vast differences in region, and even amongst persons from distinct ethnonational groups.⁶⁰⁷

A second example regards community members and others who take an interest in the welfare and instruction of someone younger. It’s common even today to hear one address such persons as ‘aunty’ or ‘uncle’. As a community member acquires more significant age, she may take on an instructional role vis-à-vis the community more generally.⁶⁰⁸ Nowadays we often call folks who’ve undertaken such a commitment ‘elders’, but it remains common to hear them addressed through rooted constitutional idiom as our ‘grandfathers’ and ‘grandmothers’.⁶⁰⁹

Another example of metaphorical kinship extension regards *manidoog* and *aadizookaanag*, whom we generally call grandfathers and grandmothers. To Nanabozho, the Anishinaabe culture hero, Anishinaabeg are nephews⁶¹⁰ and animals are little brothers.⁶¹¹

As a fourth example, we enter into treaty relationships with other indigenous peoples, tightening our always already existing—but uncommitted—relationship. Elder and former Treaty Commissioner Dennis White Bird says that during his work with the Treaty Relations

⁶⁰³ Landes, *Ojibwa Sociology* at 15.

⁶⁰⁴ Rogers, *The Round Lake Ojibwa* at B13.

⁶⁰⁵ Teaching of anonymous elder #1 (26 October 2016) Mitaanjigamiing First Nation; Elder Bessie Mainville (19 August 2013); Bessie Mainville, “Traditional Native Culture and Spirituality: A Way of Life That Governs Us” (2010) 8:1 Indigenous LJ 1 [Mainville, “Traditional Native Culture and Spirituality”]; Blackbird, *History of the Ottawa and Chippewa Indians* at 90; G Copway, *The Ojibway Conquest, A Tale of the Northwest* (New York: George P Putnam, 155 Broadway, 1850) at 88-89; Zhingwewegaabaw / Bennie Rogers, “Bear Clan” in H James St Arnold & Wesley Ballinger, eds, *Dibaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013) 82.

⁶⁰⁶ Paul Radin, “Ethnological Notes on the Ojibwa of Southeastern Ontario” (1928) New Series, 30:4 American Anthropologist 659 at 666; Peter Jones, *History of the Ojibway Indians; with Especial Reference to Their Conversion to Christianity* (London: A.W. Bennett, 5, Bishopsgate Street Without, 1861) [Jones, *History of the Ojibway Indians*] at 138; Broker, *Night Flying Woman* at 54-55; Johnston, “Connecting People to Place” at 7.

⁶⁰⁷ Henry Youle Hind, *Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858, vol 2* (London: Longman, Green, Longman, and Roberts, 1860) at 146; Warren, *History of the Ojibway Nation* at 42-43; Landes, *Ojibwa Sociology* at 35; Williams, *Kayanerenkó:wa* at 125.

⁶⁰⁸ See Boyce Richardson, *Strangers Devour the Land: The Cree Hunters of the James Bay Area Versus Premier Bourassa and the James Bay Development Corporation* (Toronto: Macmillan Company of Canada, 1975) at 141.

⁶⁰⁹ See for instance, Rogers, *The Round Lake Ojibwa* at G5, G6. I observe this form of address regularly in Anishinaabe communities and in ceremony. Lorraine Mayer describes its application in Swampy Cree contexts: see Lorraine Mayer, “Ástam ánimotahtak (Come, let’s talk, have a discussion)” in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: OUP, 2013) 296 [Mayer, Ástam ánimotahtak] at 304-305. Second, I note that this choice of relation may be a shift from how our distant ancestors invoked kinship to structure this knowledge-transmission relationship. For instance, in the late 1600’s, Nicholas Perrot recorded that “The old men treat the young men as sons, and these call the old men their ‘fathers’.” Perrot, *Savages of North America* at 136.

⁶¹⁰ Blackbird, *History of the Ottawa and Chippewa Indians* at 72, 77.

⁶¹¹ *Ibid* at 77.

Commission of Manitoba's Oral History Project, "We heard about early pre-contact inter-Tribal Treaties such as those between the Anishinaabe and the Dakota and how they consecrated their agreements without paper. It was more of a spiritual commitment with the Creator and the beginning of new kinship relations."⁶¹²

Ordinarily the relation established through treaty is one of brotherhood,⁶¹³ although exceptions exist in which other kinds of kin relations are established.⁶¹⁴ In circumstances where a mutually recognized imbalance exists regarding their respective co-creative capacities, but where neither side wants the more powerful party to absorb responsibility for the welfare of the weaker one (which is the case of a father-child relation), age specifications are used. The more powerful people is thus termed *elder* brother, and the weaker people, the *younger* brother.⁶¹⁵ This metaphorical adaptation is also an extension of actual kinship relations. Landes overstates the Anishinaabe case when she says "Relations between siblings differ only in degree from that between parents and children"⁶¹⁶, but her assessment that "The older child is supposed to look after the younger siblings in the same ways that the parents do, and represents the parents during their absence"⁶¹⁷ squares with what I've consistently heard from various Anishinaabe elders.

George Copway presents a speech delivered at Saugeen by Chief Jones, at what was then the most recently held general council (no date was provided for the event, but the book containing Copway's report was published in 1847). The speech contains a remarkable passage expressive of the scale of mutual aid exchange that the brotherhood relation contemplates. Addressing 48 chiefs from various Ojibwe and Odawa communities⁶¹⁸, host Chief Jones said: "These nations, I am proud to say, are my brothers; many of them, are bone of my bone, and for them, if needs be, I could willingly, nay, cheerfully, sacrifice any thing [sic]."⁶¹⁹

Fifth and finally, Anishinaabeg (and I believe all indigenous peoples of Mikinaakominis) metaphorically extend our kinship structure throughout all our relations.⁶²⁰ In fact, the first word *nokomis* taught me in *Anishinaabemowin* is '*indinawemaaganidog*', a formal expression of "all my relatives", or as many prefer, "all my relations".

In the teaching I received, *indinawemaaganidog* refers to everyone, not just to humans. I'm to consider animals and spirits, too, as my relatives.⁶²¹ The Anishinaabeg of Migisi

⁶¹² Cote et al, *Gakina Gidagwi 'igoomin Anishinaabewiyang* at 91.

⁶¹³ Jones, *History of the Ojebway Indians* at 32, 113, 118, 119; Blackbird, *History of the Ottawa and Chippewa Indians* at 90.

⁶¹⁴ Jones, *History of the Ojebway Indians* at 116.

⁶¹⁵ Blackbird, *History of the Ottawa and Chippewa Indians* at 95; Charles 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* (Wayne State University Press, 1994) [Kawbawgam, "The League of the Four Upper Algonquian Nations"] 112-113; Copway, *Traditional History and Characteristic Sketches* at 71, 92; RW Dunning, *Social and Economic Change among the Northern Ojibwa* (Toronto: UTP, 1972 [1959]) [Dunning, *Social and Economic Change among the Northern Ojibwa*] at 88-90; Williams Jr, *Linking Arms Together* at 72-73.

⁶¹⁶ Landes, *Ojibwa Sociology* at 15.

⁶¹⁷ *Ibid.*

⁶¹⁸ Copway, *The Life, History, and Travels, of Kah-ge-gah-bowh* at 189.

⁶¹⁹ *Ibid* at 190.

⁶²⁰ An excellent introduction to the meaning of this statement is found in Mayer, *Ástam ánimotahtak* at 304-306.

⁶²¹ Animals are often called our elder brothers because they were created before us and thus have greater knowledge. See for instance Peacock & Wisuri, *Ojibwe Waasa Inaabida* at 44, 50, 70, 74; Courchene, "Sharing Indigenous Knowledge"; Johnston, "Introduction" in *The Gift of the Stars* at 11. See also Grand Council of Treaty No. 9, "Grand Council of Treaty no. 9" at 20; Brian D McInnes, *Sounding Thunder: The Stories of Francis Pegahmagabow* (Winnipeg: University of Manitoba Press, 2016) at 111.

Sahgaigan hold that “Our kinship is described as knowing that *Ka kina’kego’ Naapsin* (everything is interconnected and part of the land) which also extends to the air, the animals and water.”⁶²² Plains Cree scholar and lawyer Harold Johnson says to his imagined settler reader, “We are related to the animal nations and the plant nations as surely as we are related to you.”⁶²³ Nehetho elder D’Arcy Linklater similarly explains that, “we call plants and animals our relatives. We call them by relatives’ names. They are our older brothers and sisters.”⁶²⁴ In a more general statement, Haudenosaunee faithkeeper Oren Lyons said, “We native people understand that all living things are one large extended family and that we therefore should be working together in all the four corners of the world.”⁶²⁵ In other words, *ceteris paribus* (i.e. outside relations of war, etc.) the set of beings recognized throughout creation as persons is the same as the set of beings each of us recognizes as kin relations⁶²⁶ (although what *sort* of kin relation each of us recognizes another as will often vary considerably). Stan McKay, a Fisher River Cree, expresses this understanding when he says that:

Indigenous Spirituality from around the world is centred on the notion of our relationship to the whole creation. We call the earth “our mother.” The animals are “our brothers and sisters.” Even what biologists describe as inanimate, we call our relatives.

This calling of creation into our family is a metaphorical construction that describes the relationship of love and faithfulness between human persons and creation. Our identity as creatures in the creation cannot be expressed without talking about the rest of creation, since that very identity includes a sense of the interdependence and connectedness of all life.⁶²⁷

This adds significant depth to my earlier comment that we receive *gifts* through our relationships with non-humans, rather than *resources* by extracting from things. I realize that for many readers, this claim probably pulls against an intuition that human communities need to be distinguished from earth community writ large, and that similarly, given basic material requirements of human existence, human moral agency must be differentiated from that of non-humans. My reply is already implicit in my earlier claim that rooted communities are local disclosures of the earthway.

Whether as captives,⁶²⁸ fur traders or settlers, newcomers could be invited into kinship networks. In the period prior to settler supremacy’s third form of violence, when liberal constitutionalism hadn’t yet been imposed over our communities, relationships and territories,

Many call these kinship extensions to non-humans treaties. See Heidi Kiiwetinepinesiiik 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 [Stark, “Respect, Responsibility, and Renewal”] at 147; Stark, “Changing the Treaty Question” at 262; Simpson, “Looking After Gdoo-naaganinaa”; Simpson, *The Gift Is In The Making: Anishinaabeg Stories* (Winnipeg: Highwater Press, 2013) ch 1; Craft, *Breathing Life Into the Stone Fort Treaty* at 70; Borrows, *Recovering Canada* at 20 (see also page 138, where Borrows refers to a “union” between Cape Croker Anishinaabeg and “fish, birds, plants, and animals”, “water, wind, sun, and stars” as a “federation”).

⁶²² *Migisi Sahgaigan Maa’a Chi Totaa-Aki Declaration* at 1; emphasis in original.

⁶²³ Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing Ltd, 2007) [Johnson, *Two Families*] at 30.

⁶²⁴ Linklater et al, *Ka’esi Wahkotumahk Aski* at 39.

⁶²⁵ Oren Lyons, “Spirituality, Equality, and Natural Law” at 8.

⁶²⁶ I thank Meaghan Daniel (my wife) for heavy lifting in developing this insight.

⁶²⁷ McKay, “Calling Creation into Our Family” at 29.

⁶²⁸ John Tanner with Edwin James, ed, *A Narrative of the Captivity and Adventures of John Tanner (U.S. Interpreter at the Saut de Ste. Marie) During Thirty Years Residence Among the Indians in the Interior of North America* (London: Baldwin & Cradock, Paternoster Row, and Thomas Ward, 84 High Holborn, 1830).

newcomers often did so. Fur Traders significantly increased their power by marrying into these networks, joining rooted indigenous communities in the role of brothers, fathers, and sons. Ethnohistorian Bruce White, who has done much work on and for Anishinaabe communities, explains the potential that kinship held for fur traders: “Gifts made for a close relationship, just as a close relationship would result in gifts being given. If you wished to receive or to present goods to someone, you would address the other person as your brother, sister, father, or mother.”⁶²⁹ In his remarkable article, “Give Us a Little Milk”, White carefully explains how both fur traders and Anishinaabeg sought to benefit through fur trader entry into the kinship structure.

For indigenous-settler relations, too, kinship structured and sustained relationships.⁶³⁰ Elder and former Treaty Commissioner Dennis White Bird (Naawaakomiigowinin) identifies “developing a kinship-based relationship with Newcomers” as foundational to treaty.⁶³¹ However, unlike treaties between indigenous peoples, kinship established with representatives of the Crown (first the French Crown⁶³² and after the fall of New France, the British Crown) was ordinarily not that of brothers, but of father/mother and child (again, exceptions exist⁶³³). Within these relationships, the king or queen was referred to as the great father or great mother⁶³⁴ and this term was later extended to governors general.⁶³⁵

Importantly, the assignation and acceptance of this kin role had nothing to do with jurisdiction or the establishment of sovereign-subject lines of authority. Shortly after the establishment of the Treaty of Niagara, 1764 relationship, Sir William Johnson sought to explain this fact to General Gage, saying:

it is necessary to observe that no Nation of Indians have any word which can express, or convey the Idea of Subjection, they often say, “we acknowledge the great King to be our Father, we hold him fast by the hand, and we shall do w^t. he desires” many such like words of course, for which our People too readily adopt & insert a Word very different in signification, and never intended by the Indians without explaining to them what is meant by Subjection.⁶³⁶

⁶²⁹ 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 [White, “Give Us a Little Milk”] at 62.

⁶³⁰ A great introduction to how this worked is Cary Miller, “Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities, 1820–1832” (2002) 26:2 Am Indian Q 221 [Miller, “Gifts as Treaties”].

⁶³¹ Cote et al, *Gakina Gidagwi 'igoomin Anishinaabewiyang* at 80.

⁶³² William Warren gives oral tradition as to how the western Anishinaabeg first “learned to term the French king ‘father.’” See Warren, *History of the Ojibway Nation* at 130-132.

⁶³³ Jones, *History of the Ojibway Indians* at 120.

⁶³⁴ *Ibid* at 208.

⁶³⁵ *Ibid* at 123. Kinship readily allows for evolving constitutional relationships. Consider the following instance from Peter Jones in 1861. Pashegeezhegwashkum was an Anishinaabe *ogimaa* who had taken treaty in the United States, but who later crossed the Medicine Line north and settled at Walpole Island. Having done so, he referred to the President of the United States, whom he formerly called “Great Father”, as his “*Step-father*”; ‘great father’ he now reserved for the King of England (*ibid.* at 208, emphasis in original). A second example is from 1832. *Ogimaa* Flat Mouth chastised Indian agent Henry Rowe Schoolcraft for having addressed his people as “My children” (Warren, *History of the Ojibway Nation* at 479). Flat Mouth rejects the former paternal-child relationship in light of subsequent behaviour, saying “You call us children. We are not children, but men. When I think of the condition of my people I can hardly refrain from tears. It is so melancholy that even the trees weep over it” (*ibid* at 480). Citing a wounding lack of fatherly aid, he then returns the American treaty medals and treaty wampum to Schoolcraft “stained with vermillion”, saying “These and all your letters are stained with blood. I return them all to you to make them bright. None of us wish to receive them back...until you have wiped off the blood” (*ibid* at 480-481).

⁶³⁶ “William Johnson to Thomas Gage, Johnson Hall Octb^r. 31st. 1764”, in Milton W. Hamilton & Albert B Corey, eds, *The Papers of Sir William Johnson, vol. 11* (University of the State of New York, 1953) 394 at 395.

Bruce M. White's work on Anishinaabeg reveals that "parents did not exert the same kind of authoritarian power over their children that European parents might have, and in a very real sense family members' roles were defined less by authority than by the ways in which they cared for, or were cared for by, others in the family."⁶³⁷ Rather, metaphorical parenthood established a relationship of unequal exchange: the parent is responsible for meeting the child's needs.⁶³⁸

Two exceptional, book-length works on these dynamics include Aimée Craft's *Breathing Life Into The Stone Fort Treaty*⁶³⁹ (an Anishinaabe study of Treaty One) and Harold Johnson's *Two Families*⁶⁴⁰ (a Cree study of Treaty Six). A critical feature of Johnson's work is that it articulates his people's relationship not only with the Queen, but also with "her children": settlers. That kin relation is one of cousins,⁶⁴¹ although Johnson notes that it was supposed to be a relation of brotherhood.⁶⁴² This shift is significant. For the reason that kin relations stipulate the boundaries governing the movement from gratitude/responsibility to reciprocity, getting the relationships right is essential. This need is underscored by the potential scale of the consequences of a normative claim under particular kinds of mutual aid relationships.⁶⁴³

An example will demonstrate: Egerton R. Young was a Wesleyan missionary among the Nelson House Cree and Berens River Saulteaux in the 1860s-70s. In his missionary narrative, *On The Indian Trail*⁶⁴⁴, he recounts a story revealing metaphorical kin role confusion. It involves a Nehetho man⁶⁴⁵ appearing at Young's home, insisting that Young and his wife accept the haunch of venison the man had just carried 60 miles.⁶⁴⁶ Young squirms and protests, desperate to avoid accepting the venison *as a gift*. He explains, having learned from past mistakes, that:

While they were contented to sell at a reasonable rate the various things which they could supply for our needs, yet, if a present were accepted, they expected something many times its value. Had this been allowed to continue, we would have been speedily left destitute of everything in the house. Therefore, not many weeks before the arrival of this strange Indian with the venison, as a precautionary measure we had made a rule that no more presents were to be received from the Indians; but that for everything brought which we needed, such as meat, fish, or moccasins, there was to be a fair tariff price mutually agreed upon. Yet in spite of all this, here was a stalwart

⁶³⁷ White, "Give Us a Little Milk" at 61.

⁶³⁸ See explanations in 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* (Palgrave Macmillan, 2010) 91 [Walters, "'Your Sovereign and Our Father'"]; Craft, *Breathing Life Into the Stone Fort Treaty* at ch 5; Miller, "Gifts as Treaties".

⁶³⁹ Craft, *Breathing Life Into the Stone Fort Treaty*.

⁶⁴⁰ Johnson, *Two Families*.

⁶⁴¹ *Ibid* at 13.

⁶⁴² *Ibid* at 28.

⁶⁴³ Lorraine Mayer cautions, quoting Robert Williams, that "'To be related to another in a system of kinship is to expect assistance from that other person and to expect to be asked for and ready to render assistance as well.' Expectation in this respect exceeds that which follows simply from an abstracted, individual, rights-based perspective." Mayer, "Ástam ánimotahtak" at 305; citation removed. Mayer is right to emphasize that the scale of normative claim potentially surpasses the minimum guarantee (and thus minimal imposition) model of rights.

⁶⁴⁴ Egerton R Young, *On the Indian Trail: Stories of Missionary Work Among the Cree and Saulteaux Indians*, 2nd Ed (Fleming H. Revell Company, 1897).

⁶⁴⁵ Young often fails to indicate where and amongst which indigenous peoples his stories took place. This story presents such an instance, however it can be traced to Young's Nelson House (Nehetho / Rock Cree) mission work because Burntwood River is directly referenced as the setting for the narrative's critical incident. *Ibid* at 154.

⁶⁴⁶ *Ibid* at 158.

Indian insisting, that I should receive a haunch of venison without payment. Judging from some past experiences, I was fearful that if I accepted it as a present, it would about bankrupt me.⁶⁴⁷

I confess to finding something delicious in Young's predicament. He can't seem to navigate the logic of mutual aid because he misunderstands the role the community has assigned him. While he doubtless intends his appellation, "Father", to represent his claim to authority (specifically, religious and hence moral authority) *over* community members, it's read through the local kinship schema instead as a way of being *with* them: specifically the role of most generous provider, the one from whom you can receive much for little—and often for nothing at all. This confusion is amplified by the fact that Young holds himself out as father *to the entire community*. Young, then, is a father without the means to sustain that role, in consequence of which 'his children', playing their role in the local constitutional idiom, slowly drain his livelihood away. Yet faced with this predicament, instead of condescending to learn how the locals sort themselves out, Young tries to organize his relations through the familiar, formal equality of contract, retreating from mutual aid altogether.⁶⁴⁸

1. Kinship and the Bounds of Community

In both its positive and negative formulations, mutual aid sets up rooted community as an open and contingent circle of relationships, placing extraordinary emphasis on individual agency. Because mutual aid consists in countless spontaneous acts of co-creation each day, community within Creation's way is always becoming: constituting, not constituted. Thus the boundaries of rooted communities are in some sense always open. This is why it was a small matter for Anishinaabeg to extend our kinship structure to settler peoples. The determinative question was the same for them as it was for everyone else: will you live as our kin?

Consistent with radical interdependence, membership isn't defined by a hard line separating self from other, establishing a *static* quality of belonging, like citizenship does. Rather, kinship consists in ongoing, dynamic practices of relationality.⁶⁴⁹ In both liberal and rooted communities, community is the set of persons with whom one practises freedom. But where those persons aren't citizens in a state but rather kin in an earth circle, there can be no neatly organized boundary line between 'us' and 'them'.⁶⁵⁰ Whereas citizenship is always provisionally closed and settled, kinship is always provisionally open and contingent.

This makes the delineation of a constitutional boundary uniquely challenging. While the nature of kin roles may be stable, the arrangement and the distribution of persons inhabiting them

⁶⁴⁷ *Ibid* at 153.

⁶⁴⁸ In a delightful contrast, D'Arcy Linklater, a Nehetho elder from Nelson House (today, Nisichawayasihk Cree Nation), recalls his father sharing the same teaching, but running the other direction: when dealing with white people, don't ever accept cash, else their expectation of internal correspondence will catch you in a contract. He says: "I remember when I first got into the Council, my late father talked to me about *kímótásiw*. He told me if *kimotasiw* [sic] (*white man*) offers you a penny, don't accept it. Because, he is going to want something in return sometime in the future because of that penny that you accepted; never accept it." Hyslop et al, *Dtantu Balai Betl Nahidei* at 45; parentheses and emphasis in original.

⁶⁴⁹ Meaghan Daniel, *Finding law about life: a cross-cultural study of indigenous legal principles in Nishnawbe Aski Nation* (LLM Thesis, University of Victoria, 2018) [unpublished] [Daniel, *Finding Law About Life*] at 70. Leanne Simpson began to develop a similar conception of boundary, with the significant difference that instead of presenting kinship as a full answer to the question of belonging, she sought to preserve a conception of citizenship: Simpson, *Dancing on Our Turtle's Back* at 89.

⁶⁵⁰ For a slightly different account of rooted boundaries, see Christie, "Indigeneity and Sovereignty" at 341-342.

at any given time is always changing. Further, while there will be significant overlap between the differing sets of actual kin relations each community member possesses, the content of those kin-sets clearly vary from one person to another (and over time for each person).⁶⁵¹

The complexity of a relational boundary is complicated even further when one factors in the level of variability that metaphorical kin introduces. Anishinaabe philosopher Dennis McPherson and philosopher J. Douglas Rabb remind us of a most foundational rooted constitutional point: “it is through the exchange of gifts that one maintains one’s membership in Ojibway society. Are not these other-than-human persons with whom they exchange gifts members of that society and entitled to the same respect and help accorded to any other member of the community?”⁶⁵² For Bear, gifting berries to “his neighbours” meant that he “gave and gave until every insect, bird, animal and fish had received a berry.”⁶⁵³ Similarly, Kimmerer was careful to note, in reflecting on the agency of berries—plants—that they offer “their sweetness to birds and bears and boys alike”.⁶⁵⁴ In all these sources, community is diverse and complex.

In the result, none will agree on what *the* set of relevant relationships is definitive of *the* community, and all would think it nonsense to try. It makes no sense to think of rooted community as stably bounded in that sense.

In his remarkable text, *An Infinity of Nations*⁶⁵⁵, Anishinaabe scholar Michael Witgen captures this point. He explains that New France’s Chief Financial Officer in the 1680s called the Anishinaabeg, Cree and Oji-Cree peoples, “an infinity of undiscovered nations”.⁶⁵⁶ Reflecting on the accuracy of that characterization of the nature of belonging for these Algonquian peoples, Witgen rejects the static notion of nationhood for active relationality:

Of course, this was not actually a world of indigenous nations, but rather a world of bands, clans, villages and peoples. In the Native New World land was not the exclusive dominion of a single individual or nation. It was instead a shared resource where use rights were claimed, negotiated, and exercised as part of the lived relationships that people forged with one another in the process of creating landscape and social identity.⁶⁵⁷

Rather than a hard boundary circling community, for mutual aid constitutional orders there’s just a steady gradient in the thickness of lived relationships.⁶⁵⁸ Those relations are of course thickest at the relational centre and weakest at its periphery.⁶⁵⁹ We might think of this gradient in at least two senses: physically (as territoriality) and interpersonally (as belonging).

⁶⁵¹ Rogers, *The Round Lake Ojibwa* at B10.

⁶⁵² McPherson & Rabb, *Indian From the Inside* at 90.

⁶⁵³ Johnston, “Seagull” at 38.

⁶⁵⁴ Kimmerer, *Braiding Sweetgrass*, at 382.

⁶⁵⁵ Michael Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia: University of Pennsylvania Press, 2012).

⁶⁵⁶ *Ibid* at 20, citing to Archives National de France, Archives des Colonies, Series C11 E, Des limites des Postes, AN C11 E 1 Mémoire sure la domination des Francois en Canada, July 1687, f 210.

⁶⁵⁷ *Ibid* at 20.

⁶⁵⁸ In addition to this primary function, understanding constitutional boundaries as gradients of relationality also helps to explain certain behavioural taboos. One is the Anishinaabe prohibition against marriage under conditions of shared patrilineal descent (cousins through matrilineal descent aren’t considered as close and thus are marriageable). This prohibition includes clan members too, since clan identity is always specified as either patrilineal or matrilineal. Directly related, the thickness of clan relationships (brothers/sisters) explains the prohibition against eating animals of one’s own clan. See Hiebert et al, *We Are One with the Land* at 53.

⁶⁵⁹ See Simpson, *Dancing on Our Turtle’s Back* at 89.

However, more strictly speaking the former is an instance of the latter. Again, from a rooted perspective land isn't a thing but rather another kind of person with whom one stands in relation.

Let's consider territoriality first. Starblanket and Stark wonder "how have our attempts to assert our political authority through framing nationhood become wedded to territorial boundaries and fixed political formations that close off our rich understandings of relating to one another?"⁶⁶⁰ This is a critical question. Anishinaabe scholar Thomas Peacock and co-author Marlene Wisuri take issue with the assumption of ownership that a territorial boundary presumes. They say "our ancestors engaged in armed struggles with other tribal nations for the use of the land; however, international boundaries as we know them today did not exist in those times. In a sense, land was not something to possess and govern. Land was a place to live and to be a part of."⁶⁶¹ A place to be a *part of*: that is, with whom to be in relation and through whom to make possible all of our relationships.⁶⁶² The Anishinabek Nation has captured those dual aspects of territoriality so well:

All our lands are known to us; we continue to use them as the source and support of our lives and communities, both in an economic sense and in a spiritual way. Each place has its name and its importance to us. Let any who doubt our connection with these lands live with us, observe our ways. Though we have shared our lands through Treaties, we have never separated our people and our lands in our minds.⁶⁶³

Leroy Little Bear's articulation of the relationship-not-ownership conception of territoriality is "To us land, as part of creation, is animate. It has spirit. Place is for the interrelational network of all creation. When we talk of Blackfoot territory, Cree territory or Ojibway territory, we are really talking about the place where the interrelational network occurs."⁶⁶⁴

This rooted understanding of territoriality requires a conception of boundary in the gradient-of-relationality sense I've suggested.⁶⁶⁵ Its centre is *odena*, the village site. Its periphery is the outer reaches of the community's territory, where relationships are less robustly sustained

⁶⁶⁰ Starblanket & Stark, "Towards a Relational Paradigm" at 190.

⁶⁶¹ Peacock & Wisuri, *Ojibwe Waasa Inaabida* at 45. See also Agger, *Following Nimishoomis* at 86-87; A I Hallowell, *Some Psychological Aspects of Measurement Among the Saulteaux* at 71, reprinted from (1942) 44:1 *American Anthropologist*.

⁶⁶² Georges Erasmus & Joe Sanders, "Canadian History: An Aboriginal Perspective" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills: House of Anansi Press, 1992) 3 [Erasmus & Sanders, "Canadian History: An Aboriginal Perspective"] at 5. Kaaren Olsen Dannenmann's explanation of what this means is truly exceptional. See Kaaren Olsen Dannenmann, "Reflections from a NamekosippiwAnishinaapekwe: My Trout Lake, Your Trout Lake" (2008) 26:3/4 213 at 214.

⁶⁶³ Union of Ontario Indians, "To the Parliament of the Dominion of Canada" at 19.

⁶⁶⁴ Leroy Little Bear, "Aboriginal Relationships to the Land and Resources" in Jill Oakes et al, eds, *Sacred Lands: Aboriginal World Views, Claims, and Conflicts*, Canadian Circumpolar Institute Occasional Publication No. 43 (Art Design Printing Inc, 1998) 15 [Little Bear, "Aboriginal Relationships to the Land and Resources"] at 19.

⁶⁶⁵ *Ibid* at 15. This conception of territorial boundary still allows for exclusion; the axis of and justification for exclusion just works differently. Interlopers may be excluded, not because they've crossed an imaginary line without first obtaining consent of the land's owner to do so, but because they're assuming a capacity for action (whether harvesting or simply passing through) in an area where they lack the enabling relationships, and in which others hold those relationships. Thus, one will find many anecdotes of exclusionary actions in Anishinaabe stories and ethnography. See for instance Copway, *The Life, History, and Travels, of Kah-ge-ga-gah-bowh* at 19-20; Jones, *History of the Ojibway Indians* at 71. For an excellent example, see also Brian Noble, "Treaty Ecologies: With Persons, Peoples, Animals, and the Land" in Michael Asch, John Borrows, & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) ch 11 [Noble, "Treaty Ecologies: With Persons, Peoples, Animals, and the Land"] at 317.

and thus where land is often shared with other human groups⁶⁶⁶ and with other-than-humans.⁶⁶⁷ The territorial edges are those places where kinships thin out to the point that eventually persons don't recognize one another as kin (beyond the thin sense of their shared participation in earth community). As kinships falter, so too does mutual aid.

This relationality-gradient, 'non-contours' conception of territorial boundary explains how certain indigenous communities maintained their integrity despite significant patterned mobility (what John Borrows cleverly describes as "settled flux"⁶⁶⁸). For instance, Anishinaabeg constituted their communities not at a specific, permanent location, but rather in the annual round which saw community members aggregate in sizes that varied with what the local wild food economy would support, and then disperse as they moved in different directions throughout their territory towards their next respective stopping places.⁶⁶⁹ The entire village might assemble only in high summer, when a productive fishery supported that scale of population density.

Interpersonally, the centre is the communicative nexus of those gifts which make the greatest contribution to individual lives being lived through and for one another, and thus to intra-community relationality. The belonging periphery, conversely, consists of those gifts shared only infrequently and/or to little effect. Such gifts have a smaller impact on relationality (but might hold tremendous and indeed unique significance for our own lives). The way Scott Richard Lyons puts the general point is that "Culture was about the practice, not the thing, the action, not the content, the verb, not the noun."⁶⁷⁰

The implications of such an approach to the bounding of community are sweeping. Most important, it means that the community to which one may claim belonging has nothing to do with where one was born or which people one was born into, and everything to do with whom one practises co-creativity, communicating gifts.⁶⁷¹ Thus Ruth Landes observed of Manitou Rapids that "People may at any time (though not to-day due to the regulations of the Canadian Government), become citizens of any village where they have cordial relatives or friends"⁶⁷² and Nicolas Perrot likewise observed of Anishinaabe kinship that "for as the ties of marriage and alliance are so strongly knit together, each man considers himself as a member no longer of the

⁶⁶⁶ Copway, *Traditional History and Characteristic Sketches* at 21, 35; Stark, "Marked by Fire" at 129-135; Simpson, "Looking After Gdoo-naaganinaa"; Victor P. Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region" in David H Pentland, ed, *Papers of the Twenty-Eighth Algonquian Conference* (Winnipeg: University of Manitoba, 1997) 210; Hill, *The Clay We Are Made Of* at 80-84; Williams, *Kayanerenkó:wa* at 339-344; Ariss with Cutfeet, *Keeping the Land* at 50.

⁶⁶⁷ See Peacock & Wisuri, *Ojibwe Waasa Inaabida* at 74.

⁶⁶⁸ Borrows, *Freedom & Indigenous Constitutionalism* at 21.

⁶⁶⁹ Anonymous elder #1 (15 June 2014); Teaching of anonymous elder #1 (25 November 2015) Mitaanjigamiing First Nation [Anonymous elder #1 (25 November 2015)]; Teaching of anonymous elder #1 (22 March 2016) Mitaanjigamiing First Nation; Warren, *History of the Ojibway Nation* at 263-266; Dorothy Dora Whipple / Mezinaashiiikwe, "Ziigwan, Niibin, Dagwaagin, Biboon / Spring, Summer, Fall, Winter (Version 2)" in Wendy Makoons Geniusz & Brendan Fairbanks, eds, *Chi-mewinzha: Ojibwe Stories From Leech Lake* (Minneapolis: University of Minnesota Press, 2015) 18; Ron Geyshick, "Gawa Bay" in *Te Bwe Win (Truth)* (Toronto: Summerhill Press, 1989) 94; Michael Greenlar, *Kokom Lena of the First Nation Algonquin* (Michael Greenlar, 2017) at 64-68; George I Quimby, "A Year with a Chippewa Family, 1763-1764" (1962) 9:3 *Ethnohistory* 217. Other Algonquian peoples were also like this (Battiste, "Nikanikinútmagq" at 16-17) as were some other indigenous peoples (Mills, *Eagle Down Is Our Law* at 38-40) of Turtle Island.

⁶⁷⁰ Lyons, *X-Marks* at 89.

⁶⁷¹ Borrows has an extended discussion about this in Borrows, *Freedom & Indigenous Constitutionalism* at ch 1.

⁶⁷² Landes, *Ojibwa Sociology* at 4.

village where he was born, but of that one in which he has settled.”⁶⁷³ Basil Johnston most fulsomely addresses the nature of relational belonging, saying:

When asked of their identity, men and women might answer “Zaugee,” or “zaugeewinini,” meaning “I am of the People of the River Mouth,” or “Pottawotomi,” which means “I am of the People of the Keepers of the Fire,” or “Menominee – I am of the People of the Wild Rice,” or “Mitche Kuneewinini – I am of the People of the Water Fence (Rama)”. In all cases the emphasis was not on the place or origin of birth, but on an affiliation, “I am of the People of . . .) Custom and practice seemed to indicate that totemic and band or community affiliation took precedence over tribe or other consideration.”⁶⁷⁴

In summary, rooted constitutional orders have no settled, closed boundary lines, whether in regard to territoriality or to belonging/membership. I haven’t taken it up, but the justification for rejecting these two forms of boundary—their dependence on settled, binary lines—ought also to remove ethnonational membership (ethnic/lineal descent belonging) from contention. This isn’t to say that rooted peoples don’t care about these other forms of belonging but only that the work they do is a function of the thickness of the relationships they represent, and not of the firm line they (wrongly) presuppose.⁶⁷⁵ Members of a rooted community neither have nor need such lines, which, consequently, have no proximate analytic relevance. Rooted peoples have only common roots storying themselves into creation and much more importantly, the lived practice of mutual aid relationships which those stories generate. Ultimately, for rooted communities the ongoing practice of mutual aid kinship is all that keeps rooted persons together, and others, apart.

iii. Harmony: The Purpose of Rooted Constitutionalism

That rooted constitutionalism is oriented towards harmony, “to repair and maintain relationships in an encompassing way”,⁶⁷⁶ will probably be so clear by now that it need not be stated. We’ve already explored many of its implications, and have discussed a common Anishinaabe expression of this concept, *bimaatiziwin*, at length.⁶⁷⁷ Yet I suspect some discussion of what it means to take harmony as the central purpose of community is necessary, for one major implication may be less clear, and where a liberal lifeworld has been normalized, it’s an implication which will be controversial.

In his introduction to his book *Living in Harmony*⁶⁷⁸, Basil Johnston presents harmony as a state of kinship lived with one another and with the earth,⁶⁷⁹ saying “They used ‘mino-inawau-daumoowin’ or ‘mino-nawaemaugaewin’ to express this special kinship with other beings.”⁶⁸⁰ He next sets out the mutual aid that these relationships empower: “After the earth was formed

⁶⁷³ Perrot, *Savages of North America* at 140.

⁶⁷⁴ Johnston, *Ojibway Heritage* at 59-60. See also Basil Johnston, *Ojibway Ceremonies* (Toronto: McClelland and Stewart, 1987) at 159. Warren, too, translates (and sometimes interprets) the meaning of many of these names. Warren, *History of the Ojibway Nation* at 31-38, 82-85, 123, 405.

⁶⁷⁵ Williams, *Kayanerenkó:wa* at 3.

⁶⁷⁶ Clifford, “WSÁNEĆ Legal Theory” at 759. See also *ibid* at 785.

⁶⁷⁷ Matthew LM Fletcher does an outstanding job of articulating bimaatiziwin in just the sense of harmony at issue in our discussion: a connection between all beings which enables effective mutual aid. See Matthew LM Fletcher, “Anishinaabe Law and *The Round House*” (2017) 10 Albany Gov Law Rev 88 at 91.

⁶⁷⁸ Johnston, “Introduction” in *Living in Harmony*.

⁶⁷⁹ *Ibid* at 3-5.

⁶⁸⁰ *Ibid* at 3.

into seas, mountains, forests, plains, marshes, Kitchi-Manitou planted trees and all sorts of growing things upon the land. There, all living beings found a time and a place to perform their services for Mother Earth and for each other.”⁶⁸¹

In explaining harmony, Johnston’s teachings seem to summarize what we’ve so far learned of rooted constitutionalism. Individuals endowed with gifts and needs, common and unique, interact with one another in ways which endeavour to align the former with the latter. The particulars of each interaction are governed by kinship, actual or metaphorical.

Note that this image of community harmony isn’t one of non-conflict.⁶⁸² Harmony consists in individuals being connected with, attuned to, and communicative with one another.⁶⁸³ Conflict contributes to disharmony only where it disrupts the communication of gifts and needs, or where it creates disconnections between community members. Harmony is the purpose of rooted community because it serves as the condition of possibility of freedom: one is able to practise co-creativity if and only if she’s connected to and in dialogue with others.

Rather than absencing harmony, conflict can thus be a means of performing it. This will be true, for instance, where conflict sustains a dynamic tension which supports more life. In an Anishinaabe context, perhaps the best known example is the tension sustained on earth through the conflict between *animikiig* (thunderers) and the water *manidoog* such as the Mishi-ginebeg.⁶⁸⁴ There are many powerful images of this tension.⁶⁸⁵

Now we come to the critical implication. A community oriented towards this rooted, unromantic sense of harmony has no need of justice. Just as kinship displaces the need for citizenship by offering itself as a full answer to the question of belonging, so too does harmony displace the need for justice by offering itself as a full answer to the question of a return to order.

If my abandonment of justice appears sacrilegious, that’s one way of appreciating my point. Justice *is* sacred from a liberal standpoint. It’s enforcement of the social contract, respecting the consent of citizens, respecting the autonomy of rational, moral persons. Justice is a conception of order directly consequent to the liberal ECO-system. In particular, it follows from the liberal notion of *desert* so essential to promoting, protecting and vindicating the dignity of autonomous persons. This is true in each of justice’s applications. Procedural justice says that each deserves to be treated fairly; distributive justice says that each deserves a fair share of community goods; corrective justice says each deserves to be put back in the place she occupied

⁶⁸¹ *Ibid.*

⁶⁸² Kagedonice, *Drawing Out Law* at 103.

⁶⁸³ The Woodlands School represents these linkages with ‘communication lines’ connecting beings to one another. My favorite example is Norval Morrisseau, *Harmony in Nature*, Oil on Canvas, 1980.

⁶⁸⁴ See for instance 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; Kagedonice, *Drawing Out Law* at Scroll Seven; Alan Corbiere & Crystal Migwans, “Animikii miinwaa Mishibizhiw: Narrative Images of the Thunderbird and the Underwater Panther” in David W Penney & Gerald McMaster, eds, *Before and After the Horizon: Anishinaabe Artists of the Great Lakes* (Washington, DC: National Museum of the American Indian, Smithsonian Institution, 2013) 37; Theresa S Smith, *The Island of the Anishinaabeg: Thunderers and Water Monsters in the Traditional Ojibwe Life-World* (Lincoln, NE: University of Nebraska Press, 1995).

⁶⁸⁵ One example is Norval Morrisseau, Thunderbird with Serpent, 1965, Acrylic on Kraft Paper; reproduced in Norval Morrisseau & Kinsman Robinson Galleries, *Norval Morrisseau: Travels to the House of Invention* (Toronto: Key Porter Books Limited, 1997) at 93. See also the painting by Anishinaabekwe artist Estrella Whetung, which adorns the cover of Michael Asch, John Borrows, & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018). The image is discussed in *Ibid.* at viii-ix.

before suffering injustice, and retributive justice says that a wrongdoer is deserving of punishment proportional to his wrongdoing.

If justice requires an underlying notion of desert, what room is there in a community that doesn't recognize desert? Rooted communities have no use for desert because it follows the logic of expectation. We can observe these dynamics in the *aadizookaan* "Nenebuc Transforms the Bear",⁶⁸⁶ summarized as follows: the Great Bear was devouring everybody, so Nanabozho transformed him into a squirrel. And turning to see a squirrel, Nanabozho transformed it into a bear. But he knew his task was as yet incomplete. He asked the bear-become-squirrel "what shall you eat?" The little one chirped boldly that he'd continue to eat people, but alas his size prevented that ambition. Nanabozho was happy: "Now you can't do any harm to the Indians. But you had better change your food. Just run up that black-spruce tree and taste the acorn seeds and then see whether you want to eat people any more."⁶⁸⁷ He loved it and loves it still.

Critiqued on liberal grounds, this story is awful. Nanabozho doesn't seem interested in justice. Not only does the bear escape punishment proportional to the harms he's caused, but Nanabozho's central concern seems to be ensuring that the bear's needs continue to be met. Second, the autonomy of the poor squirrel innocently passing by is violated in rather dramatic fashion as he's suddenly transformed into a bear.

Without evaluating the substance of the story, I think we can at least make sense of it when we consider it in respect of harmony. From that perspective, the goal of community is to sustain (and where necessary, to restore) relationships that support co-creativity. Thus harmful acts are to be terminated not because they're abjectly 'bad' in some abstract moral sense, but because (and perhaps only to the extent that) they impair this result. Transformation is a remedy which may do so. However, as a return to the giftway it's only a first step. We need to know that the bear-become-squirrel can offer a squirrel's gifts—and it can only do so when its needs are met. Since the shift from eating people to eating cone seeds is a big one, this explains Nanabozho's close attention to the bear-squirrel's diet.

To clarify then, Nanabozho gave the bear-squirrel focussed attention so that co-creativity would be re-established *through* him, but *for* everyone. It's for the very same reason that the passerby squirrel was transformed into a bear: the fact that the bear was acting violently doesn't reduce the community's need of its gifts. If this bear is to exist no longer, someone else shall have to take its place (recall the *aadizookaan* of the last rose, in which the animals were unable to simply eliminate waabooz (rabbit) for want of its gifts). If we already have a squirrel's gifts, this pulls in favour of squirrel's candidacy. Again, given the complexity of the issues at play here, I'm not drawing any general conclusions from Nanabozho's actions (I go on to argue that *aadizookaan* don't work like that), but I do hope to have shown that seen in their rooted context, those actions are at least logical.

Finally, I recognize that indigenous persons writing about indigenous law in the rooted sense often refer to 'justice', but are careful to assign it a novel meaning. Thus Justice Sinclair (as he then was) claimed that "The primary meaning of 'justice' in an Aboriginal society would be that of restoring peace and equilibrium to the community"⁶⁸⁸; "'justice' is achieved in Aboriginal societies only when harmony is restored to the community",⁶⁸⁹ and "'Justice' in

⁶⁸⁶ Unknown orator, "Nenebuc Transforms the Bear".

⁶⁸⁷ *Ibid.*

⁶⁸⁸ Sinclair, "Aboriginal Peoples, Justice and the Law" at 178; see also Justice Harry S LaForme, "The Justice System in Canada: Does it Work for Aboriginal People?" (2005) 4 Indigenous LJ 1 at 4.

⁶⁸⁹ Sinclair, "Aboriginal Peoples, Justice and the Law" at 181.

Aboriginal societies would be relationship-centred”.⁶⁹⁰ This relationship-centring, harmony-oriented conception of ‘justice’ differs dramatically from the contractarian conception of justice. Harmony also seems to be the sense in which Taiaiake Alfred understands justice:

The dominant Western conception of justice is rooted in a fundamentally individualistic, materialistic ideal of equity of sameness. By contrast, indigenous notions of justice arose within the context of belief in a universal relationship among all the elements that make up our universe. Native ideas centre on the imperative of respectful, balanced coexistence among all human, animal, and spirit beings, together with the earth. Justice is seen as a perpetual process of maintaining crucial balance and demonstrating true respect for the power and dignity of each part of the circle of interdependency.⁶⁹¹

The same sense of justice was articulated by RCAP:

Even though First Nations do not adhere to a single world view or moral code, there are nonetheless commonalities in the approach of all First Nations to justice issues. A justice system from the perspective of First Nations is more than a set of rules or institutions to regulate individual conduct or to prescribe procedure to achieve justice in the abstract. ‘Justice’ refers instead to an aspect of the natural order in which everyone and everything stands in relation to each other. Actions of individuals reflect the natural harmony of the community and of the world itself. Justice must be a felt experience, not merely a thought. It must, therefore, be an internal experience, not an intrusive state of order, imposed from the outside and separate from one’s experience of reality.⁶⁹²

Trish Monture, too, spoke to “Aboriginal notions of justice”⁶⁹³, explaining, “As I understand this concept, it embraces a knowledge of who I am, an understanding of my responsibilities, which are both individual and collective, and only then a sense of what is fitting, right or fair.”⁶⁹⁴ On another occasion she sought to understand indigenous conceptions of justice from Shirley O’Connor, an Anishinaabekwe grandmother from Lac Seul.⁶⁹⁵ Monture noted, “During our conversation, the grandmother repeated many times to me that there really is no word for justice in the Ojibwe language”⁶⁹⁶ and thus drew the conclusion, “We are attempting to recover a concept for which there is no word in our own languages to describe!”⁶⁹⁷ The final conclusion she drew from O’Connor’s teachings very closely mirrors where the RCAP definition ended: “justice initiatives must respect experiences—the totality of an individual’s experience—not just incidents or alleged offences”⁶⁹⁸ and further, that “the experiences of women and men

⁶⁹⁰ *Ibid* at 181.

⁶⁹¹ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 2nd Ed (Don Mills: OUP, 2009) [Alfred, *Peace, Power, Righteousness*] at 66.

⁶⁹² RCAP, *Bridging the Cultural Divide* at 3.

⁶⁹³ 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, “Thinking About Aboriginal Justice: Myths and Revolution”] at 228.

⁶⁹⁴ *Ibid*.

⁶⁹⁵ Monture-Okanee, “The Roles and Responsibilities of Aboriginal Women” at 261.

⁶⁹⁶ *Ibid*.

⁶⁹⁷ *Ibid* at 261-262.

⁶⁹⁸ *Ibid* at 263.

cannot be presumed to be the same.”⁶⁹⁹

The conception of justice described in these passages clearly has nothing to do with the enforcement of the terms set out in a social contract, and everything to do with lived relationships. ‘Justice’, here, bears little or no resemblance to liberal uses of the term, and a remarkable affinity with harmony.

iv. Summary

I’d like to sum up the discussion on rooted constitutionalism by turning to a passage in Kayanesen Paul Williams’ stunning work, *Kayanerenkó:wa*. I don’t know any other work with which my conception of rooted legality, and in particular, rooted constitutionalism, aligns so closely. After explaining that the Haudenosaunee *Kayanerenkó:wa*—the Great Law of Peace—consists of two parts, Williams writes:

The two parts are inseparable as a description of the legal system. The narrative is not only a story: it describes how the Peacemaker achieved a rational and persuasive dialogue [harmony] with people who stood in the way of peace, and his methods became living examples for later generations to use [legality moves from creation stories to constitutional orders]. The narrative describes the thinking behind the ceremony of Condolence, the ultimate, compassionate way to restore rationality and the threshold to any lawmaking. It sets out the principles of inclusiveness, mutual aid, generosity, and reciprocity [mutual aid’s positive analytic]. It confirms family as the foundation of the legal system [kinship]. The narrative is also a template for the creation of consensus, unity of mind. It sets a path to be followed [constitutionalism (which in the first sentence of the next paragraph he states expressly)] by Haudenosaunee government in every council and in all dealings with other nations [legal traditions: to which I now turn].⁷⁰⁰

c. Rooted Legal Traditions

In this section I reflect on the processes and institutions involved in generating, changing, and applying rooted law. Predictably, they look nothing like the law schools, legislatures and courts one finds within liberal legality. I explore three features common to rooted legal traditions: that the multiple modalities of reason they take seriously orient them towards holistic judgment, that they’re embedded within cultural practice more generally, and that they’re often accessible to all and practised in the everyday course of life.

I had planned to illustrate these features through four examples, then two examples, and finally through a single example. In the end my supervisors and I decided that even it should be cut given the size of this dissertation. Thus this section is smaller and less weighty than others.

Within the legality tree, a society’s legal traditions are empowered and constrained by its constitution, just as branches grow from a trunk. Since mutual aid structures constitutionalism in respect of ongoing lived relationships, the work of rooted legal traditions is to teach community members what healthy, workable relationships are, to give them the tools and training necessary to realize them, and thus to *live* good relationships through and for others. The processes and institutions which facilitate these goals thus instill in community members an orientation to

⁶⁹⁹ *Ibid.*

⁷⁰⁰ Williams, *Kayanerenkó:wa* at 137. The degree of connection this passage shares with my dissertation is simply stunning. It also presents concepts I articulate below, including the conception of law-as-judgment, persuasive authority, and the claim that rooted treaties are higher-order reproductions of rooted constitutionalism.

being-with one another. And ‘being-with’ is indeed the right way to put it: for the reasons already explored, no community member can ever ‘just’ be; no community member ever exists freestanding but for an agreement to associate with others. He or she always already stands in relation to others. Sákéj explains what this means for rooted legal process and institutions:

This distinction between Eurocentric and Aboriginal jurisprudence is crucial. Aboriginal jurisprudences rely on performance and oral traditions rather than on political assemblies, written words, and documents. They stress the principle of totality and the importance of using a variety of means to disclose the teachings and to display the immanent legal order. They have always been consensual, interactive, and cumulative. They are intimately embedded in Aboriginal heritages, knowledges, and languages. They are intertwined and interpenetrated with worldviews, spirituality, ceremonies, and stories, and with the structure and style of Aboriginal music and art. They reveal robust and diverse legal orders based on a performance culture, a shared kinship stressing human dignity, and an ecological integrity that demonstrates how Aboriginal peoples deliberately and communally resolved recurring problems.⁷⁰¹

It will be helpful to look more closely at the holism, embeddedness and everydayness of indigenous legal traditions which Sákéj has introduced.

i. The Multiple Modalities of Reason Generate Holistic Judgment

The crucial activity that being-with points towards is judgment. In a rooted community, good judgment is the critical and analytical activity of central importance to order because of its role in building, sustaining, changing, and sometimes ending one’s relationships. Note how different this purpose is from the liberal processual and institutional one of producing and managing provisionally determinate norms. At the level of branches, difference between distinct kinds of legality becomes more obvious. Mutual aid and contractarian kinds of constitutionalism condition very different kinds of legal traditions.

Once more, I realize that in stipulating the meaning of ‘legal traditions’ as legal processes and legal institutions, I’m narrowing its conventional meaning. The broader, dominant use of ‘legal traditions’ fails to recognize constitutional logics. In consequence, constitutionalism, the most significant ground of legality difference, is occluded, and a false sense of the difficulty of the task of working across differences in systems of law is the result.

I go on to describe the rooted conception of law *as* a particular form of legal judgment, one which places relationships over rules, contingency over certainty. A rooted community’s legal traditions are thus its processes and institutions which cultivate, hone, and limit members’ capacity for legal judgment. They can be separated into two broad categories: (1) those which develop and train legal judgment (capacity-building), and (2) those which deploy it in particular ways (application). *Aadizookewin*, puberty rites, and spending time learning from the land are examples of the former, while shake tents, round houses and pow wows are examples of the latter. In reality these categories aren’t mutually exclusive; often rooted legal traditions serve both capacity-building and application functions and the distinction is merely one of emphasis. *Madoodiswan*, the sweat lodge, is an example of such an institution.

⁷⁰¹ James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon: Purich Publishing Ltd., 2004) 67 [Henderson, “Aboriginal Jurisprudence and Rights”] at 71. I’ve removed two citations (which cite favorably to John Borrows).

Sound legal judgment turns on effective reasoning, and recall that for Anishinaabeg there are four modalities of reason: mind, body, heart and spirit. Rigour in legal judgment will often require that all four modalities be engaged.⁷⁰² Unsurprisingly, indigenous legal academics have sometimes expressed disquiet between their expectations regarding reasoned engagement and the reality of Canadian legal education. Trish Monture wrote:

In ten years of being at university, I have not spent one single day in any of those institutions where I was dealt with as a complete person. I was merely a mind. No one wanted to address my spirit, or my emotions, or my sexuality. We have to look at the definition of what is knowledge – the way we learn things – if we are going to address First Nations concerns.⁷⁰³

John Borrows voiced a similar sense of upheaval when he wrote:

When I went to law school, I once again sat very quietly. I don't think I spoke in class more than ten times. Unlike before though, my silence wasn't because I didn't want to disturb; I was quiet because what I heard was disturbing. The stories were so different. Everything seemed cold, lifeless. The people we spoke about were detached from any context. Case after case piled one upon another, where background barely mattered and facts were only shadows of the reasons for decision. The places we studied had no spirits: only uses, divisions, and remainders. And the dead were, well, ... dead. They could only seemingly be relevant vicariously, through criminal law and civil remedies. The stories did not connect me to any place; in fact they seemed to sever me from the world. They created a realm of interchangeable and abstract concepts that concealed Canada as I knew it. Law, I discovered, had the power to hide many things.⁷⁰⁴

Since reasoning is a 'whole person' activity⁷⁰⁵, its legal judgment output is holistic too. This is a point of crucial significance. Since legal judgment isn't constrained to a particular mode of reasoning, nor are the processes and institutions which develop and apply it. Rather, they intersect with many aspects of a reasoning self's life. As such, recognizing the legal aspect of a tradition is, for outsiders, an all too common challenge. I've often been present when guests in indigenous spaces have failed to identify pipe and water ceremonies, singing, smudging, and story-telling as doing *work*. Practices such as these, so often reduced to 'culture' in the private sphere sense of religion and aesthetics, are in fact not mere private preferences, but robust institutions of law and governance.⁷⁰⁶

ii. Total Social Phenomena: Embedded Legal Traditions

The challenge of recognizing the legal aspect of such practices arises from the embeddedness of legal process within cultural practice more generally.⁷⁰⁷ John Borrows says, "First Nations law

⁷⁰² See Borrows example of the elder's intervention in Kegdonce, *Drawing Out Law* at 212-214.

⁷⁰³ Monture-Okanee, "The Violence We Women Do" at 195-196.

⁷⁰⁴ John Borrows, "Indian Agency: Forming First Nations Law in Canada" (2001) 24:2 PoLAR 9 at 9.

⁷⁰⁵ Kegdonce, *Drawing Out Law* at 212.

⁷⁰⁶ Lindberg, "Miyo Nêhiyâwiwin (Beautiful Creeness)" at 55.

⁷⁰⁷ Harold Berman took the differentiation of law from sociality, politics and religion as diagnostic of legal systems. Normative contexts for which legal activity isn't a category unto itself he instead called legal *orders*. Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: HUP, 1983) at 49-50. I don't follow his practice because I don't see that the combined centralization, formalization, specialization, and professionalization of law are diagnostic of anything of unique importance. The salient taxonomical difference for

originates in the political, economic, spiritual, and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. These principles are discovered in the rich stories, ceremonies, and traditions within First Nations.”⁷⁰⁸ Val Napoleon similarly states “I use the term ‘legal order’ to describe law that is embedded in non-state social, political, economic, and spiritual institutions. For example, Gitksan, Cree, and Dunne za peoples have legal orders. Indigenous law is a part of and derives from an Indigenous legal order.”⁷⁰⁹ In discussing “the basics of Haudenosaunee political thought”, Trish Monture offers that “in this knowledge tradition it is difficult to separate intellectual, spiritual, political and legal realms.”⁷¹⁰ Marie Battiste and James (Sa’ke’j) Youngblood Henderson state the point still more forcefully: “No separation of science, art, religion, philosophy, or aesthetics exists in Indigenous thought”.⁷¹¹ For James Dumont, “the unique forms of Aboriginal justice seem to call for its being situated in a comprehensive scheme of culture—a scheme that integrates the concerns of Aboriginal justice with the other facets of family, social and community development and well-being.”⁷¹² Still others have made similar observations.⁷¹³

These many descriptions of the embeddedness of indigenous law within multi-function cultural practice all seem to express a view that indigenous law is part of what Marcel Mauss famously called ‘total social phenomena’ in his study of gift exchange societies:

In these ‘total’ social phenomena, as we propose calling them, all kinds of institutions are given expression at one and the same time—religious, juridical, and moral, which relate to both politics and the family; likewise economic ones, which suppose special forms of production and consumption, or rather, of performing total services and of distribution.⁷¹⁴

me is constitutional logic, and only for the purposes of discerning the possibility of communication across legalities. There are no constitutional logics which fail to produce ‘systems’ of law.

⁷⁰⁸ Borrows, “Living Between Water and Rocks” at 454; citation omitted.

⁷⁰⁹ Napoleon, “Thinking About Indigenous Legal Orders” at 231; citation omitted. See also *ibid* at, 240; Napoleon, “Delgamuukw: A Legal Straightjacket for Oral Histories?” (2005) 20:2 Canadian J of Law & Soc’y 123; Val Napoleon, “Aboriginal Discourse: Gender, Identity, and Community” in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) at 236.

⁷¹⁰ Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Winnipeg: Fernwood Publishing, 2011) [Monture-Angus, *Journeying Forward*] at 40.

⁷¹¹ Marie Battiste & James (Sa’ke’j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd, 2000) at 43.

⁷¹² James Dumont, “Justice and Aboriginal People” in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993) [Dumont, “Justice and Aboriginal People”] 42 at 83. I take that all law is situated in a comprehensive scheme of culture, but I read Dumont’s point as the willing and open embrace of culture-in-law that characterizes indigenous systems of law, counter to the liberal impulse for the separation of law from what it takes to be private spheres of action and belonging.

⁷¹³ Johnston, *Ojibway Heritage* at 7; Stark, “Nenabozho’s Smart Berries” at 349; Jourdain, “Pazaga’owin” at 16; Jeff Corntassel, “Living in a Longer Now: Moving Beyond the State-centric System” in Waziyatawin & Michael Yellow Bird, eds, *For Indigenous Minds Only: A Decolonization Handbook* (Santa Fe: School of American Research Press, 2012) [Corntassel, “Living in a Longer Now”] at 88; Williams, *Kayanerenkó:wa* at 75; Mark Walters, “‘According To The Old Customs Of Our Nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847” (1998-99) 30:1 Ottawa L Rev 1 at 13; Morales, “Locating Oneself in One’s Research” at 166; Morales, “St’ul Nup: Legal Landscapes of the Hul’qumi’num Mustimuhw” at 116-117; Chartrand, “Eagle Soaring” at 66.

⁷¹⁴ Mauss, *The Gift* at 3 (see also page 79).

As I've been at pains to explain, these "phenomena" aren't *mere* facts, facts severed from law; they're infused all the way through with normativity. Elder Harry Bone explains why settler society often misreads the normativity of indigenous legal traditions, reducing them to mere fact:

We need to sit and discuss our thoughts on the sundances, what the sweatlodges are, what the pipe ceremonies are, as we heard these things and we've lived through them. What you read about in history in books about the sundances, I will tell you the reason why that is the only thing they talk about, the writers, the white people is because those are the things that they see physically, what they observe, that's how they translate them, not what they understand and what they are meant to be. The teachings in sweatlodge, they don't see it, white people have to see things to translate it into something, observations but we go strongly on faith and belief. So that is why when they talk about sundances or the Ghost Dance that they were scared of years ago. They can see physically and they can stand there and see what is going on but the ones that can't see, they just generalize them.⁷¹⁵

If I understand elder Bone correctly, there's a rationale for every legal tradition (he speaks specifically of ceremonies, but his reasoning applies more broadly), but it's indiscernible from the position of observer. One must actively participate in the experience to share in its normative content.⁷¹⁶ This is doubtless why he so dutifully encourages me to do more ceremony. I'm so grateful for his encouragement and I know he's right.⁷¹⁷

iii. Participation and Accessibility: the Everydayness of Rooted Legal Process

The imperative to participate points directly to the fact that rooted legal traditions are generally ordinary and democratic: the practice of rooted law isn't reserved to a class of professional elites⁷¹⁸ (nor legal education to law schools).⁷¹⁹ That the practice of Anishinaabe law is the

⁷¹⁵ Hyslop et al, *Dtantu Balai Betl Nahidei* at 91-92.

⁷¹⁶ The value of direct experience is a major focus of much of John Borrows' work on indigenous law. Presumably such a position is implied in all of his work on *akinoomaagewin* (learning from the earth), and thus in the Anishinaabe law camps he runs at his community, Neyaashiinigiming. See in particular Borrows, "Outsider Education" and Borrows, "Earth-Bound". I can also attest to this in my direct experience as Borrows' student: while I lived in Victoria and we could still meet in person, John would always prefer to talk while walking Mount Tolmie.

⁷¹⁷ I have ceremony in my life, but on a quotidian scale: acts of prayer, smudging, drumming, and of leaving offerings at sacred sites in and around Koojijing Zaaga'igan, especially at and near Couchiching and Mitaanjigamiing First Nations, where my relationships with people, land, and spirits are strongest. On a seasonal scale, I add spring and fall ceremonies. There are also the ceremonies in the course of community work, while helping an elder in his or her endeavours. In sum, I engage in ceremony in the ordinary course of my life and work. However, I realize how much more I could learn from a more intentional commitment, such as membership in a ceremonial society. Elder Bone reminds me, in that teasing but instructive way many elders have, that while I'm on the cusp of earning a PhD in the western knowledge system, I haven't yet earned one in our own. That will be another four-year commitment, whether to a Midewiwin or Sundance lodge. And just as with the graduated qualification system in western legal knowledge (in addition to being called to a bar, progression through LLB/BCL/JD, LLM and PhD/JSD degrees), one's credibility is in large part a function of how far one has progressed in knowledge. For Anishinaabe law, I haven't got very far.

⁷¹⁸ Dakh'l'awèdì elder Pearl Keenan says "What is Justice? It is our way of living for each individual. Our justice system is our way of life (Ha Kus Teyea). We are proud People. Tlingit Law was truth and honesty. We need to have that back again. We also need to love and understand one another." Teslin Tlingit Council, Justice Council and Peacemaker Court, pamphlet (Teslin, YT: Teslin Tlingit Council, December 2015) at 4. See also Chartrand, "Eagle Soaring" at 68.

⁷¹⁹ Sandy, "*Stsqey'ulécw Re St'exelcenc*" at 198-199.

practice of everyday living,⁷²⁰ and thus of everyone's life, is one of nokomis' most constant teachings.⁷²¹ It's why she can say, quite literally, "I grew up with the law of the people."⁷²² Sometimes she's offered express statements to this effect: "I guess what I really want to pay attention to is how the government broke our *law of living*."⁷²³ On other occasions the teaching is implicit in how she answers. For instance, she's often taken up my invitation to share about our law by teaching me about ceremonies Anishinaabeg do to mark important life transitions.⁷²⁴ When I'm being bold and instead of just listening I follow up with the idiot's question (ah, so you're saying these ceremonies *are* our law and governance?), her face alights and she replies with great excitement, yes, yes, that's it; "That's what it is, all that I'm talking about, eh".⁷²⁵

I received the same teaching from grandmother Sherry Copenace: "Everything that we do is about law. Everything. It doesn't have to be, like, in this situation or that situation, only here, only there. It's like everyday life. [interruption by little boy at door looking for Sherry's grandson]. It tells us how we're to live life, how we're to work for life. Really it's all about that, it's all about life." Zuni Cruz's perspective seems to square with noko's and grandmother Copenace's. She writes that indigenous law "is in no one place, but rather everywhere. This is what makes the Indigenous legal tradition a community endeavour. This is also what alienates it from the tribal court system modelled on the common law tradition and presents the challenge for its incorporation."⁷²⁶

As part of the everyday practice of being-with one another, rooted legal traditions are intrinsic to belonging in rooted communities. This speaks to Borrows' concern with the accessibility of indigenous law.⁷²⁷ However, for many of us, rooted legal traditions never were or are no longer part of our everyday lives. For decades the Crown in right of Canada targeted these sorts of processes and institutions, like sundance and potlatch⁷²⁸, through its practice of settler supremacy's second form of violence, violence to indigenous peoples. The attempted erasure and largely successful suppression of indigenous legal traditions has had a predictably catastrophic impact on their accessibility. This consequence of colonialism has degraded indigenous legalities generally, and our contemporary systems of law in particular (since, as the legality tree attempts to show, these are immediately dependent on the legal traditions beneath them for their viability).

d. A Rooted Conception of Law

From anchor roots through trunk to branches, our journey through rooted legality at last ascends

⁷²⁰ Grandmother Sherry Copenace (24 June 2018); Stark & Stark, "Nenabozho Goes Fishing" at 18; Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women" at 264; Zuni Cruz, "Law of the Land" at 325; Ontario Human Rights Commission, *To Dream Together: Indigenous Peoples and Human Rights Dialogue Report* (Government of Ontario, 2018) [Ontario Human Rights Commission, *To Dream Together*] at 24; Ariss with Cutfeet, *Keeping the Land* at 44.

⁷²¹ Elder Bessie Mainville (19 August 2013); Elder Bessie Mainville (17 June 2014); Elder Bessie Mainville (14 June 2015); Elder Bessie Mainville (25 October 2015); Elder Bessie Mainville (2 December 2015); Teaching of elder Bessie Mainville (12 March 2018) Couchiching First Nation; Mainville, "Traditional Native Culture and Spirituality" at 1.

⁷²² Elder Bessie Mainville (2 December 2015).

⁷²³ Elder Bessie Mainville (19 August 2013); emphasis added.

⁷²⁴ Elder Bessie Mainville (17 June 2014).

⁷²⁵ *Ibid.*

⁷²⁶ Zuni Cruz, "Law of the Land" at 323.

⁷²⁷ Borrows, *CIC* at 142.

⁷²⁸ See for instance, *An Act Further to Amend the Indian Act, 1880*, SC 1884, c 27, s 3.

to canopy. In getting here I've identified the consistent centrality of individual agency expressed at each level, and thus an overarching privileging of contingency over certainty. At the roots I explained that we're all co-creators. At the trunk I showed how our individual movements from gift/need to gratitude/responsibility to reciprocity holds rooted community together. As we reached the branches, I explained that rooted community members learn how to be-with one another through processes and institutions that guide appropriate behaviours. Unlike courts, legislatures, or ministerial decisions—which move well past providing direction to giving answers—songs, dances, legends, elders' teachings, legends, and earth teachings don't point individuals towards determinate ends. Instead, rooted legal traditions teach ordinary community members legal reasoning, which centres their agency. As Borrows observes, "Laying claim to a tradition requires work and imagination, as particular individuals interpret it, integrate it into their own experiences, and make it their own."⁷²⁹

This emphasis on legal reasoning is where I want to pick up law. At the leaves, the significance of individual agency reaches its apex, for the conception of law I present in this section isn't about provisionally determinate norms. I don't mean to suggest the common view in legal education today that one ought to place the *emphasis* on legal reasoning rather than on rules. I mean to argue that rooted law doesn't find its ultimate expression as rules (much less as rights), *at all*. Rather than rules that present binding obligations, the doctrine of which is organized in subject matter categories like tort, property or criminal law, rooted law refers to a particular form of judgment about how to exercise responsibilities organized in relational (and specifically, kinship) categories like grandfather, younger sibling, or stranger.

In *anishinaabemowin*, this form of judgment is called *inaakonigewin*. I explore its logic (responsibilities discourse) and its structure (kinship). I also consider how legal issues are triggered (for instance, whether responsibilities need to take the form of claims on others). Finally, I advert throughout this introductory section to a worry that, at a structural level, the inherent subjectivity of law-as-judgment results in unworkable prescriptive indeterminacy.

The second arc of the discussion is aimed squarely at the question of whether prescriptive indeterminacy in rooted law destroys its capacity to create good governance. I respond to this worry with a rooted analogue to the work that the *rule* of law does in legitimating liberal governance: what I call the *grounding* of law. I explain it in respect of an Anishinaabe conception of self-governance, *bimiwinitiziwin*. This concept enables me to show how even in the absence of determinate norms, rooted law serves to legitimate governance.

In the third arc of this discussion I consider the question of how force operates within law-as-judgment. I begin by canvassing the nature of persuasion as a logic of authority and then proceed to consider how it promotes compliance with one's kin-bound responsibilities. I explore three kinds of persuasive compliance: positive reinforcement, negative social force, and negative manidoo/medicine force.

The fourth arc presents a tentative analytic meant to illustrate what the process of forming rooted law decisions is like, from trigger through to reciprocal action. Since much of this deliberative process is often undertaken internally, I underscore the paramount importance of the need to justify one's decision when prompted to do so. Consistent with the degree of prescriptive indeterminacy that rooted law requires, I suggest that the justificatory standard a decision-maker is expected to meet is *formal plausibility* in conjunction with *substantive adequacy*. Community members need not have arrived at the decision-maker's conclusion, but in general they must be able to accept that they could have.

⁷²⁹ Borrows, *Recovering Canada* at 27. See also Borrows, *Freedom & Indigenous Constitutionalism* at 207-208.

This final arc of this discussion explains what I've called 'takings', a category of action which maps roughly to the western legal tradition's concept of harm, but which turns on creative contribution, not on individual autonomy, for its sense. Unfortunately, the scope of a dissertation doesn't permit me to explore both the more general social interaction function of law and its more focussed role in conflict resolution, so after a brief introduction, takings drop out.

I hope these five arcs have allowed me to provide a thick enough explanation of rooted law to have met Borrows' demand for its intelligibility.⁷³⁰ This initial account certainly isn't without problems, but they shall have to be taken up in future research.

Readers may wish to mark this page, as I don't repeat these connections as one subsection transitions into another.

i. Law-as-Judgment

In a discussion about "Nenabozho narratives", stories about the Anishinaabe transformer, Stark explains that "Stories detail relationships. They teach us how to conduct ourselves and how to make sense of our actions vis-à-vis one another."⁷³¹ If you take the time to hear or to read even a small part of the colossal heritage of Anishinaabe *aadizookaanan*, you'll find a great deal about loyalty and betrayal, carefulness and carelessness, seriousness and foolishness, exertion and idleness, controlling and accepting, excellence and mediocrity, humility and arrogance, kindness and meanness, giving and taking. Often little of it will be obvious, some of it may seem contradictory, and much will be expressed with rather bold humour. What you won't generally find is any reference to rules, rights, or the institutions of their production, interpretation and enforcement.⁷³² Rather than distilling normative content to specific determinate ends—rules to be followed—*aadizookaanan* work as Stark suggests: by teaching us *how* to conduct ourselves. To reduce an *aadizookaan* to a rule is to rob it of its intended contribution to legal reasoning.⁷³³

⁷³⁰ Borrows, *CIC* at 138.

⁷³¹ Stark, "Transforming the Trickster" at 261.

⁷³² I say 'generally' because often our stories were recorded as our communities were transitioning between forms of government, and in such instances were sometimes articulated partially or in whole within the new normative framework. See, for instance, the discussion of '*ogimaakaan*' below in the section on persuasive authority.

⁷³³ Not all agree. Borrows would almost certainly take a softer stance. He says "I think it is possible to organize the study and practice of some Indigenous legal traditions by common law or civil law categories" (Borrows, "Heroes" at 813) and "I am not averse to finding creative ways to translate Indigenous law into common or civil law categories. In fact, I support such efforts and organization." *Ibid* at 815. Yet, he cautions that "the teaching of Anishinaabe law is best facilitated by understanding and working through Indigenous legal epistemologies" (*ibid* at 823) and that the "twin problems of power and cultural appropriateness" (*ibid* at 815) complicate the representation of indigenous law in western legal forms. Consequently, they "should not be a dominant way of proceeding." *Ibid*.

Consistent with this general approach, when Borrows translates Anishinaabe *aadizookaanan* through the case method in order to encourage their uptake within Canadian law, he describes these translated stories as producing "rules" and "precedent" (Borrows, *Recovering Canada* at 52, 53). Yet he warns readers not to read such translations as codifications (*ibid* at 17; Borrows, *Freedom & Indigenous Constitutionalism* at 7), reminding us that: Aboriginal laws should be regarded as even more relevant in less formal settings, both within Indigenous communities and in the interactions of Indigenous peoples with their neighbours. Courts should only be the smallest corner in which Aboriginal laws are applied. In fact, the changes of Canadian law accepting Indigenous legal principles would be substantially weakened if First Nations did not continue to practise their own laws within their own systems. Borrows, *Recovering Canada* at 26-27; citations omitted; see also Borrows, "With or Without You" at 662-663; Borrows, "Living Between Water and Rocks" at 454; Borrows, *CIC* at 21.

Thus when Borrows turns his attention from the Canadian uptake of indigenous law to indigenous law on its own terms, it seems he may support the law-as-judgment conception of Anishinaabe law argued for here:

Some *aadizookaanan* seem to present this lesson. In Nanabozho and the ducks, Nanabozho organizes a dance, ostensibly for ducks to enjoy, but in reality to kill and eat them. In the following telling, the narrator is more heavy-handed than some in his emphasis on the failure of legal reasoning implicit in rule-following, but for our purposes this helps to demonstrate the point. In this passage, Wiisakejak⁷³⁴ is instructing the ducks before the dance begins:

“Now,” said he, “you must obey the rule of this dance and do whatever you are told when you hear the order.” He sat down on one side of the fire near the door and they all began dancing around. They got well mixed up before long;—the geese, ducks, loons, and all kinds of birds, and Cingəbis was there too. When he got them warmed up to the dance, they all got mixed up and soon Wiske·djak said, “Now, you must all close your eyes and not open them until I give the word.” Then they obeyed and kept on dancing with their eyes closed. Then, while their eyes were closed, Wiske·djak got up and began wringing the neck of one after another. The noise of the dancing prevented them from hearing what he was doing.⁷³⁵

The birds forsook their own agency in reasoning through the request of the dance put to them, choosing simply to follow a rule.⁷³⁶ That deference cost them their lives. Basil Johnston helps us to understand the nature of the birds’ error—and the purpose of story as a tool of law production—when he explains of Anishinaabe law that:

There were no commandments, no laws, no courts, no judges, no dungeons. There was but one abiding principle that governed all life and that was “to live in harmony with the world and within one’s being”. Instead of laws that are guidelines, our ancestors made up stories to guide us along on the right course.⁷³⁷

In keeping with the conventional methods of Anishinabek legal process, and to illustrate its operation, I will leave it up to the readers to go back in the text, study the stories for themselves, and draw their own conclusions about their messages [...] My retelling of these stories demonstrates that the most important messages in First Nations stories may be the least obvious on first hearing. The speaker may even intentionally bury the primary motivation in relating a story to deflect its directness and thereby avoid outright confrontation. Clearly, this path to judgment leaves much to an individual’s analytical reflections and contains a very different understanding of legal reasoning from that most familiar to Canadian courts (Borrows, *Recovering Canada* at 21).

One might read some of Borrows works in just this way. See Kegedonce, *Drawing Out Law*, and especially Borrows, “Seven Gifts”.

⁷³⁴ Throughout *Anishinaabe-akiing*, this character is called Nanabozho (spellings vary considerably). However in some areas towards the periphery of the territory, Anishinaabeg instead (or in some cases, interchangeably) use the name Wiisakejak, which is the dominant name used amongst Cree peoples.

⁷³⁵ Benjamin Mackenzie, “Wiske·djak Invites the Ducks to a Dance” in FG Speck, ethnographer, *Myths and Folk-Lore of the Timiskaming Algonquin and Timagami Ojibwa* (Ottawa: Government Printing Bureau, 1915) 8 at 9 [citation omitted].

⁷³⁶ My use of the word ‘simply’ isn’t meant to erase reasoning from rules. Charles Taylor famously argued that it isn’t at all obvious how to follow a rule: Charles Taylor, *Philosophical Arguments* (Cambridge: HUP, 1997) at ch 9. Rather, there’s an “embodied” (*ibid* at 173, 178, 179) and “largely inarticulate” (*ibid* at 170) “Background understanding, which underlies our ability to grasp directions and follow rules” (*ibid* at 173). See also Tully, *Strange Multiplicity* at 105-109; Tully, *PPNK 1* at 27-29, ch 2. I don’t mean to disagree with any of this. But it’s one thing to disagree about how best to follow a rule—that is, to accept the contingency of the application of rules—and quite something else to disagree about whether rules are an appropriate form of normative expression. Rules require abstractions which not all societies have reason to accept. Rooted communities, unlike communitarian, relationally autonomous, or agonistic democratic ones, don’t agree even provisionally on the existence of determinate norms.

⁷³⁷ Johnston, “Introduction” in *The Gift of the Stars* at 13.

A charitable reading of Johnston's reference to 'law' in a list that includes commandments, courts, judges and dungeons allows that he means to reject the *conception* of law-as-rules and its coercive form of authority, and not to assert that Anishinaabeg are without the *concept* of law altogether.⁷³⁸ That he sets up a contrast between commandments and courts on the one hand, and "stories to guide us along on the right course" and "laws that are guidelines" on the other, seems to suggest just such an alternative conception of law: one which requires persons to actively use stories (or elders' teachings, dreams, earth's teachings, etc.) to follow "the right course".

We find ourselves back at the pathways metaphor, which James Tully seems to have in mind when he shares his insight that the purpose of indigenous storytelling:

is not to set out categorical imperatives but to develop the listeners' ability to think for themselves. Elders tell stories in a manner that encourages and guides listeners to reflect independently on the great problems of life that the story presents to them through myths. The test of understanding a story is not the answer listeners might give in an exam, but how it affects their attitude and how they go on in various circumstances to conduct their life in light of what they have learned from reflection on the story.⁷³⁹

This account of law fits squarely with my own experience. One time a friend active in indigenous youth work wanted to meet nokomis. She asked nokomis how she responded to particularly challenging youth. Nokomis replied that one time mothers and grandmothers had asked her to address youth about the overuse of drugs. Her reply was "I just tell a story of how it was in the past"; "Just mention it and *leave it*. If he want to talk about it he will, but he'll think

⁷³⁸ Many leading legal anthropologists have suggested that the conception of law-as-rules is a dated and deeply inadequate account of how order is maintained within any society. Peter Just, "History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law" (1992) 26:2 L & Soc'y Rev 373; Snyder, "Anthropology, Dispute Processes and Law"; James M Donovan, *Legal Anthropology: An Introduction* (Lanham, MD: AltaMira Press, 2008) 108-110, ch 11 [Donovan, *Legal Anthropology*].

First, its emphasis on formal dispute resolution misses the whole of normative reasoning and interaction that occurs through other social processes, and frequently these alternatives occupy the bulk of a society's normative action. Laura Nader & Harry Todd, Jr, eds, *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press, 1978); Conley & O'Barr, "Legal Anthropology Comes Home"; Robert M Hayden, "Rules, Processes, and Interpretations: Geertz, Comaroff, and Roberts" (1984) 9:2 Am Bar Found Res J 469.

Second and more devastating, despite the promise of law-as-rules to serve as a universal analytic tool enabling cross-cultural legal comparison, rules aren't necessarily translatable across societies. The operability of rules turns on unique contextual factors local to each society. John L Comaroff & Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago: University of Chicago Press, 1981) [Comaroff & Roberts, *Rules and Processes*]. Thus what has variously been called a rules-centred, formal, or jurisprudential paradigm of law that functions through the case method gave way to the processual view, which functions through the extended case method, which centres on the social contexts and processes animating disputes. Donovan's description of this transition is helpful: "Pursuing the necessarily wide-ranging background of the conflict involved the anthropologist in longitudinal analyses of disputes, of which institutional intervention in the form of a 'case', if any occurred at all, would be only one event in a longer chain of interactions between parties." Donovan, *Legal Anthropology* at 136. Processualists don't generally argue that law-as-rules should be abandoned, but rather that it isn't the only (or even dominant) mode of normative interaction.

Processualism, too, has been deeply critiqued. Although no consensus has settled legal anthropology's 'how should we think about law?' question, many legal anthropologists now hold that both ways of thinking about law are important. Comaroff & Roberts, *Rules and Processes*; Snyder, "Anthropology, Dispute Processes and Law". The reconciliation in the tension which *Rules and Processes* sought to achieve has proven particularly influential. Note, however, that even here the goal is to *attenuate* how we may think of law-as-rules (i.e. as determinative and negotiable), and not to *replace* it with another conception of law altogether.

⁷³⁹ Tully, *Strange Multiplicity* at 32-33.

about it.”⁷⁴⁰ Rather than demanding the young man’s compliance with a rule drawn from the story, noko would invite him to use the story to clear his covered path.

Elder Allan White says “There is no difference between these stories and the laws in them”.⁷⁴¹ John Borrows similarly cautions that “When you are on the land, it is more difficult to isolate legal phenomena from their broader context. Legal reasoning cannot be as easily contained within the four-square pages of case law, statutes, and other written texts.”⁷⁴² Law is accessed through our relationships with land, stories, and one another. It can’t be disembedded from these relationships into abstract and generalized ideas severed from their relational contexts.⁷⁴³ Coast Salish scholar Sarah Morales makes this point emphasizing land in particular:

in examining the Hul’qumi’num legal tradition one must always be cognizant not to sever the relationship between the law and the land. This was demonstrated to me during interviews with my Elders. Laws were never discussed in the abstract. They were always spoken of in relation to place and time. Context was always given to help me understand a greater teaching than a single legal principle. I came to realize that understanding this process was just as important as understanding the legal principle itself. This recognition is important to this legal tradition because failure to recognize the integral connection between the law and the territory would fundamentally alter the legal tradition that I am trying to preserve, revitalize, and practise.⁷⁴⁴

Harold Johnson likewise explains of Cree law that “Our law does not adapt to abstractions. It is the law of every day, of every human. It is not the law of fantasy and imagination. It will not allow humans to imagine themselves in boxes and believe that the boxes are natural and necessary”.⁷⁴⁵

From these examples, it seems that *rooted law cannot be articulated as rules*, which are by definition abstracted from any particular context in order to apply generally across them. James (Sákéj) Youngblood Henderson puts the point this way:

Most aboriginal orders do not impose order on relationships by establishing rules that govern general categories of acts and persons and then using these rules to decide particular disputes. Instead, they determine that harmony, trust, sharing, and kindness are the shared ends of the circle of life and then make choices that contribute to these goals.⁷⁴⁶

Like Johnson, Sákéj not only rejects a conception of law-as-rules, but provides the beginnings of an alternative conception of law. Critically, both thinkers seem to share a view that this alternative (I would say ‘rooted’) conception of law is about being-with others in the right way—the giftway. Such a view seems to square with nokomis’ teachings. She says, “When we talk about the ways, those are our laws. Those are the laws, we just don’t call them that.”⁷⁴⁷

⁷⁴⁰ Teaching of elder Bessie Mainville (29 June 2016) Couchiching First Nation.

⁷⁴¹ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 43.

⁷⁴² Borrows, “Outsider Education” at 4.

⁷⁴³ See also Alfred, *Peace, Power, Righteousness* at 67.

⁷⁴⁴ Morales, “Locating Oneself in One’s Research” at 162; citation removed. See also Morales, “Stl’ul Nup: Legal Landscapes of the Hul’qumi’num Mustimuhw” at 107-108.

⁷⁴⁵ Johnson, *Two Families* at 45.

⁷⁴⁶ James (Sákéj) Youngblood Henderson, “*Ayukpachi*: Empowering Aboriginal Thought” in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) ch 18 at 273.

⁷⁴⁷ Elder Bessie Mainville (14 June 2015).

This view also seems to be what an indigenous speaker had in mind recently when addressing the Ontario Human Rights Commission: “One of the teachings is love. Imagine creating a law about how to generate love, rather than prescriptive ‘don’t do this, don’t do that’ rules.”⁷⁴⁸ Similarly, after having explained to me that within Anishinaabe law there’s no analogue to Western Law’s separation of church and state, elder Bone said of our law “that connection with creator is an everyday thing. Like respect and kindness. Honesty and truth, like that kind of stuff, eh. It’s a *behaviour*. The law that we’re talking about is not right or wrong. It’s not just somebody’s wrong, somebody’s right.”⁷⁴⁹

On my understanding of what elder Bone was sharing with me, Anishinaabe law trades out the determinacy of rules establishing right and wrong actions for the openness of being-with the other in a good way.⁷⁵⁰ Instead of rule-following, it conditions the development of good behaviour—which requires a relentless exercise of judgment.⁷⁵¹ I think this is the distinction Métis law professor Larry Chartrand intends when he says indigenous law is “internalized and intimate”,⁷⁵² whereas “Euro-Canadian law tends to be more rigid and inherently more concrete and passive, characterized by externalized abstract binding rules and detached authority.”⁷⁵³

Honouring the humility requires a constant exercise of individual agency. Nothing about the need to, as Sákéj put it, “live in harmony with the world” or to “determine that harmony, trust, sharing, and kindness are the shared ends of the circle” points toward *particular* actions or decisions. One is always forming judgments, ‘being’ the law. Sarah Morales shares that for Coast Salish peoples, this conception of law is called ‘snuw’uyulh’. She explains: “Because Hul’qumi’num Mustimuhw strive to live life according to *snuw’uyulh*, this doctrine organizes and guides one’s thinking, speaking, behaviour, and interactions with people and the natural world on a daily basis.”⁷⁵⁴

Implicit within the foregoing is an explanation of a common frustration. That the practice of rooted law is a relentless exercise of judgment, not the observance of rules, may be a full explanation as to why elders and knowledge-keepers often say that law can’t be written down.⁷⁵⁵ Elder Allan White seems to share this perspective when he says “We are taught by our grandparents. The law is not written; it is shown in pictographs and stories. It is a storyline. I can’t write it for you,”⁷⁵⁶ and “The law is the responsibility we have as Anishinaabe. This idea needs to be embedded into what we write about the law, rather than trying to capture the law as an idea.”⁷⁵⁷ George Copway similarly remarked that “Among the Indians there have been no

⁷⁴⁸ Ontario Human Rights Commission, *To Dream Together* at 24.

⁷⁴⁹ Elder Harry Bone (16 June 2018); emphasis in original.

⁷⁵⁰ For me this is perhaps the only confusing aspect of Kayanesenh Paul Williams’ remarkable *Kayanerenkó:wa*. The whole conception of constitutionalism and of law which Williams develops (in particular, through Condolence) is oriented towards law-as-judgment, yet he *also* consistently refers to law as rules, including the “legislative” aspect of Haudenosaunee law (*ibid* at 137) and its necessity for good governance (*ibid* at 138).

⁷⁵¹ Elder Dave Courchene says “It’s the laws of our people that define who we are, that act as a foundation of how we should live and behave as human beings.” Elder Dave Courchene Jr (24 February 2018).

⁷⁵² Chartrand, “Eagle Soaring” at 68.

⁷⁵³ *Ibid* at 69.

⁷⁵⁴ Morales, “Locating Oneself in One’s Research” at 160. I recognize that Morales discusses rules within Hul’qumi’num law, but I think the significance of this quotation for my purposes stands. *Ibid* at 152.

⁷⁵⁵ Gespe’gewa’gi Mi’gmawei Mawiomi, *Nta’tugwaqanminen* at 50.

⁷⁵⁶ Allan White in Craft, *Anishinaabe Nibi Inaakonigewin Report* at 15.

⁷⁵⁷ *Ibid* at 12.

written laws. Customs handed down from generation to generation have been the only laws to guide them.”⁷⁵⁸ Elder Bone explained to me that this is why “ours is not written.”⁷⁵⁹

While the possibility always exists that such assertions are straightforward fundamentalism, I suggest that far more often such statements are simply expressing the logical consequence of the rooted conception of law-as-judgment. The problem with writing is that it purports to substantively articulate law. That requires determinate norms and as we’ve seen, rooted legal systems don’t proceed via determination. They offer lifelong training brought to moments of decision. Thus the often-raised prohibition exists not because of some fundamentalist stricture forbidding it, but because crystallizing law in respect of how to be-with someone is an incoherent endeavour.⁷⁶⁰ It demands a level of flexibility and contingency that a reduction to text can’t sustain. The emphasis on legal reasoning never shifts to legal rule. Robert Clifford states the point clearly:

The revitalization of WSÁNEĆ law should not be about looking for a separate system of rules, but rather for processes of normative deliberation. I have therefore not read WSÁNEĆ stories with a common law mode of reasoning in mind. I have not looked for a ratio or for explicit rules within stories. I don’t think WSÁNEĆ stories are meant to (at least predominantly) encode rules within individual stories in the same way. Rather, my inquiry has been to try and build implicit and meaningful connections across stories and thus to identify and better understand the WSÁNEĆ mode of reasoning encoded within them.⁷⁶¹

⁷⁵⁸ Copway, *Traditional History and Characteristic Sketches* at 144.

⁷⁵⁹ Elder Harry Bone (16 June 2018).

⁷⁶⁰ There are of course historical examples where Anishinaabeg have written down ostensible laws. Among the best known is Andrew J. Blackbird’s “Twenty-one Precepts or Moral Commandments of the Ottawa and Chippewa Indians”. Blackbird, *History of the Ottawa and Chippewa Indians* at 103-105. I think such exceptions can be explained in respect of colonialism and/or voluntary conversion to other lifeworlds—on Turtle Island, notably conversion to various denominations of Christianity. This seems to be the case with Blackbird’s 21 laws. First, his 21 precepts appear in his text immediately preceding his translation of the Ten Commandments, the Creed, and The Lord’s Prayer from English into Anishinaabemowin (*ibid* at 105-106), and these four documents are grouped as a chapter unto themselves. Blackbird writes that these 21 precepts “were almost the same as the ten commandments which the God Almighty himself delivered to Moses on Mount Sinai on tables of stone.” *Ibid* at 12.

Second, Blackbird seems to have simply stylized widely encouraged Anishinaabe behaviours as “Moral Commandments”, with the propositional structure “Thou shalt” followed by a predicate. Blackbird asserts that these are the laws “by Which They [i.e. Anishinaabeg] Were Governed in Their Primitive State” (*ibid* at 103; see also 12) but the passive structure of that sentence allows him to omit identifying the body which must have been responsible for issuing these “commandments” and for enforcing them. However, he does speak to their transmission: “every child of the forest was observing and living under the precepts which their forefathers taught them, and the children were taught almost daily by their parents from infancy unto manhood and womanhood, or until they were separated from their families.” *Ibid* at 12. There’s no mention of a sovereign authority capable of issuing or enforcing these purported commandments, but there are educational processes and institutions which sound suspiciously like every day legal traditions in the rooted sense.

In addition to this formal similarity, there’s great substantive similarity to Anishinaabe law and constitutionalism. For instance, I’ve personally received 19 of Blackbird’s 21 precepts as teachings, which is remarkable consistency. The two exceptions are strongly contradictory with what I’ve been taught, and moreover, appear to be contradictory with Blackbird’s other precepts. More important, they’re overtly biblical. They are: “1st. Thou shalt fear the Great Creator, who is the over ruler of all things” and “15th. Thou shalt chastise thy children with the rod whilst they are in thy power”. *Ibid* at 103 and 104, respectively. I contend that the persuasive power of Christianity—whether by Blackbird’s own lifeworld commitments or as a tactical appeal to an anticipated Christian readership—has caused him to redescribe law-as-judgment as rules.

⁷⁶¹ Clifford, “The Emerging People” at 96-97; citations omitted. See also *ibid* at 84, 85, 88, 91, 92, 96, 97, 98, 114.

Thus one could write on all sorts of Anishinaabe law topics, explaining how various indigenous legal traditions work and train community members for good judgment, recording and offering one's best understandings of *aadizookaanan*,⁷⁶² presenting a section or the sum total of a life's worth of earth teachings,⁷⁶³ recording an elder's memoirs⁷⁶⁴, producing a synthesis of legal knowledge,⁷⁶⁵ or presenting the application of legal knowledge by actual people to actual situations as a casebook—but none of these, strictly speaking, *are* law. As disappointing as some may find it, one can't carry rooted law in a book; again, *nokomis*' teaching is that one must *be* the law.⁷⁶⁶ Larry Chartrand's casting of the point is perhaps most stark: the specifically internal nature of law-as-judgment “prevents people from being a slave to ‘the law’.”⁷⁶⁷

For Anishinaabeg at least, there's a considerable amount of evidence in support of a conception of law-as-judgment. It's imperative then that I make express what I hope is already clear: I mean ‘judgment’ in the sense of internal discernment (Saul judges that he ought not to assist on Tuesday) not in the object-requiring sense of external evaluation (Saul judges his sandwich adequate).⁷⁶⁸ I've argued that indigenous legal traditions are oriented towards such a

⁷⁶² Thomas W. Overholt & J. Baird Callicott, *Clothed-in-Fur and Other Tales: An Introduction to Ojibwa World View* (Lanham, MD: University Press of America, Inc., 1982); Friedmann-Conrad, *Eavesdropping on the Atisokanak*; Alethea K Helbig, ed, *Nanabozhoo: Giver of Life* (Michigan: Green Oak Press, 1987).

⁷⁶³ Arthur Solomon & Michael Posluns, ed, *Songs for the People: Teachings on the Natural Way* (Toronto: NC Press, 1990); Ron Geyshick with Judith Doyle, *Stories of An Ojibway Healer: Te Bwe Win / Truth* (Toronto: Impulse Editions, 1989); Dorothy Dora Whipple / Mezinaashiikwe and Wendy Makoons Geniusz & Brendan Fairbanks, eds, *Chi-mewinzha: Ojibwe Stories From Leech Lake* (Minneapolis: University of Minnesota Press, 2015); Gary (Morning Star) Raven and Björk Bjarnadóttir, *The Seven Teachings and More: Anishinaabeg Share Their Traditional Teachings with an Icelander* (Winnipeg: KIND Publishing, Department of Icelandic Language and Literature, 2013).

⁷⁶⁴ Vanderburgh, *I am Nokomis, Too*; Barry Milliken and Annie Rachel Shawkence, *Annie Rachel: Mshkikiikwe; Stories from an Elder of the Kettle and Stony Point First Nation* (London: The Centre for Research and Teaching of Canadian Native Languages, 1996); Madeline Katt Theriault, *Moose to Moccasins: The Story of Ka Kita Wa Pa No Kwe* (Toronto: Natural Heritage / Natural History Inc, 1992); Jim Clark with Keller Paap, Lisa LaRonge & Heid Erdrich, eds, *Naawigiizis: The Memories of Center of the Moon* (Minneapolis: Birchbark Books, 2002); Wilmer F. Nadjiwon, *Not Wolf, Nor Dog* (Tobermory: Tobermory Press Inc, 2012); George Barker, *Forty Years a Chief* (Winnipeg: Peguis Publishers Limited, 1979).

⁷⁶⁵ Hannah Askew & Lindsay Borrows, with Hadley Friedland, Maegan Hough & Renée McBeth, eds, *Anishinabek Legal Traditions Report*, The Accessing Justice and Reconciliation Project (Victoria: Indigenous Law Research Unit, [undated]).

⁷⁶⁶ See Lindberg, “Miyo Nêhiyâwiwin (Beautiful Creeness)” at 55; Sandy, “*Sisqey'ulécw Re St'exelcenc*” at 206.

⁷⁶⁷ Chartrand, “Eagle Soaring” at 68.

⁷⁶⁸ I want to pick up here where note 738 left off. I intend for the conception of law-as-judgment to stand not as a further processual refinement of the law-as-rules paradigm, but as an alternative to it. Commentators have frequently noted Malinowski's insistence on the need to prioritize function over legal form. Snyder, “Anthropology, Dispute Processes and Law” at 143, 144; Comaroff & Roberts, *Rules and Processes* at 11. See also Malinowski, *Crime and Custom* at 58-59, 61-62, 125; Bronislaw Malinowski, “The Functional Theory”, in *A Scientific Theory of Culture and Other Essays* (Chapel Hill: University of North Carolina Press, 1944) 145. My goal with law-as-judgment might be seen as an instantiation of that claim, if we understand it in the helpful way that Conley and O'Barr explain it: “Instead of questioning, as [Sir Henry] Maine might have, whether a society had police and prisons, Malinowski asked what behavioral patterns controlled antisocial deviance. In *Crime and Custom*, for example, he demonstrated that witchcraft, far from being an extralegal aberration, was actually a conservative mechanism for discouraging promiscuity and excessive resource consumption.” Conley & O'Barr, “Legal Anthropology Comes Home” at 46 (see also 47); citation removed.

Thus if we understand Malinowski to mean that the institutional forms of law-as-rules are but one analytical possibility amongst many which satisfy the social function of controlling antisocial deviance, then with law-as-judgment I'm simply presenting an analytic which satisfies the same function in another (Malinowski would probably say ‘social’; I'd prefer the additional clarity of ‘constitutional’) context.

conception of law and I've suggested that Anishinaabe *aadizookaanan* contain an obvious dearth of information on centralized authorities capable of creating, interpreting and enforcing rules.

Linguistic evidence provides additional support for this view. The *Anishinaabemowin* term most frequently used to represent 'law' is '*inaakonigewin*'. Basil Johnston defines *inaakonigewin* (in his orthography, *inaukinigaewin*) variously as "to decide, judge, make up one's mind, settle, consider, decree; from 'inawk', in a certain direction, way, according to some plan, idea, notion, practice, habit, and 'inigaewin', to set up, put, place, arrange, etc."⁷⁶⁹; as "[d]ecision, determination, choices, judgement"⁷⁷⁰; as "to decide, judge, resolve"⁷⁷¹ and he gives as synonyms "settle; decide; resolve; judge; set; plant; intend; mean; will; propose".⁷⁷² Finally, he says that *inaukinigaewin* "refers to judgment, decision, measurement; to the character and nature of making a decision".⁷⁷³ 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".⁷⁷⁴ 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".⁷⁷⁵ Leeanne Simpson writes that "Naakonige is a culturally embedded concept that means to carefully deliberate and decide when faced with any kind of change or decision. It warns against changing for the sake of change, and reminds Nishnaabeg that our Elders and our Ancestors did things a certain way for a reason."⁷⁷⁶ In a footnote attached to the word 'Naakonige', Simpson adds "Shirley Williams translated this word to mean 'to plan' to make plans after deciding what is going to be done, a decision to follow what was said, a plan, a law or a rule."⁷⁷⁷ In his study of Treaty #9, John Long observes that, "It is highly unlikely that the Ojibwe and Cree understood the Euro-Canadian concept of 'law.' The closest Ojibwe word, *onaakonigewin*, referred to a plan or decision."⁷⁷⁸ In Mitaanjigamiing First Nation's consultation protocol, *Manito Aki Inaajimowin*⁷⁷⁹, "*inaakonig'ewin*" is defined as "The people making laws and making decisions for the people".⁷⁸⁰ Maureen Matthews defines "*Inaakonige(wag)*" as "To make decisions, agreements and laws with a pipe".⁷⁸¹ Scott Richard Lyons says "there is a judicial connotation here, as *inaakonon* refers to deciding something formally, and *inaakonige* means making a

However if we take Malinowski to mean that function stands in opposition to form, then I fear we've fallen into error (Comaroff and Roberts come dangerously close to such a claim: Comaroff & Roberts, *Rules and Processes* at 5). Witchcraft was effective in the context Malinowski observed *because of its fit within the local analytic order*. We must never accept romantic explanations of social processes that operate outside of law-as-rules, as though rules alone possess analytic rigour. There's *always* an analytic order present (even if it isn't followed).

⁷⁶⁹ Basil Johnston, *The Gift of the Stars/Anungook gauh meenikooying* (Cape Croker First Nation: Kecedonce Press, 2010) at 97.

⁷⁷⁰ Johnston, *Ojibway Language Lexicon* at 101.

⁷⁷¹ Basil H Johnston, *Anishinaubae Thesaurus* (East Lansing: Michigan State University Press, 2007) at 94.

⁷⁷² *Ibid.*

⁷⁷³ *Ibid* at 198.

⁷⁷⁴ Lee Obizaan Staples & Chato Ombishkebines Gonzalez, *Aanjikiing/Changing Worlds: An Anishinaabe Traditional Funeral* (Winnipeg, Algonquian and Iroquoian Linguistics, 2015) at 154.

⁷⁷⁵ Nichols & Nyholm, *A Concise Dictionary of Minnesota Ojibwe* at 66.

⁷⁷⁶ Simpson, *Dancing on Our Turtle's Back* at 56. This is the same word as 'inaakonige' but in Simpson's eastern dialect of *Anishinaabemowin*, they drop the initial 'i'.

⁷⁷⁷ *Ibid* at 63.

⁷⁷⁸ John S Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: MQUP, 2010) at 340, as cited in Craft, *Breathing Life Into the Stone Fort Treaty* at 77.

⁷⁷⁹ Mitaanjigamiing First Nation, *Manito Aki Inaajimowin* (unpublished).

⁷⁸⁰ *Ibid* at 4.

⁷⁸¹ Matthews, *Naamiwan's Drum* at 270.

judgment. Our word for law is *inaakonigewin*.⁷⁸² Bishop Baraga defined *inaakonigewin* 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”.⁷⁸³ Finally, my elder from Mitaanjigamiing explained that *inaakonigewin* is “what you’re planning on”.⁷⁸⁴ He added that “*Inaakonigewin* is ‘what do you want to do?’” and he gave two examples. First, he referred to Mitaanjigamiing’s Fall Harvest that coming weekend and spoke as if we were involved in planning it. We would have to decide what we wanted to do. He paused then added “Let’s talk about it”.⁷⁸⁵ These actions, which seem to represent reflective deliberation and decision, he called “*inaakonige*”.⁷⁸⁶ The second example he used was the decision we had just made that after we’re finished talking, we’ll go make our tobacco offerings at the sacred sites in the community. That’s *inaakonigewin*, he said.⁷⁸⁷

Many Anishinaabemowin speakers also give ‘*dibaakonigewin*’ for law, but this term, too, seems to emphasize good judgment and careful decision-making instead of rule-following. Baraga defines “*dibaakonigewin*” as “judgment, *made* or pronounced; law, justice” and *dibakonige*, in the first person, as “I judge”.⁷⁸⁸ For Basil Johnston, “*Debaukinigaewin*” means “Decision, judgement, assessment, evaluation, testing, examination, law-making”.⁷⁸⁹ Richard A. Rhodes identified “*dbaakniged*” as “judge things, be a judge”.⁷⁹⁰ James Dumont similarly wrote that “The Anishinabe way of expressing the concept of justice is *gwaik/minodjiwi/dibaakonagewin* (literally, “right/and respectful/judgment”),⁷⁹¹ and “Within the Aboriginal concept of justice (*gwaik/minodjiwi/dibaakonagewin*) is an embodiment of both the honesty and straightness of good judgment, uniquely harmonized with the ever important value of respect.”⁷⁹²

Clearly, an enormous portion of the foregoing establishes *inaakonigewin* and *dibaakonigewin*—‘law’ for Anishinaabeg—as a process of careful decision-making: a process of forming legal judgments.⁷⁹³ Rooted law is deeply deliberative.⁷⁹⁴

⁷⁸² Lyons, *X-Marks* at 86.

⁷⁸³ Baraga, *A Dictionary of the Otchipwe Language* at 149.

⁷⁸⁴ Teaching of anonymous elder #1 (4 October 2017) Mitaanjigamiing First Nation [Anonymous elder #1 (4 October 2017)].

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Ibid.*

⁷⁸⁸ *Ibid.* at 102 [emphasis in original].

⁷⁸⁹ Johnston, *Ojibway Language Lexicon* at 101.

⁷⁹⁰ Richard A Rhodes, *Eastern Ojibwa-Chippewa-Ottawa Dictionary* (Werner Winter, ed, Trends in Linguistics, Documentation 3) (Germany: Moulton Publishers, 1985) at 103.

⁷⁹¹ Dumont, “Justice and Aboriginal People” at 69.

⁷⁹² *Ibid.* at 84.

⁷⁹³ I note that legal glossaries intended for use by court interpreters tend rather to define indigenous terms in respect of common law concepts (and thus Anishinaabe terms like ‘*inaakonigewin*’ in respect of rules). This is the methodological approach taken in Seymour, *A Glossary of Legal Terms (English/Ojibway)*; Donald J Auger & Tom Beardy, *Glossary of Northwestern Ojibwe Legal Terms, with English Translation* (Thunder Bay: Nishnawbe-Aski Legal Services Corp, 1992) [Auger & Beardy, *Glossary of Northwestern Ojibwe Legal Terms*]; Aboriginal Languages of Manitoba, Inc, *Manitoba Aboriginal Legal Glossary, Ojibwe/Saulteaux* (Winnipeg: Aboriginal Languages of Manitoba, Inc). The most pointed statement I know about such conceptual translations is “No ‘legal terminology’ existed in traditional Ojibwe. As a result, words cannot be translated but are created from the context and by borrowing words which are really part of a different context.” Freda Ahenakew, Cecil King & Catherine I Littlejohn, *Indigenous Languages in the Delivery of Justice in Manitoba*, a paper presented for the Public Inquiry into the Administration of Justice and Aboriginal People (Winnipeg: 9 March, 1990).

In fairness to these works, they’re often self-reflective of how problematic this fact is: see Seymour, *A Glossary of Legal Terms (English/Ojibway)* at “INTRODUCTION” pages one and two (formal pagination not

So much of that discernment and deliberation involves others. In the context of an Anishinaabe water law project spearheaded by Professor Aimée Craft, knowledge-keeper Peter Atkinson said, “What we’re doing here is Anishinaabe law; talking together, figuring out what to do about water.”⁷⁹⁵ Larry Chartrand likewise observes the diminished value of “prescriptive regulations” in the multi-vocal, radically deliberative context of indigenous law.⁷⁹⁶ We might caucus with others as we weigh decisions, or we might actually make those decisions collectively, as is the case with *zagasawe’idiwin*, the council.

Of equal importance, careful legal judgment also turns on individual agency. In the same water law project, elder Allan White said “We have a responsibility to acknowledge the laws. Unwritten laws—I have to do them in my own way.”⁷⁹⁷ Another participant, Nizhoosake Copenace (grandmother Sherry Copenace), also emphasized the role of individual agency, saying “Each of the stories has a law or a teaching; we may hear or receive them differently, but each interpretation is true. There is law, or many laws, in each story.”⁷⁹⁸ Heidi Kiiwetinepinesiiik Stark, too, emphasizes the role of individual agency in law-as-judgment, saying “Nenaboozhoo’s seemingly contradictory behaviours promote underlying values and principles, yet each listener is encouraged to make sense of the story for himself and to infer meaning that will be applicable to his own behaviours, actions, and relationships with creation.”⁷⁹⁹ Finally, Aimée Craft expressed the point in a comical and highly effective manner:

I was in a boat with my Dad and Mishomis (grandfather) on the Winnipeg River. My Dad was steering and my Mishomis was giving directions because he knew all the spots along the river. At one point, my Mishomis pointed to one side. My Dad veered in that direction. We hit a rock and damaged the propeller on the motor. Later, when we arrived at our destination, my father asked “why did you lead me directly into the rock?” My Mishomis answered that he was pointing to the rock and explained that his role was to tell my father of the dangers, but not to tell him how to deal with them. “Your guide (teacher) will tell you what’s there; he’s not going to tell you what to do.”⁸⁰⁰

1. The Prescriptive Indeterminacy of Law-as-Judgment

To state that a rooted conception of law isn’t about rules but rather legal judgment only begins to articulate its logic. What kind of normative claim is consistent with a conception of law-as-

given); Auger & Beardy, *Glossary of Northwestern Ojibwe Legal Terms* at “Preface” page two (formal pagination not given). Additional commentaries on the problematic nature of this form of translation of legal concepts include Donald Auger, “Legal Aid, Aboriginal People, and the Legal Problems Faced by Persons of Aboriginal Descent in Northern Ontario” in *The Ontario Legal Aid Review, Report of the Ontario Legal Aid Review: a Blueprint for Publicly Funded Legal Services, Volume 2* (Ontario, 1997) 397 at 422, and an impressive MA thesis: Dawn Dubois, *A Linguistic Analysis of the Structure of an Ojibwe Legal Glossary* (MA Thesis, University of Manitoba, 2004, unpublished) at 86-87, 118-119.

⁷⁹⁴ Williams, *Kayanerenkó:wa* at 266-267; Clifford, “Listening to Law” at 60.

⁷⁹⁵ Peter Atkinson in Craft, *Anishinaabe Nibi Inaakonigewin Report* at 21.

⁷⁹⁶ Chartrand, “Eagle Soaring” at 65-66.

⁷⁹⁷ Allan White in Craft, *Anishinaabe Nibi Inaakonigewin Report* at 13.

⁷⁹⁸ Nizhoosake Copenace in Craft, *Anishinaabe Nibi Inaakonigewin Report* at 15.

⁷⁹⁹ Stark, “Transforming the Trickster” at 261; citation removed. See also Stark’s comment in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiiik Stark, eds, “Bagijige: Making an Offering” in *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) xv at xxv, and Peacock & Wisuri, *Ojibwe Waasa Inaabida* at 73.

⁸⁰⁰ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 21.

judgment? Does law-as-judgment even proceed by way of claims? These are important questions. Without a way to navigate law-as-judgment's propositional boundaries, it seems that any judgment might be called legal.

Geoffrey MacCormack's paper "Anthropology and Legal Theory"⁸⁰¹ helps to provide the missing specificity. He observes that "A rule implies the existence of conduct that ought to be followed where 'ought' has a mandatory or imperative sense. Likewise a right implies strongly that one may require another to behave in some particular way."⁸⁰² This is a way of expressing our earlier discussion that since rights are rules expressing entitlement, rights-claims issue as demands. But MacCormack raises the possibility of other forms of normative expectation: "it may be possible to draw a distinction between rules and a wide range of expectations to which are attached the notion of 'ought'. The essence of the distinction lies in the degree of prescription conveyed by the 'ought'. In the case of a rule the 'ought' is mandatory."⁸⁰³

This is a critical insight. It suggests that for legalities more concerned with contingency than with certainty, law will be characterized by a lesser degree of prescription. Unlike a rule which provides an answer—a determinate (even if only provisionally so) end—we've learned that rooted law offers only direction. Thus Basil Johnston asks and answers,

The Anishinabeg were, like other peoples, concerned about duties. What did a man owe to his community? What to his neighbour? What to his family? What to self? What forms of duty was he required to discharge? When? To what extent? What was the nature of duty? Were there natural duties from which there was no release? Does a promise exact a duty of fulfilment similar to that which arises from natural laws? To these questions, there was no final answer except further questions raised in stories.⁸⁰⁴

Professor Aimée Craft also expresses this understanding when she reflects on what she's learned from her elders:

Anishinaabe inaakonigewin can be seen as less prescriptive and positivistic than other forms of law. It is generally related by stories that provide lessons and meanings. However the interpretation rests with the individual: [quoting elder Allan White] "However you picture that in your own mind—that is yours." Each person has the ability to understand the spirit and intent of stories and teachings.⁸⁰⁵

In an even more pertinent passage, she writes:

Harry Bone expressed caution about being too prescriptive and rigid in the application of rules. "There are rules and regulations in Anishinaabe law, but we can't just focus on that. If we have too many rules, we start to worship the rules." Rather it is the "spirit and belief" that underlie the law that are meant to provide principles to guide conduct.⁸⁰⁶

MacCormack draws the necessary implication, concluding of law in what I call rooted communities that:

⁸⁰¹ Geoffrey MacCormack, "Anthropology and Legal Theory" (1978) *Jurid Rev* 216.

⁸⁰² *Ibid* at 217.

⁸⁰³ *Ibid* at 222.

⁸⁰⁴ Basil Johnston, *Ojibway Heritage* at 73.

⁸⁰⁵ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 13.

⁸⁰⁶ *Ibid*, quoting twice from elder Harry Bone.

what in a particular instance is regarded as proper or appropriate behaviour may be the subject of legitimate doubt, that is, there may be a wide range of responses each of which arguably qualifies as proper or appropriate. There will, consequently, be greater scope for disagreement about whether behaviour conforms to what is expected than about whether it complies with what is prescribed.⁸⁰⁷

Yes indeed: judgment about how to be-with others necessarily means allowing for multiple possible answers in every instance.⁸⁰⁸ Whatever form claims within rooted systems of law take, it must allow for this openness. As a first step towards a rooted conception of law then, whatever propositional form rooted law takes, it shall have to allow for the possibility of multiple legitimate decisions and thus an element of prescriptive indeterminacy. Tully's reflection on indigenous storytelling is again helpful: "Because there is not one right answer or one truth to an allegory, it is possible to go on in a variety of ways and still be acting in accord with the story. There are a multitude of ways of being guided."⁸⁰⁹

Such a requirement comes with obvious complications. Rooted law can't be so open-ended as to eliminate any predictive quality from law which would serve the ends of social cooperation, and more broadly, of harmony. In the sections which follow, I propose to approach the issue of prescriptive indeterminacy in the following way. First, by determining rooted law's form of normative prescription (for instance, whether rights discourse); second, exploring how its claims are organized substantively and formally; finally, by considering whether residual uncertainty exists, and if so, whether its sufficient to undermine law's purpose: enabling governance which supports and protects freedom.

2. Legal Judgment Operates Through Responsibility (Claims)

As a first step, I'm mindful of the quotation a page above in which Elder Bone's doesn't categorically reject the possibility of "rules and regulations", but rather insists that they're besides the point. Perhaps rooted systems of law contain rules of a strictly regulatory nature, coordinating social interaction without creating stakes for the freedom of community members. I have no stakes in that possibility; the claim I want to defend is that rooted systems of law don't express law as *rights*,⁸¹⁰ rules safeguarding the autonomy of persons.

As Sandra Tomsons and Lorraine Mayer have observed, "The all-my-relations way of being in the world is not the adversarial me-against-the-world understanding presupposed by rights talk. For indigenous people, the starting point in thinking about being in relationships with

⁸⁰⁷ *Ibid* at 223. As a theoretical claim, there is indeed greater scope for disagreement where a wide range of appropriate responses exists. Whether greater disagreement *actually* exists where law is characterized by a lesser degree of prescription is an empirical question that neither I nor MacCormack may answer. As for rooted societies generally, I suspect his claim holds true, within a relatively thin band of tolerable disagreement, but even if I'm wrong about this, the consequences are manageable because the degree of agency an individual may exercise in forming his or her judgment is constrained by force (explored in detail below).

⁸⁰⁸ Again, this isn't to suggest that rules are self-enforcing; as the common law tradition amply evidences, an exercise of agency is necessary to follow rules: see note 736. However, the very purpose of a legal rule is to constrain one's exercise of interpretive agency to the novel application of an already provisionally settled determinate end. This is a second-order form of reasoning; it requires that, in the first instance, law be reasoned into positions abstracted from context. In this way, legal certainty precedes and constrains the ambit of legal creativity, and thus, as I've argued, the range of possible outcomes in any given instance.

⁸⁰⁹ Tully, *Strange Multiplicity* at 33.

⁸¹⁰ Turpel, "Aboriginal Peoples and the Canadian Charter" at 30.

others (whether an individual, a group, or a nation) cannot be rights because relationship is not about entitlements.”⁸¹¹ The assumed normative logic of entitlement is incommensurable with the actual normative logic of gratitude/responsibility. Entitlements present as demands, the whole purpose of which is to produce *normative certainty*. This purpose contrasts sharply with the necessary contingency of rooted law. Nehetho elder D’Arcy Linklater expresses his concern with rights discourse, saying “I have been asking when we say inherent rights, when I said rights to our land, when we say human rights, when we say civil rights, I haven’t found a word for that in Cree”, adding “*ká-isi-mínikawisiyahk* is that how we should interpret that word right.”⁸¹²

Yet if rooted legal claims lack the mandatory prescription of rights, they must still effectively bound legal judgment. An articulation of that boundary is what we must work towards. We might take guidance from what elders and knowledge-keepers have to say about rights discourse and possible rooted alternatives. It turns out that an alternative term appears consistently: “One key distinction the Elders drew between the two systems is that our laws aren’t as much about rights as responsibilities”,⁸¹³ “The law is the responsibility we have as Anishinaabe”,⁸¹⁴ “Anishinabek law does not mention anything about rights, just roles and responsibilities to all our relations”,⁸¹⁵ and “This law, our law, does not define ‘rights,’ nor does it defend ‘rights.’ In our ways, there are no ‘rights,’ only responsibilities”.⁸¹⁶

Indigenous theorists, too, have often suggested that a discursive shift from rights to responsibilities better represents indigenous normativity. For instance, Vine Deloria Jr. said:

The basic problem is that American society is a rights society, not a responsibilities society. What you got is each individual saying, ‘well I have a right to do this’. Having religious places and revolving your religion around that means that you are always in contact with the earth, you’re responsible for it and to it.⁸¹⁷

Heidi Kiiwetinepinesiik Stark similarly argues that:

Too often the Western prevalence of and preference for a discourse of rights locks us into thinking about our individual rights and distracts us from discussing our responsibilities to one another. This rights-based discourse has clouded and limited our understandings and applications of tribal sovereignty.⁸¹⁸

For Aimée Craft, “Anishinaabe inaakonigewin is structured relationally, primarily in a realm of responsibilities (rather than the binary of rights and obligations).”⁸¹⁹ Tsalagi scholar Jeff Corntassel explains that “interconnectedness is key to our existence as Indigenous nations, which

⁸¹¹ Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: OUP, 2013) at 60; citation removed.

⁸¹² Nehetho Elder D’Arcy Linklater in Pratt et al, *Untuwe Pi Kin He* at 77. See elder Linklater also in Hyslop et al, *Dtantu Balai Betl Nahidei* at 88.

⁸¹³ Peter Atkinson in Craft, *Anishinaabe Nibi Inaakonigewin Report* at 21. See also his comments on page 12.

⁸¹⁴ Allan White in Craft, *Anishinaabe Nibi Inaakonigewin Report* at 12.

⁸¹⁵ Ontario Human Rights Commission, *To Dream Together* at 25.

⁸¹⁶ Osennontion and Skonaganleh:rá, “Our World” at 11. Osennontion and Skonaganleh:rá then proceed to identify the responsibilities they have in mind: “to observe the clans, to bring honour, trust, friendship and respect; to be kind; honest; share and have strength; to maintain a relationship with all of the natural world.” *Ibid.*

⁸¹⁷ *In the Light of Reverence*, 2001, DVD (Sacred Land Film Project of Earth Island Institute and Bullfrog Films).

⁸¹⁸ Stark, “Nenabozho’s Smart Berries” at 339.

⁸¹⁹ Craft, “Navigating Our Ongoing Sacred Legal Relationship with Nibi” at 56.

is why we do not have rights as Indigenous Peoples—we have inherent responsibilities. These responsibilities come from our lived relationships with our homelands and the natural world, while rights are the artificial creations of the state.”⁸²⁰

And yet despite this broad rejection of rights discourse and acceptance of responsibilities discourse, there are also many exceptions. We’d be foolish not to take them seriously. Sometimes rooted (and generally, but not exclusively, indigenous) elders, knowledge-keepers, storytellers and intellectuals *do* speak about indigenous rules or even indigenous rights. For instance, in the *Anishinaabe Nibi Inaakonigewin Report* that Aimée Craft worked with Manitoba and Treaty #3 elders and knowledge-keepers to produce, one finds numerous instances of elders using the language of rules, procedures, protocols, formalities, and even rights.⁸²¹ This corresponds to the ordinary course of conversations I have with elders and knowledge-keepers, too. In fact, in an article in the *Indigenous Law Journal*, my own grandmother speaks of “a rule” against intra-clan marriage as “Anishinaabe law”.⁸²²

What are we to make of these exceptions? Do they warrant a concession that the notion of law-as-judgment I’ve been arguing for doesn’t hold? It seems to me rather that appeals to indigenous rights, rules, and protocols are often usages of these terms in an unarticulated but decidedly rooted sense which transforms their meaning. Mohawk scholar Patricia Monture adverts our attention to the risk of discursive ambiguity:

I am concerned with the rights that have been excluded and I also refer to these as Aboriginal rights. The source of the tension is that Aboriginal rights in Canadian law do not embrace the much broader notion of Aboriginal rights that exist within my Aboriginal understanding. In effect the same words mean very different things.⁸²³

One obvious fault line regards the fact that as demands, rights require an immediate and *coercive* enforcement mechanism. Yet elders and others who invoke them make no appeal to a centralized authority empowered and intended to enforce compliance with the ostensible right claimed. Rather, rooted interlocutors using the language of rights frequently source them in creation. As with sacred law and the giftway, some speakers source ‘rights’ in Creator and some in earth, but since creation is Creator-through-earth, both groups are saying the same thing. Mi’kmaw elder, scholar, and hereditary chief Stephen Augustine demonstrates this fact when he says, “through our spiritual ceremonies we have ‘negotiated’ our survival with our environment, gaining out natural rights based on the natural laws of the land to which we belong.”⁸²⁴ So does elder Linklater: “When I meet with government people, I am always told, be careful (*nánátawínihta/ papéyahktak*) but that is still our right that flows from our land, flows from our Creator and flows through our land (*Ká-isi-ká-pawiyahk, ká-ohcipanik askíhk, ká-ohcipanik Manitóhk mina ká-isi-pimipanic askíhk*) and sacred right *Manitó methikowesewena*.”⁸²⁵

Heidi Kiiwetinepinesiik Stark grounds Anishinaabe ‘rights’ in Creator when she writes, “Anishinaabe leaders acted according to a code of ethics—a set of human rights or, perhaps

⁸²⁰ Cornassel, “Living in a Longer Now” at 88.

⁸²¹ As an easy point of reference, see Craft, *Anishinaabe Nibi Inaakonigewin Report* at 12.

⁸²² Mainville, “Traditional Native Culture and Spirituality” at 3.

⁸²³ Monture-Angus, *Journeying Forward* at 56.

⁸²⁴ Stephen J Augustine, “Negotiating for Life and Survival” in Marie Battiste, ed, *Living Treaties: Narrating Mi’kmaw Treaty Relations* (Sydney: Cape Breton University Press, 2016) 16 [Augustine, “Negotiating for Life and Survival”] at 17.

⁸²⁵ Hyslop et al, *Dtantu Balai Betl Nahidei* at 88.

better stated, human responsibilities—and were made accountable to *Gizhe-Manidoo*.⁸²⁶ Elder Harry Bone similarly explains, “The government says, ‘Your rights come from the Indian Act. Your rights come from the Canadian Constitution. Your rights came from when the Treaties were made. Your rights came from when the white people came here.’ No, those are not true. Our rights came from the Creator.”⁸²⁷ He seems to repeat this view in another conversation, saying, “In other words, we had rights from the Creator. The Treaty gave us some more rights. It is not only the Treaty that created rights for us; we already had rights. In other words, we were here already, all those rights that we had”.⁸²⁸ The Ojibway and Cree Cultural Centre’s Political Terminology Glossary gives “Aboriginal Rights” as “*anishinaabeg manidonaang miigiwewin tibinawewisiwin*”,⁸²⁹ which it explains as “These are not man made rights. These are rights given to us by the Creator to live a certain way of life and to have our own forms of government, out own languages, our own culture, and our own spirituality.”⁸³⁰ The Treaty Relations Commission of Manitoba’s *Treaty Elders Teachings* volumes are replete with assertions of this claim.⁸³¹

In an oration challenging the beneficence of state protection, elder and Midewiwin leader Charles Nelson instead invokes the earth, saying “There are other things that help us; like the deer who in spirit asked to be used, to feed the people. These are rights that have been taken away from us through ‘protection’.”⁸³²

In statements like these, whether they’re grounded in Creator, the earth, or both, specific terms like ‘legal right’ appear to be used in the general sense of ‘legal interest’. In fact, elders are often live to this tension and sometimes even voice their anxiety in respect of it. Elder Bone, for instance, observes that “Rights mean different things to different people”.⁸³³ Perhaps elders and others are using rights discourse because it’s the only available one in English.⁸³⁴ It may be an undesired but ultimately necessary translation if one is to be heard, in a liberal colonial context, at all.⁸³⁵ James Tully’s work on constitutional dialogue explains this dynamic. He says that any claim for recognition made to a ‘modern’ constitutional order (by which label he includes liberal constitutional orders⁸³⁶) is, as a first step,

⁸²⁶ Stark, “Nenabozho’s Smart Berries” at 347.

⁸²⁷ Hyslop et al, *Dtantu Balai Betl Nahidei* at 131. See also Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights” at 19.

⁸²⁸ Hyslop et al, *Dtantu Balai Betl Nahidei* at 113.

⁸²⁹ Jacasum, *Ojibway Political Terminology Glossary* at 4.

⁸³⁰ *Ibid.*

⁸³¹ The Treaty Relations Commission takes this view institutionally, saying, “Inherent rights” are “A God/Creator-given right; those rights that exist naturally within a people.” Treaty Relations Commission of Manitoba, “Treaty Vocabulary Cards”, online: <http://www.trcm.ca/wp-content/uploads/Treaty-Vocabulary.-Cards-1.pdf>.

⁸³² Nelson, “‘Protection’ Conflicting with Anishinaabe Rights” at 144.

⁸³³ Hyslop et al, *Dtantu Balai Betl Nahidei* at 176.

⁸³⁴ Sitting in a sharing circle about water, elder Alice Williams / Minwajmod-kwe said “We try to use words and concepts in the English language to reach dominant cultures so that they can understand that we’re all in it together.” Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 111.

⁸³⁵ See Turner, *This Is Not a Peace Pipe* at 81, 95-96, 99, 110. To compound this already complex matter further, sometimes the informal act of conceptual translation occurs within the formal act of translation between languages. Sometimes this happens where indigenous normative concepts are rendered as ‘rights’. See for instance Cote et al, *Gakina Gidagwi’igoomin Anishinaabewiyang* at 26, 43. However, language translation also has an impact on rigour more generally. For instance, nokomis observes that when speaking in *anishinaabemowin*, she offers a rationale for the propositions she makes, “to back it up”, however she’s aware that in general she doesn’t do the same when speaking in English. Teaching of elder Bessie Mainville (18 August 2013) Couchiching First Nation [Elder Bessie Mainville (18 August 2013)].

⁸³⁶ Tully, *Strange Multiplicity* at 36.

redescribed as a claim in the prevailing language of constitutionalism. This is a condition of it being recognized as a constitutional demand at all. When, for example, Aboriginal peoples strive for recognition, they are constrained to present their demands in the normative vocabulary available to them. That is, they seek recognition as ‘peoples’ and ‘nations’, with ‘sovereignty’ or a ‘right of self-determination’, even though these terms may distort or misdescribe the claim they would wish to make if it were expressed in their own languages.⁸³⁷

If I understand correctly then, indigenous interlocutors may be using terms like ‘rights’ to mean ‘responsibilities’.⁸³⁸ Even though he sometimes speaks of indigenous rights, Elder Bone says that “our system doesn’t work like common law rights.”⁸³⁹ Indeed, elder Bone seems to have something like responsibilities in mind when he says “The original rights for our people is to protect the land.”⁸⁴⁰

Fortunately, indigenous elders, knowledge-keepers and intellectuals have taken up this analytical work themselves. Haudenosaunee knowledge keeper Oren Lyons made the previous inference explicit, defining rights *as* responsibilities:

We are the aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfil its responsibility under the law of the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means aboriginal responsibility, and we were put here to fulfil that responsibility.⁸⁴¹

A little further down, he adds, “It is hard work being an Indian. There are a lot of responsibilities. You always have to do this or that, but that is what we were given to do. That is our aboriginal responsibility, our aboriginal right.”⁸⁴² Kanyen’keha (Mohawk) scholar Susan Hill seems to share the perspective that in a Kanyen’keha law context, rights are to be read as responsibilities:

The Haudenosaunee concept of “rights” is different from the typical use of the term in mainstream North American society. In this sense, rights are what one can expect if one upholds his or her duties to family, clan, nation, and Confederacy—and to the rest of creation. Essentially, Haudenosaunee rights exist in the sense that one has a right to enjoy life and the gifts of creation so long as one fulfills the responsibilities to the other beings of this world and the Sky World.⁸⁴³

Sákéj, too, appeals to the creative order to argue that within indigenous legal systems, ‘rights’ are only coherent when read within the logic of responsibility:

Within this encompassing web of social relations the individual is characterized as the repository of responsibilities rather than as a claimant of rights. Rights can exist only in the measure to which each person fulfils his responsibilities toward others. That is, rights are an outgrowth of

⁸³⁷ *Ibid* at 39.

⁸³⁸ Sam McKegney & Basil Johnston, “Indigenous Writing and the Residential School Legacy: A Public Interview with Basil Johnston” (2009) 34:2 *Studies in Can Lit* 264 at 271.

⁸³⁹ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 24.

⁸⁴⁰ Interview of elder Harry Bone by Commissioner Loretta Ross, “Episode 2: The Treaty of Niagara and Anishinaabe Constitutionalism with Aaron Mills” on *Let’s Talk Treaty*, Treaty Relations Commission of Manitoba, online: <<http://www.trcm.ca/multimedia/lets-talk-treaty/>>.

⁸⁴¹ Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights” at 19-20.

⁸⁴² *Ibid* at 20.

⁸⁴³ Hill, *The Clay We Are Made Of* at 42.

every person's performing his obligation in the cosmic order. In such a society there is no concept of inherent individual claims to inalienable rights.⁸⁴⁴

St'exelcenc (a Secwepemc people) legal scholar Nancy Sandy seems to have a similar notion of 'rights' in mind when she observes that for St'exelcenc law, "rights and responsibilities" exist "with the restriction or freedom to exercise a right with the safety measures in place to protect the right from misuse or abuse."⁸⁴⁵

Patricia Monture began to articulate a theory of indigenous law, and like so many others, she cast her argument within rights discourse.⁸⁴⁶ She shifts slightly between different meanings for 'rights' though, at some junctures asserting the reality of both rights and responsibilities within indigenous law⁸⁴⁷ and at others collapsing the former into the latter. For instance, she says "The liberal theory of rights must recognize and affirm that it is possible for another theory of 'rights' (in this case, more accurately, responsibilities) to exist within Aboriginal people's cultures and that this other theory is legitimate."⁸⁴⁸ Her closing note on the topic seems to support this latter sense of rights *as* responsibilities:

Human rights in an aboriginal frame of reference seem to me to include the relationship with the land. What I think human rights means in this context is the right to be self-governing or self-determining or sovereign. This right is essentially the right to be responsible. This is the most fundamental of all human rights (or responsibilities).⁸⁴⁹

With all of this said (and consistent with the negative constitutional logic analytic), I submit that, *responsibility* captures the right amount of prescription for rooted legality. If this is right, it suggests that *responsibility-claims* are the propositional form through which rooted systems of law operate, expressing expectation without demanding particular decisions as necessary outcomes.⁸⁵⁰

In fact, responsibility-claims often operate implicitly. They may be issued, for instance, through such indirect means as the telling of a story (recall nokomis' reply to the youth worker), repetition of a particular pattern of behaviour (modelling), or encouragement to pursue a particular form of personal development. One might well wonder then whether it really makes sense to cast responsibilities in terms of claims made on one another.

It may be helpful to consider once more that rights proceed by way of claims on others because they represent entitlements which inure in autonomous persons. That's why it's possible for rights-bearers and their corresponding duty-bearers to have no relationship beyond the transactional boundaries of their immediate interaction (and the abstracted form of liberal belonging which enables it, whether humanity, citizenship, contract, etc.). In the absence of a genuine connection, making claims of one another makes sense. But this is precisely what we've said isn't the case with respect to responsibilities: *responsibilities are inherently relational*.

⁸⁴⁴ Boldt & Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" at 166.

⁸⁴⁵ Sandy, "*Sisqey'ulécw Re St'exelcenc*" at 200.

⁸⁴⁶ Monture-Angus, *Journeying Forward* at 55-60.

⁸⁴⁷ *Ibid* at 57.

⁸⁴⁸ *Ibid* at 56.

⁸⁴⁹ *Ibid* at 60.

⁸⁵⁰ I'm careful not to use 'responsibilities' and 'obligations' interchangeably. As Hart explains, obligations imply the existence of rules (Hart, *The Concept of Law* at 85), and stronger, are "rule-dependent notions" (*ibid* at 89).

Since responsibilities and rights are different kinds of normative propositions, we might naturally expect them to take different forms. In a world premised on being-with, it's at best odd to represent the action of normativity as demands one makes on another, since that other is always already part of oneself. This point is perhaps most easily understood in respect of normative interactions that commence with the offering of a gift and hence which track mutual aid's positive analytic. It seems nonsense to suggest that reciprocity must be moved by gratitude-claims instead of by gratitude, *full stop*. Rather, in presenting the rooted constitutional logic analytic, I explained that gift-recipients are *moved* by gratitude to reciprocity, and similarly that need-recipients are *moved* by responsibility to reciprocity.

However in adverting to this challenge, I don't mean to unwind the argument to this point. In many circumstances arising through mutual aid's negative analytic, responsibilities can be presented as claims, but with a lesser degree of prescription. Rather than presenting as demands, responsibility-claims issue as invitations and requests. Rooted law thus contemplates a level of complexity preclusive of the universal approach to representing legal interests that rights discourse offers. This is true of both its substance (the content of one's responsibility varies with each of his distinct kin relations) and its form (responsibility may or may not present in the form of a claim, and even where it does so responsibility-claims may be implicit).

This first step in understanding how a rooted conception of law works is significant, but it leaves unanswered how responsibility-claims are bound. *Which* responsibilities are to be practised *when*? All systems of law must answer this question (or an analogous one, where obligations replace responsibilities, etc.). Canadian common law's *formal* answer is rights-holder categories such as human, citizen, recognized minority, contractee, and property owner. Its *substantive* answer is subject matter categories such as property, tort, contract, criminal and administrative law, each with its own well-developed body of doctrine. Rooted peoples, too, require some schema of both formal and substantive categorization within which to distribute responsibility. Without one, they would have no actionable standards for judgment, just examples of putatively responsible and irresponsible behaviours.

3. Responsibility Is Internal to Kinship

The following remarkable passage by Dakota elder Wendy Whitecloud helps to identify the missing boundaries (although quotations in the previous section already point towards them):

I remember about land, my grandmother right from the early times, said to me that I would always have to honour the land, she said because as Dakota people or "*ikchewichashta*", that means the *common man* or the *common person*, meaning you are the same, nobody is above, that you are always the same. She said "because we come from this land" she says, "you have different rules to live by." That is what she told me. The different rules were also related to our ceremonies and to our medicines. She would say, "Don't misuse any medicine off the land." So I think in that way too, again going back to the relationship and honouring the land and knowing that if you are honouring the land, then you are not just going to sell it or give it away. That any kind of relationship with lands, you would have to work it out.⁸⁵¹

There's an enormous amount happening in this statement, which seems to affirm much of what has so far been argued. There's the claim that 'rules' are to be understood in respect of land and

⁸⁵¹ Linklater et al, *Ka'esi Wahkotumahk Aski* at 57-58.

spirit and thus probably aren't 'rules' at all in the liberal sense of determinate norms. There's the fact that the instruction she receives from her grandmother doesn't have the form of a rule demanding a specific action, but rather presents as a more general responsibility for how to be-with the land while using it. But what I wish to focus on is what comes next: the specification that the responsibility described is internal to a particular set of relationships (viz. with land), and not held generally across all of elder Whitecloud's relationships.

This helped me to understand what I had long taken as a riddle: why is it that elders and knowledge-keepers so frequently describe human responsibility as a gift? The examples of these discursive moments are many. For clarity's sake, here's one: "This Loving Creator as we say, he gifted us with the responsibility for the land, as you also say, those of you who follow the Anishinaabe traditions. That's what I believe as well about the gifts that we were given."⁸⁵²

Elder Whitecloud's comment begins to reveal an answer: responsibility is a gift because it only ever lives within a relationship. Thus to carry responsibility is, necessarily, to live within a relationship. And while this means sharing our gifts with others (the reciprocity moved by responsibility), *it also means having others' gifts shared with us* (the reciprocity moved by gratitude). This, then, is the critical insight needed to delineate the elusive boundary for claims within law-as-judgment: all responsibility is bound by particular relationships.⁸⁵³ I suspect this is what scholar and tribal court judge Christine Zuni Cruz has in mind when she speaks of a "law of relationships."⁸⁵⁴ Potawatomi philosopher Kyle Whyte explains that "Responsibilities refer to the reciprocal (though not necessarily equal) attitudes and patterns of behavior that are expected by and of various parties *by virtue of the different roles that each may be understood to be accountable for in a relationship*."⁸⁵⁵

Those relationships are articulated through kinship,⁸⁵⁶ actual or constructive. Sákéj explains that claims within indigenous legal systems are to be construed as responsibilities, which are necessarily embedded within kinship:

Instead of promoting abstract rights, the Aboriginal order of kinship implies a distinct form of responsibilities. Everyone has the responsibility to give and receive according to his or her choices and gifts. Those who give the most freely and generously enjoy the strongest claims to sharing—claims directed to their relations.⁸⁵⁷

This view that responsibilities vest in kinships is also affirmed by Ruth Landes' work with Anishinaabeg at Manitou Rapids. Landes observed that "The generic term used for relative is *nda² koma.gan* [I haven't heard this word] or the synonym *ndunawema. gan*, [in contemporary double vowel orthography, *indinawemaagan*, "my relative", a word still used commonly today] and the associated generic obligation is kindness."⁸⁵⁸ Importantly, she proceeded to differentiate

⁸⁵² Elder Donald Catcheway in Linklater et al, *Ka'esi Wahkotumahk Aski* at 27.

⁸⁵³ See for instance, Malinowski, *Crime and Custom* at 25-26, 58-59; Cornthassel et al, eds, "Introduction" in *Everyday Acts of Resurgence: Peoples, Places, Practices* (Olympia, Washington, Daykeeper Press, 2018) 16 at 17.

⁸⁵⁴ Zuni Cruz, "Law of the Land" at 315.

⁸⁵⁵ Whyte, "Food Sovereignty, Justice, and Indigenous Peoples" at 356; emphasis added.

⁸⁵⁶ Sandy, "*Stsqey'ulécw Re St'exelcenc*" at 198-201.

⁸⁵⁷ James (Sákéj) Youngblood Henderson, "Sui Generis and Treaty Citizenship" (2002) 4:6 *Citizensh Stud* 415 at 425.

⁸⁵⁸ Landes, *Ojibwa Sociology* at 11.

kindness into degrees, stating “The kindness which is insisted upon as the primary attitude among relatives is most strongly stressed in the relations of the domestic family.”⁸⁵⁹

Here then is a critical insight. For rooted peoples, kinship is at once the formal *and* the substantive system of categorization within which responsibility is distributed.⁸⁶⁰ Cree lawyer Harold Johnson expresses this reality to his imagined settler reader, saying “while your law is divided into several areas—tort, property, criminal, contract, taxation—our law is primarily concerned with the maintenance of harmonious relations.”⁸⁶¹ Trish Monture seems also to have affirmed this view when she wrote “My understanding always comes from a woman’s place, a mother’s place, an auntie’s place, a sister’s place, and a *kohkum*’s place. And each of these are sets of responsibilities, not roles.”⁸⁶² In fact, she expanded this way of structuring normativity further still, placing domestic family responsibilities near the centre of a steady gradient of relationality. She begins by identifying her relationship with herself, proceeds to her domestic family relationships, and then moves further outwards to other kinships:

I first want to say that there is a myth about how difficult this task is. One of my elders taught me that in its vast complexity it is profoundly simple. It is as simple as I am and I am responsible. I understand my responsibilities to myself, to the Cree man that I married, to the children that we have made and brought into this world through the gift that I have as woman. I understand my responsibilities to my new relations in the Cree territory; to Mother Earth, on whom we walk and who nurtures all life; to Father Sky; to Brother Sun; and to Grandmother Moon, who watches over the women.⁸⁶³

Thus one’s ability to effectively make responsibility-claims in a rooted community context turns on her substantive knowledge of which kinds of kinship relations the community recognizes⁸⁶⁴ and which responsibilities it recognizes as internal to each.⁸⁶⁵ The answer varies considerably across rooted communities, making a general discussion about kinship impossible

⁸⁵⁹ *Ibid* at 13.

⁸⁶⁰ Importantly, for some indigenous constitutionalisms mutual aid is structured not only through kinship, but also through houses and clans, with an associated impact on their respective systems of law. For instance, amongst Northwest Coast peoples, house and clan structures are strong. I know little about these communities, but one presumes that these differences will have a significant impact on the boundaries of their law.

⁸⁶¹ *Ibid* at 27.

⁸⁶² See for instance, Patricia A Monture, “Power, Identity, and Indigenous Sovereignty” (2008) 26:3/4 Canadian Woman Studies 154 [Monture, “Power, Identity, and Indigenous Sovereignty”] at 158. See also NWAC, “Native Women’s Association of Canada” at 133.

⁸⁶³ Monture-Okanee, “Thinking About Aboriginal Justice: Myths and Revolution” at 223. In this quotation, Monture has one citation which reads “I pay my respects to Dr. Art Solomon [who is Anishinaabe] for his vision and the gift he made to me when he shared this teaching.”

⁸⁶⁴ Examples from across *Anishinaabe-akiing* include Johnston, *Ojibway Language Lexicon* at 29-30; Ruth Landes, *Ojibwa Sociology* at 7-11; Rogers, *The Round Lake Ojibwa* at B11-B12; “Kinship Terms” in FG Speck, ed, *Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley* (Ottawa: Government Printing Bureau, 1915) at 24-25; Patricia M Ningewance, *Talking Gookom’s Language: Learning Ojibwe* (Lac Seul: Mazinaate Press, 2013) at 45; Dunning, *Social and Economic Change among the Northern Ojibwa* at 74.

⁸⁶⁵ There are many sources which *partially* address these responsibilities for *some* relational roles, such as Weechi it te win Family Services and The Fort Frances Governance Team, *Traditional Childcare Practices: Raising Our Children the Anishinaabe Way* (2000) [unpublished]; Health Nexus Santé, *A Child Becomes Strong: Journeying Through Each Stage of the Life Cycle* (Toronto: Best Start Resource Centre, 2010). The most systematic survey of Anishinaabe kin responsibilities I know of is Edward S Rogers’ remarkable account of the Round Lake Ojibwa: Rogers, *The Round Lake Ojibwa* at B13-B34. Dunning, *Social and Economic Change among the Northern Ojibwa* at 85-97 is also quite fulsome.

(thus the two footnotes immediately above identify only Anishinaabe sources). Yet this element of variability can hardly be called a frailty for it does the same work between distinct liberal communities. Consider for instance the vast differences in Canadian and American property and tort law regimes, or for that matter, how property law works in Ontario and in Quebec.

In closing this section, I advert briefly to two challenges regarding kinship. The first is simply a reminder that in addition to the structure of actual and constructive kinship which establishes the boundaries of responsibility in rooted communities, there's one relation managed within the logic of mutual aid but above its distributional structure: the relationship we all share as co-creators belonging to one Earth.⁸⁶⁶ It's here, in earth community, that we can find the set of responsibilities which comprise basic respect for persons. Note that it turns on the sacredness of one's status as co-creator, not the dignity of one's status as individually autonomous.

The second issue regards my hope that this dissertation might have use to indigenous people and to those who wish to root themselves on Mikinaakominis. To that end, any effort at indigenous law revitalization which doesn't begin from within our contemporary colonial context must fail.⁸⁶⁷ Yet that context is one in which liberal constitutionalism has structured relationships into our lives which, to say the least, are not easily reconcilable to kinship. The assumption which underlies (and empowers) these imposed relationships is the existence of common citizenship: abstracted membership in a community that claims its origin in human choice and which roundly rejects the humility thesis. Such conditions allow for the proliferation of all sorts of relationships that are strictly transactional, merely professional, which exist only in an artificial public sphere, or which privilege privacy and/or anonymity over connection. Rooted legality revitalization efforts must meet the deep challenge of producing kinship from within a context of deliberate, normalized disconnection.

ii. The Grounding of Law: Residual Prescriptive Indeterminacy and the Legitimacy of Rooted Governance

We've now established the form of rooted law (responsibility claims) and the analytic categories of its operation (kinship). Larry Chartrand emphasizes his understanding of the latter point, saying of indigenous law that "Certainty of interactional expectations is developed and fostered in kinship and thus contributes to a sense of social security."⁸⁶⁸ Yet an obvious element of prescriptive indeterminacy remains. Reasonable people might disagree about what a particular kin-bound responsibility is in a certain circumstance, or what it means to give effect to it.

This residual element of prescriptive indeterminacy is unavoidable, for the moment one tries to disembell his moment of decision from its relational context in order to articulate it in an abstract and generalized way serviceable across contexts, he obliterates the boundaries of rooted law, translating relationally-bound responsibilities into rule-defined obligations, and thereby shifts legalities altogether. Yet if there can be no substantive articulation of law, there can be no rule of law either.⁸⁶⁹ To outsiders, this might seem to pose a serious challenge to the legitimacy

⁸⁶⁶ Simpson, *Dancing on Our Turtle's Back* at 38; elder Edna Manitowabi speaking.

⁸⁶⁷ Saysewahum, *Cultural Teachings* at 7.

⁸⁶⁸ *Ibid* at 66.

⁸⁶⁹ The expectation readers may have to discover a rooted conception of the rule of law might follow from deep (for many of us, lifelong) immersion in liberal constitutionalism. As Martha Nussbaum reminds us, the rule of law is the very thing liberal citizens have contracted for: "The dominant theory of justice in the western tradition of political philosophy is the social contract theory, which sees principles of justice as the outcome of a contract people make,

of rooted governance. But the absence of the *rule* of law isn't necessarily a chaos of claims in which each of us lives as a law unto ourselves. The predictive necessity of law need not require prescriptive certainty as its standard.

That Canadians often misunderstand this point is to be expected, for the Supreme Court of Canada teaches otherwise. In *Re Manitoba Language Rights*, the Court asserted that “the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife.”⁸⁷⁰ In such an imagined binary, the rule of law specifically, and not legal order generally, is taken to contrast with legal disorder. Restated, the rule of law isn't taken as one conception of legal order, but rather as another way of representing the concept itself: “The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law.”⁸⁷¹

Because it disallows the possibility that other peoples may have distinct conceptions of legal order and thus of legitimate governance, such a slippage is ethnocentric. In the presence of order (recall, harmony) but in the absence of rule, rooted communities may speak instead of the *grounding* of law. In one sense, this is an appropriate way to speak of law because law, like lightning, flickers and strikes. It's a creative flash bringing judgment to a momentary point of contact with our lived relationships, before absorption into earth's turning.

However, there's a deeper sense in which ‘the grounding of law’ is an appropriate way to think about the role of law in legitimate rooted governance. The *rule* of law takes a position on the predictive quality of law oriented to certainty. In a liberal lifeway, a constitutional starting point is that humans must be ruled (which requires both rules and rulers) if they're to be free. As Fuller famously illustrated, legitimate governance exists when citizens are ruled *by laws* (higher laws: constitutional law) and not by the caprice of other humans.⁸⁷²

Sákéj reminds us that “*Sui generis* Aboriginal orders constitutionalize Aboriginal peoples' own understandings of their relationships to the land and to their surrounding ecosystems. They are, in every sense, part of the ancient law of the land. They do not require a sovereign, the will of a political state, or the affirmation of outsiders to be legitimate.”⁸⁷³ Since rooted legalities lack both rulers and rules, the role of law in securing the legitimacy of governance must work differently. But where to look?

If the problem of prescriptive indeterminacy in rooted law regards rooted legality's deep commitment to contingency, then perhaps a logical starting point is the extraordinary emphasis that the practice of law-as-judgment places on the agency of gift/need recipients. Rising to the challenge of mutual aid requires remarkable self-governance, although not in what for many will be the conventional sense of the transparent accountability of a centralized government to its citizens. Self-governance in rooted communities begins with radically interdependent persons—community members, not governments—governing themselves effectively.⁸⁷⁴ Elder Bone explains that it undergirds the entirety of the giftway, tracking even back to *miinigowiziwin*:

for mutual advantage, to leave the state of nature *and govern themselves by law.*” Martha C Nussbaum, “Beyond the Social Contract: Capabilities and Global Justice” (2004) 32:1 Oxford Development Studies 3 at 4; emphasis added.

⁸⁷⁰ *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 749, quoting from Wade, ECS and GG Phillips, in AW Bradley, ed, *Constitutional and Administrative Law*, 9th Ed (London: Longman, 1977) at 89.

⁸⁷¹ *Ibid* at 751.

⁸⁷² Fuller, *The Morality of Law* at 34, 39 (within the allegory of King Rex, Rex's first error).

⁸⁷³ Henderson, “Aboriginal Jurisprudence and Rights” at 71.

⁸⁷⁴ Patricia Monture, “Notes on Sovereignty” in Andrea P Morrison & Irwin Cotler, eds, *Justice for Natives: Searching for Common Ground* (Montreal: MQUP, 1997) 197 [Monture, “Notes on Sovereignty”] at 198; Clifford, “The Emerging People” at 108.

“That’s why we’re given that language, our teachings, our history, and the way you conduct yourself. But conducting yourself is like government, right? So it’s governing yourself.”⁸⁷⁵

In the Boundary Waters communities, we have a word for this rooted sense of self-governance: *bimiwinitiziwin*. Nokomis emphasized its importance to me, saying “*Bimiwinitiziwin*—to me that’s number one thing to know about.”⁸⁷⁶ She, too, shares that it’s about self-knowledge and knowing how to govern one’s own behaviour. “*Bimiwinitiziwin*—knowing where you are, how to behave yourself. It’s about ourselves first and knowing who we are. And *bimiwinitiziwin*, that’s when it really begins, you’re more in control of the good behaviour and learning from the bad behaviour.”⁸⁷⁷ That good judgment is the arbiter of good and bad behaviour seems implicit in her explanation, but she goes on to make the point expressly. *Bimiwinitiziwin* is about “Being extra careful, how to guide yourself in life. Being careful how to look after—or what you’re sharing. It’s about yourself, to go about things carefully.”⁸⁷⁸ She emphasizes the care that must precede action: “Taking care of yourself, healthwise. And spiritualwise—spiritually. And carefully—think about something carefully before you share. Whatever it is you’re sharing about, do it carefully.”⁸⁷⁹ The exercise of such careful judgment is something in which “Your whole person” is involved.⁸⁸⁰

We still need an explanation of how this person-centred vision of self-governance amounts to a form of community governance. One part of the answer regards its ubiquity. We begin to engender self-governance, this rigorous capacity to guide oneself with great care, in children. Noko explains “Knowing *bimiwinitiziwin*—how you were brought up—should be able to control your behaviour.”⁸⁸¹ She reiterated this point at an elders gathering reflecting on Grand Council Treaty #3’s child care law, saying “*Bimiiwinitisowin* should be what we have to offer”⁸⁸² and “This is the way to reach children at very young age is in repetition to reinforce their minds and spirit the ways to be guided in the right directions – I wish the Agency to refocus and to have programs to provide Guidance to young ones and to support parenting skills.”⁸⁸³ This view is also shared in a Mishkeegogamang community book where the text immediately beneath the subheading “True Self-Government” reads “After careful teaching in childhood, people took responsibility for their own moral conduct through inner control, rather than by responding to rules or laws imposed by government or leader.”⁸⁸⁴ The Anishinabek Nation also shares this view. In a recent report summarizing community engagement sessions, it stated that “It was each of our own personal responsibility to strive to implement our laws and teachings within our day-

⁸⁷⁵ Elder Harry Bone (16 June 2018).

⁸⁷⁶ Elder Bessie Mainville (2 December 2015).

⁸⁷⁷ *Ibid.* Although she uses only English words and so the word ‘*bimiwinitiziwin*’ doesn’t appear in her text, nokomis shared teachings directly about this conception of self-governance in the *Indigenous Law Journal*. I’d be remiss if I failed to note that her piece is entitled “Traditional Native Culture and Spirituality: A Way of Life that Governs Us”. Mainville, “Traditional Native Culture and Spirituality”; emphasis added.

⁸⁷⁸ Elder Bessie Mainville (4 July 2018).

⁸⁷⁹ *Ibid.*

⁸⁸⁰ *Ibid.*

⁸⁸¹ Elder Bessie Mainville (2 December 2015); emphasis added.

⁸⁸² Grand Council Treaty #3 with Irene Linklater, *Abinoonjii Ombig Igos Owin – Elders Gathering On Teachings and Principles* (Report of the Child Welfare Summit, Kenora, 10 & 11 October, 2012) [Grand Council Treaty #3 with Linklater, *Abinoonjii Ombig Igos Owin Report*] at 16.

⁸⁸³ *Ibid.*

⁸⁸⁴ Heinrichs et al, *Mishkeegogamang* at 217.

to-day lives to achieve *mino bimaadiziwin* (a good life or living in a good way) and each of us had a responsibility to pass these laws and principles on to our children and grandchildren.”⁸⁸⁵

However ubiquity is but a small part of the answer. The deep nexus between individual and community self-governance consists in its inherent relationality: one’s personal practice of *bimiwinitiziwin* is always a relational practice. Recall nokomis’ teaching about this word: “*Bimiwinitiziwin*—knowing where you are, how to behave yourself. It’s about ourselves first and knowing who we are”⁸⁸⁶ and “It’s about yourself, to go about things carefully.”⁸⁸⁷ There are two things of critical importance here. First, nokomis is saying that each of us has a *relationship* with ourselves, and second, *bimiwinitiziwin* is about ourselves *first*, implying that self-governance isn’t exhausted by one’s relationship with herself. Both implications are prefigured by the rooted conception of persons. Where persons are radically interdependent (*I am* my relationships) and a community’s logic of belonging is mutual aid (the circular reciprocity of free gift), then one’s careful self-governance is also always a form of direct participation in community governance.

Trish Monture draws the point out, explaining that for radically interdependent kinsfolk, to be self-governing *means* to carefully attend to one’s relationships:

self-determination begins with looking at yourself and your family and deciding if and when you are living responsibly. Self-determination is principally, that is first and foremost, about relationships. Communities cannot be self-governing unless members of those communities are well and living in a responsible way. It is difficult for individuals to be self-determining until they are living as part of their community.⁸⁸⁸

Leanne Simpson similarly explains for Anishinaabeg that “There was a belief that good governance and political relationships begin with individuals and how they relate to each other in families”⁸⁸⁹ and “In a real sense for the Nishnaabeg, relating to one’s immediate family, the land, the members of their clan, and their relations in the nonhuman world in a good way was the foundation of good governance in a collective sense.”⁸⁹⁰

In the result, I’m self-governing if and only if I live responsibly as a son, brother, cousin, father, uncle, and so on: in relation with my community members.⁸⁹¹ I achieve this state of relationality by exercising careful judgment that accords with what my legal traditions have taught me, with how my lifeway informs them, with how my lifeworld has shaped it, and finally, with how that lifeworld is *grounded* in earth: the humility thesis. That law-as-judgment connects back to the earthway is the deeper reason why, in a rooted legality, it’s appropriate to speak of the legitimacy of governance in terms of the *grounding* of law.

Finally, the process of careful decision-making is replicated in (what is to my knowledge, the sole) communal Anishinaabe self-governance context: *zagasawe’idiwin*, the council, convened for the most serious of matters. Basil Johnston observed of the deliberative form of the council that when a weighty comment was offered, “Only after a long delay did the next speaker

⁸⁸⁵ Union of Ontario Indians, “Revitalization of Anishinabek Legal Traditions, Regional Sessions, *Final Summary Report*” (Nipissing First Nation: Anishinabek Nation Legal Department, 2018) at 16.

⁸⁸⁶ Elder Bessie Mainville (2 December 2015).

⁸⁸⁷ Elder Bessie Mainville (4 July 2018).

⁸⁸⁸ Monture-Angus, *Journeying Forward* at 8.

⁸⁸⁹ “Looking after Gdoo-naaganinaa” at 32.

⁸⁹⁰ *Ibid.*

⁸⁹¹ Calvin Morrisseau (of my community, Couchiching) explains how responsibilities to self serve as the foundation for responsibility to others at progressively higher levels of relationality (and in respect of mutual aid) in Calvin Morrisseau, *Into the Daylight: A Wholistic Approach to Healing* (Toronto: UTP, 1998).

in the circle of chiefs and councillors rise to respond”⁸⁹² and in the particular example he uses, “For three days the chiefs sat in council, looking into the question from different angles. There was no debate. Instead, the speakers sought illumination through mutual inquiry.”⁸⁹³

With this background in *zagasawe’idiwin*, it’s unsurprising that we find the word *bimiwinitiziwin* used in the context of collective self-governance. In one of nokomis’ explanations of the term, she said “The communities helped each other to do whatever you have to do to make a living”⁸⁹⁴ and she spoke of “those that pay attention to planning things” within “a group, in a community”, giving as examples “meetings, teachings, maybe a powwow”.⁸⁹⁵ And indeed, certain community governance bodies in Treaty #3 have used the term in a collective sense. For instance, Migisi Sahgaigan (Eagle Lake) First Nation defines “Bimi’onitizowin” as “how we are to govern ourselves.”⁸⁹⁶ Grand Council Treaty #3 has likewise used “Bimiiwinitisowin” to describe its governance.⁸⁹⁷ The Ojibway and Cree Cultural Centre’s *Political Terminology Glossary* also gives the word “pimiwinidisowin” in the context of inherent governance.⁸⁹⁸ Larry Chartrand suggested we might think of Idle No More in this way.⁸⁹⁹

Here then is the critical insight. Although *bimiwinitiziwin* is deployed in both individual and collective senses, what’s really being communicated through its use is an inherently relational form of self-governance (since the rooted self *is* relational) which scales from one’s relationship with herself all the way through to one’s relationship with the community as a whole. This clearly hasn’t resolved the ‘problem’ of residual prescriptive indeterminacy. But by now I hope we can see that it was never going to. Where rootedness settles into certainty, it dies. The appropriate question is whether we’ve told a story which, despite the indeterminacy it clings to, allows law to sustain its predictive quality. If it does, then rooted law meaningfully enables rooted governance and the structural worry disappears, although of course the worry persists for rooted peoples (as for all others) in the sense of particular instances of illegitimacy. However the justification and intelligibility of particular decisions is a different sort of analysis and one best taken up after I’ve introduced the rooted law analytic.

Before proceeding to that culminating stage of my rooted law analysis, there’s one remaining issue which my effort to closely track the issue of prescriptive indeterminacy meant deferring. I turn now to the vital issue of force in rooted law.

iii. Force

Even amongst those who find my argument for law-as-judgment thus far compelling, anyone not already familiar with such a conception of law must find that the question of force looms large. Indeed, it would be reasonable to dismiss my sub-theory entirely if an adequate account of how force operates within it couldn’t be offered.

This may seem a vexing task for those of us whose background assumptions about legal force are shaped by our citizenship in a liberal constitutional order (even if only through colonial

⁸⁹² Johnston, *Ojibway Ceremonies* at 171.

⁸⁹³ *Ibid.*

⁸⁹⁴ Elder Bessie Mainville (2 December 2015).

⁸⁹⁵ *Ibid.*

⁸⁹⁶ Migisi Sahgaiganing Anishnaabeg, *Migisi Sahgaigan Maa ’a Chi Totaa-Aki Declaration* at 1; bold and italic scripts removed.

⁸⁹⁷ Jourdain, “Pazaga’owin” at 3, 9; italic script removed.

⁸⁹⁸ Jacasum, *Ojibway Political Terminology Glossary* at 44.

⁸⁹⁹ Chartrand, “Eagle Soaring” at 77.

imposition) and thus by a liberal conception of law-as-rules. For in such societies, the role of rule creation, interpretation, adjustment and enforcement belongs to a centralized, sovereign authority and rooted societies have no such sovereign: “Although the Ojebway nation of Indians is scattered over a vast section of country there is no person among them recognized as king.”⁹⁰⁰ So if a *legitimate* exercise of force exists (i.e. force beyond vigilante vengeance, which is merely self-help and, thus, extralegal force), clearly it must operate in an altogether different way. Further, it will respect our overarching purpose for rooted law: conformity to the earthway, respect for co-creativity, promotion of and return to harmony.

I begin this section with an incomplete discussion of one Anishinaabe legal tradition: *ogimaag*. It’s incomplete in that for present purposes I’m interested only in the nature of force this institution embodies, persuasive authority.⁹⁰¹ Importantly, readers will observe how carefully persuasive authority tracks co-creativity, the rooted conception of freedom: *ogimaag* exercise force only through and for their community members.

With the logic of persuasion explained, I proceed from authority (governance) to compliance (law) and canvass three kinds of persuasive compliance. The first two, positive reinforcement and negative social force, share a common feature in that they’re both forms of social discipline. This informality of governance should be expected given rooted legality’s foundation in radically interdependent selves and co-creativity. In the absence of centralized governmental authority, and thus formal agents of law enforcement, rooted community members turn to themselves, seeking to democratically reinforce the social order from below. In Leroy Little Bear’s apposite comment, “It is as though everybody is a ‘cop’ and nobody is a ‘cop.’”⁹⁰² The third and arguably most powerful form of persuasive compliance is negative *manidoo* / medicine force. In *Anishinaabemowin*, it’s called *onjinewin*. It operates on a cosmological scale, and, critically, it’s triggered without direct appeal.

1. Persuasive Authority

Above and in the rooted legal traditions discussion, I used the word ‘*ogimaa(g)*’, which I translated as ‘leader(s)’.⁹⁰³ Other common translations include ‘boss’ and depending on the

⁹⁰⁰ Jones, *History of the Ojebway Indians* at 108.

⁹⁰¹ A vital aspect of *ogimaawin* (persuasive authority leadership) which I’m unable to explore is *zagasawe’idiwin*, the council. In a broader study of Anishinaabe authority, it would feature prominently. The council is a forum in which *ogimaag* and others negotiate complex matters between multiple parties. The scale is variable: the parties might be spokespersons of distinct families within the community, or of distinct communities within an alliance. For our purposes, what matters is that *zagasawe’idiwin* isn’t a *public* forum in the liberal sense. While the parties meet in a space equally open to all, they haven’t consented to vest a leader with coercive authority (and thus to be bound by her decisions), or to constrain themselves from reasoning in respect of their substantive views. Rather, *zagasawe’idiwin* is a logical extension of the logic of persuasive authority: *ogimaag* endeavour to bring voluntary participant parties to a workable understanding, but none of them is *bound* by this provisional consensus. The force that constrains each party to abide by the understanding is just the persuasive force of the *ogimaag* facilitating the dialogue, skilfully emphasizing its benefits, the costs of non-compliance, and the nature of the relationships at issue. Parties may (and often do) reach an understanding, only to break it soon after. Helpful overviews include Basil Johnston, “The Council / Zuguswediwin” in *Ojibway Ceremonies* (Toronto: McClelland and Stewart, 1987 [1982]) 155 [Johnston, “The Council / Zuguswediwin”]; Jones, *History of the Ojebway Indians* at ch 9.

⁹⁰² Little Bear, “Jagged Worldviews Colliding” at 84.

⁹⁰³ The secondary literature on Anishinaabe leadership is rich. Perhaps the most comprehensive source is Cary Miller, *Ogimaag: Anishinaabeg Leadership, 1760-1845* (Lincoln, NE: University of Nebraska Press, 2010). This source is valuable in that Miller goes beyond merely documenting historical observations. Other significant sources include Theresa M Schenck, “*The Voice of the Crane Echoes Afar*”: *The Sociopolitical Organization of the Lake*

context, sometimes ‘king’. Yet probably the most common translation is ‘chief’, because the context of ‘*ogimaa*’s’ usage is ordinarily a reference to Anishinaabe leadership over Anishinaabeg, and in English we ordinarily associate the word ‘chief’ with the role of an indigenous sovereign. I’m uncomfortable with all of these translations except ‘leader’ for the reason that they mischaracterize the nature of the leadership they endeavour to describe—and to deploy the term ‘sovereign’ and to speak of leadership ‘over’ is already to speak the problem.

These translations imply a leader exercising authority *over*, not *with*, his or her community members.⁹⁰⁴ Anishinaabeg explain, rather, that “Our governments are, and have been, as much government as the people wanted or needed, and no more. We have never accepted the concept that a majority has the right to force others to follow its ways.”⁹⁰⁵ In this section I explain how *ogimaag* exercise force-with—consistent with co-creativity—in order to persuasively secure compliance from community members.⁹⁰⁶ After this we’ll turn to three associated forms of legal force which fill in the obvious gap.

Peter Jones’ description of Anishinaabe leadership seems to me to succinctly capture all the critical aspects of the logic of persuasive authority. I introduce it as a kind of road map, and I invite readers to return to it once they finish this section. Jones says:

The chiefs are the heads or fathers of their respective tribes; but their authority extends no further than to their own body, while their influence depends much on their wisdom, bravery, and hospitality. When they lack any of these qualities they fall proportionably [sic] in the estimation of their people. It is, therefore, of importance that they should excel in everything pertaining to the dignity of a chieftain, since they govern more by persuasion than by coercion. Whenever their acts give general dissatisfaction their power ceases. They have scarcely any executive power, and can do but little without the concurrence of the subordinate chiefs and principal men. They have no written code of laws, nor any power to put their people to death by their own will; but they are taught by their chiefs and wise men to observe a certain line of conduct, such as to be kind and hospitable. They are encouraged to be good hunters and warriors, and great pow-wows, or medicine men.⁹⁰⁷

Superior Ojibwa, 1640-1855 (New York: Garland Publishing, Inc, 1997) ch 6, and James GE Smith, *Leadership Among the Southwestern Ojibwa*, Publications in Ethnology, No 7 (Ottawa: National Museums of Canada, 1973).

⁹⁰⁴ Discerning the difference is a major focus of much of James Tully’s recent work. See Tully, *PPNK* 2 at 116; James Tully, “On Global Citizenship: Replies to Interlocutors” in Bert van den Brink, Antony Simon Laden, Peter Niesen and David Owen, eds, *On Global Citizenship: James Tully in Dialogue* (New York: Bloomsbury Academic, 2014) 269 [Tully, “On Global Citizenship: Replies to Interlocutors”] at 272; Tully, “A View of Transformative Reconciliation”; Tully, “On the Significance of Gandhi Today”; Tully, “Deparochializing Political Theory and Beyond” at 55; James Tully, “Richard Gregg and the Power of Nonviolence: The Power of Nonviolence as the Unifying Animacy of Life” (J. Glenn and Ursula Gray Memorial Lecture, Department of Philosophy Colorado College, 1 March 2016) [Tully, “Richard Gregg and the Power of Nonviolence”]; James Tully, “Editor’s Introduction: Integral Nonviolence” in Richard Bartlett Gregg & James Tully, ed, *The Power of Nonviolence* [forthcoming, CUP].

⁹⁰⁵ Union of Ontario Indians, “To the Parliament of the Dominion of Canada” at 19. Note how anti-populist persuasive authority is.

⁹⁰⁶ While I can’t make a study of it within the current project, I suspect all rooted communities are like this. See for instance Ladner, “Governing Within an Ecological Context” at 139; Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2017) 63 at 76-77.

⁹⁰⁷ Jones, *History of the Ojebway Indians* at 108-109.

It may be helpful to begin by explaining what persuasive authority is not. Perhaps most obviously (yet strikingly), persuasive authority works without resort to coercion.⁹⁰⁸ In the colourful language of his era, while travelling throughout Anishinaabe territory between the mid and late 1600's, Nicholas Perrot offered an outsider observation of this fact:

The savage does not know what it is to obey. It is more often necessary to entreat him than to command him; he nevertheless yields to all demands made upon him—especially when he fancies that there is either glory or profit to be expected therefrom, and then he comes forward of his own accord and offers his aid. The father does not venture to exercise authority over his son, nor does the chief dare to give commands to his soldier—he will mildly entreat; and if any one [sic] is stubborn in regard to some [proposed] movement, it is necessary to flatter him in order to dissuade him, otherwise he will go further [in his opposition].⁹⁰⁹

In Basil Johnston's more succinct expression, "the act of leading is without compulsion. The followers follow freely and are at liberty to withdraw."⁹¹⁰ Here we must recall the total social phenomenon, and thus that an ethic of non-coercion holds for legal authority, too. Johann George Kohl observes this reality and points towards diffuse sites of legal authority (albeit with a jaundiced vocabulary), saying "Their chiefs, or civil authorities, hence usually play a less important part in the matter than the private revenge of those aggrieved by the culprit."⁹¹¹ He fails to recognize an alternative logic of power, but nonetheless helpfully adds, that "The so-called chiefs, as a general rule, are authorities possessing very little power, and rarely venture to punish criminals seriously. They fear the private revenge of their young men. But now and then it happens that they will order a criminal's gun to be destroyed, or his horses shot."⁹¹²

At least two principles firmly establish an ethic of non-coercion within the institution of *ogimaag*. The first is non-hierarchy, which is as straightforward as it sounds. Perrot observed that, "The chiefs who are most influential and well-to-do are on an equal footing with the poorest, and even with the boys—with whom they converse as they do with persons of discretion."⁹¹³ Nehetho/Ininiw Elder Rose Hart / Black Bear Woman explains why: "it wasn't such a big thing to be chosen as a Chief back then, because when you were chosen as a Chief, you had to put your people first and you always were last, you know. So it wasn't very prestigious as it is now. You had to be very humble."⁹¹⁴ For Basil Johnston, this means that leaders are "first in terms of showing the way and not in any other sense."⁹¹⁵ In a slightly different formulation, elder Fred Kelly makes the same point, saying "A traditional chief is the first among equals. Not a hierarchy where he commands. He builds up consensus and then there's collective action",⁹¹⁶ and "these leaders were consensus builders. They were not leading

⁹⁰⁸ I believe this form of governance authority characterizes many rooted peoples. As one example, Denys Delâge describes the same phenomenon amongst the Huron: Delâge, *Bitter Feast* at 61, 63, 66.

⁹⁰⁹ Perrot, *Savages of North America* at 145 (second and third sets of square brackets in original)

⁹¹⁰ Johnston, *Ojibway Heritage* at 61.

⁹¹¹ Kohl, *Kitchi Gami* at 269.

⁹¹² *Ibid* at 270.

⁹¹³ Perrot, *Savages of North America* at 136.

⁹¹⁴ Linklater et al, *Ka'esi Wahkotumahk Aski* at 85.

⁹¹⁵ Johnston, *Ojibway Heritage* at 62.

⁹¹⁶ Interview with Fred Kelly, "Elder Fred Kelly on the Anishinaabe Worldview and What It Means To Be an Indigenous Leader" on *Face to Face with Michael Hutchinson* (Aboriginal Peoples' Television Network, 3 February 2016), online: APTN <<http://aptn.ca/news/2016/02/03/elder-fred-kelly-on-the-anishinaabe-worldview-and-what-it>

from the front or as commanders.”⁹¹⁷ I believe there’s an affinity here with the Mohawk concept for leader, ‘rotianer’.⁹¹⁸

Elder Kelly’s comments point towards a second but directly related principle establishing non-coercion. This principle regards the powers persuasive authority contemplates. Specifically, *ogimaag* possess facilitative (and thus necessarily communicative), but not decisional, authority. This is frequently described as the power to speak (and by implication, to listen), but not to decide.⁹¹⁹ In Basil Johnston’s words, “He was as leader an example and the first of speakers only”⁹²⁰, and “As a speaker he did not utter his own sentiments, but those of his people”.⁹²¹ Others have observed that, “This title [chief] is more honorary than anything else, apparently, as his only power is to speak occasionally for the tribe when necessity demands it.”⁹²² Reflecting on the Cree cognate *okimaw*, Cree scholar-lawyer Sharon Venne emphasizes the point saying “Indigenous peoples are the boss of the chief”.⁹²³ Rooted societies are acephalous. Overstepping the boundary between speaker and decision-maker could have grave consequences.⁹²⁴

Being an effective (i.e. persuasive) speaker requires attention to many details. Some of the more significant ones are that once a speaker voices a position, he must hold to it, unflappably. While new and important information is of course cause for reconsideration, a speaker may not move with the wind if he wishes others to have any confidence in him.⁹²⁵ Another critical aspect to persuasive speaking is that one must use his voice to ensure that the needs of all are considered.⁹²⁶

With coercion eliminated from the context of leadership, we must ask what conception of force replaces it.⁹²⁷ Several of the above quotations already disclose an answer: persuasive

means-to-be-an-indigenous-leader/> [APTN, “Elder Fred Kelly on the Anishinaabe Worldview and What It Means To Be an Indigenous Leader”].

⁹¹⁷ *Ibid.* See also *Restoule v Canada*, Transcript of elder Fred Kelly at 2917-2918, 2930.

⁹¹⁸ Osenntion and Skonaganleh:r  say “A ROTIANER is considered to have been given great and serious responsibilities when he assumes the position; he is not considered to be at the top of an hierarchy with authority that is subject to abuse, as on the outside. Again, the women must ensure that her ROTIANER are carrying out their responsibilities or they will see to them being reprimanded and ultimately removed, when necessary.” Osenntion and Skonaganleh:r , “Our World” at 14; emphasis and capital letters in original.

⁹¹⁹ Paul Williams suggests this is also true of the Haudenosaunee. See Williams, *Kayanerenk :wa* at 359.

⁹²⁰ Johnston, *Ojibway Heritage* at 61.

⁹²¹ *Ibid.*

⁹²² Horace P Beck, “Folklore from Maniwaki” (1947) 60:237 *Journal of American Folklore* 259 at 261.

⁹²³ Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) ch 7 at 179.

⁹²⁴ Warren, *History of the Ojibway Nation* at 302.

⁹²⁵ One of the most striking examples I know of this aspect of persuasive authority is found in Henry Youle Hind, “Rainy River” in Edmund Head, ed, *Papers Relative to the Exploration of the Country Between Lake Superior and the Red River Settlement* (London: George Edward Eyre and William Spottiswoode, 1859) 23-25. In August of 1857, the British Red River Expedition was passing through Lake of the Woods, where it was met by Anishinaabeg. Misapprehending the nature of the *ogimaa*’s authority, two officers engaged with him strategically, assuming he’d shift positions if outmaneuvered. When pushed far enough that he announced a settled position unfavorable to the expedition, the officers at last disclosed their true purpose—but were shocked to find the *ogimaa* no longer interested in what they had to say.

⁹²⁶ Cecilia Sugarhead, “The Five Moons of Winter” in John O’Meara, ed, trans., *Ninoontaan / I Can Hear It: Ojibwe Stories from Lansdowne House Written By Cecilia Sugarhead* (Winnipeg: Algonquian and Iroquoian Linguistics, 1996) 39.

⁹²⁷ One might expect that in taking up this question, I’d have paid more attention to the work of Pierre Clastres. While there’s much I admire the originality and vigorous anti-ethnocentrism in *Society Against the State*, I find

authority seeks (evidently) to *persuade* community members to accept a proposal and thus to *choose* to follow it.⁹²⁸ In respect of co-creativity, persuasive authority is perhaps the clearest manifestation of force being exercised *through* others.

Some of the clearest articulations of persuasive authority I know of are found in moments where *ogimaag* try to explain to colonial officials how it differs from the coercive forms of authority they understand and expect. At the same July 1695 congress with the Governor General of New France of which we earlier heard part of Dakota leader Tioskatin's speech, *ogimaa* Chingouabé, representing the western Anishinaabeg, also addressed the Count. He hoped to support the Dakota in their war against mutual enemies, but Frontenac declined to support the request. In reply, Chingouabé explained:

Father: It is not the same with us as with you. When you command all the French obey you and go to war. But I shall not be heeded and obeyed by my nation in like manner. Therefore I cannot answer except for myself and those immediately allied or related to me. Nevertheless I shall communicate your pleasure to all the Sauteurs [western Anishinaabeg], and in order that you may be satisfied of what I say, I will invite the French who are in my Village to be witnesses of what I shall tell my people on your behalf.⁹²⁹

Similarly, on February 16th 1806, *ogimaa* Wiscoup addressed United States Lieutenant Zebulon M. Pike.⁹³⁰ In a statement which clearly indicates the persuasive nature of his authority, he asserted, "Be assured that I will use my best endeavours to keep my young men quiet."⁹³¹ In a much more dramatic speech, *ogimaa* Keesh-ke-mun of the Lake Superior Anishinaabeg addressed Mr. Askin, a British agent and commandant, on Mackinaw Island during the War of 1812.⁹³² Keesh-ke-mun's remarkable address reflects his understanding of the considerable difference in forms of authority, but redoubtably—even confrontationally—asserts the power intrinsic to his own: "Englishman! you [sic] ask me who I am. If you wish to know, you must seek me in the clouds. I am a bird who rises from the earth, and flies far up, into the skies, out of human sight; but though not visible to the eye, my voice is heard from afar, and resounds over the earth!"⁹³³ A short while later, he continued his avian metaphor, bringing it to his desired,

myself confused by Clastres' account of the absence of coercive force within indigenous societies. The answer I proceed to offer, persuasive authority, I locate within the logic of mutual aid. Following the humility thesis, it annihilates the putative nature/culture divide. This directly conflicts with Clastres' contention that the absence of coercive authority within indigenous societies is to be explained by their decision to turn away from the logic of power intrinsic to nature. As Clastres tells it, for indigenous peoples "culture apprehends power as the very resurgence of nature" and "power is essentially coercion". Clastres, *Society Against the State* at 34.

Clastres thus concludes that indigenous peoples reject power as such. But this conclusion, which collapses any space between the concept of power and the coercive conception thereof, seems unwarranted even if we limit our critique to the inside of Clastres' argument. At so many points Clastres identifies the effective exercise of chiefly power through persuasion, but refuses to acknowledge it as power. In consequence, I believe he seriously misreads the expectations that community members have of their leaders, which he calls "a kind of blackmail" (*ibid* at 36), when he claims they believe themselves possessed of a "kind of right" to subject their leaders "to a continuous looting." *Ibid* at 22.

⁹²⁸ Hallowell draws examples from early European accounts of such an approach to leadership amongst other Algonquian (Micmac, Delaware, Huron and Montagnais) peoples. Hallowell, *Culture and Experience* ch 6 at 135.

⁹²⁹ O'Callaghan, "Narrative of the most remarkable Occurrences in Canada" at 612.

⁹³⁰ Warren, *History of the Ojibway Nation* at 457.

⁹³¹ *Ibid* at 458.

⁹³² *Ibid* at 373.

⁹³³ *Ibid*.

resounding close: “Englishman! You say, that you will keep me a prisoner in this your strong house. You are stronger than I am. You can do as you say. But remember that the voice of the Crane echoes afar off, and when he summons his children together, they number like the pebbles on the Great Lake shore!”⁹³⁴ In 1826 at a meeting with US Treaty Commissioners in Wisconsin, *ogimaa* Peezhikee explained his view to the commissioners that, “You are strong to make your young men obey you. But we have no way, Fathers, to make our young men listen, but by the pipe.”⁹³⁵ A final example regards an observation of Simon J. Dawson, during his employment of the 1857 Red River Expedition. Albeit with the narrowness of view common to many colonial officers, he reported of the Rainy River and Lake of the Woods Anishinaabeg that “They have a rude sort of Government, and the regulations made by their Chiefs are observed, it is said, better than laws usually are where there are no great means of enforcing them.”⁹³⁶

What an incredible challenge! How skilled *ogimaag* must have been to hold so many disparate minds, hearts, spirits and bodies to a common course. Elder Fred Kelly reflects on this fact: “European legal systems are based on enforcement; ours are based on compliance—which means respect of laws. So that means ... how would one coerce people to enforce those seven laws of creation?”⁹³⁷ The answer to his rhetorical question, we’ve learned, is that one cannot—they aren’t rules to be policed, but rather teachings to be taken in through legal traditions and then practised as judgment: a path to follow. Elder Kelly provides the natural conclusion: “So you can understand then that the different concept of legal systems is one that is based on compliance and respect rather than enforcement.”⁹³⁸

It follows that persuasive authority is tenuous and contingent. One is always becoming a leader, never safely settled into that role. One is always more or less a leader, never either/or one. Basil Johnston says so expressly: “Leadership was predicated upon persuasion; its exercise upon circumstances and need. It was neither permanent nor constant for a chief”.⁹³⁹ William Warren shares several stories wherein an *ogimaa*’s efforts fell short.⁹⁴⁰

The question which naturally follows is *how* one earns the kind of respect which promotes authority. I suggest that there are two principles to the logic of persuasion. The first is caretaking and provision; the second, merit and suitability. Together these principles further demonstrate how persuasive authority is reconcilable to co-creativity (and in particular, relationality). Here the principles are demonstrative of force exercised *for* others. A basic statement of the first principle might be something like the following: “They [*ogimaag*] were always supposed to be planning for the interests of the people in one way or another. They *took care* of widows and orphans”.⁹⁴¹ This suggests prudent planning, which is a considerable aspect of this principle. But much more simply, the principle also stands in a basic, material sense: the

⁹³⁴ *Ibid* at 375.

⁹³⁵ Thomas L McKenney, *Sketches of a Tour of the Lakes, of the Character and Customs of the Chippeway Indians, and of Incidents Connected with the Treaty of Fond du Lac* (Baltimore: Fielding Lucas, Jun’r, 1827). This quotation first came to my attention in White, “Give Us a Little Milk” at 63, citing to a reprint of McKenney’ *Sketches*.

⁹³⁶ S J Dawson, *Report on The Line of Route Between Lake Superior and the Red River Settlement* (Ottawa: Hunter, Rose & Company, 1868) 27.

⁹³⁷ APTN, “Elder Fred Kelly on the Anishinaabe Worldview and What It Means To Be an Indigenous Leader”.

⁹³⁸ *Ibid*.

⁹³⁹ Johnston, *Ojibway Heritage* at 61.

⁹⁴⁰ One particularly clear statement to this effect is “The influence of the chief Mons-o-ne at first checked the young men, but the least additional spark to their excitement caused his voice to be unheard, and his influence to be without effect.” Warren, *History of the Ojibway Nation* at 325.

⁹⁴¹ “Chieftainship” in FG Speck, ed, *Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley* (Ottawa: Government Printing Bureau, 1915) 20 at 21 (emphasis added).

provision of gifts (which the archival material and ethnography generally refer to as ‘presents’) and of food.⁹⁴² For instance, missing the logic but observing the practice, Perrot wrote:

If the chiefs possess some influence over them, it is only through the liberal presents and the feasts which they give to their men, and here is the reason which induces them to pay respect to their chiefs; for it is characteristic of the savages always to incline to the side of those who give them most and who flatter them most.⁹⁴³

A couple examples of *ogimaag* successful in both aspects of this principle might be helpful to illustrate: “Waub-o-jeeg was a warrior of some distinction. He possessed much influence with, and was loved and respected by his people. His lodge was ever filled with the fruits of the successful chase, to which the hungry were always welcome. His social pipe was ever full, and the stem often passed around among his fellows.”⁹⁴⁴ And another:

Curly Head was much respected and loved by his people. In the words of one of their principal warriors, “He was a father to his people; they looked on him as children do to a parent; and his lightest wish was immediately performed. His lodge was ever full of meat, to which the hungry and destitute were ever welcome. The traders vied with one another who should treat him best, and the presents which he received at their hands, he always distributed to his people without reserve. When he had plenty, his people wanted not.”⁹⁴⁵

One’s persuasive influence thus grows directly in proportion to one’s demonstrated ability to take care of and to provide for others in respect of both their long term interests and their immediate material needs. One common way to demonstrate this ability, as these quotations repeatedly reveal, is to host feasts. A wonderful example of how *ogimaa*-hosted feasts serve to shore up an *ogimaa*’s caretaking and provision credibility, and thus his or her persuasive authority, is a story Frank Speck collected in the early 1900s which he called, “Beaver Gives a Feast”.⁹⁴⁶ The story begins with *ogimaa* Beaver hosting a feast for his animal community, and as it progresses Beaver becomes the target of Otter’s derisive behaviour (Beaver suffers from flatulence, and Otter always laughs at him for this social failure). The story is remarkable for *how* it demonstrates the deep persuasiveness of Beaver’s authority. We might expect the story to proceed to Beaver’s persuasive exercise of authority over Otter, calling him into compliance, but this isn’t how it unfolds. Rather, Beaver is so beloved by his community that community members, wanting him to continue to excel in his role, collectively intercede and resolve the looming conflict before Beaver even becomes aware of it.

The second principle associated with effective persuasion is merit-suitability. Despite the bias of Ruth Landes’ ethnography on the Rainy River Anishinaabeg,⁹⁴⁷ her works on this

⁹⁴² Johann Georg Kohl provides a vivid description of this practice amongst Lake Superior Anishinaabeg in Kohl, *Kitchi Gami* at 66-67, although he errs in stating that an *ogimaa*’s “followers blindly obey his orders.” *Ibid* at 67. Rather, they follow his directions or even exhortations (but not orders) because they’ve been persuaded to do so.

⁹⁴³ Perrot, *Savages of North America* at 145 (citation omitted).

⁹⁴⁴ Warren, *History of the Ojibway Nation* at 351.

⁹⁴⁵ *Ibid* at 348.

⁹⁴⁶ Orator unknown, “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 [Speck, “Beaver Gives a Feast”].

⁹⁴⁷ Sally Cole casts Landes’ ethnocentrism as an intersection of narrative traditions, but even if she’s right the effect isn’t to remove the question of Landes’ responsibility for her representation of Anishinaabe society. See Sally Cole, “Women’s Stories and Boasian Texts: The Ojibwa Ethnography of Ruth Landes and Maggie Wilson” (1995)

community, if carefully read, contain important information. On the immediate question, she observed that “Anyone could at one time or another ‘conduct’ something, whether a giddy boy leading a group to romantic conquests, or a fasting visionary fulfilling a feud on the war-path”.⁹⁴⁸

For our purposes, the context of greatest significance is that of civic leadership.⁹⁴⁹ Basil Johnston provides a helpful general statement on the significance of merit to civic persuasive authority: “Merit was the criteria for assessing the quality of a candidate. Thus, if a person, born of another totemic group were deemed to possess a greater capacity for leadership than one so prepared, he would be preferred”.⁹⁵⁰ Elder Fred Kelly also emphasizes the vital importance of the “quality” of a leadership candidate: “You have to carry all those values and those qualities, and you have to have credibility. You have to have that leadership ability rather than forcing people to do your commands.”⁹⁵¹ A clear example of this is Andrew Blackbird’s account of the decline of his father’s leadership:

After my father’s return to Arbor Croche, he became quite an orator, and consequently he was appointed as the head speaker in the council of the Ottawa and Chippewa Indians. He continued to hold this office until his frame was beginning to totter with age, his memory became disconnected and inactive, and he therefore gave up his office to his own messenger[.]⁹⁵²

Of course, suitability can be proven in much more subtle ways, too, including when *not* to exercise authority. In the “Beaver Gives a Feast” story just discussed, part of the resolution reached is that at his community members’ behest, Otter declines to attend Beaver’s feast. In consequence, “When the guests arrived at the feast, the Beaver chief saw that the Otter was not with them. Said he, ‘Where, indeed, is Otter? *I like him because he is so funny.*’”⁹⁵³ On one reading, this passage shows Beaver disclosing to his community that he has always known that Otter laughs at his expense, but he’s either too sage or too humble (or perhaps both) to make unnecessary conflict of it, allowing instead for the pretense that vice is virtue.

Perhaps the best evidence of the power of persuasive authority is that *ogimaag* who already held leadership roles through heredity were generally ill-content with this foundation, and sought to ground their position on suitability as well. William Warren gives an example:

37:1 *Anthropologica* 3. A much more damning indictment of Landes’ ethnographic work at Manitou Rapids is found in Joan A Lovisek, Tim E Holzkamm, Leo G Waisberg, “Fatal Errors: Ruth Landes and the Creation of the ‘Atomistic Ojibwa’” (1997) 39:1/2 *Anthropologica* 133; Joan A Lovisek, Tim E Holzkamm & Leo G Waisberg, “‘Cultural Leprosy’: The ‘Aboriginal Ethnology’ of Ruth Landes” in David H Pentland, ed, *Papers of the Twenty-Seventh Algonquian Conference* (Winnipeg: University of Manitoba, 1996) 164.

⁹⁴⁸ Landes, *Ojibwa Sociology* at 2. See also Lovelace, “Prologue. Notes from Prison”.

⁹⁴⁹ Following Jim Tully, I say ‘civic’ and not ‘civil’ intentionally. Tully explains that civil governance represents a form of sovereign authority-over the demos, in which the demos participates in governance *in*, but not *over*, the constitutional order. In the civic tradition, the demos sustains its capacity to legislate not only within, but also over the constitutional order; this form of governance is thus characterized as authority-with. For a concise comparison and explanation, see Tully, “On Global Citizenship: Replies to Interlocutors” at 270-272. See Tully, *PPNK* for a two-volume explanation, mapping, and justification of what’s at stake in the distinction. While civic political associations contemplate law in terms of provisionally determinate norms, I take the connection between civic authority and persuasive compliance to be obvious.

⁹⁵⁰ Johnston, *Ojibway Heritage* at 63.

⁹⁵¹ APTN, “Elder Fred Kelly on the Anishinaabe Worldview and What It Means To Be an Indigenous Leader”.

⁹⁵² Blackbird, *History of the Ottawa and Chippewa Indians* at 31.

⁹⁵³ Speck, “Beaver Gives a Feast” at 54 [emphasis added].

Keesh-ke-mun was not only chief by hereditary descent, but he made himself truly such, through the wisdom and firmness of his conduct, both to his people and the whites. During his lifetime, he possessed an unbounded influence over the division of his tribe with whom he resided, and generally over the Lake Superior bands and villages.⁹⁵⁴

Peter Jones, too, speaks to this point:

The civil chiefs, who in general inherit their chieftainship by descent, are not expected to go to the field of action. They seldom, however, neglect a good opportunity of displaying their wisdom, skill, and bravery, and often accompany their people and engage in the conflict. The more scalps they take, the more they are revered and consulted by their tribe.⁹⁵⁵

Hereditary *ogimaag* were wise to do so. For so powerful was the effect of demonstrated ability that in a contest between hereditary and merit, heredity was ordinarily the loser. Peter Jones says that:

The office of civil chieftainship is hereditary, but not always conferred on the eldest son. When a vacancy occurs, the surviving chiefs and principal men meet in council, and then select the most suitable person out of the family. The eldest son has the first consideration; but if he is deficient in any of the qualifications which they consider necessary, they elect the next best qualified.⁹⁵⁶

Heredity then seems to provide something like a *prima facie* interest in, but not a guarantee of, civic leadership.⁹⁵⁷ Warren provides two wonderful examples, saying, “Buffalo, of the Bear Clan, also became noted as a chief of the St. Croix Ojibways, in fact superseding in importance and influence the hereditary chiefs of this division”⁹⁵⁸, and:

A-ke-gui-ow, after his death, was succeeded by his son, Waub-uj-e-jauk (White Crane), who could rightfully claim the first chieftainship in his tribe; but who, being of an unambitious and retiring disposition, neglecting his civil duties, and attending only to those of the chase, he became at last superseded by a noted character of his time, named Au-daig-we-os (Crow’s Flesh), the head or chief of the Loon family, who is justly celebrated in the traditions of his people, for wisdom, honesty, and an unvarying friendship to the whites. During his lifetime, his influence extended over the whole tribe[.]⁹⁵⁹

Unfortunately for *ogimaag*, settler officials often succeeded in exploiting the dominance of merit. Warren recounts a speech of *ogimaa* Hole-in-the-Day (the younger) to American treaty commissioners in 1847, which culminates in his saying “Now, if I say sell, our Great Father will obtain the land; if I say no, you will tell him he cannot have it. The Indians assembled here have nothing to say, they can but do my bidding.”⁹⁶⁰ Such deviations were usually the result of deliberate colonial intervention into Anishinaabe governance. Through practices such as the

⁹⁵⁴ Warren, *History of the Ojibway Nation* at 318.

⁹⁵⁵ Jones, *History of the Ojibway Indians* at 130.

⁹⁵⁶ *Ibid* at 107.

⁹⁵⁷ See also Johnston, *Ojibway Heritage* at 63; Williams, *Kayanerenkó:wa* at 10.

⁹⁵⁸ Warren, *History of the Ojibway Nation* at 335.

⁹⁵⁹ *Ibid* at 317.

⁹⁶⁰ *Ibid* at 498.

awarding of treaty medals, British⁹⁶¹ and American⁹⁶² commissioners and traders sought to create a new class of settler-friendly leadership and simultaneously to destroy the otherwise uncontrollable system of persuasive authority through which *ogimaa* held power.⁹⁶³

As Warren tells it, Hole-in-the-Day's father, *ogimaa* Hole-in-the-Day (the elder) was just one such leader. In July of 1838 he addressed an Indian Agent, saying "You call me chief, and so I am, by nature, as well as by office, and I challenge any of these men to dispute my title to it. If I am chief, then my word is law, otherwise you might as well put this medal [showing the one received from Governor Cass] upon an old woman."⁹⁶⁴

In some communities, such as at Manidoo Baawitigong, a linguistic device was developed to differentiate between the two forms of leadership. In addition to '*ogimaa*', the term '*ogimaakaan*' now came into use. Ruth Landes, in her work with Manidoo Baawitigong, reported of the added suffix that "Kan is said to connote that the *ogi'ma* title—or any other title that Kan modifies—was not earned according to native standards, but is a factitious white title".⁹⁶⁵ In the Ojibwe People's Dictionary, elder Nancy Jones renders "*ogimaakaan*" as "a chief" and the linguistic notes for the entry add that the suffix "-kaan" indicates "something made".⁹⁶⁶ Hallowell gives "*ogimaakanag*" as "made up chiefs".⁹⁶⁷ Maureen Matthews gives "*ogimaakaan*" as "chief (once again the morpheme -kaan implies an inferior copy), literally like a wealthy boss/leader"⁹⁶⁸ and as "Chief, false wealth" and identifies it as a "Reference to early tribe representatives with red coats and medals provided by governments".⁹⁶⁹ Edward S. Rogers gave "*okima'hka'n*" as "the term by which today chief is known - it means literally 'boss-like'".⁹⁷⁰ Kohl, too, describes the concept, but without using the word⁹⁷¹ and elder Gidigaa Migizi / Doug Williams describes "Medal Indians" in this way, although he assigns the understanding to *ogimaa*, and doesn't mention *ogimaakaan*.⁹⁷²

These statements support Landes' contention that '*ogimaakaan*' is a title which describes someone who was *made* a chief, not someone who has *earned* leadership. This was confirmed by one of my elders born in the community Landes studied, who explained to me that before settlers arrived, "There's no *ogimaakaan* at that time"⁹⁷³, that "chief and council come from the white people"⁹⁷⁴ and that only "when the government came"⁹⁷⁵, imposing its governance model, did the office of "*ogimaakaan*" come into existence.⁹⁷⁶ The pre-colonization role of civic leader,

⁹⁶¹ *Ibid* at 371-372; Jones, *History of the Ojibway Indians* at 108, 110.

⁹⁶² Warren, *History of the Ojibway Nation* at 319, 335, 393-394.

⁹⁶³ Kohl, *Kitchi Gami* at 270-271; Warren, *History of the Ojibway Nation* at 135.

⁹⁶⁴ Warren, *History of the Ojibway Nation* at 496; square brackets in original.

⁹⁶⁵ Landes, *Ojibwa Sociology* at 3, n 1.

⁹⁶⁶ See "*ogimaakaan*" in *The Ojibwe People's Dictionary*, online: <<http://ojibwe.lib.umn.edu/main-entry/ogimaakaan-na>> accessed 2017 11 15).

⁹⁶⁷ A Irving Hallowell with Jennifer SH Brown & Susan Elaine Gray, eds, *Contributions to Ojibwe Studies: Essays, 1934-1972* (United States: University of Nebraska Press, 2010) at 589.

⁹⁶⁸ Matthews, *Naamiwan's Drum* at 255.

⁹⁶⁹ *Ibid* at 273.

⁹⁷⁰ Rogers, *The Round Lake Ojibwa* at G12.

⁹⁷¹ Kohl, *Kitchi Gami* at 66.

⁹⁷² Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 63.

⁹⁷³ Teaching of anonymous elder #1 (29 November 2017) Mitaanjigamiing First Nation [Anonymous elder #1 (29 November 2017)].

⁹⁷⁴ Anonymous elder #1 (4 October 2017).

⁹⁷⁵ Anonymous elder #1 (29 November 2017).

⁹⁷⁶ Anonymous elder #1 (4 October 2017); Anonymous elder #1 (29 November 2017).

rather, was ‘*gaaniigaanizid*’ instead.⁹⁷⁷

Christianized Anishinaabe communities sometimes chose to adopt settler forms of leadership in addition to worship, and this, too, was a way of privileging merit (construed differently of course) over heredity. Peter Jones offers an example in a general council held in January of 1840, in which the following statement is made: “It was stated that our fathers never recognized a presiding chief in their councils; but, as we were imitating the good ways of the white people, it was thought proper to appoint one.”⁹⁷⁸

Finally, the supersession of heredity by merit is a dynamic sustained across other kinds of leadership too, for instance, with respect to war⁹⁷⁹ and medicine.⁹⁸⁰

Basil Johnston has a wonderful story which summarizes this entire section on persuasive authority.⁹⁸¹ It’s about a loon who aspires to civic leadership, even challenging the existing leader, crane, for the position. For his part, Crane simply allowed loon to take over, and loon “assumed the position with pomp and considerable authority.”⁹⁸² As summer wound to a close and the birds began to think of migration, loon proceeded to make decisions for them, rather than merely giving voice to and sharpening focus around their expressed needs. Loon had now broken both the non-hierarchy and facilitative-not-decisional principles of non-coercion. But more important still, in declining to attend to the unique and varied needs of the different kinds of birds, he failed in his caretaking responsibility. The general plan failed to meet the particular needs of many kinds of birds, who subsequently died. Loon was soon considered ill-suited for leadership. His persuasive authority collapsed and his leadership was consequently abandoned by all. Crane became leader once more.⁹⁸³

⁹⁷⁷ Anonymous elder #1 (29 November 2017). See also Simpson, *Dancing on Our Turtle’s Back* at 121, citing to Vanessa Watts, *Towards Anishinaabe Governance and Accountability: Reawakening Our Relationships and Sacred Bimaadiziwin* (MA Thesis, IGOV, University of Victoria, 2004 [unpublished]) at 89. Gidigaa Migizi / Doug Williams uses a similar word, *Eniigaanzijig*. Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 63. So, too, does Cecil King: *Naagaanzidjig*. King, *Balancing Two Worlds* at 259.

⁹⁷⁸ Jones, *History of the Ojebway Indians* at 114.

⁹⁷⁹ “The office of war chief is not hereditary, but the tribe in council confer this honour on those who have distinguished themselves by bravery and wisdom.” Jones, *History of the Ojebway Indians* at 108; “The war chieftainship was usually obtained by courage and exploits in war, and success in leading a war party, through spiritual vision, against the enemy. It sometimes descended from father to son, in fact always, where the son approved himself in a manner to secure the confidence of the warriors.” Warren, *History of the Ojibway Nation* at 319; see also *ibid* at 243; “In their war excursions the war chiefs take the lead, and act as captains over their respective warriors. These chiefs direct the order of the march and mode of attack, and are men who have distinguished themselves for their bravery, and consequently obtain the confidence of their tribe.” Jones, *History of the Ojebway Indians* at 130.

⁹⁸⁰ Peter Jones provides that, “The Ojebways have no regularly appointed priests among them. The pow-wows, conjurors, and gifted speakers, act for them, so that any ambitious Indian, by cultivating the talent of public speaking, may become the mouthpiece of his deluded brethren.” Jones, *History of the Ojebway Indians* at 96-97. Ruth Landes observed the same dynamic:

Na’mepok (Sturgeon) of the Manitou Reserve on Rainy River inherited such a title from his father but he is recognized only by the Government, not by the Indians, because he does not qualify as an Ojibwa “wise man” or “conductor.” The Indians had recommended his father for the honor, but they do not therefore respect his heir. They have given the “wise man” title, instead, to Namepok’s brother, twenty-five years his junior, “because he does a lot of Grand Medicine and he takes care of funerals.” Landes, *Ojibwa Sociology* at 3.

See also Warren, *History of the Ojibway Nation* at 269-270.

⁹⁸¹ Johnston, *Ojibway Heritage* at 62-63.

⁹⁸² *Ibid* at 62.

⁹⁸³ *Ibid*.

2. Persuasive Compliance

While the foregoing study of persuasive authority might have seemed like a lengthy digression, it's essential to my purpose. Without first understanding how persuasion works *as a logic of force*, readers are unlikely to accept as valid or effective the three kinds of persuasive compliance I go on to explain. Trish Monture explains the problem in a fashion that connects directly back to the conception of law we've been discussing:

The whole presumption in the mainstream system is that we need law because there inevitably and invariably will be disputes among people that are not resolvable. The mainstream system is based on the presumption that there will be conflict and that we need a system of coercion to correct that conflict. That is obviously not my Mohawk woman's view of what law is. Law is about retaining, teaching and maintaining good relationships. To come to this conversation about getting Aboriginal justice together, as soon as we start talking courts and we start talking constitution, when we start talking policing, we are defeated.⁹⁸⁴

Thus I hope the length of this seeming aside is justified and I'm correct that one must appreciate the logic of persuasion before one can make the move from persuasive authority (force in governance) to persuasive compliance (force at law). Having done so, I now turn to three kinds of persuasive compliance. With the transition from political to legal force, readers will again observe that force in rooted legalities respects the *through* and *for* of co-creativity.

a. Positive Reinforcement

In *Tales of Nokomis*⁹⁸⁵, her remarkable book of *aadizookaanan*, Patronella Johnston shares a story⁹⁸⁶ which beautifully illustrates what is by far the dominant—most pervasive and most effective—of the three kinds of force within persuasive compliance: positive reinforcement. This story is ideal for appreciating how positive reinforcement works in a rooted legal context, not only because of its clarity but also because the relevant dynamic—the social value of grace—is given emphatically (twice, in connected interactions).

A dull grey oriole, overlooked by the other birds and lonely, sings each morning to greet Giizis, the Sun. Oriole's beautiful singing "made Sun feel very joyous, and he shone even more brightly than usual."⁹⁸⁷ One morning, Sun said to Oriole, "because you have been so friendly", that he would grant Oriole a wish.⁹⁸⁸ Oriole wished to be beautiful, and flying over a pond later that day, he saw his stunning new orange and black colours reflected beneath him. This had a huge impact on Oriole and his gift of song: "The next morning, because he was so grateful, he sang all the harder to greet the Sun."⁹⁸⁹ For his part, "Sun was pleased at the small bird's joy, and happy that oriole had remembered to say thank you."⁹⁹⁰ Sun thus rewarded Oriole a second time, teaching him how to build his nests "out on the highest limbs", ensuring that "no one will ever

⁹⁸⁴ Monture-Okanee, "Thinking About Aboriginal Justice: Myths and Revolution" at 228.

⁹⁸⁵ Patronella Johnston, *Tales of Nokomis* (Toronto: Charles J. Musson Limited, 1970).

⁹⁸⁶ Patronella Johnston, "The Legend of the Oriole" in *Tales of Nokomis* (Toronto: Charles J. Musson Limited, 1970) 59. Illustration by Francis Kagige.

⁹⁸⁷ *Ibid* at 61.

⁹⁸⁸ *Ibid*.

⁹⁸⁹ *Ibid* at 62.

⁹⁹⁰ *Ibid*.

learn the secret of how you weave them there.”⁹⁹¹ The central thrust of the story is depicted in a stunning painting by Francis Kagige, *The grateful Oriole sings to greet the Sun*.⁹⁹²

In the same book, Johnston includes a Nanabozho story in which a skunk is gifted for his sacrifice. Because he allowed himself to be eaten so that Nanabozho might live, Nanabozho said to him that his descendents would all benefit from a noxious spray, such that “None of your enemies will bother you, and you will live in peace for all the days to come.”⁹⁹³ Nanabozho, for all his faults and frequent errors, often rewards those he meets for beneficent behaviour and kind deeds; for being-with the other in a good way. Consider for instance, just Meskwaki anthropologist William Jones’ famous collection of Nanabozho *aadizookaanan*. Here we find Nanabozho frequently rewarding people for various beneficent tasks—the sharing of knowledge and other gifts—by ‘making them proud’, which means to ‘paint’⁹⁹⁴ them (recall the Anishinaabe concept of medicine power: the value of being ‘painted’ is more than merely aesthetic).⁹⁹⁵

Stories such as these expertly convey how the gentle encouragement and affirming reception of grace is operationalized as the logic of positive reinforcement in rooted legal contexts.⁹⁹⁶ Taught programmatically within a rooted educational context, the decisions, reasoning, and sequence of actions of the characters within *aadizookaanan* serve to instill Creation’s way within community members, right from youth (positive reinforcement is intrinsic to *bimiwinitiziwin*: being self-governing). The characters serve as models for how we ought (and ought not) to be.⁹⁹⁷ Nokomis explains, “There was lessons all the way through these stories. What would happen if you did that, or didn’t listen carefully”⁹⁹⁸, and “In your child’s mind, you imagine, *I like that way of life*, so it stays with you, the good side of a story. That’s what I think,

⁹⁹¹ *Ibid.*

⁹⁹² *Ibid* at 60. I see this painting and I think of Oriole singing to the Sun whenever I listen to Edmonton-based Hip Hop artist Infamous Red’s stunning honour song, “Heaven Looking Down”. Infamous Red, “Heaven Looking Down”, *The REDucation* (Cha Bro Music, 2012), Track 4. It’s available online, for purchase and streaming, through bandcamp at <<https://chabromusic.bandcamp.com/releases>>.

⁹⁹³ Patronella Johnston, “Nanabush and the Skunk” in *Tales of Nokomis* (Toronto: Charles J. Musson Limited, 1970) 5 at 7. Illustration by Francis Kagige.

⁹⁹⁴ Occasionally Nanabozho says that he will “adorn” rather than “paint” someone, but de Josselin de Jong gives that the sense of ‘to adorn’ in Anishinaabe *aadizookaanan* is ‘to paint’: see JPB de Josselin de Jong, ed, *Original Odžibwe-Texts with English Translation, Notes, and Vocabulary* (New York: Johnson Reprint Corporation, 1913) at 53 (at “Wawežiā (nin)”). More important, “paint” means to render coloured through Nanabozho’s medicine power.

⁹⁹⁵ See Wāsagunäckānk (also given as Wāsagunackāng), “The Death of Nānabushu’s Nephew, The Wolf” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 89 at 93-95 (painting Kingfishers); Midāsugaⁿj, “Nānabushu and Windigo” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 197 at 201-203 (painting Weasel; I note that this reward is quasi-contractual); Midāsugaⁿj, “The Death of Nānabushu’s Nephew, the Wolf” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 251 at 257 (painting Kingfisher); Midāsugaⁿj, “Nānabushu Slays Toad-Woman, the Healer of the Manitou” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 261 at 279 (painting Raven); Kāgigē Pinasi (John Pinesi (also given as Penessi, Penassie)), “The Death of Nānabushu’s Nephew” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 389 at 395 (painting Kingfisher and Loon) and 397 (painting Turtles); Kūgigēpināsi’kwā (Marie Syrette), “Nānabushu Swallowed by the Sturgeon” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden, Netherlands: EJ Brill, 1917) 467 at 479-481 (painting Gulls).

⁹⁹⁶ A wonderful example is Simpson, “Land As Pedagogy” at 1.

⁹⁹⁷ I suspect the inclusion of ‘ought not’ stories, and thus the need to discern what kind of story one is hearing, is common amongst other indigenous peoples. See for instance Sandy, “*Stsqey’ulécw Re St’exelcenc*” at 205.

⁹⁹⁸ Elder Bessie Mainville (25 October 2015).

what I believe, those stories are very helpful to hear as a child.”⁹⁹⁹

Reflecting on Nuu-chah-nulth education scholar Marlene Atleo’s account of salmon stories in her community, Potawatami philosopher Kyle Whyte says “Learners come to see themselves as endowed with sacred responsibilities connecting them to past and future generations and the continued flourishing of their peoples”.¹⁰⁰⁰ Just imagine the feeling of having your community think you sufficiently important and trustworthy to invest such a responsibility in you! Imagine its impact on your behaviour! It’s plain to see why George Copway would say “These legends have an important bearing on the character of the children of our nation” and that in the process of their transmission, “social habits are formed and strengthened.”¹⁰⁰¹

Of course, *aadizookaanan* are only one way that Anishinaabeg come to understand and to be motivated by positive reinforcement. We also learn from the earth, from elders and often from family and community members.¹⁰⁰² Then-Justice Murray Sinclair referenced several of these sources in explaining the significance of normative modelling—of which stories are but one part—in positively reinforcing desired community behaviour:

Appropriate conduct in Aboriginal societies was assured through the teaching of proper thought and behaviour from one generation to the next. Moral, ethical and juridical principles were taught by example. Individuals within society who lived according to tribal principles were esteemed and honoured. They were treated as living role models of fitting conduct. Examples were also drawn from the lives of people no longer living and from the lives of fictitious heroes and heroines whose manners and behaviour were considered worth emulating.¹⁰⁰³

Blackfoot scholar Leroy Little Bear explains that such an emphasis results in “a positive rather than a negative approach to social control. If individuals are appropriately and immediately given recognition for upholding strength, honesty, and kindness, then a ‘good’ order will be maintained, and the good of the group will continue to be the goal of all the members of the Society.”¹⁰⁰⁴ He then expands upon the rooted human infrastructure that allows for positive reinforcement to function as a stable, shared logic of force, rather than as an individual’s capricious commitment detached from consequence.¹⁰⁰⁵ In so doing, he connects to our earlier discussion on indigenous legal traditions, being careful to draw out the intergenerational aspect necessary to instill respect for positive reinforcement, and explaining the emphasis rooted societies thus place on the normative development of youth:

How do Aboriginal peoples educate and inculcate the philosophy, values, and customs of their cultures? For the most part, education and socialization are achieved through praise, reward,

⁹⁹⁹ Elder Bessie Mainville (12 January 2016).

¹⁰⁰⁰ Whyte, “Critical Investigations of Resilience” at 140, reflecting on Marlene Renate Atleo, “The Ancient Nuu-Chah-Nulth Strategy of Hahuulthi: Education for Indigenous Cultural Survivance” (2006) 2:1 *International Journal of Environmental, Cultural, Economic and Social Sustainability* 153.

¹⁰⁰¹ Copway, *Traditional History and Characteristic Sketches* at 96-97. As a case in point, see Rob Clifford’s reflections on how his grandfather impacted upon him in Clifford, “Listening to Law” (notably at 56).

¹⁰⁰² Without realizing she’s doing so, Ruth Landes reveals one way that certain Anishinaabe kin members positively reinforce desired behaviour in children. She describes a form of familial jesting in which certain family members hold up the virtues of one’s cross-cousins as model-worthy: Landes, *Ojibwa Sociology* at 13.

¹⁰⁰³ Sinclair, “Aboriginal Peoples, Justice and the Law” at 176-177.

¹⁰⁰⁴ Little Bear, “Jagged Worldviews Colliding” at 80.

¹⁰⁰⁵ Further examples include Jones, *History of the Ojebway Indians* at 66; Blackbird, *History of the Ottawa and Chippewa Indians* at 12; Copway, *Traditional History and Characteristic Sketches* at 96-97.

recognition, and renewal ceremonies and by example, actual experience, and storytelling. Children are greatly valued and are considered gifts from the Creator. From the moment of birth, children are the objects of love and kindness from a large circle of relatives and friends. They are strictly trained but in a “sea” of love and kindness. As they grow, children are given praise and recognition for their achievements both by the extended family and by the group as a whole. Group recognition manifests itself in public ceremonies performed for a child, giveaways in a child’s honour, and songs created and sung in a child’s honour.¹⁰⁰⁶

Grandmother Sherry Copenace explains the consequence of such a youth-engaged approach to community formation: “It was up to us if we were going to take that responsibility or not. But because we were raised like that from birth, we did it because we know it will only add to the strength and harmony of us as people.”¹⁰⁰⁷ The results as youth become adults were as predicted: grandmother Copenace adds that “One of the things I heard the old people say is that we didn’t have to enforce anything. And we didn’t have to feel obligated to do anything. We just knew what our responsibilities were. We just wanted to comply because we knew we would add to that harmony and balance.”¹⁰⁰⁸

Outside of a rooted context (and setting aside his final remark about ceremonies), what Little Bear describes is likely to be read by many as saying not much of anything; as the kind of morally basic and fundamentally human (read: non-force and therefore non-law) commitment to youth that every society wants to claim of itself. But from a rooted standpoint, much more than this can be seen in his words. In fact, they map effortlessly to the rooted conception of creation, constitutionalism, legal tradition, and law we’ve been exploring. Where I understand law as a form of judgment about relationally-bound responsibilities, legal traditions as inculcating a normative orientation to being-with myself and others, constitutionalism as the active (and open) circle of mutual aid exchange of gifts and needs between interdependent community members, and freedom as co-creativity—the capacity to gift and to be gifted—then it only makes sense that I should be more motivated by the prospect of sustaining good relationships than I am by the prospect of constrained or diminished individual choice.

There’s an inherent—indeed, a necessary—relationship between mutual aid and positive reinforcement, which is why I place it first in importance amongst various kinds of force operating in law-as-judgment. For folks whose subjectivity is constituted in respect of radical interdependence¹⁰⁰⁹, the prospect of the serious normative character of positive reinforcement raises no mystery, but is rather the very thing which seems natural, expected, and persuasive.

¹⁰⁰⁶ Little Bear, “Jagged Worldviews Colliding” at 81.

¹⁰⁰⁷ Grandmother Sherry Copenace (24 June 2018).

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ I hope this is a point by now sufficiently emphasized, but to be clear, many indigenous persons do not (and some do not want to) fit this subjectivity category. I take that where this has occurred, in general it is a consequence of colonialism. In particular, missionization often played a significant role. Despite his considerable cultural knowledge, Peter Jones, for instance, appears unable to identify the force within positive reinforcement, and his Christian transformation seems to be the cause:

In family government, I regret to say, my countrymen are very deficient; no discipline is enforced upon their children, consequently they grow up without restraint, and become self-willed and disobedient to their parents and guardians. As before stated they are not allowed to grow up without receiving the wise counsels of the sachems; but the evil lies in not insisting on the due observance of what they are taught. They scarcely ever inflict any punishment upon them beyond that of angry looks, and a little angry talk. Like Eli, when their children make themselves vile they restrain them not. Most of the Christian Indians now see and lament the want of family government; but not having been themselves instructed in the right

Using the example of the relationship between Anishinaabeg and game animals, Anishinaabe religion and culture theorist Lawrence W. Gross takes the academy to task for its narrowness of view in failing to apprehend the possibility that positive reinforcement might constitute a serious form of force amongst Anishinaabeg:

It is disappointing that past scholars often played up the fear inherent in Anishinaabe relations with game animals; that is, scholars argued that the prime motivating factor for treating animals well is usually presented as a fear of illness or the fear that game animals will make themselves scarce, thus bringing starvation. I would like to counter this approach. First, I find it regrettable that most scholars in the past have only focused on the negative reinforcement for moral behavior while completely ignoring positive aspects of the relationship. This would be similar to a discussion of Christian morality in which the only focus was on the fear of going to hell. In that case, the conclusion might be that the only reason Christians acted in a moral manner was due to the terror of eternal damnation. Such an approach would completely ignore the positive aspects of Christianity, such as the saving grace of Jesus Christ and the promise of a life of eternity in heaven. The same argument can be applied to the old Anishinaabe. Yes, the fear of retribution from game animals may have existed. However, as long as one acted well, one could look forward to the promise of a long and healthy life. One could also look forward to a continuing positive relationship with game animals.¹⁰¹⁰

Gross' even-handed expression of frustration with scholars who've failed to emphasize (and perhaps even to identify) positive reinforcement within Anishinaabe society is helpful. But we can venture further still, to suggest why this occlusion occurs. While positive reinforcement is the dominant kind of force exercised within rooted legalities, it has only private sphere significance within liberal ones. No vision of substantive good may trespass into public life.

b. Negative Social Force

The effectiveness of positive reinforcement for conditioning human behaviour is entailed within mutual aid. This is true also of negative social force: the knowledge that if we flout our responsibilities in any given relationship, adverse consequences will follow. Both kinds of force function, to use Malinowski's phrase, through "the constraint of reciprocal obligations."¹⁰¹¹

In the case of negative social force, radical interdependence means the risk of non-compliance is so high that no one can reasonably run it. Just like a liberal legal order, our very freedom is at stake in our daily interactions. Within co-creativity, freedom requires that I

way, they are quite ignorant how to exact implicit obedience from their children[.] Jones, *History of the Ojebway Indians* at 67.

He continues: "Nothing appears more lovely to me than to see a well-ordered family where the law of kindness rules, and the parents are obeyed, feared, and loved. In such a family peace and harmony reign." *Ibid.*

¹⁰¹⁰ Lawrence W Gross, "Bimaadiziwin, or the 'Good Life,' as a Unifying Concept of Anishinaabe Religion" (2002) 26:1 Am Indian Cult Res J 15 at 20-21.

¹⁰¹¹ Malinowski, *Crime and Custom* at 28; see also *ibid* at 23. Malinowski doesn't distinguish between *obligations* (including rights) and *responsibilities*. This differs in important respects from my account of the gift, but is consistent with the logic of his. Recall that in most instances Malinowski intends 'reciprocity' as direct, whereas I have circular reciprocity in mind. Thus to include positive reinforcement within "the constraint of reciprocal obligations" is neither to reduce grace to contract, nor more generally to misunderstand it as ends-driven. Only negative force is consequentialist. I repeat my earlier statement, now evidenced in the *aadizookaan* of the Oriole, that we don't gift in anticipation of having our own needs met; we gift to meet the needs of others and we simply trust that they feel the same way.

continue to benefit from the gifts of others. Yet this is just the future state put in jeopardy by non-compliance.¹⁰¹² Without the gifts of others to meet the many needs I'm incapable of meeting independently, my freedom is impaired and I may be in serious trouble. Indeed, my very life may be at risk.¹⁰¹³ In the result, I have overwhelming motivation to self-police, to voluntarily limit the exercise of agency my rooted system of law affords me—that is, to practise grace and equality—as I consider when and when not to share my gifts, how and how not to present my needs. In explaining Anishinaabe law, Copway put the point exceptionally well (and not without judgment of what, from his conception of freedom, seems like the inhumanity of coercive authority):

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.¹⁰¹⁴

Copway's use of "compact" to describe the collective understanding of negative social enforcement is unfortunate, for it risks suggesting the community has *consented* to a general constitutional arrangement, and thus, of inadvertently invoking the contract. It seems doubtful that Copway intended this meaning. Far more likely, he intended to emphasize the power, ubiquity, and critically, *shared knowledge* of negative social force that pervades the community.

It's this fact of common prospective consequence—that everyone knows negative consequences will invariably follow from non-compliance—which makes negative social force effective, necessitating carefulness and good judgment in the here-and-now. Malinowski's description of Trobriander law identifies this dynamic exactly when he states, "failure to comply places a man in an intolerable position, while slackness in fulfilment covers him with opprobrium. The man who would persistently disobey the rulings of law in his economic

¹⁰¹² Webber, "The Grammar of Customary Law" at 608.

¹⁰¹³ Here I have to disagree in part with Hollowell's reading of how force operates in Saulteaux society, for his overwhelming emphasis on negative social force risks transforming positive reinforcement to be more like it. Hollowell recognizes that "Saulteaux society functions in terms of primary group relations and in certain respects the kinship structure buttresses the discouragement of open aggression, *just as the struggle to make a living may be partly responsible for food sharing and outward cooperation in economic tasks.*" Hollowell, *Culture and Experience* ch 15 at 279; emphasis added. The section of Hollowell's comment that I've rendered in italic script indicates his view that positive reinforcement, too, is consequentialist. In fact, he says so expressly: "If I have more than I need I share it with you today because I know that you, in turn, will share your surplus with me tomorrow." *Ibid* at 278.

But Hollowell tenders no evidence in support of this interpretation, which isn't surprising since it misreads the Anishinaabe logic of mutual aid. Perhaps it's because of his only partial apprehension of mutual aid that even after acknowledging the work that kinship does within negative social force, Hollowell proceeds to limit its significance for positive reinforcement: "I do not believe that the kinship structure as such is the basic factor in the discouragement of open aggression. There is no intrinsic reason, moreover, why relatives should not quarrel." *Ibid* at 279-280. That Hollowell's misapprehension of mutual aid left him unable to discern the reason may be why he so heavily emphasizes the distinction between overt and covert aggression (*ibid* at 280), and why he suggests ultimately that the fear of covert harm (primarily through the means of sorcery) serves as the primary motivation for the self-policing upon which negative social force relies. *Ibid* at 281, 282, 284.

Perhaps Hollowell's most memorable passage on this point is "This society does not actually say, 'Thou shalt love thy neighbour.' What it does say is, if I hate my neighbour it is better that I should not openly quarrel with him." *Ibid* at 281. Hollowell never takes up the tension between his accounts of positive and negative social force, even though his account of negative social force is arguably fatal to the viability of community as such.

¹⁰¹⁴ Copway, *Traditional History and Characteristic Sketches* at 144.

dealings would soon find himself outside the social and economic order—and he is perfectly well aware of it.”¹⁰¹⁵ More succinctly he summarizes: “Law is the specific result of the configuration of obligations, which makes it impossible for the native to shirk his responsibility without suffering for it in the future.”¹⁰¹⁶

Most of the time, a healthy community member has a clear sense of her relationships, of her responsibilities within them, and of the consequences for disregarding them. In moments of mutual aid interaction she’s proficient in mapping her legal education against these sensibilities. This is, after all, precisely what rooted legal traditions prepare community members for. Leroy Little Bear explains that if he were a member of any given indigenous society, “then I would carry the behavioural code around in my mind. Knowledge is internalized, and once internalized it is forever with me. This knowledge tells me what is proper and what is improper behaviour.”¹⁰¹⁷ Little Bear’s statement about the internalization of normative expectation seems to describe nokomis’ view well. She says of hurtful behaviours, “It’s just known in me that I should not do that ever. My head and heart, I guess I should say.”¹⁰¹⁸

Yet there will always be instances, both erroneous and intentional, where practice fails to reflect theory, where reality falls short of our ideals.¹⁰¹⁹ *Aadizookaanan* are replete with tales of such interactive moments. Recall misbehaving Otter and how he treated *ogimaa* Beaver about his gassiness. Yet recall also that in order to avoid the result of their much-loved leader suffering public shame at Otter’s instigation, the community members took it upon themselves to address the matter. After having previously warned Otter and been ignored by him, they stood firm:

Now the people told the Otter this time, “You must not come; you never keep your mouth shut; you always laugh. If you only knew enough to keep still like the rest of us, it would be all right, but you had better stay home.” “Oh well, all right,” said the Otter, “I’ll stay back.” All went to the feast except the Otter.¹⁰²⁰

Peter Jones reminds us that where “the good counsel of the wise sachems,” failed to leave an impression, “the mark of disgrace put upon unruly persons, had a very desirable influence.”¹⁰²¹ Ruth Landes likewise observed at Manitou Rapids that “neighbors would warn parents of the child’s wrong doings; then all would join in ridiculing the child until he conformed.”¹⁰²² The reality of theory meets practice, then, is more that I *should* be adept at determining what’s required of me in any given interaction—practising *bimiwinitiziwin*—and in most situations I am. But where I fail to constrain myself, my relations will do it for me. Grandmother Copenace explained to me (I hasten to note, consistent with the diffuse nature of

¹⁰¹⁵ Malinowski, *Crime and Custom* at 41.

¹⁰¹⁶ *Ibid* at 59.

¹⁰¹⁷ Little Bear, “Jagged Worldviews Colliding” at 84. I’m uncomfortable with Little Bear’s word choice, “code”, but his more general idea I share entirely. See also Sandy, “*Sisqey’ulécw Re St’elcencw*” at 206.

¹⁰¹⁸ Elder Bessie Mainville (12 January 2016).

¹⁰¹⁹ Peter Jones relates, “I have made particular inquiry of the old men if they ever knew an Indian to walk so straight as never to break the law of nature. The answer uniformly has been, ‘Not a single one.’” Peter Jones, *History of the Ojebway Indians* at 92.

¹⁰²⁰ Speck, “Beaver Gives a Feast” at 54.

¹⁰²¹ Peter Jones, *History of the Ojebway Indians* at 57.

¹⁰²² Landes, *Ojibwa Sociology* at 13-14. In recognition of colonial impact, Landes also observes “Nowadays the young people have no respect for others. They are not afraid of what other people will say” and she expressly places this change on the Canadian government’s insistence “that when a man is of age he is his own boss.” *Ibid* at 13.

persuasive authority) that the corrective responsibility is vested broadly throughout the community (recall *pabamiziwin*), and that a demonstrative commitment accompanied it:

And when we weren't behaving properly, anybody told us that. It wasn't only a certain person. I think too because our parents were so busy, sometimes it was the aunts and uncles who held that responsibility, so they'd tell you, 'you're not supposed to be doing that, but this is how you're supposed to be behaving'. So they'd not only tell you, but they'd show you. They'd model all of those behaviours. So it wasn't just certain people. Of course some took the lead in that, but we all helped in it.¹⁰²³

In sum, what I've called 'the fact of common prospective consequence' may do most of the work within negative social force, but its efficacy is contingent on the reality of *actual* social enforcement. Legal power in rooted communities is diffuse and often internal, but no less effective for it.¹⁰²⁴

c. Negative Manidoo / Medicine Force

In the vast majority of one's interactions, positive reinforcement and negative social force prove sufficiently persuasive to reform what would otherwise have been freedom-diminishing courses of action. But sometimes someone persists in their pursuit of careless or self-interested ends. In such circumstances, the third and perhaps most severe layer of rooted force is triggered: negative *manidoo* or medicine force. I suspect that all indigenous peoples of Mikinaakominis have a word for this kind of force. Anishinaabeg call it *onjinewin*. The nearest Algonquian relations of the Western Anishinaabeg where my community is use similar words (local dialects and orthographies will of course vary): for Nehetho (Rock Cree) peoples it's "Ohchiniwin"¹⁰²⁵ or "O'chinewin"¹⁰²⁶, Nêhiyawak (Plains Cree) call it "ohcinêwin"¹⁰²⁷, and amongst Ininiwag (Oji-Cree), it's "Ochininawin"¹⁰²⁸.

In our ongoing dialogue about *inaakonigewin*, the concept of *onjinewin* is something nokomis has frequently taken up with me. The following are some of her clearest statements

¹⁰²³ Grandmother Sherry Copenace (24 June 2018).

¹⁰²⁴ This naturally raises the matter of remedies. Unfortunately a systematic exploration of Anishinaabe law needs much more space than what a dissertation chapter can provide. Examples of the exercise of negative social force which regularly appear in ethnographic and archival material on peoples indigenous to Mikinaakominis include the offering of presents, adoption, intentional killing, non-acknowledgment, banishment, etc. An outstanding introductory work on this topic, focussing on presents and intentional killing, is Johnston, "Aboriginal Traditions of Tolerance and Reparation" at 156-159. Another exceptional work, this one on intersocietal adoption as legal remedy, is Joseph Bauerkemper & Heidi Kiwetinewin Stark, "The Trans/National Terrain of Anishinaabe Law and Diplomacy" (2012) 4:1 Journal of Transnational American Studies 1 [Bauerkemper & Stark, "The Trans/National Terrain of Anishinaabe Law and Diplomacy"].

¹⁰²⁵ Linklater et al, *Ka'esi Wahkotumahk Aski* at 9. Closely related concepts are "pâstâhōwin" and "pâstâmōwin". See Robert A. Brightman, *Grateful Prey: Rock Cree Human-Animal Relationships* (University of California Press, 1993) at 103, 109, ch 4. See also Borrows, *CIC* at 335, n 112.

¹⁰²⁶ Pratt et al, *Untuwe Pi Kin He* at 32 (Nehetho elder D'Arcy Linklater speaking).

¹⁰²⁷ Saysewahum, *Nationhood Interrupted* at 43-47, 101, 103, discussing "ohcinêwin", and, following Brightman, "pâstâhōwin" and "pâstâmōwin". The first two of these terms appear also in Saysewahum, *Cultural Teachings* at 8, 51. The latter two terms appear also in Louis Bird with Jennifer SH Brown, Paul W DePasquale & Mark F Ruml, eds, *Telling Our Stories: Omushkego Legends & Histories from Hudson Bay* (Peterborough: Broadview Press, 2005) at 24: "PAS-STA-HO-WIN: A blasphemous act, distinct from pas-sta-moo-win, a spoken blasphemy."

¹⁰²⁸ Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang* at 69.

explaining what it is and how it works. She's insistent on the need for positive behaviour, saying "for spiritual ceremonies, especially the shaking tent, we were warned not to use it for anything negative. To use it only for healing",¹⁰²⁹ and that the tent-shaker "Must be positive thinking. And for that person that is doing the tent, to be very, very mindful not to fool around with the spiritual part of it. It's all about healing".¹⁰³⁰ More generally, she says "It's very important to speak positive, not to make-up anything, just what you know",¹⁰³¹ and "I'm sure in every community that's known. You gotta be very careful what you do, especially about hurting someone."¹⁰³²

The injunction for good behaviour is offered for good reason. "*Onji'idim*", she says, is "a saying I'll never forget: a very important warning that you must not do anything negative. Telling lies. When you do something negative to another person, you don't get away with it. That's what my aunt used to say. It will come back to you. It will come back to you, whatever it is, the bad thing you've done to someone else".¹⁰³³ A similar explanation she offered against taking negative action was, "In those days I heard a lot about being careful, not to harm anyone. Because it comes back to you. You don't get away with anything. When a person does something bad, it comes back to you later on."¹⁰³⁴

In nokomis' teachings on *onjinewin*, at least two components are clear. First, there's a prohibition on conduct which might negatively impact someone else.¹⁰³⁵ For instance, she explains that part of what *onjine'idizowin*¹⁰³⁶ and *onji'idowin*¹⁰³⁷ means is, "it is forbidden".¹⁰³⁸ She explains that another word, '*baataa'idizowin*', is directly related to the discussion (indeed, that I "almost have to mention it together"¹⁰³⁹), and that it too means, "You are not to do something; forbidden within Anishinaabe ways of life."¹⁰⁴⁰

The second aspect to the concept which is clearly discernible is a certainty of consequence reciprocal to bad acts (although grandmother Copenace explains that through ceremony such acts may be redressed¹⁰⁴¹). Elder Peter Atkinson says, "Every action we take that is negative will have a reaction."¹⁰⁴² Maureen Matthews similarly explains that *onjinewin* refers

¹⁰²⁹ Teaching of elder Bessie Mainville (6 January 2016) Couchiching First Nation [Elder Bessie Mainville (6 January 2016)]. Norval Morrisseau emphasizes this point in the story of Lynx Paw and Little Grouse in Norval Morrisseau, *Legends of My People The Great Ojibway* (Toronto: The Ryerson Press, 1965) [Morrisseau, *Legends of My People*] at 77-78.

¹⁰³⁰ Elder Bessie Mainville (25 October 2015).

¹⁰³¹ *Ibid.*

¹⁰³² Elder Bessie Mainville (12 January 2016).

¹⁰³³ Elder Bessie Mainville (25 October 2015).

¹⁰³⁴ Elder Bessie Mainville (6 January 2016).

¹⁰³⁵ Grandmother Copenace also explained to me the need to always speak mindfully and to act towards others in a good way. Grandmother Sherry Copenace (24 June 2018).

¹⁰³⁶ Elder Bessie Mainville (17 June 2014).

¹⁰³⁷ Depending on the context, she shifts between '*onjinewin*', '*onji'idim*', '*onji'idowin*', and '*onji'itizowin*', the first and last of these being her most frequent terms.

¹⁰³⁸ Elder Bessie Mainville (18 August 2013). See also "Prohibit" in Jones et al, *Ezhichigeyang* at 169; '*onji'idim*' in Anton Treuer, "Main Glossary" (2010) 7:2 Oshkaabewis Native J 123 at 167.

¹⁰³⁹ Elder Bessie Mainville (18 August 2013).

¹⁰⁴⁰ *Ibid.* This word and its meaning were again shared with me in a teaching of Elder Bessie Mainville (17 June 2014). Maureen Matthews defines *Baataa'idizowin* as "Concept of being endangered by another's actions".

Matthews, *Naamiwan's Drum* at 268.

¹⁰⁴¹ Grandmother Sherry Copenace (24 June 2018).

¹⁰⁴² Craft, *Anishinaabe Nibi Inaakonigewin Report* at 35. See also Colleen Sheryl McIvor, *Gikino'amaagowin Anishinaabeg (Teaching the Anishinaabe People)* (MA Thesis, University of Winnipeg, 2013) [unpublished] at 26, 29-30.

to “Consequence(s) of a moral infraction.”¹⁰⁴³ She and Roger Roulette offer a very helpful explanation of this second aspect of the concept:

The operative Ojibwe idea here is *onjinewin*. It means, roughly, that what comes around, goes around. It is the condition in which one finds oneself when one has offended some powerful being, human or non-human, and is, or should be, anticipating the consequences. Several terms deal specifically with the repercussions of *onjinewin*. *Baataa'idizowin* is when the insult or deed rebounds directly on the perpetrator, *obaataa'aan* is when it is visited on a loved one, a child for instance, and *baataa'aa* is when it comes back to a member of the extended family or community.¹⁰⁴⁴

This description turns our attention to the range of triggers of and targets for *onjinewin*'s reciprocal action.¹⁰⁴⁵ The powerful beings to which Matthews and Roulette refer include affected *manidoog*¹⁰⁴⁶ or ordinary beings (for instance, humans or regular animals) with significant medicine power.¹⁰⁴⁷ In particular, animals¹⁰⁴⁸, plants¹⁰⁴⁹, the earth¹⁰⁵⁰, spirits (*manidoog* and

¹⁰⁴³ Matthews, *Naamiwan's Drum* at 273.

¹⁰⁴⁴ Maureen Matthews & Roger Roulette, “Fair Wind’s Dream: Naamiwan Obawaajigewin” in Jennifer SH Brown & Elizabeth Vibert, eds, *Reading Beyond Words: Contexts for Native History* (Peterborough: Broadview Press Ltd., 2001) 330 at 346 (citations omitted; see also Matthews, *Naamiwan's Dream* at 264). Matthews defines “*Baataa'aa*” as “Bring harm to others by one’s own actions, also guilt by association”, to which she adds the comment, “Associated with Ojibwe belief where your actions may affect others, *onjine*, particularly those close to you”. *Ibid.* She adds helpful depth to the prefix “*Baataa-*” in *ibid.* at 265. Linklater et al, in *Ka'esi Wahkotumahk Aski* seem to support this understanding, defining *baataa'aa* in their glossary as “To inadvertently hurt a friend, negative consequence to another by someone else’s action(s)”. Linklater et al, *Ka'esi Wahkotumahk Aski* at 127.

¹⁰⁴⁵ Elder Dave Courchene shared a much broader sense of *onjinewin* with me, saying “Onjinewin means that whatever you put into your circle will come back to you, multiplied. But of course peoples have really relied on the negative context of that.” He then emphasized that if you put love and kindness into your circle, that’s what will come back to you. Elder Dave Courchene Jr (24 February 2018).

¹⁰⁴⁶ Ozaawaagosh, “Why the Anishinaabe Way of Life is Valued” at 46 (para 36).

¹⁰⁴⁷ Within Anishinaabe lifeworld, possessing some medicine power is normal.

¹⁰⁴⁸ In the context of *onjinewin*, nokomis specifically says “not to torture animals.” Elder Bessie Mainville (6 January 2016). Hunters and trappers had to be very careful in treating their quarry respectfully, else the boss spirit of the kind of prey sought would ensure its non-availability. Peter Jones explains, “In addition to this belief in the immortality of their own souls, they suppose that all animals, fowls, fish, trees, stones, &c., are endowed with immortal spirits, and that they possess supernatural power to punish any who may dare to despise or make any unnecessary waste of them.” Jones, *History of the Ojebway Indians* at 104. Hallowell takes this up directly in Hallowell, “Ojibwa Ontology, Behaviour, and World View” at 560. Another story, William Berens, “The Animals Know When They Are Not Used Right” in A Irving Hallowell with Jennifer SH Brown & Susan Elaine Gray, eds, *Memories, Myths, and Dreams of an Ojibwe Leader* (Montreal & Kingston: MQUP, 2009) at 87, illustrates Jones’ claim. My favorite narrative example of this imperative is a dramatic injunction in one of John Pinesi’s stories: “Never speak you ill of a beaver! Should you speak ill of (a beaver), you will not (be able to) kill one.” Kāgigē Pinasi (John Pinesi (also Penessi, Penassie)), “The Woman Who Married a Beaver” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 2 (New York: G.E. Stechert & Co., Agents, 1919) 251 at 257. See also Gespe’gewa’gi Mi’gmawei Mawiomni, *Nta’tugwaqanminen* at 94; Driben et al, “No Killing Ground” at 104-105; Borrows, “With or Without You” at 652.

¹⁰⁴⁹ Johann Georg Kohl collected a wonderful story illustrative of this point, “The Spirit of the Corn” in Kohl, *Kitchi Gami* at 266-268.

¹⁰⁵⁰ Anishinaabe elder Charlie Nelson / Mizhakwanigizhk explains, “I think we had to manage how we do things like manage the resources. Like we don’t overdo something. There’s a price to pay for that. We used to have a word, giga-onjine’idiz. You do something to cause yourself harm.” Hyslop et al, *Dtantu Balai Betl Nahidei* at 116.

aadizokaanag), ordinary beings blessed with advanced medicine power,¹⁰⁵¹ and sacred gifts¹⁰⁵² must all be treated respectfully if one is to avoid the possibility of his actions towards them triggering an *onjinewin* response.¹⁰⁵³ Responses may include sickness¹⁰⁵⁴ or even death¹⁰⁵⁵, and, as the additional Ojibwe words introduced above indicate, may be visited upon oneself, one's family (especially one's children or grandchildren)¹⁰⁵⁶ or on the wider community.¹⁰⁵⁷

Using the example of the traditional drum (which fits in the sacred gifts category), *nokomis* ties both threads of *onjinewin*—prohibition and *manidoo*/medicine reciprocity—together when she says, “If someone deliberately destroys a traditional drum, bad consequences follow you if you do it. Main reason it's forbidden is you've got to be very careful or it's gonna come back to harm you in some way; if not you, it's gonna be your family members.”¹⁰⁵⁸

Thus far our discussion of the certainty of consequence reciprocal to bad acts has proceeded as if reciprocation is enacted only by the party acted upon. This is untrue and thankfully so, else *onjinewin* would fail to trigger in cases where bad acts are visited upon non-*manidoog* persons without truly significant medicine power—which is most of us. Hallowell was taught that at least some kinds of bad behaviour towards ordinary persons provokes automatic

¹⁰⁵¹ Some examples of animals exercising such medicine power include William Berens, “The Boys Who Tormented the Pelicans” in A Irving Hallowell with Jennifer SH Brown & Susan Elaine Gray, eds, *Memories, Myths, and Dreams of an Ojibwe Leader* (Montreal & Kingston: MQUP, 2009) at 88; Charles Kawbawgam, “The Girls and the Porcupine” in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893-1895* (Wayne State University Press, 1994) at 108. Examples of humans (generally tent shakers) with such power include William Berens, “Teasing and Retaliation—The Rolling Head”, in A Irving Hallowell, ethnographer, Jennifer SH Brown & Susan Elaine Gray, eds, *Memories, Myths, and Dreams of an Ojibwe Leader* (Montreal & Kingston: MQUP, 2009) at 86-87; Morrisseau, *Legends of My People* at 76-81.

¹⁰⁵² Elder Bessie Mainville (18 August 2013); Elder Bessie Mainville (17 June 2014).

¹⁰⁵³ In a statement which traverses several of these categories, Edward S. Rogers observed that *onjinewin* “occurs when a person abuses an animal or another person, is sacrilegious, has improper sexual relations, or fails to tell his dreams to his male descendents.” Rogers, *The Round Lake Ojibwa* at D23.

¹⁰⁵⁴ Teaching of anonymous elder #1 (22 January 2016) Fort Frances, Ontario; A Irving Hallowell, “The Social Function of Anxiety in a Primitive Society” in Jennifer S H Brown & Susan Elaine Gray, eds, *Contributions to Ojibwe Studies: Essays, 1934-1972* (Lincoln: University of Nebraska Press, 2010) 291 [Hallowell, “The Social Function of Anxiety”] at 295; A Irving Hallowell, “Psychosexual Adjustment, Personality, and the Good Life in a Nonliterate Culture” in Jennifer S H Brown & Susan Elaine Gray, eds, *Contributions to Ojibwe Studies: Essays, 1934-1972* (Lincoln: University of Nebraska Press, 2010) 325 [Hallowell, “Psychosexual Adjustment”] at 329; Rogers, *The Round Lake Ojibwa* at G12. Rogers lists particular forms of illness associated with *onjinewin*: “The symptoms of *onjinewin* are varied and numerous – weakness, hip deformity, pain in the side, pain in the groin, skin disease, pain across the chest, bloody bowel movements, and urinary disorders.” *Ibid* at D23 (he provides case studies from D23 to D26).

¹⁰⁵⁵ Elder Bessie Mainville (17 June 2014); Geyshick, “About Winning” at 158; Hallowell, “Psychosexual Adjustment” at 329.

¹⁰⁵⁶ Elder Bessie Mainville (18 August 2013); Elder Bessie Mainville (17 June 2014); Elder Bessie Mainville (12 January 2016); Grandmother Sherry Copenace (24 June 2018); Hyslop et al, *Diantu Balai Betl Nahidei* at 173 (elder Harry Bone speaking); Hallowell, “The Social Function of Anxiety” at 295; Hallowell, “Psychosexual Adjustment” at 329; William Berens, “Murder Followed By a Daughter's Sickness” in A Irving Hallowell with Jennifer SH Brown & Susan Elaine Gray, eds, *Memories, Myths, and Dreams of an Ojibwe Leader* (Montreal & Kingston: MQUP, 2009) at 85-86. Rogers states, “The precise meaning of the term *onjinewin* is difficult to define. It refers to illness, but includes a number of different types which are the result of past actions either of the victim or some member of his family.” Rogers, *The Round Lake Ojibwa* at D23. He extends the potential intergenerational impact of unaddressed *onjinewin* further still: “The illness may effect the originator of the improper action, his son, his son's son and/or his son's son's son.” *Ibid*, with examples at D24-D25.

¹⁰⁵⁷ The glossary to *Untuwe Pi Kin He* gives “Baataa'aa” as “To inadvertently hurt a friend, negative consequence to another by someone else's action(s)”. Pratt et al, *Untuwe Pi Kin He* at 118.

¹⁰⁵⁸ Elder Bessie Mainville (18 August 2013).

consequences, noting in particular that “any departure from culturally evaluated sex behaviour provokes its own penalty—disease and sometimes death.”¹⁰⁵⁹ He proceeds to note the purported cause of reciprocation: “The significant thing is that the supernaturals have nothing directly to do with this. There are other obligations one owes them. *The universe is simply constituted in such a way that disease automatically and inevitably follows sexual transgression.*”¹⁰⁶⁰

I take the point that *onjinewin* applies in the case of bad acts to *all* persons, but as for the cause in the case of reciprocation amongst non-*manidoog*, non-medicine targets, I’ve been taught differently than Hallowell. Importantly, what I’ve been taught about this supports the general theory of rooted legality put forward. A section of George Copway’s narrative about Wendat-Haudenosaunee wars in the first half of the 17th century reveals a key insight. In Copway’s narration, the devastated Wendat threw themselves upon the mercy of the Anishinaabeg (in this instance, Odawa, Ojibwe and Menomini peoples), who ignored their pleas owing to past Wendat violations of a treaty between their peoples.¹⁰⁶¹ Copway writes of this reply:

They had not forgotten their former treaties, or that their faith in the sacredness of them, confirmed by the pipe of peace, had been violated. The allies of the Ojibwas had been trifled with; they must now receive the reward of their perfidy, *for the frown of that Monedoo before whom they had consented to smoke the pipe of peace, rested upon them.*¹⁰⁶²

Here Copway has involved Gizhe Manidoo in the interaction. His use of the term “reward” signals a cause-effect relation: the current suffering of the Wendat is the effect of their past wrongdoing and it is Creator, not the Anishinaabeg, who enacts reciprocation. The Anishinaabeg, on Copway’s account, simply refuse to stand in the way.

Still, this isn’t quite the account needed to establish Creator as an indirect reciprocating agent. Some might claim that in a fashion, Creator is simply involved in direct *onjinewin* reciprocity here, just like other *manidoog* generally. This would follow, the argument might go, from the Wendat’s misuse of *opwaagan*, the sacred pipe, the very purpose of which is to invoke Creator’s presence in the relationship being formed. The question arises then as to whether there’s a sense in which Creator has an indirect stake in inter-person interactions.

We’ve learned that within rooted legalities, the answer is yes—and in all of them. Recall what we learned from the *aadizookaan* in which Waabooz had eaten all but the last rose, which in a context of radical interdependence, put the welfare of all at risk. As the community members determined to vent their fury on Waabooz, Makwa, the bear, interjected to save his life, reminding all that Waabooz was put here for a reason. Under Creator’s original instructions, Waabooz, too, was given a gift to use for the benefit of others; Waabooz, too, is a co-creator. And since creation is Creator’s vision made real, which Creator wishes to continue, Creator does indeed have a stake in the continuing capacity for creative contribution of each of us. And the fact that Creator is all-knowing¹⁰⁶³ ensures that no bad action goes unseen:

¹⁰⁵⁹ Hallowell, “Psychosexual Adjustment” at 329.

¹⁰⁶⁰ *Ibid*; citation removed; emphasis added.

¹⁰⁶¹ Copway, *Traditional History and Characteristic Sketches* at 69-70.

¹⁰⁶² *Ibid*; at 70; emphasis added.

¹⁰⁶³ Teaching of elder Bessie Mainville (29 August 2013) Couchiching First Nation; Hyslop et al, *Dtantu Balai Betl Nahidei* at 85; Blackbird, *History of the Ottawa and Chippewa Indians* at 103; Broker, *Night Flying Woman* at 55, 56. See further examples in Stark, “Nenabozho’s Smart Berries” at 350-351.

God or the Great Spirit sees all things everywhere, night and day, and it would be impossible to hide our actions, either good or bad, from the eye of this Great Being. Even the very threshold or crevice of your wigwam will be a witness against you, if you should commit any criminal action when no human eye could observe your criminal doings, but surely your criminal actions will be revealed in some future time to your disgrace and shame.¹⁰⁶⁴

That Creator is always indirectly involved in the receipt of a bad act establishes that reciprocation is not strictly limited to parties directly acted upon, and thus that *onjinewin* is triggered for bad acts impacting upon ordinary persons. Finally then, we can appreciate what was, initially, for me one of *nokomis*' more remarkable statements: "If you do something wrong, it will get back at you as well. Almost as if saying, 'Creator, I'll teach you a lesson too!'"¹⁰⁶⁵

This brings the discussion on force within rooted systems of law to a close. I've structured the discussion in respect of the prominence of each of three kinds of persuasive compliance. The first line of force one encounters is positive reinforcement, which is intrinsic to the logic of mutual aid and which seeks to inspire the sorts of positive behaviours upon which mutual aid depends. When it fails, negative social force comes into effect. Owing to the fact of radical interdependence, it's ordinarily sufficient to eliminate courses of action which would deliberately and negatively impact others. Negative social force is primarily internal: since a person knows that social consequences will follow from bad acts, she has powerful incentive not to commit them in the first place. When she persists, external enforcement ordinarily follows.

However when negative social force, too, fails, there's a third kind of force which is triggered. Negative *manidoo* / medicine force operates somewhat differently than the other forms of persuasive compliance in that it isn't necessarily a form of social discipline. Rather, spirit beings or beings with substantial medicine power respond to bad acts they (or theirs) receive. It also operates within a wider temporal frame of reference, perhaps taking years before consequences return to bad actors. But no matter how much time may pass, in a rooted system of law, there's no possibility of 'getting away' with bad acts. Rules—and certainly more generally—don't have a monopoly on order. Thus while persuasive compliance works in a radically different way than, say, coercive legal authority does within a liberal system of law like Canada's, it's also logical, fixed, systematic, and effective.

iv. A Tentative Rooted Law Analytic

Throughout this section, the metaphorical 'leaves' of the rooted legality tree, I've argued for a conception of law-as-judgment. I've explained that that means carefully assessing how the knowledge one has about the responsibilities internal to her myriad kinships best maps to the interaction at issue. Although he presents it as a thought experiment, Gordon Christie seems to have this understanding in mind when, after arguing the constructivist case that "sense is made of obligations within a cultural-historical setting",¹⁰⁶⁶ he presents the possibility of an alternative vision of law from a particular kind of cultural-historical setting:

When mature the expectation is that each will know—and act in light of the knowledge of—who they are in relation to all others, knowledge that spurs the 'right action'. In such a society rules

¹⁰⁶⁴ Blackbird, *History of the Ottawa and Chippewa Indians* at 13.

¹⁰⁶⁵ Elder Bessie Mainville (12 January 2016).

¹⁰⁶⁶ Gordon Christie, "'Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27 Can J L & Jurisprudence 259 at 279.

are few, as they are generally unnecessary—the society of mature individuals is not one of independent beings each searching on her own for a sense of what is right to do in particular situations (which generates endless coordination problems, one mode of resolution of such being the creation of complex systems of rules and the institutions that surround them). Rather, in this society—properly functioning—each person goes into a morally complex situation not only having a grounded moral sense, but one crafted such that it is generally shared (or consonant) with those around.¹⁰⁶⁷

We’re now in a position to unpack Christie’s hypothetical and suggest that (1) “mature individuals” are those who, through long immersion in their community’s legal traditions, have become self-governing; (2) “who they are in relation to all others” is kin; (3) the statement “her own sense of what is right to do in particular situations” refers to the exercise of law-as-judgment; (4) the “grounded moral sense” Christie describes is gratitude/responsibility; and (5) it’s “crafted such that it is generally shared” because it’s learned through common legal traditions, because it relies on a conception of force that involves the wider community, and because it exists within a common kinship, locating and lived by each and all.

With the picture in view, and understanding that the effectiveness of rooted law comes down to the legitimacy of its deliberative framework, I present a tentative eight-step analytic for the practice of law-as-judgment. I proceed as if an individual were engaging it, but as we’ve discussed, the reasoning body might be a group or even the community generally (i.e. *zagasawe’idiwin*) which does so.

1. The Analytic

- 1) *Determination of the nature of the legal interaction.*
 - a. Am I being presented with a gift (which calls for gratitude and reciprocity), or a need (which calls for responsibility and reciprocity)?¹⁰⁶⁸
- 2) *Invoking the kinship superstructure.*
 - a. What are the relationships (actual and/or constructive) structuring this interaction?
- 3) *Identifying and scoping the relevant responsibilities.*
 - a. What are the responsibilities internal to each governing relationship and how far do they reach within it?
 - i. In taking up this question, I draw internally from my training in the legal traditions of my community. This will generally require that I use all four of my modalities of reason.
 - ii. Where possible, practicable, and relevant, I also draw externally from relevant knowledge others share.
- 4) *Contemplating persuasive compliance.*
 - a. My response may represent the perspectives and commitments of others with whom I’m closely or uniquely radically interdependent. Upon whom does my answer reflect? Who does it bind? My answer to these questions will powerfully constrain the scope of my license to reply and may well require me to enter into dialogue with others before offering my response. These are the sorts of questions I might ask as I walk myself through all three kinds of persuasive compliance.

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ A third possibility is that I’m presented with what I call a ‘taking’, but for reasons explained below I’ve excluded takings from this analytic.

5) *Provisional Analysis.*

- a. The foregoing four steps—the core of the analysis—leads me to a tentative decision that maps the immediate interaction against the relevant responsibilities within my relationship(s) with the immediate party(ies).
 - i. This provisional decision is merely a device used to advance the analytic; it is as yet premature and thus not intended as a basis for action/communication.

6) *Contextual considerations.*

- a. *Relational.* Are there intervening or supervening relationships involved here, and if so, what are the responsibilities internal to them?
 - i. They may agree or they may conflict with the responsibilities internal to the governing relationships.
- b. *Situational.* Spatial and temporal specificities might modify how I would otherwise decide the matter (while situational considerations are properly their own category, it will often be the case that situational and relational considerations overlap).
 - i. Example questions might include: am I in someone else's territory, and if so, is this relevant with respect to responding to the gift/need at issue? Is the time of year relevant to my receipt of the gift/need or to how I may respond to it? Is there a context of ceremony that bears relevance? Does this person have a history of abusing their relationships, for instance taking too much from others? Is there a history of previous substantive agreement or disagreement (for instance, in the case of a treaty relationship)? These questions can only serve as guides; there can be no exhaustive list.
- c. *Discursive.* In judging what the appropriate decision to the interaction at hand is, it's necessary but insufficient for me to measure the application of responsibilities within the relevant relationships to the current interaction—even attending to additional layers of relational and situational complexity. Beyond all of this, there remains the question of power. Not all of us, all of the time, lives our relationships in a good way (even if unintentionally).
 - i. How is power operating *within* the relationship(s) at issue, in this instance?
 - ii. Are there larger and possibly patterned problems of power distribution doing work *across* relationships here (whether between me and the immediate party(ies), or between immediate parties and contemplated third parties)?

7) *Reconciliations.*

- a. I have to pull all of this together into a clear and rational decision—and it must be one which, upon request, I can effectively communicate to others. This requires that I reconcile my provisional analysis with any contextual considerations arising.
 - i. *Relational reconciliations.* I must do my best to reconcile the responsibilities of intervening and supervening relationships with those that are internal to the governing relationships. This is as much art as science. Recall that while a person's freedom (i.e. grace and equality) must be respected, there are no rights-claims constraining creative possibility. Freed from the logic of rules, it may be possible to respect multiple seemingly conflicting responsibilities.
 - ii. *Situational reconciliations.* The provisional response may need to be modified in light of (in particular) spatial or temporal facts germane to the circumstances at issue.

- iii. *Discursive reconciliations.* The movement from provisional to final decision must reflect consideration of any power relationships at issue. However, how to do so is, like everything else within a rooted conception of law, a matter of good judgment.

8) *Final analysis: the decision.*

- a. At the end of this process, I must come to a course of action: what am I to do?
 - i. I must communicate my response, reciprocating the corresponding action.

2. Justification and Intelligibility

All systems of law require justification for particular decisions, even if that justification is as thin as deference to a sovereign's command. In the common law, justification is paradigmatically sought formally. A community member claims that someone has violated her rights and seeks recourse through a court or administrative process which places the impugned action/omission under examination. For rooted peoples justification is no less important, although for all the reasons we have seen its process will necessarily be quite different. Given its strident emphasis on contingency, presumably the justificatory standard for decision-making will also be unique.

Given the inherent subjectivity of law-as-judgment, a justificatory issue which looms especially large is intelligibility. In the case of rooted law, this means that community members engaged by the issue at hand (especially, for instance, close family members) need to be able to follow the decision-maker's reasoning through the analytic.¹⁰⁶⁹ To make good on Borrows' concern with the internal integrity of indigenous (for me, rooted) law, any account thereof must take this challenge seriously.¹⁰⁷⁰

Insofar as intelligibility goes, it's necessary but not sufficient to identify that rooted law's predictive quality is maintained through the conditioning power of kinship links, and that because community members experience roughly the same normative formation through common rooted legal traditions, most of them, most of the time, facing similar circumstances will come to a similar decision. Indeed, in some cases, patterns of action manifesting responsibility within particular kinds of relationship may be so frequently repeated (and thus their result so commonly accepted) that they appear as determinate ends.

But if 100 consecutive decisions achieved the same result under the same circumstances, it would remain true that no rule applies, because in each instance the decision turns on an active assessment of responsibilities, not a passive invocation of established rights.¹⁰⁷¹ And so long as responsibility remains the logic of law, it will be insufficient to point to the common formation of legal character, for the reason that diverse community members won't *always* decide matters the same way and rooted law must survive their disagreement.

Similarly, a robust rooted conception of law must also account for agreement via diverse means. For any given issue, community members' respective pathways through the analytic will

¹⁰⁶⁹ Determining that rooted law is practised by all community members addresses a significant portion of Borrows' concern with the applicability of indigenous law: see Borrows, *CIC* at 155-165. What remains provisionally unanswered is the question of applicability to non-community members present within the space of the community. However, we already have the tools to offer a provisional answer. Since the boundaries of community are open, the answer turns on what kind of relation the non-member is identified as.

¹⁰⁷⁰ Borrows, *CIC* at 138.

¹⁰⁷¹ I'm unsure how the concession is warranted, but I note that Clifford allows for indigenous law to take the propositional form of rules. He argues that indigenous law can't be *reduced* to rules, for one's reasoning through rules is what matters most: *ibid* at 96; Clifford, "WSÁNEĆ Legal Theory" at 759, 770, 778, 787, 787-788, 788.

vary, perhaps most importantly at step 3, given that although community members will ordinarily have received the same general training in their community's legal traditions, they'll have been exposed to distinct substance: specific earth teachings, elders' teachings, *aadizookaanan*, family histories, etc.

Community members looking for intelligibility in the decision-maker's justification don't expect to agree on the details of each point along the way. But in order to hold faith with the decision, they need to recognize its analytic integrity.¹⁰⁷² Even if the answer offered isn't the one he would have arrived at, a community member must be able to appreciate how he might have done so, in order to be persuaded of its reasonableness. I want to suggest that what's required then is a two-part justificatory standard of formal *plausibility* and substantive *adequacy*.

Formally, the sources of legal knowledge upon which the decision-maker relies, and her interpretations of them, must be plausible. Substantively, the decision-maker's reciprocal action must be adequate to the gift or need with which she has been presented. Plausibility-adequacy is a justificatory standard which respects the inherent subjectivity of law-as-rules and the community-wide commitment to contingency, while providing for predictability in law. The result—at last—is to establish the boundaries around rooted law, which we said at the outset would need to allow for a range of possible answers on every issue.¹⁰⁷³

Some might worry that adequacy is too squishy a substantive standard to be useful, and that it succeeds only in pushing the decision-maker's unbound subjective freedom a level of analysis further down. I don't think this worry is nearly as serious as it might seem. Unless the decision-maker is prepared to accept the consequences which follow from non-resolution of the matter, he *needs* to obtain the agreement of immediately-involved parties, and where the matter is one of broader community interest, he *hopes* to obtain it from others too. Once more, everyone and no one is a cop and persuasive compliance is a full answer as to why.

Where decision-makers interpret open matters in narrow ways which serve their own interests and which work against those of the gift-offering/need-presenting party (and their radical interdependencies), those with stakes in the decision are likely to reject the result—a possible consequence present at each of the eight steps in the decision-maker's mind, heart, body, and spirit. As the logical consequence of judgment born into the routine and ubiquitous practice of law, this risk is inescapable—and serves as a powerful disincentive for abuse.

v. Takings

Before closing off this chapter, I wish to turn to a matter previously reserved: what I call 'takings'. Although the scope of a dissertation doesn't permit me to explore takings, I'd like at least to explain what I mean, to close what would otherwise be a critical gap in my account.

Thus far, the entire discussion on rooted law has proceeded as if there are only two kinds of triggers for legal interactions: those beginning with the offering of a gift and those beginning with the presentation of a need. These were natural choices to centre in this work because of its central focus on constitutionalism: as I've explained, gifts and needs serve as the starting points for mutual aid. Thus the two kinds of legal interactions I've sought to explain flow directly from

¹⁰⁷² Some communities have a more structured form of deliberation, which includes elements intended to actively promote reliability. See for instance Williams, *Kayanerenkó:wa* at 138-139.

¹⁰⁷³ Robert Clifford responds to the prescriptive indeterminacy of WSÁNEĆ law saying that stories help community members to internalize norms within an "acceptable range". Clifford, "The Emerging People" at 84, 107, 108, 111. See also (and especially) Clifford, "WSÁNEĆ Legal Theory" at 778, 791-792.

a rooted constitutional context.¹⁰⁷⁴ Yet there's a third kind of trigger for legal interactions which I've hived off: interactions that begin when one person simply *takes* a gift from another, in direct conflict with rooted constitutionalism.

Within Canadian law, the analogous notion is conceptualized as 'harm'. We tend to speak of it just so, as harm *full stop*. But this practice betrays one's liberal worldview. Harm only appears as harm *full stop* because the reality that harm is always *to autonomy* is so deeply ingrained and taken for granted that it would be bizarre to specify it. But the fact that harm is a distinctively liberal way of imagining impairments to the legal interests of persons is why it's an inappropriate term within rooted legal theory.¹⁰⁷⁵

Consider the standard categories of Canadian law as presented in a typical first-year common law school curriculum. Tort law regards the involuntary obligations persons are owed; contract law regards the voluntary obligations persons are owed; property law regards the extension of one's autonomy over non-persons; criminal law regards the obligations that persons owe to society as a whole; constitutional law regards the obligations the state owes to persons. Autonomy serves as the organizing criterion of Canadian law (the first three examples track aspects of private autonomy; the last two, public). When something illegal happens within any of these areas of law, the associated aspect of autonomy has received some kind of impairment. We often conceptualize it as a harm.

All of this is irrelevant to rooted legalities, which have nothing to do with autonomy. In a rooted legal context, actions which visit impairments on persons are more appropriately represented as 'takings'. The relevant constitutional context isn't concerned with the inviolate integrity of autonomous individuals, but rather with the open communication of gifts and needs in radically interdependent relationships. 'Taking' is thus a conceptualization internally consistent with the relevant constitutional idiom.

1. Preliminary Takings Categories

One might wonder whether this arc of argument is wasted effort. Why should the way in which we imagine and represent impairments to persons matter? How we categorize impairments bears directly upon the nature of the remedies we imagine they contemplate. As we've discussed, the legal categories that mutual aid renders up are defined by lived kinship roles, not by subject matter categories designed to reflect distinct kinds of autonomy interests. As a provisional sketch, we might then think of categorizing takings in the following ways.

First is the taking of material things which aren't persons. This category is defined by the fact that the original possessor doesn't have an active relationship with the thing taken; her claim to it is one of ownership-over, not of responsibility-to. However, note that as a second-order consideration such objects may well be necessary for realizing one's responsibilities within her

¹⁰⁷⁴ A thesis to test in future research turns on the following question: are remedies for kinds of wrongdoing which in mutual aid terms are unconstituting of community (banishment and intentional killing, for instance) constrained in applicability to takings? Or are they available also for failures of *bimiwinitiziwin*: acts which merely err in their exercise of the analytic. Such errors are illegal, but not unconstitutional: they fail in adequately *manifesting* the logic of mutual aid (whether the gift→gratitude→reciprocity or the need→responsibility→reciprocity analytics), but don't *flout* it. My thesis is that such remedies are reserved for takings.

¹⁰⁷⁵ Canadians might speak loosely of 'harm' to plants, animals or to inanimate objects, but Canadian law doesn't recognize such consequences as harms. For instance, one can't bring an action on behalf of an animal or an inanimate object which has suffered 'harm'. However, as the person who *owns* the 'harmed' animal or object, one may well be able to bring an action in respect of the harms *she* has suffered by virtue of the loss.

active relationships, or may issue from such relationships and be necessary to sustain them. In a sweatlodge, I was given to create a headband; it's an example of this kind of object.

A second category would be the taking of material things which are persons. Here we've crossed a critical conceptual line in rooted taxonomy: this kind of taking directly disrupts an active relationship. A great many sacred objects fit into this category, notably drums¹⁰⁷⁶ and pipes, who are part of our kinship (commonly as grandfathers).

A third category includes inchoate things. Some examples include songs, dances, visions, names, legends, medicines, and ceremonies. Many of these kinds of things are persons but even those which aren't nonetheless form part of a sacred relationship one has with spirit.

Despite these differences, all three categories follow the same straightforward logic in which A takes something which is external to B but which belongs to B.

There's another kind of taking which doesn't share this logic, wherein the thing A takes *is* B, whether in whole or in part (of B's body, mind, spirit, or heart). Common law analogies might be harms like murder, forcible confinement, kidnapping, human trafficking, voyeurism and assault: harms which fundamentally impair the dignity of persons and which, in general, are thus contemplated within the criminal law category (in Canada, often now codified¹⁰⁷⁷).

Within a rooted constitutional context, actions of this sort certainly break the boundaries of permissible behaviour within established kinship roles. But the consequence of such boundary-crossings is overwhelmed by the far more dire consequence of having broken our primordial relationship within the creative order: the relationship each of us shares with all others as co-creators. Recall the teaching from the *aadizookaan* of the last rose: everyone was put here for a purpose; it's not for anyone to judge the value of another's purpose. Thus to take one's co-creator, even in part, is to openly challenge creator's vision for creation.

There are at least two ways of thinking about this category of takings within the logic of mutual aid. The first is that persons don't just *have* gifts; they *are* gifts. Basil Johnston reminds us of this way of thinking in his story, "The Gift of the Stars".¹⁰⁷⁸ Southwind, a small boy, has received a teaching from his grandmother but he struggles to understand it: "His mind was too small, too young to understand how stars and babies and gifts could be the same thing."¹⁰⁷⁹ That persons are gifts is why practices of honouring feature so prominently within rooted societies. We sing honour songs and we celebrate significant accomplishments and transitions within our community members' lives. This is an emphatic point within *nokomis*' teachings.¹⁰⁸⁰

A second rationale for the prohibition on taking from persons *qua* persons involves a temporal dimension. The discussion so far concerns the taking of gifts *per se*, but it need not suffer this limitation. It's consistent with the logic of mutual aid to concern oneself also with another's *capacity* for gift, because it can be reframed in terms of future gifts. This way of seeing the matter helps to clarify that we need not venture from the immanence of our active relationships (and hence from a pragmatic orientation) into abstraction. Because rooted societies

¹⁰⁷⁶ Elder Bessie Mainville (18 August 2013); Elder Bessie Mainville (2 December 2015).

¹⁰⁷⁷ *Criminal Code*, RSC 1985, c C-46.

¹⁰⁷⁸ Johnston, "The Gift of the Stars".

¹⁰⁷⁹ *Ibid* at 19.

¹⁰⁸⁰ Elder Bessie Mainville (18 August 2013); Teaching of elder Bessie Mainville (22 August 2013) Couchiching First Nation; Elder Bessie Mainville (6 January 2016). If I were to consider *noko*'s teachings on coming of age ceremonies, there would probably a dozen more citations here.

move in a circle, they're always already concerned with the interests of future generations and they hold themselves responsible within these as yet unrealized kinships.¹⁰⁸¹

As triggers for legal interactions and thus for law-as-judgment, takings begin by violating both the grace (takings flout sacrifice) and equality (takings flout respect) conditions of co-creativity, rendering community members who find themselves the objects of takings unfree. As such, takings cut against the constitutional integrity of community, rather than manifesting as specifications of the gift- and need-originating mutual aid practices which sustain it. In a dissertation focussed generally on legality and specifically on constitutionalism, this makes serious study of takings a natural (if unfortunate) exclusion.

In closing chapter six, I recognize that my argument for rooted legality contains errors as yet unknown to me. This has happened in each of my works to date.¹⁰⁸² Others who see differently or who simply see more than I do will identify issues missed or misidentified, counter-arguments I haven't considered, and assumptions I was unwarranted in making. And yet still I hope there's enough here, presented with sufficient rigour, that skeptics will be constrained to acknowledge the intelligibility of the rooted conception of law I present.

If so, then the universal legalities fallacy is dead and indigenous constitutional orders shall now have to factor into indigenous-settler relationships on Mikinaakominis. The next chapter thus returns to Manito Api and centres the question of the future merged path.

¹⁰⁸¹ Elder Harry Bone explained to me that “in our language it’s ‘aanikoobijigewin’” (Elder Harry Bone (16 June 2018)) and “That’s why sometimes they say that ‘seven generations’”. *Ibid.* Elder Bone likely refers here to the fact that in *anishinaabemowin* we use that same word, *aanikoonijige*, to refer to great-grandchildren and to great-grandparents, drawing a link across seven generations. He emphasized, “When they say that, it means that you’re making that connection.” *Ibid.*

¹⁰⁸² My best example may be an essay I wrote in 2013 as I was just beginning to understand the ideas now central to this dissertation. As my first effort at articulating some of those ideas, it contains a critical error. I defined ‘responsibility’ in the context of Anishinaabe law as “obligations and entitlements”, the very language of contract which flips constitutional logics and thus which I now so strongly reject. See Aaron Mills, “Opichi: A Transformation Story, an Invitation to Anishinaabe (Ojibwe) Legal Order” (2013) 34:3 *For the Defence* 40 at 45.

7. Legality Pluralism

Chapter seven marks a transition in my dissertation from disclosure of legality difference to its application in indigenous-settler relationships on Mikinaakominis. Having communicated my understandings of both liberal and rooted legality, and in particular, of liberal and rooted kinds of constitutionalism, here I take up the question of which of the two ought to serve as the merged lifeway to which all can belong. Since one answer would simply shift the violence of constitutional imposition to settler peoples, this chapter sees a shift in the language I use. I approach the question with a view to non-violence generally, not colonialism specifically.

To that end, I argue for two principles of indigenous-settler reconciliation which any candidate model of indigenous-settler relationship must meet in order to avoid giving violence pride of place in organizing the relationship. The exploration and determination of these principles is the work of the first of chapter seven's two parts. The first principle, constitutional dialogue, follows from what has already been argued; I merely state how this is so and announce the principle. The second principle, earth reconciliation, takes some work to produce.

The first step involves an examination of the theses which liberal and rooted communities hold about the relationship of constitutionalism relative to earth (the sovereignty and humility theses, respectively). Taken together, these two theses are the first cause of my argument from incommensurability. Since reconciliation must take the form of either a liberal or a rooted lifeway, yet must be non-violent for both groups, the second move is to test how the subjects of each fare against the earth-relativity thesis of the other. I conclude that the humility thesis isn't necessarily violent to liberal subjects (in general, settlers) but that the sovereignty thesis is to rooted ones (in general, indigenous peoples). In the result, reconciliation requires that all peoples take the humility thesis as the starting point for their communities, which is to say that reconciliation requires that all constitutional logics be reconcilable to the earthway.

The second part is an exploration of how various commonly proposed models of indigenous-settler relationship fare against the two reconciliation principles. I conclude that assimilation, legal pluralism and hybridity models fail the first principle. I consider sovereign nation models and conclude that they may pass the first principle but at least in the standard case, fail the second one. However I look closely at a particular indigenous nationalist, Heidi Stark, whose project I think satisfies both principles. Finally, I consider three conceptions of treaty. The first two accounts fail, but the third one, treaty mutualism, satisfies both principles. I explore it in more detail so that it can be more richly understood.

a. Principles of Indigenous-Settler Reconciliation

The reason for fleshing out these two conceptions of legality is so that we understand why they can't be combined and so that we can capably choose between them as we consider how best to place the lifeway rocks which remain. I'm at Manito Api watching the two side paths slowly converge, wondering what should happen once they meet. I began my journey towards an answer with the claim that indigenous law has to form part of this alternative ground and in working to deepen my justification for that claim, have considerably expanded its scope: first from law and legal traditions to lifeways, and then to legality.

Disclosing the fact of legality difference is a necessary step in showing the depth of colonial violence, that the principle of settler supremacy enables colonization not only of indigenous peoples' systems of law, but also of the unique legalities which generate and sustain

them. Ending settler supremacy, then, shall have to mean revitalizing the rooted legalities indigenous communities inhabit.

This consequence narrows the focus of the question this dissertation poses. Instead of hanging the prospect of indigenous-settler reconciliation on the termination of settler supremacy, we can now ask how to reconcile our relationship in light of legality difference.

I suggest there are two principles which must be practised if indigenous and settler legalities are to be reconciled, and a shared path forward opened up. The first is already implicit in the foregoing and thus can be quickly stated; the second shall require additional argument.

i. First Principle of Indigenous-Settler Reconciliation: Constitutional Dialogue

I've argued that, since it serves as the logical-structural level of legality, constitutionalism is the most critical difference between rooted and liberal legalities. Since the termination of settler supremacy requires respect for indigenous constitutionalism, indigenous-settler reconciliation requires that we trade out constitutional capture for constitutional dialogue.

I'm certainly not the first to have suggested that reconciliation between indigenous and settler communities requires constitutional dialogue. Much of James Tully's work makes this point,¹⁰⁸³ as does Sákéj's brilliant and original work on treaty federalism,¹⁰⁸⁴ supported and expanded upon by Kiera Ladner.¹⁰⁸⁵ As I've worked my way through a detailed study of rooted (and in particular, Anishinaabe) legality towards the necessity of constitutional dialogue, I've walked in their footsteps. With the universal legalities fallacy shown false, it follows that any candidate model for indigenous-settler reconciliation shall have to respect the principle of constitutional dialogue.¹⁰⁸⁶

¹⁰⁸³ This is arguably the central theme running throughout James Tully's many works, which is largely how I came to think seriously about it. Tully's first comprehensive treatment of the topic was Tully, *Strange Multiplicity*, and he considerably developed his concept of constitutional dialogue through Tully, *PPNK*. Since the publication of that two-volume set, he has continued to reflect on the topic through many articles and public talks, in particular, on the role of earth within human constitutional dialogues.

¹⁰⁸⁴ See James [Sa'ke'j] Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72:1 Sask L Rev 29; James (sákéj) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241 at 248; James Youngblood Henderson, "Implementing the Treaty Order" in Richard Gosse, James Youngblood Henderson and Roger Carter, eds, *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Purich Publishing, 1994) at 52; James (Sákéj) Youngblood Henderson, "Sui Generis and Treaty Citizenship" (2002) 4:6 *Citizensh Stud* 415; James (Sa'ke'j) Young Blood Henderson, "Incomprehensible Canada" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: UTP, 2013) 115.

¹⁰⁸⁵ Kiera Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in *New Trends in Canadian Federalism*, 2nd edition, Francois Rocher and Miriam Smith, eds, (Peterborough: Broadview Press, 2003) 167; Ladner, "Take 35".

¹⁰⁸⁶ I'm hopeful that this requirement does away with the unhelpfully ambiguous ideal of a 'nation to nation' relationship. The trouble with conceiving of the relationship in this way (which Will Kymlicka has so expertly used, and Dale Turner, critiqued) is that it allows for the possibility that indigenous peoples' political claims of Canada can be adequately accounted for as a unique species of minority rights (in Kymlicka's language, as the claims of 'national minorities'), and thus subsumed *within* the ambit of liberal constitutionalism. As such, it serves to sustain settler constitutional hegemony when this is the very injustice rejected. See Kymlicka, *Liberalism, Community and Culture*; Kymlicka, *Multicultural Citizenship*; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: UTP, 2007) [Macklem, *Indigenous Difference and the Constitution of Canada*] at 61-62; Turner, *This Is Not a Peace Pipe* at 66-70. See also Chartrand, "Eagle Soaring" at 52-53, 83-84.

Colonialism, our current model of indigenous-settler relationship, fails by virtue of its violence to indigenous lifeways. Of course, this is soft-peddling reality. Colonialism hasn't 'failed' to respect the principle of constitutional dialogue; it has deliberately sought to eviscerate it: to not only replace, but also annihilate indigenous constitutional orders so that they can't be practised, recognized, or even whispered about; so that settler interests can settle permanently, absolutely, and unjustifiably, atop them. At best, Canada thinks reconciliation demands attention to indigenous law in carefully constrained ways which avoid exposing indigenous constitutional erasure.¹⁰⁸⁷ I don't see how the era of reconciliation, if it is to have integrity, can bear such violence. I hope that the disclosure of rooted constitutionalism helps to facilitate its end.

In light of rooted constitutionalism being made intelligible to Canadians, I can see three main options for Canada. First (and preferably), it could reject settler supremacy and begin to work with indigenous peoples, rooted Canadians and curious relatives to grow indigenous-settler relations on better grounds. Second, errors fatal to my diagnostic argument and/or to my positive project might be identified causing my critique to collapse, or in the latter case, to remain without offering a viable alternative (which perhaps amounts to the same thing).

Third, I suggested in the introduction that Canada could affirm settler supremacy as a constitutional principle, seizing upon an opportunity the Supreme Court left open in the *Quebec Secession Reference*.¹⁰⁸⁸ I reject this possibility because of its affirmation of violence, yet I appreciate that the difficulty of squaring such a principle with the logic and structure of Canadian constitutionalism would be productive. The doctrinal gymnastics necessary to enable it without unwinding Canada's constitutional fabric would provide invaluable transparency into how Canadian constitutionalism actually and already regards indigenous peoples in ways irreconcilable with its own ideals.

For obvious reasons my argument proceeds in respect of the first possibility, although chapter eight is a way of taking seriously the second one.

ii. Constitutional Dialogue's Conditions of Possibility

Despite the enormous impact respect for the principle of constitutional dialogue would have on Canada's colonial status quo, it remains a minimalist, negative principle. It tells us only how *not* to place the rocks, so as to avoid crushing one another. It says nothing about how the remaining rocks *should* be placed and so offers no clear way forward. It remains for me to clarify which positive conditions enable a genuine dialogue, and to identify obstacles to their realization.

¹⁰⁸⁷ John Borrows, "Listening for a Change: the Courts and Oral Tradition" (2001) 39:1 Osgoode Hall LJ 1 at 24-28; Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UNB Press, 2007) ch 3; Fraser Harland, "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in *Tsilhqot'in Nation v British Columbia*" (2018) 16/17:1 Indigenous LJ 21.

¹⁰⁸⁸ In *Reference Re Secession of Quebec* [1998] 2 SCR 217, the Supreme Court of Canada acknowledged the presence of "underlying constitutional principles", which "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based". *Ibid* at para 49. The Court then recognized that at least four such constitutional principles, "federalism, democracy, constitutionalism and the rule of law, and respect for minority rights" are "defining" and "foundational" (*ibid*), and stated that they "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood". *Ibid* at para 51. However, the Court was careful to reserve space for future elaboration of additional constitutional principles which could share this status. It said, "The following discussion addresses the four foundational constitutional principles *that are most germane for resolution of this Reference*". *Ibid* at para 49; emphasis added. Thus a third option is for Canada to affirm that settler supremacy stands as a fifth equiprimordial constitutional principle.

We might assume that the answer to the first task is to establish a fair procedure and accept whatever outcome follows from its observance. In our case, since any decision about rock placements will establish a shared path forward, such a decision could emerge through an agreement which settler and indigenous parties have negotiated in good faith. But I think this is to assume far too much. In turning to the consent of each party for the legitimacy of the procedure, such an approach smuggles in the liberal ECO-system. Consent implies autonomous parties contracting towards an agreement. This assumption thus applies the liberal ECO-system as the structural condition of any possible dialogue. The result is to prefigure the dialogue's range of possible outcomes before even the first word has been spoken.

However even if this weren't the case, it seems the negotiated agreement model of dialogue must fail in practice. To the extent that indigenous peoples speak from within a rooted constitutional order and settler peoples from within a liberal one, we're speaking different constitutional languages. As James Tully has so carefully explained, perhaps most effectively through his use of Bill Reid's *The Spirit of Haida Gwaii*,¹⁰⁸⁹ until we can hear each other across such a divide, it isn't possible to negotiate a common understanding.¹⁰⁹⁰

How about a more basic question then: if negotiation-towards-agreement isn't a workable model of dialogue, what might a constitutional dialogue across distinct modes of constitutionalism look like? My method has been to try to show that both liberal and rooted kinds of legality are robust and internally consistent. In both cases, the same relationship of empowerment and constraint exists between each of the four levels of the legality tree: creation stories, constitutional orders, legal traditions, and law. Yet in the process of this exposition we've also revealed how very different each kind of legality is from the other. While we can now appreciate the necessity of the first principle of reconciliation, it hasn't resolved our dilemma. While the argument has advanced considerably, we retain the initial conundrum: the profundity of difference between our respective legalities suggests that such a dialogue isn't possible.

1. Rooted and 'Rooted' Constitutionalisms

To begin sorting out this difficulty, and thus to figure out how the remaining rocks should be placed, it may be helpful to consider how rooted and liberal constitutional orders deploy the arboreal metaphor in articulating their own constitutionalism. The Canadian instance is well known to every jurist in Canada. Indeed, one can't obtain a Canadian legal education without learning about it. Speaking for the Judicial Committee of the Privy Council (Canada's then-final legal arbiter) in 1929, Lord Sankey stated that "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."¹⁰⁹¹ The *living tree* metaphor is celebrated for the adaptability it affords contractarian constitutional orders, allowing for the revision—and thus, critically, the continued social relevance—of constitutional doctrine through time. It removed from contention the possibility of constitutional originalism.

Consider how striking the difference is from *ogimaa* and lead orator Mawendopenais' assertion of Anishinaabe constitutionalism in 1873. On the third day of Treaty #3 negotiations, Mawendopenais explained to Commissioner Morris that "the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property.

¹⁰⁸⁹ See for instance Tully, *Strange Multiplicity* at 17-18.

¹⁰⁹⁰ *Ibid* at 24.

¹⁰⁹¹ *Edwards v Canada (Attorney General)*, [1929] JCJ No 2, [1930] AC 124 (JCPC) at 136.

I will tell you what he said to us when he he [sic] planted us here; the rules that we should follow—us Indians—He has given us rules that we should follow to govern us rightly.”¹⁰⁹²

What a stunning contrast! The *British North America Act* “planted” Canadian constitutionalism, and the Great Spirit “planted” the constitutional order of the Treaty #3 Anishinaabeg. In the former case, humans are the creators of their own constitutional orders; in the latter case, the Creator is. This distinction discloses the different senses in which liberal and rooted societies can each claim rootedness. That is, both cases extend my legality model beyond the tree, establishing what empowers and constrains the roots.

In the case of Canada, beneath the roots we find only *human choice*. Canada’s creation story isn’t truly a story (in the sense of narrative) at all, but rather a device. It’s the careful making of a choice and Canadian constitutionalism is the choice made: a social contract in which humanity alone exhausts the social. Here rootedness is a metaphor. Liberal societies have roots only in the idiomatic sense of a genealogy tree: human societies ‘come from’ somewhere in the senses of ethnicity and migration. The ‘roots’ they often speak of aren’t actually *in* anything material. Canada’s ‘living’ tree is free-floating in imaginative space, untethered from earth, water, air, and sun. Recall that the liberal creation story takes as its genesis point the human decision to separate from ‘nature’; political communities are literally defined *in opposition* to a state of nature. Creation of the earth, though it necessarily predates the creation of political communities, is taken as a post-constitutional consideration. If individuals so choose,¹⁰⁹³ they may develop ideas about Creation, but all those who choose to do so, do so within their private lives, safely beyond the purview of public governance.

Within Anishinaabe legalities, roots aren’t a metaphor. Our creation stories disclose our coming-into-being within all of creation: our roots are planted firmly in the earth below and the Creator who put it there (again, creation’s way signifies the relation of Creator-through-Earth). The Anishinaabe legality tree thus grows through and for Creation. Of course, as elders so often remind us, there’s no escaping the hermeneutic character of constitutionalism.¹⁰⁹⁴ We must interpret the part of creation we grow from as best we can, and for this reason no two Anishinaabe constitutionalisms are quite the same.

In sum, rooted creation stories are disclosures of the earthway; liberal creation stories are displacements of it. The critical insight is that each approach represents a distinct *earth-relativity thesis*, which sets the course for the legality it grows, roots through to leaves.¹⁰⁹⁵ To apprehend the possibility of constitutional dialogue, we need to examine what these respective theses say.

¹⁰⁹² Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including The Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co., 1880) [Morris, *The Treaties of Canada*] at 59. Don’t be confused by Mawendopenais’ supposed use of the word “rules”. This is almost certainly a mistranslation of something like ‘instructions’ or ‘judgments’. On the very same page, he’s quoted as saying “The rules laid down are the rules that they wish to follow—a council that has been agreed upon by all the Indians.” *Ibid.* That is, ‘rules’ in precisely the sense of *inaakonigewin*: a careful decision; law-as-judgment. On the next page the ‘rules’ alluded to in this last passage are given: “We ask fifteen dollars for all that you see, and for the children that are to be born in future. This year only we ask for fifteen dollars; years after ten dollars; our Chiefs fifty dollars per year for every year, and other demands of large amounts in writing, say \$125,000 yearly.” *Ibid.* at 60. These ‘rules’ aren’t rules at all, but rather decisions previously settled in council.

¹⁰⁹³ Benjamin Berger describes takes up this cosmological erasure in Benjamin L Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 Osgoode Hall LJ 277.

¹⁰⁹⁴ Pratt et al, *Untuwe Pi Kin He* at 27; Jourdain, “Pazaga’owin” at 15.

¹⁰⁹⁵ See Tully, “Richard Gregg and the Power of Nonviolence” at 12-13.

Having done so, we'll better understand the conundrum of how the converged path—the path both indigenous and settler—can avoid the fate of the terminal middle path.

2. Earth-relativity Theses

Liberalism's displacement of the earthway corresponds to its *sovereignty thesis*. Since creation is inherently unlawful and disordered, and only humans possess the autonomy to choose to live otherwise, we're uniquely responsible for constituting the communities we wish to inhabit. Constitutionalism that follows from the sovereignty thesis is thus a form of engineering. In engineering our communities, we stand alone, masters over themselves. First, in separating ourselves from nature's unlaw and disorder, we separate ourselves from nature.¹⁰⁹⁶ Second, as self-constituted, self-contained, *self-determined* bodies, we separate ourselves from other human communities, with whom we must *choose* to have a relationship.¹⁰⁹⁷

Rooted communities' disclosure of the earthway corresponds to its *humility thesis*. Since creation is inherently lawful and ordered, and all beings participate in sustaining the creative order, humans are responsible for constituting communities reconcilable to the earthway. Constitutionalism generating from the humility thesis is thus a form of reproduction. In reproducing the earthway, human communities stand connected with all others, masters of nothing. In constituting ourselves as a local disclosure of the earthway, we remain always-already in interdependent relationships with all other communities, whether human, animal, plant, *manidoog*, etc.¹⁰⁹⁸ (there are qualitative distinctions between relationships which stand *merely* on the strength of their creative interdependence and intentional relationships).

Taiaiake Alfred's articulation of the humility thesis is an important one because it foregrounds the role of human agency in indigenous constitutionalism:

Unlike the earth, social and political institutions were created by men and women. In many indigenous traditions, the fact that social and political institutions were designed and chartered by human beings means that people have the power and responsibility to change them. Where the human-earth relationship is structured by the larger forces in nature outside human prerogative for change, the human-institution relationship entails an active responsibility for human beings to use their own powers of creation to achieve balance and harmony. Governance structures and

¹⁰⁹⁶ This is true also of Rawls' original position, a sophisticated refinement of the social contract tradition which imagines a 'veil of ignorance' in lieu of a state of nature. Rawls, *A Theory of Justice* at 118. Rawls concedes that a generalization of his theory beyond his use of it "would seem to include only our relations with other persons and to leave out of account how we are to conduct ourselves towards animals and the rest of nature. I do not contend that the contract notion offers a way to approach these questions which are certainly of the first importance; and I shall have to put them aside." *Ibid* at 15.

¹⁰⁹⁷ A brief aside on a possible equivocation on the word 'relationship' is in order. Many liberals accept that selves are socially-constituted and thus that relationships in the sense of *subject formation* aren't necessarily (and in some contexts, couldn't have been) chosen. Yet owing to the ongoing dominance of negative liberty, many still seem to accept that what we might call relationships *of practice* must be chosen if freedom is to be respected. It's this latter sense of 'relationship' to which my claim refers (recognizing that often the two senses of relationship coincide) and in respect of which I think all liberals across their considerable diversity hold their capacity for choice sacred.

¹⁰⁹⁸ "In the First Nations world-view, all creation stories are confirmed by the Elders' language and teachings. Each Nation has creation stories, some are similar and some are quite different. All of them are about how we came into being and how we came to be where we are. They tell of our relationships to the earth, each other, and to other beings." Pratt et al in Pratt et al, *Untuwe Pi Kin He* at 17.

social institutions are designed to empower individuals and to reinforce tradition to maintain the balance found in nature.¹⁰⁹⁹

A small but vital revision to my earlier statement that Creator authors Anishinaabe constitutionalism is thus required. Properly stated, the humility thesis provides that the Creator planted us into the earthway, but we exercise agency in choosing how to fit into it.¹¹⁰⁰

3. Earth-relativity Incommensurability

The tension between theses was brought into clear relief for me in the oral history my elder from Mitaanjugamiing carries. The topic he has returned to more than any other in the ten years I've known him is the damming and subsequent flooding of Rainy Lake in the early 20th century. The dams built throughout the Boundary Waters area (including the dam on Rainy Lake) quite literally represent an engineer's approach to earth transformation. The increased volume of water raised the entire lake many feet, submerging an incredible amount of land.¹¹⁰¹

Omaakakiizaagaa'igan (Frog Lake) was connected to Rainy Lake by *mitaanjugamiing*, an opening two-four feet wide¹¹⁰² in which shallow water moves into a deeper lake.¹¹⁰³ Because it didn't have an open exchange of freshwater, and had an average depth of only about two feet,¹¹⁰⁴ Omaakakiizaagaa'igan was a bog.¹¹⁰⁵ It was well known for *manoomin* (wild rice) and was a feeding ground for migrating birds.¹¹⁰⁶ After the flooding, *mitaanjugamiing* opened up so much that Omaakakiizaagaa'igan became Rainy Lake's Stanjikoming Bay.¹¹⁰⁷ The entire rice habitat was lost, as was a vast supply of medicines, such as *waazhushk watabiig* (rat root).¹¹⁰⁸

These engineered changes in the relationship between land and water were life-threatening for Boundary Waters Anishinaabeg. Shoreline erosion toppled countless trees which

¹⁰⁹⁹ Alfred, "Sovereignty" at 46.

¹¹⁰⁰ Tom Porter pushes the understanding further still, explaining the Onkwehonwe *re*-planting as the Haudenosaunee through the coming of the Peacemaker in this way: Tom Porter, "Traditions of the Constitution of the Six Nations" in Leroy Little Bear, Menno Boldt & J Anthony Long, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: UTP, 1984) 14.

¹¹⁰¹ Anonymous elder #1 (15 June 2014). On several occasions, he suggested as much as ten feet. Teaching of anonymous elder #1 (13 June 2014) Mitaanjugamiing First Nation [Anonymous elder #1 (13 June 2014)]; Anonymous elder #1 (12 December 2015). I note here the extraordinary accuracy of the oral tradition my elder carries. Lovisek, Waisberg and Holzkamm report that the dam, built between 1905 and 1909 raised the water level eight feet: Joan A Lovisek, Leo G Waisberg & Tim E Holzkamm "'Deprived of Part of Their Living': Colonialism and Nineteenth-Century Flooding of Ojibwa Lands" in David H Pentland, ed, *Papers of the Twenty-sixth Algonquian Conference* (Winnipeg: University of Manitoba, 1995) 226 at 234. The Lake of the Woods Control Board's historical charts show considerable fluctuation of Rainy Lake Water levels. Note especially the dramatic changes reflected in the data for 1916 and 1917. Lake of the Woods Control Board, "Historical Graphs", "Rainy Lake". Online: <<http://www.lwcb.ca/historicalgraphs.html>>.

¹¹⁰² Anonymous elder #1 (13 June 2014).

¹¹⁰³ Anonymous elder #1 (12 December 2015).

¹¹⁰⁴ Anonymous elder #1 (25 November 2015); Teaching of anonymous elder #1 (9 November 2016) Mitaanjugamiing First Nation [Anonymous elder #1 (9 November 2016)]; Teaching of anonymous elder #1 (28 June 2018) Mitaanjugamiing First Nation [Anonymous elder #1 (28 June 2018)].

¹¹⁰⁵ Anonymous elder #1 (13 June 2014).

¹¹⁰⁶ *Ibid*; Anonymous elder #1 (25 November 2015); Anonymous elder #1 (9 November 2016); Anonymous elder #1 (28 June 2018).

¹¹⁰⁷ Anonymous elder #1 (12 December 2015).

¹¹⁰⁸ Anonymous elder #1 (13 June 2014); Anonymous elder #1 (15 June 2014); Teaching of anonymous elder #1 (30 August 2014) Mitaanjugamiing First Nation [Anonymous elder #1 (30 August 2014)].

for some communities nearly led to starvation.¹¹⁰⁹ Big trees would snag and destroy gill nets which, lacking money, Anishinaabeg were unable to replace until they received new twine at the next treaty day.¹¹¹⁰ They didn't have enough fish, a protein staple, to survive the winter.¹¹¹¹ The deadwood soon accumulated on the shorelines, making birch bark canoe access impossible. People in the canoes could hear animals on land and yet couldn't get to them.¹¹¹² The rich *manoomin* bed, the primary grain in our diet, was completely destroyed.¹¹¹³ Fish spawning areas for perch, bass and whitefish were also lost.¹¹¹⁴

Myriad secondary impacts also diminished the available food supply. For instance, the destruction of *manoomin* meant that ducks, formerly so populous that they appeared as a black cloud or as smoke and could be heard all night long, no longer stopped here.¹¹¹⁵ Similarly, the destruction of the small fur-bearing habitat (my elder emphasized muskrat in particular) ended spring trapping.¹¹¹⁶ Also, medicine that moose loved was drowned out and moose no longer frequented the area.¹¹¹⁷ Finally, as water levels continued to rise and hills became islands, some camps had to relocate three times¹¹¹⁸ and couldn't return for five years.¹¹¹⁹

My elder offered his view that to cause these sorts of changes in the creative order is to remake creation, something Anishinaabeg are prohibited from doing.¹¹²⁰ I take that this tension between sovereignty and humility theses is also the point of then-chief Potts' remarks about his community's late 20th century experience with settler land management: "Our basic disagreement with the government, with the environmentalists and with the logging companies centres on where the authority comes from to decide what can be done on the land. They believe it's up to the Ministry of Natural Resources to make the decisions, based on what all the user groups want."¹¹²¹ In stark contrast, "We say the authority comes from the land itself"¹¹²²; "The land is the boss."¹¹²³ Tying this line of thought back to the humility thesis, he concludes "Once you know what the land can accommodate and you accept that the land is boss, you're at peace with yourselves because you are in harmony with your natural environment. It's understanding that the land is boss that can get us out of all this confrontation between user groups."¹¹²⁴

¹¹⁰⁹ Anonymous elder #1 (13 June 2014).

¹¹¹⁰ *Ibid*; Teaching of anonymous elder #1 (16 September 2017) Mitaanjigamiing First Nation [Anonymous elder #1 (16 September 2017)].

¹¹¹¹ Anonymous elder #1 (13 June 2014).

¹¹¹² *Ibid*; Anonymous elder #1 (16 September 2017).

¹¹¹³ Anonymous elder #1 (13 June 2014).

¹¹¹⁴ Anonymous elder #1 (30 August 2014).

¹¹¹⁵ Anonymous elder #1 (15 June 2014); Anonymous elder #1 (9 November 2016). On another occasion my elder described the volume of birds as a storm, because their countless bodies caused the whole sky too turn dark and their sound was cacophonous. Anonymous elder #1 (28 June 2018).

¹¹¹⁶ Anonymous elder #1 (13 June 2014); Anonymous elder #1 (15 June 2014).

¹¹¹⁷ Anonymous elder #1 (15 June 2014).

¹¹¹⁸ Anonymous elder #1 (13 June 2014); Anonymous elder #1 (11 August 2017); Anonymous elder #1 (16 September 2017).

¹¹¹⁹ Anonymous elder #1 (11 August 2017); Anonymous elder #1 (16 September 2017).

¹¹²⁰ Anonymous elder #1 (13 June 2014). Three years later, in another context, he again repeated "native people don't redo what the Creator did." Teaching of anonymous elder #1 (4 August 2017) Mitaanjigamiing First Nation.

¹¹²¹ Potts, "The Land Is the Boss" at 36.

¹¹²² *Ibid*.

¹¹²³ *Ibid*. See also Johnston, "The Council / Zuguswediwin" at 169-170: "It is not man who owns the land; it is land that owns man."

¹¹²⁴ Potts, "The Land Is the Boss" at 37.

Thus French philosopher Bruno Latour is correct in his assessment that where the divide between communities is ontological, the gods are at war. But not the gods he imagines. There's a cosmological war to be fought (or avoided) long before the matter of dueling fundamentalisms arises. It's between the incompatible creation-reproducing and human-engineering constitutional orientations which follow from incommensurable earth-relativity theses.¹¹²⁵ In the former sort of community, Creation (again, Creator-through-earth) is god; in the latter one, we are.¹¹²⁶

Thus the challenge of speaking across the rooted-liberal divide is much greater than a communicative difficulty. There's a foundational ECO-system incommensurability beneath the roots of each kind of legality. Any party which has come to appreciate this fact doesn't enter a constitutional dialogue with the intention of winning the other side over by the force of its superior proposals. Rather, having understood the necessity of non-combination, it seeks transformation (whether of itself or of the other side) so that a shared earth-relativity thesis 'takes root'.¹¹²⁷ It's this *common rooting* which explains the Three Paths Prophecy Petroform's fusion of indigenous and settler paths. I've suggested that liberalism's negotiated compromise and post-structuralism's identity hybridity are represented in the middle, terminal path. Constitutional dialogue is enabled—and a common path thus discernible—if and only if all parties are speaking in either a rooted or a 'rooted' (i.e. contractarian) register.

a. Discomfort and Resistance

If we were all asked to consider this matter today, perhaps a majority of Canadians and a great many indigenous persons, too, would feel deeply unsettled by and resist the incommensurability conclusion. As a general matter, people don't want to be forced to make such an enormous, prefigurative choice, regardless of what their respective choices might be. In Canada they're also likely to feel resentment at being asked to do so. Where alternative lifeways aren't taken seriously and thus haven't been disclosed, difference appears to exist only *within* one's own lifeway and not *across* lifeways. This misunderstanding promotes an expectation of free normative interaction, occluding translation's violence. Against such an assumption, claims of incommensurability are easily cast as conservative, protectionist, and backwards: as *anti*-change.

If pressed to choose, feeling threatened we might inadvertently retreat to our respective ECO-systems to justify our act of refusal. Liberals might reject the forced choice for eliminating free choice (the choice not to choose). Postmoderns might likewise reject having to choose, for doing so would affirm a permanent power relation between indigenous and settler subject positions. Both sorts of refusal appear to be informed by a sense that one's autonomy has been violated, and are thus ultimately grounded in a liberal ECO-system. But even if unknowingly done, a retreat to one's own ECO-system is a retreat from the challenge. The persuasive force of such arguments thus fails by virtue its form: those who argue in this way have traded a constitutional dialogue for a monologue the other side won't (and possible can't) hear.¹¹²⁸

¹¹²⁵ Lyons, *X-Marks* at 89.

¹¹²⁶ Sinclair, "Aboriginal Peoples, Justice and the Law" at 176.

¹¹²⁷ Sara Mainville is incisive then when she cautions that "The *Anishinaabeg* also must understand our role as *dibendaagozi*, that we are citizens who are controlled by *Miinigowin*; the laws the Creator gave us. These are first principles for the *Anishinaabeg* and cannot be rooted out by Canadian constitutional laws that have been created unilaterally by the settlers' government." Sara J Mainville, *Manidoo Mazina'igan: An Anishinaabe Perspective of Treaty 3* (LLM Thesis, University of Toronto, 2007) [unpublished] [Mainville, *Manidoo Mazina'igan*] at 125; underlining mine.

¹¹²⁸ Tully, *Strange Multiplicity* at 57.

As discomfoting as it is, we *must* make a choice and it will have sweeping consequences. But if the resulting change promises to be radical in scope, it isn't in principle. We're not looking in at the incommensurability predicament from a safe distance outside of it. No such space exists; no such space ever has.¹¹²⁹ We're looking out at it from within the choice already made: our purportedly shared constitutional order is unequivocally settler in logic and structure, and operates within a settler vision of legality. Canadian lifeway follows from a settler creation story and produces settler legal traditions and laws. How could anyone imagine that reconsidering this choice can (much less should!) be comfortable for settler Canadians?¹¹³⁰ The inescapable question is whether the purposes of indigenous-settler reconciliation should prefer a mutual aid or a contractarian dialogue.

4. Non-violence is a Necessary Condition of Reconciliation

I've emphasized consistently throughout that the problem of indigenous-settler relationships is violence. I've defined colonialism in respect of the principle of settler supremacy, and argued that it consists of three forms of violence. My purposes have required that I focus on colonialism specifically and not violence generally. However, when I let go the reactive posture the existing power configuration in the relationship provokes and adopt a more reflective mode, the more general casting of the problem is as of structural violence. Since one relationship proposal would simply reverse the current of oppression, I prefer the more general language of non-violence in this part of my analysis.

a. The Trouble with Firstness

If I've been persuasive in arguing that the imposition of liberal constitutional orders over already existing indigenous ones *is* a form of the colonial violence that must end, then it's already clear that liberal constitutionalism is inadequate to reconciliation, and this section appears superfluous. Yet persuasive as I hope this argument has been, it can't be my final word. For it may appear that my argument is contingent upon an unacknowledged premise, the moral primacy of firstness, and I wish it to stand independently of that principle. Firstness is a powerful moral principle and indigenous peoples are right to avail themselves of it. But matters of the sort this dissertation takes up are more clearly (and more rigorously) set out when firstness sits in a supportive role.¹¹³¹ Firstness is ultimately an appeal to fairness, and as I've tried to show in detail, justice isn't the end towards which rooted systems of law aim.

The principle of firstness says that indigenous peoples' reception of settler constitutionalism as violence is reasonable, and their resulting rejection of it justified, on the ground that it has been imposed over indigenous peoples' already existing ones.¹¹³² An argument

¹¹²⁹ Sandel, "The Procedural Republic and the Unencumbered Self" at 81.

¹¹³⁰ Ladner, "Proceed With Caution" at 248-250, 260-261.

¹¹³¹ I have no illusions that a shift away from firstness will eliminate contention regarding the moral status of indigenous political communities, but such a move should at least remove specious arguments like Tom Flanagan's, which endeavour to undermine indigenous peoples' political claims for recognition by attacking their moral claims about firstness. Flanagan, *First Nations? Second Thoughts* at ch 2.

¹¹³² While I'm unable to make the case here, I believe that liberal constitutionalism couldn't have been introduced on Mikinaakominis without second-comer imposition, for rooted constitutional orders already occupied the entirety of its constitutional space. I look forward to making this case in future research. See also Erasmus & Sanders, "Canadian History: An Aboriginal Perspective" at 3-4.

that turns on firstness is thus inescapably constrained by its historical context: its claim to moral priority turns on an accounting of things past. However we might imagine an argument which turns on historical context without appealing to firstness. There are two separate justifications I wish to offer for the moral priority of indigenous peoples' constitutional orders. The first is just such an argument. The second stands regardless of historical context: liberal constitutionalism is inherently violent to indigenous peoples. Both justifications establish liberal constitutional imposition as necessarily violent to indigenous peoples, and thus its failure in reconciliation.

b. Indigenous Constitutional Priority and Fitness

Given the contemporary power of firstness in liberal societies generally, and in particular the contemporary legal force of firstness in the context of aboriginal rights in Canada¹¹³³, it's no surprise that *Indian Act* leadership, indigenous political organizations, lawyers serving indigenous communities, scholars, and activists all frequently ground their arguments for indigenous legal and political priority in firstness. However, it may be surprising how infrequently elders and knowledge-keepers do so. In my experience, elders often assert indigenous legal and political firstness, but tend rather to hang their arguments on a principle of constitutional *fitness*. Fitness in the specific sense they intend is a function of sacred law. The Creator placed all peoples, including humans, in particular places, with particular gifts,¹¹³⁴ which is to say that there's also a collective aspect of *miinigowiziwin*.¹¹³⁵

Elders of the Turtle Lodge, say "We come from the Dakota, Nehetho, and Anishinaabe Nations who have lived on our ancestral lands since *Kizhay Manitou* placed us here".¹¹³⁶ We all

¹¹³³ In the *Van der Peet* case, the Chief Justice of Canada wrote for the majority: "In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries." *R v Van der Peet* at 30; emphasis in original.

¹¹³⁴ Jones, *History of the Ojibway Indians* at 31; Linklater et al, *Ka'esi Wahkotumahk Aski* at 108-110 (Ininiw elder Stella Neff and Dakota elder Doris Pratt sharing); Hyslop et al, *Dtantu Balai Betl Nahidei* at 33 (Anishiniw elder Peter McKay sharing); Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights" at 19; Grand Council of Treaty No. 9, "Grand Council of Treaty no. 9" at 20, 30; Iain J Davidson-Hunt et al, "Iskatewizaagegan (Shoal Lake) Plant Knowledge: An Anishinaabe (Ojibway) Ethnobotany of Northwestern Ontario" (2005) 25:2 J of Ethnobiology 189 [Davidson-Hunt et al, "Iskatewizaagegan (Shoal Lake) Plant Knowledge"] at 196; Del  ge et al, "The Ojibwa-Jesuit Debate at Walpole Island, 1844" (throughout, but especially at 303-304); Frederick Wm. Major, *Manitoulin, the Isle of the Ottawas: Being a Handbook of Historical and Other Information on the Grand Manitoulin Island* (Gore Bay, ON: The Recorder Press, 1934) at 11; *Tthow Legwelth* (Lavina White) & *tlakwakse* (Eva Jacobs), *Liberating Our Children, Liberating Our Nations: Report of the Aboriginal Committee*, Community Panel, Family and Children's Services Legislation Review in British Columbia (British Columbia: KJ Lee & Associates Inc, 1992) at vii; Anonymous elder #1 (23 August 2013); Teaching of anonymous elder #1 (5 February 2014) Mitaanjigamiing First Nation; Anonymous elder #1 (30 August 2014); Teaching of anonymous elder #1 (11 April 2015) via telephone; Anonymous elder #1 (30 May 2015); Teaching of anonymous elder #1 (4 October 2015) Mitaanjigamiing First Nation; Anonymous elder #1 (9 November 2016); Anonymous elder #1 (11 August 2017); Anonymous elder #1 (4 October 2017); Anonymous elder #1 (28 June 2018). Through the summer of 2018, my elder from Mitaanjigamiing frequently spoke about a sacred site we leave offerings at as evidence that the land we were standing on was meant for Anishinaabeg to live upon, and that in other lands, there would be other symbols foreign to him and I. Finally, I believe that the fact of our intentional placement upon particular lands is why elder Dave Courchene, reflecting on indigenous-settler relations, says "We are the true leaders of our homeland." Elder Dave Courchene Jr (24 February 2018).

¹¹³⁵ See for instance the definitions of "Inherent Right of Governance" and "Inherent Right to Sovereignty" in Jacasum, *Ojibway Political Terminology Glossary* at 44, 45.

¹¹³⁶ Oshoshko Bineshiikwe et al, "Ogichi Tibakonigaywin".

fit in a unique way into a grand plan intended to grow, as Lyons earlier observed, more life. This understanding is commonly expressed amongst Anishinaabeg by referring to Creation as Creator's garden.¹¹³⁷ The creative order contemplates the direct participation of all of the beings placed within each of its myriad regions. Basil Johnson expressed this understanding saying "Each creature had its place on earth, its time, and its purpose. This was the source of order and harmony".¹¹³⁸ This quotation clarifies the depth of the divide between constitutional principles of firstness and fitness: fitness isn't an appeal to fairness, but rather (and by now, I hope, predictably) to harmony.

Perhaps this is why elders say that of course you're free to learn wherever your journey may take you, but that you don't *need* to do so to live *bimaadiziwin*; everything you need to know is already on your indigenous territory.¹¹³⁹ This seems a compelling reason as to why we're taught not to assume that things work the same way in another territory and that, as visitors "The Elders encourage each person to abide by the protocols within each community, even if these are different from your own."¹¹⁴⁰

Fitness is a question of living within the creative role we were given, which is bound up in our earthway relationships. Finally, fitness also explains the claim elders so often make about the non-alienability of our lands. Elder Bone makes this point expressly: "The Creator gave us land, to have to live off, not so we can in turn give it to someone else, and not so someone else can come and take it away from us. Many of us were *put here*."¹¹⁴¹

Given that fitness is a function of Creator's vision for Earth, firstness will follow wherever it obtains. Properly understood, arguments for the moral priority of indigenous constitutional orders rest upon the claim that we're the ones who were intended to be here, not that we're the ones who were here first. Firstness is a consequence of fitness; because the former always attends the latter, one can easily appreciate the confusion.¹¹⁴²

c. The Intrinsic Violence of Liberal Constitutionalism to Indigenous Peoples

There's an obvious difficulty with the principle of fitness, some will insist. Given its grounding in indigenous lifeways, it comes uncomfortably close to circularity and in any event presents an argument 'from the inside'. This is objectionable because the purpose of a constitutional dialogue oriented to reconciliation is to speak across lifeworld differences. While lifeworlds and lifeways are distinct categories of legality, I've put considerable effort into arguing that the relationship between them is a tight one. For folks with this worry, the persuasive power of my argument might not have advanced much beyond firstness.

¹¹³⁷ Teaching of anonymous elder #1 (21 August 2013) Mitaanjigamiing First Nation; Pratt et al, *Untuwe Pi Kin He* at 28, 29; Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 96; Kathi Avery Kinew, "Manito Gitigaan: Governance in the Great Spirit's Garden—Wild Rice in Treaty #3 from Pre-Treaty to the 1990s" in David H Pentland, ed, *Papers of the Twenty-Sixth Algonquian Conference* (Winnipeg: University of Manitoba, 1995) 183; Davidson-Hunt et al, "Iskatewizaagegan (Shoal Lake) Plant Knowledge" at 196-198.

¹¹³⁸ Johnston, *Ojibway Ceremonies* at 164.

¹¹³⁹ Grandmother Sherry Copenace (24 June 2018); Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 96; Grand Council Treaty #3 with Linklater, *Abinoonjii Ombig Igos Owin* Report at 8 (elder Rosie Boshkaykin saying "I learned everything I needed to know living where we lived" at Seine River). See also Simpson, "Land as Pedagogy" at 16.

¹¹⁴⁰ Elders Council with Copenace, *Cultural Protocols Booklet* at 11.

¹¹⁴¹ *Ka'esi Wahkotumahk Aski* at 122; emphasis added.

¹¹⁴² Witness, for instance, Tom Flanagan's confusion: Flanagan, *First Nations? Second Thoughts* at 11.

Although I take both firstness and fitness to be powerful moral principles, rooted peoples need not depend upon either of them to establish that liberal constitutionalism necessarily does them violence. In this section I argue that liberal constitutionalism is intrinsically violent to indigenous peoples. If I can demonstrate this, and further, that the inverse proposition is false (that rooted constitutionalism doesn't necessarily do settler peoples violence), then insofar as violence is the fulcrum around which the possibility of indigenous-settler reconciliation turns, it will follow that we should prefer a rooted constitutional dialogue.

Ultimately, the purposes of indigenous-settler reconciliation don't need any kind of appeal to history to establish the superiority of rooted over liberal constitutionalism, and we've already done the work to see why. The sovereignty thesis necessitates the severing of earth relationships from constitutionalism. Liberal constitutional orders necessarily consume earth (which is construed as resources, not as persons, and thus which is absent legal agency) to empower human freedom.¹¹⁴³ Any robust liberal constitutional order will take care to constrain *how* it consumes earth, but *that* it will do so is a certain consequence of freedom understood as liberty. This is equally true of public and private autonomy, although in our neoliberal present it's perhaps more obvious in the latter case.

This is an untenable consequence for indigenous communities. The humility thesis necessitates that if human-earth relationships (and by necessary implication, the earth itself) are destroyed, rooted constitutional orders become unviable. There's no earthway outside of earth. The paramount importance of this point to the prospect of reconciliation was observed by Canada's Truth and Reconciliation Commission:

As [Piikani Blackfoot] Elder [Reg] Crowshoe explained further, reconciliation requires talking, but our conversations must be broader than Canada's conventional approaches. Reconciliation between Aboriginal and non-Aboriginal Canadians, from an Aboriginal perspective, also requires reconciliation with the natural world. If human beings resolve problems between themselves but continue to destroy the natural world, then reconciliation remains incomplete. This is a perspective that we as Commissioners have repeatedly heard: that reconciliation will never occur unless we are also reconciled with the earth. Mi'kmaq and other Indigenous laws stress that humans must journey through life in conversation and negotiation with all creation.¹¹⁴⁴

Until now I've argued that the principle of settler supremacy consists of three forms of violence to indigenous communities: to indigenous persons, to indigenous peoples, and to indigenous lifeways. Now we're in a position to apprehend settler supremacy's fourth and final form of violence to indigenous communities: violence to the earthway.

Recall that for indigenous peoples rootedness isn't a metaphor; our creation stories are at once stories of the creation of earth *and* of human communities. We have identity as peoples only through and for the earth.¹¹⁴⁵ The humility thesis guides us in living this understanding, but also renders us an extraordinary vulnerability: because of it, settler violence to the earthway is necessarily violence to indigenous lifeworlds. Without a healthy earth, there's no functioning earthway. Without a functioning earthway, there's no functioning rooted constitutionalism. Without functioning rooted constitutionalism, there aren't lawful Anishinaabe communities.

¹¹⁴³ Boaventura de Sousa Santos, "The New Thesis Eleven" *Critical Legal Thinking* (20 January 2018), online: *Critical Legal Thinking* <<http://criticallegalthinking.com/2018/01/20/new-thesis-eleven/>>.

¹¹⁴⁴ Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 6: *Canada's Residential Schools: Reconciliation* (MQUP, 2015) at 13.

¹¹⁴⁵ Dean Neu and Richard Therrien express the point clearly in Neu & Therrien, *Accounting for Genocide* at 9.

Without lawful communities, we experience social disintegration and assimilation into settler legal systems. Violence to the earthway is thus a *genesis violence*: it destroys the seed that would become the tree, the divine spark of possibility, the vision to be made real.¹¹⁴⁶

Now some might reply that Liberal constitutional orders admit indigenous peoples freely and without violence and so the conclusion to the causal chain above isn't really violence at all. But the invitation to membership merely screens the violence, for it invites the belonging of indigenous 'peoples' in quite a different sense. As Anishinaabe scholar and lawyer Sara Mainville cautions "Accepting the constitutional order as it presently stands cannot happen unless the *Anishinaabeg* fundamentally change their society and their identities".¹¹⁴⁷ Those who accept the offer are destroyed and *reconstituted* as liberal citizens.¹¹⁴⁸ Post-transformation, indigenous peoplehood no longer consists in a shared narrative vision of community which gives rise to a unique constitutional order. That's precisely what's been eliminated. Reconstituted indigenous peoplehood consists of shared substantive commitments (beliefs, practices, and traditions) which have nothing to do with law or governance: private life stuff that can be abandoned without anything more than private life consequence.

Many have argued that greater inclusion of indigenous law in Canadian constitutionalism is productive of reconciliation. My argument in this section contends on three grounds (firstness, fitness, and the sovereignty thesis' inherent violence to indigenous lifeways) that liberal constitutionalism can't support indigenous-settler reconciliation. However, it remains to be seen whether rooted constitutionalism can do any better by settler peoples. If it can't, then this will have been a mere digression on indigenous-settler violence which fails to advance the argument.

d. The Non-violence of Rooted Constitutionalism to Settler Peoples

I'm convinced that rooted constitutionalism is non-violent to settler peoples and deliberately inclusive of them. This is why chapter six isn't framed in respect of indigeneity. To be sure, I've engaged indigeneity consistently throughout, but I've sought always to do so as a function of

¹¹⁴⁶ From a rooted standpoint, settler violence to the earthway is a proclamation of godhood: an announcement that the original instructions could bear improvement, that creator's vision is only second best, and by necessary implication that indigenous peoples hold no gift worth sharing. Evil is an incoherent concept within rooted ECO-systems, but elimination from the possibility of creation is surely its closest analogue. In fairness, there's a question about the extent to which settlers generally realize the necessary implication, since it requires knowledge of the humility thesis. This dissertation aims to facilitate that understanding.

I share elder Dave Courchene's view that "For us to believe that we can be in control over the Creation is very arrogant, foolish thinking. And there will be suffering that will be caused by it. Because of our arrogance of not respecting the Creation, and respecting the laws that come from the Earth itself that we refer to as natural law." Elder Dave Courchene Jr (24 February 2018). In a statement which connects this view back to our central metaphor, elder Gidigaa Migizi (Doug Williams) suggests that the choice of which earth-relativity thesis to follow is a matter of life and death: "The Original Instructions separate the life path into two parts: that which promotes life and that which ends in destruction." Gidigaa Migizi, *Michi Saagiig Nishnaabeg* at 100. I take anthropogenic global warming as the clearest evidence that radical interdependence is a universal truth and that individual autonomy isn't only false, but dangerous to life as such. Anthropogenic global warming represents the catastrophic failure of liberal constitutionalism to create the conditions which allows individuals to pursue good lives, because it fails to secure the conditions for individuals to have any life at all. The constitutional image of a 'living tree' growing without interaction with nutrient soil, air, water, and sun—that is, *outside of creation*—is untenable.

¹¹⁴⁷ Mainville, *Manidoo Mazina'igan* at 125.

¹¹⁴⁸ Tully, *PPNK 2* at 116-117.

rootedness. This is why, for instance, I refer to indigenous constitutional orders as exemplars of the rooted mode of constitutionalism, and not to indigenous constitutionalism.

My intention is for readers to appreciate that rooted constitutionalism—and rooted legality more generally—is open to all persons and peoples willing to adopt the humility thesis.¹¹⁴⁹ I believe it's this lifeway commitment, not indigenous subject position, that Norval Morrisseau meant when he said "These paintings only remind you that you're an Indian. Inside somewhere, we're all Indians. So now when I befriend you, I'm trying to get the best Indian, bring out that Indianness in you to make you think that everything is sacred."¹¹⁵⁰ Acceptance of the humility thesis, not consideration of race, culture, or settlement status, is most relevant. Indeed, indigenous intellectuals,¹¹⁵¹ elders¹¹⁵² and leaders¹¹⁵³ have invited settler society in countless times. While practical obstacles exist (education, self-interest, power), I see neither a principled reason nor a relational reason why non-indigenous peoples are unable to accept.

¹¹⁴⁹ Note that reconciling oneself to the humility thesis—and thus *with* the rest of creation—isn't the same as being earth-centred. If I'm right to argue that distinct lifeways generate from distinct lifeworlds, then there's quite literally a world of difference between ecocentrism and kincentrism. Rooted legalities don't merely extend to non-humans the same respect that they afford humans; they understand that humans and non-humans are related and thus interdependent. The interaction entailed in living through and for non-human others is what Chief Potts seems to have had in mind when he said that environmentalists are wrong to make a protected "zoo" out of the bush. Nancy Turner's notion of 'kincentricity' is helpful here. See Turner, *The Earth's Blanket* at 70-71, 81.

This distinction in orientations to creation is why, for me, the wild law movement is dangerous. Instead of asking humans to constitute their communities within the earthway, wild law ascribes to non-humans the status of liberal subjects, such that creation becomes a global liberal political community. To be sure, in extending subjectivity to non-humans, wild law greatly expands the scope of liberal constitutionalism, but declines to alter its logic or structure. Since constitutionalism is the form of difference which matters most, this is a critical failure. In failing to advert to liberal-rooted constitutional difference, wild law's attunement to the earth remains oblivious to the earthway. Restated, its adherents move earth from object to subject, but fail to see that earth is a *way* which moves beyond this distinction altogether. See also Kirsten Anker, "Law as Forest: Eco-Logic, Stories and Spirits in Indigenous Jurisprudence" (2017) 21 Law Text Culture 191 [Anker, "Law as Forest"] at 193-194, 207. Recognizing that Jane Bennett's notion of vital materialism has important differences from my notion of rootedness, she's excellent on this distinction (Anker also adverts to her work in this context): "If environmentalists are selves who live on earth, vital materialists are selves who live as earth". Jane Bennett, *Vibrant Matter: a Political Ecology of Things* (Durham: Duke University Press, 2010) [Bennett, *Vibrant Matter*]. On wild law, see Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd Ed (White River Junction, VT: Chelsea Green Publishing, 2011); Helena R Howe, "Making Wild Law Work—The Role of 'Connection with Nature' and Education in Developing an Ecocentric Property Law" (2017) 29:1 J Env'tl L 19.

¹¹⁵⁰ Norval Morrisseau & Kinsman Robinson Galleries, *Norval Morrisseau: Travels to the House of Invention* (Toronto: Key Porter Books Limited, 1997) at 46.

¹¹⁵¹ Basil Johnston, "The Land We Cannot Give" in *Think Indian: Languages Are Beyond Price* (Cape Croker Reserve: Kegedonce Press, 2011) at 94; Alfred, *Wasáse* at 35.

¹¹⁵² Grandmother Sherry Copenace (24 June 2018); Teaching of elder Harry Bone (13 March 2017) via telephone; Michael Roger Relland, *The Teachings of the Bear Clan: As Told By Saulteaux Elder Danny Musqua* (Masters of Education Thesis, University of Saskatchewan, 1998 [Unpublished]) [Relland, *Teachings of the Bear Clan*] at 160; Oshoshko Bineshiikwe et al, "Ogichi Tibakonigaywin"; Courchene, Address at A Town Hall for Environmental Law. As an example of a very direct statement on this point, elder Dave Courchene said to me "I have to allow them to come to us if they want to learn." Elder Dave Courchene Jr (24 February 2018).

¹¹⁵³ Chief Gary Potts proposes a "stewardship model" of land management between user-groups—including settlers—of his community's traditional territory. He says, "This plan might be helpful to people in Canada in another way as well. It would help non-native people develop a national identity that is linked more closely to the land rather than simply to a constitution." Potts, "The Land is the Boss" at 38, emphasis in original.

On the contrary, there are a great many non-indigenous (and often settler) writers whose works have already pointed in this direction,¹¹⁵⁴ who are already identifying problems and challenges such a movement discloses,¹¹⁵⁵ and who are already offering complex articulations¹¹⁵⁶ and even visions¹¹⁵⁷ of rooted communities.¹¹⁵⁸ The best written articulation of a call for settler rootedness I've yet encountered is authored by a settler: my co-supervisor, James Tully.¹¹⁵⁹

One of the best *enactments* I know of rootedness in recent scholarship is authored by a non-indigenous person: Professor Adelle Blackett's remarkable essay, "Follow the Drinking Gourd."¹¹⁶⁰ Blackett reflects on the genesis and the teaching of two courses at McGill Law, *Critical Race Theory* and *Slavery and the Law*, and situates them in the context of that Faculty's transsystemic curricular-pedagogical transformation. What struck me is her approach to writing this piece. On almost every page, Blackett's meditation offers up a gift. She couldn't be less interested in having us appreciate her accomplishment. She draws our attention to the gifts everyone else has contributed to making these courses happen, in respect of the movement of both the wider social and institutional contexts and the immediate student agitation for, development of, and participation in these courses. Especially for settlers wanting to understand rootedness, I recommend it both for the approach it describes and the practice it enacts.

Of course, the claim that the rooted mode of constitutionalism doesn't exclude settler persons and peoples doesn't address the more foundational question of whether settler peoples are done violence in being expected to abandon liberal accounts of creation for rooted ones, and effectively, the sovereignty thesis for the humility thesis. But I don't see how they could be. Liberal accounts of creation are defined precisely in respect of the fact that they hive off any narrative sense of peoplehood for an expressly political one (i.e. the reduction of creationism to the contractarian choice). Individually and in their private lives, many liberals have creation stories. But by their own accounts, these aren't the sort of stories with which indigenous peoples (or anyone else) must contend. The moment that expectation is reversed, negative liberty is no longer sacrosanct and liberalism collapses in on itself.

¹¹⁵⁴ Fritjof Capra, *The Hidden Connections: A Science for Sustainable Living* (New York: Anchor Books, 2004); Vandana Shiva, *Earth Democracy: Justice, Sustainability, and Peace* (Cambridge, MA: South End Press, 2005); Bennett, *Vibrant Matter*.

¹¹⁵⁵ Martin Lee Mueller, *Being Salmon, Being Human: Encountering the Wild in Us and Us in the Wild* (White River Junction, VT: Chelsea Green Publishing, 2017); Fritjof Capra & Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, CA: Berrett-Koehler Publishers, Inc, 2015).

¹¹⁵⁶ Among the best I know are the works of ethnobotanist Nancy Turner (see Turner, *The Earth's Blanket*; Nancy J Turner, *Ancient Pathways, Ancestral Knowledge: Ethnobotany and Ecological Wisdom of Indigenous Peoples of Northwestern North America, Vol 2: The Place and Meaning of Plants in Indigenous Cultures and Worldviews* (Montreal: MQUP, 2014)) and social anthropologist Brian Noble (see Noble, "Treaty Ecologies: With Persons, Peoples, Animals, and the Land"). See also Peter D Burdon, "A Theory of Earth Jurisprudence" (2012) 37 Australian J Legal Phil 28; Peter D Burdon, "The Earth Community and Ecological Jurisprudence" (2013) 3:5 *Oñati Socio-Legal Series* 815.

¹¹⁵⁷ Edward Goldsmith, *The Way: An Ecological Worldview*, Special Ed (Maidenhead, UK: Veltune Publishing, 2014); Macy & Johnstone, *Active Hope*.

¹¹⁵⁸ While I celebrate this development, I share Dr. Zoe Todd's view that it's a reflection of colonialism in the academy when scholars decline to engage with indigenous work showing that non-humans are subjects with agency as though they've just had this really brilliant idea. See Zoe Todd, "An Indigenous Feminist's Take On The Ontological Turn: 'Ontology' Is Just Another Word For Colonialism" (2016) 29:1 *J of Historical Sociology* 4. Tully is an exemplar of getting this right. See Tully, "Reconciliation Here on Earth" at 84-85, 86-87.

¹¹⁵⁹ Tully, "Reconciliation Here on Earth".

¹¹⁶⁰ Adelle Blackett, "Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively, at McGill" (2017) 62:4 McGill LJ 1251.

To be sure, many liberals share an ensemble of ‘stories’ like social contract and tragedy of the commons. But these aren’t shared narratives establishing an ECO-system. Rather, these ‘stories’ are thought experiments and they take the relevant lifeworld starting points (liberalism’s belonging analytic) as already given. Thus instead of a creation story *disclosing* a liberal belonging analytic, there’s a repertoire of thought experiments through which liberals infer how we ought to think about persons, freedom, and community. The liberal ECO-system is *chosen*.

Adoption of the humility thesis clearly denies liberals that capacity for choice. It isn’t clear, however, that in so doing it does them violence. Creation stories are the bedrock first cause of normativity. They are not and *cannot* be justified, and as such, there’s no space from which I, embedded in my own lifeworld, might reasonably challenge the veracity of someone else’s.

However, since the liberal ECO-system choice *isn’t* grounded in a creation story, there’s no first cause upon which the denial of ECO-system choice occasioned by the humility thesis might be said to impose itself. The choice itself isn’t an unimpeachable first cause; it’s inferred post-fact from a repertoire of thought experiments which, consequently, don’t demand deference. Without an authorizing story by which to justify itself, the choice appears arbitrary—and it isn’t clear why non-violence should require anyone who *isn’t* a liberal to be concerned about imposing on a choice that’s merely arbitrary.

Yet it seems that political choice is an excellent device for liberals to reconcile themselves with the earthway, and without suffering violence. If settlers now on Mikinaakominis wanted to begin to tell their creation stories, the next arc in the narrative could be having contracted with one another to enter into the mode of constitutionalism ubiquitous throughout Mikinaakominis and amongst the many and diverse peoples who already lived here. All else being equal, arguably observance of their own principle, firstness, should compel them to do so.

Rawlsian liberals will object to this reply because the original position¹¹⁶¹ is oblivious to difference: through it, “One excludes the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices.”¹¹⁶² This proposal asks settlers to formulate the terms of community while retaining knowledge of a difference between settlement subject positions. However settlement difference is unlike those kinds of difference which Rawls contemplates. We might imagine that individuals with vastly different substantive commitments, endowments and embodiments¹¹⁶³ would agree to reason towards a just society from behind the veil, yet still insist that indigenous peoples wouldn’t do so. What incentives have they? Their fear isn’t of the substantive exclusion which justice as fairness seeks to eliminate; it’s of being imagined, talked, and constituted *over*; of having harmony replaced by justice in any conception.

With the original position, Rawls has assumed a liberal lifeworld and a commitment to realizing a liberal lifeway. This commitment is deeply resisted by rooted peoples. Once more, the kind of difference in which rooted peoples have the greatest stakes is logical-structural (lifeway), not substantive. Since the original position has logical-structural commitments built in (Rawls is transparent about this), it precludes engagement with settlement difference. Rawls doubtless wants his thought experiment to account for indigeneity, but he needs indigeneity to be reducible to substantive difference like race and culture.¹¹⁶⁴ Since it isn’t, indigenous peoples have

¹¹⁶¹ Rawls, *A Theory of Justice* at 11-12; ch 3.

¹¹⁶² *Ibid* at 17.

¹¹⁶³ *Ibid* at 11, 82, 118.

¹¹⁶⁴ *Ibid* at 85. As Chief Justice of Canada, the Right Honourable Beverly McLachlan also seems to have sought to reduce logical-structural indigenous difference to merely substantive difference. In 2015 she delivered a speech at the Aga Khan Museum on the subject of toleration, in which she asserted “We now understand that the policy of assimilation was wrong and that the only way forward is acknowledgement and acceptance of the distinct *values*,

insufficient reason to imagine themselves in the original position and powerful reason to insist that if settlers persist in doing so, they do so from the grounded here and now, knowing full well that they're imagining themselves *over* those already here and their express objection.¹¹⁶⁵

Settlement status is thus a kind of difference which appears to limit the applicability of Rawls' hypothetical.¹¹⁶⁶ It discloses the sharp contrast between contemporary western political philosophy, in which one can deal strictly with ideas¹¹⁶⁷, and contemporary indigenous philosophy, in which one never loses sight of that fact that his imagining mind is connected to a body (and for that matter, a heart and spirit) here on earth.¹¹⁶⁸ In a meditation on natural law and settler purposes, I believe Anishinaabe elder Ezra Bouchie rendered the appropriate reply: "Today there are many people here and they are destroying this way of life, they will not be successful in removing the sun from its original position."¹¹⁶⁹

iii. Second Principle of Indigenous-Settler Reconciliation: Earth Reconciliation

If my reasoning is sound, then liberal constitutionalism necessarily does violence to indigenous peoples and rooted constitutionalism doesn't necessarily do so to settler peoples, and it follows that the problem of earth-relativity incommensurability is to be overcome, and the possibility of constitutional dialogue thus enabled, by the acceptance of the humility thesis by all peoples. *Earth reconciliation* is thus the second and deeper principle of indigenous-settler reconciliation, since it serves as the condition of possibility of constitutional dialogue. It says that in order to reconcile themselves with one another, indigenous and settler peoples must first reconcile themselves with the earth,¹¹⁷⁰ and critically, in its own way.

b. Models of Indigenous-Settler Relationship

With both principles articulated, we now have a tool with which to consider indigenous-settler reconciliation models, each one a possible merged path. I consider five common categories: indigenous assimilation, legal pluralism, cultural hybridity, indigenous sovereignty, and treaty relationship models. I don't draw out the considerable difference between models within a category, and some categories I explore only briefly. While each specific model is complex (and often merits independent study), it often isn't complex to evaluate how each fares against the two principles. Second, some models have already been partially explored in the course of my arguments and there's no need to revisit ground already covered.

traditions and religions of the descendants of the original inhabitants of the land we call Canada." Rt. Hon. Beverley McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance; Remarks of the Rt. Hon. Beverley McLachlin, P.C. Chief Justice of Canada" (Speech delivered at the Aga Khan Museum, Toronto, 28 May 2015) at 6; emphasis added.

¹¹⁶⁵ See Tully, *Strange Multiplicity* at 82.

¹¹⁶⁶ In particular, distinctions in settlement status can't be resolved by appeal to equal citizenship, which is the highest-order political relationship which Rawls allows: Rawls, *A Theory of Justice* at 82, 84.

¹¹⁶⁷ Rawls refers repeatedly to his effort to carry contractarian theory to a still higher level of abstraction. See for instance Rawls, *A Theory of Justice* at xii, xviii, 14.

¹¹⁶⁸ Tully, "Reconciliation Here on Earth".

¹¹⁶⁹ Hyslop et al, *Dtantu Balai Betl Nahidei* at 168.

¹¹⁷⁰ Lyons, "Spirituality, Equality, and Natural Law" at 12.

I note that not everyone will approach the matter as I have, looking to model a general approach to the problem of colonialism, attentive to specific experiential differences. Some will focus only on their own communities, not concerning themselves with indigenous-settler relations across Mikinaakominis. I appreciate the appeal of such an approach, but I'm moved by the Three Paths Prophecy Petroform which seems to cast the matter broadly.

i. Assimilation Models

Of the five kinds of indigenous-settler relationship models I consider, this is perhaps the category which can be treated most swiftly. First though, a clarification: frequently when critics vent their fury on assimilation projects, their target is the expectation that indigenous peoples should be absorbed into settler culture, or perhaps the settler 'mainstream'. While I certainly reject such expectations, they're insufficiently precise for my purposes. I don't mean to restrict my worry with assimilation to settler *culture*. Rather, consistent with both the central problem I've set out (settler violence to indigenous lifeways) and the first of the two principles, I have in mind the more specific expectation that indigenous peoples should be absorbed into settler *constitutional orders*. Thus I include in this category not only models which openly recommend the assimilation of indigenous peoples, but also those which accept liberal constitutionalism as the logic and structure of ostensibly reconciled indigenous-settler communities. Some proposals of the latter sort are exceptionally thoughtful and their authors will not think of themselves as accepting a form of indigenous assimilation. I mean them no offense; I honour their contributions even as I reject them.

Far to one end are models like the federal government's 1969 White Paper¹¹⁷¹ and Tom Flanagan's book, *First Nations? Second Thoughts*,¹¹⁷² which openly call for indigenous assimilation into Canadian liberalism. The deficiencies of the White Paper are well known.¹¹⁷³ The spirit of indigenous condemnation of its anti-relational approach is summarized in a Treaty 1 centennial speech by Dave Courchene Sr. (then President of the Manitoba Indian Brotherhood) two years later. After charting the course of Canadian colonialism from abject destruction, to vicious indifference, to the present "liberal white 'Enlightenment'"¹¹⁷⁴ era, he stated:

We do not deny there are some who simply, genuinely, care. We do not even deny there are some willing to work with us to help us to attain our ends. But nor can we deny that the basis of this new Enlightenment appears to be the belief that if we work sufficiently hard, and listen sufficiently well, we many not only acquire the trappings of the whiteman's civilization, we may even become white men.¹¹⁷⁵

Dave Courchene Sr. clearly saw Canada's subjectivity transformation / lifeway reconstitution program for what it was.

At the outset of his book, Flanagan professes his commitment to classical liberalism and proceeds to form judgments as if this private commitment established classical liberalism as a set

¹¹⁷¹ Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (First Session, Twenty-eighth Parliament, 1969).

¹¹⁷² Flanagan, *First Nations? Second Thoughts*.

¹¹⁷³ Dale Turner offers an excellent treatment of the White Paper's deficiencies in Turner, *This Is Not a Peace Pipe*.

¹¹⁷⁴ Manitoba Indian Brotherhood, "Address by Chief Dave Courchene" at 8.

¹¹⁷⁵ *Ibid* at 9.

of peremptory norms against which all politics may rightly be measured.¹¹⁷⁶ He never justifies this assumption and he declines to develop it into an argument. His polemic against a purported ‘aboriginal orthodoxy’ thus reads as a commitment to the universal legalities fallacy.

A project similar in tone (though in substance, not *classically* liberal) is Alan Cairns’ work drawing from the *Hawthorn Report*,¹¹⁷⁷ to which he contributed. Cairns suggests that citizenship is a sufficiently flexible and robust structure to adequately account for indigenous difference.¹¹⁷⁸ The challenge is to calibrate what it entails differently for differently-situated groups. Aboriginal Canadians, says Cairns adopting the language of the *Hawthorn Report*, “should be regarded as ‘Citizens Plus.’ In addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community.”¹¹⁷⁹

Markedly different in tone and in rigour but still working within the confines of liberal constitutionalism are the arguments of Will Kymlicka.¹¹⁸⁰ Dale Turner has brilliantly summarized the problem here in a liberal register: “Kymlicka’s liberalism does not allow Aboriginal peoples to speak for themselves, because Aboriginal conceptions of sovereignty are subsumed within the theoretical framework of political liberalism.”¹¹⁸¹

The Royal Commission on Aboriginal Peoples goes further than Kymlicka would, but still works within the logic and structure of Canadian liberalism. RCAP proposed that the relationship be conceived of as nation to nation, that it be worked out through treaties, and that it support a federalism in which the aboriginal peoples of Canada would constitute a third order of government.¹¹⁸² Drawing out that relationship, RCAP stated that: “The governments making up these three orders are sovereign within their own several spheres and hold their powers by virtue of their inherent or constitutional status rather than delegation. They share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties.”¹¹⁸³

Finally, two models remarkable not only for their rigour but also for their thoughtfulness are Patrick Macklem’s *Indigenous Difference and the Constitution of Canada*¹¹⁸⁴, and Felix Hoehn’s *Reconciling Sovereignties*.¹¹⁸⁵ The former is an exemplary work of constitutional theory; the latter, one of doctrinal creativity. If the proposals forwarded in these texts were acted upon, significant benefits would flow to indigenous peoples in Canada. Yet for all their merits, both texts continue to work within the boundaries of Canadian liberalism. They seek to reform, not to transform, the logic and structure of the governing constitutional order.

To be sure, many of the arguments represented in these texts (especially the more thoughtful ones) require growth and adaptation within Canada’s liberal constitutional order. Yet

¹¹⁷⁶ Flanagan, *First Nations? Second Thoughts* at 8-9. These starting points drive Flanagan’s analysis throughout the eight aspects of his aboriginal orthodoxy (summarized in *ibid* at 6-8).

¹¹⁷⁷ HB Hawthorn, ed, *A Survey of the Contemporary Indians of Canada*, 2 vols (Queen’s Printer, 1966 & 1967).

¹¹⁷⁸ Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) [Cairns, *Citizens Plus*].

¹¹⁷⁹ *Ibid* at 161-162, quoting from the Hawthorn Report vol 1 at 13.

¹¹⁸⁰ Kymlicka, *Liberalism, Community and Culture*; Kymlicka, *Multicultural Citizenship*.

¹¹⁸¹ Dale Turner, “From Valladolid to Ottawa: The Illusion of Listening to Aboriginal People” in Jill Oakes et al, eds, *Sacred Lands: Aboriginal World Views, Claims, and Conflicts*, Canadian Circumpolar Institute Occasional Publication No. 43 (Art Design Printing Inc., 1998) 53 at 63.

¹¹⁸² Canada, *Report Royal of the Commission on Aboriginal Peoples, vol 2: Restructuring the Relationship* (Ottawa: Minister of Supply and Services, 1996) at 1015-1016.

¹¹⁸³ Canada, *Report Royal of the Commission on Aboriginal Peoples, vol 5: Renewal: A Twenty-Year commitment* (Ottawa: Minister of Supply and Services, 1996) at 162.

¹¹⁸⁴ Macklem, *Indigenous Difference and the Constitution of Canada*.

¹¹⁸⁵ Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).

still every model in this category fails the first principle. In accepting that Canada's (reformed) liberal constitutional order can serve as the logic and structure within which the legal interests of rooted peoples may be articulated, these models have accepted a constitutional monologue. Having failed the first principle, we need not weigh them against the second.

ii. Legal Pluralism Models

A far more open approach, in which the Canadian dialogue around indigenous law revitalization has been largely ensconced, is legal pluralism. Legal pluralism refers to the existence of multiple systems of law functioning within a community. On many pluralist accounts, these need not be formal (state-based) systems of law. One or more of them may belong to an interests-based community or a community defined by its shared ECO-system.

Legal pluralism may seem a promising approach for transforming indigenous-settler relations. It bears a foundational commitment to normative difference—and that openness is meant to extend not only to laws, but to entire systems of law. The critical (and open) question for our purposes is what the 'systems of' component contemplates.

Almost every elder I know (and every elder I work with) is interested in some kind of a relationship between indigenous law and settler law. But they advert to a question of power and are careful to draw lines around their openness. Elder Harry Bone adverts to both the desire for relationship and the tension it must navigate when he says "Indigenous law and western law. But I think the best way is not to move them here, or to move them the other way. But it's that link, it's that connection. There's some way that we can make that connection."¹¹⁸⁶ Grandmother Niizhoosake Copenace also voices a concern with maintaining the integrity of Anishinaabe law: "I can't compromise it; Creator gave us those laws. We can't change them. I can't tear down that other system but I am going to foster that Anishinaabe way of life."¹¹⁸⁷ Elder Peter Atkinson also seems to share this concern as he contemplates legal pluralism. He cautions that "You can't bring in an Anishinaabe judge trained in Canadian law – that is not Anishinaabe law."¹¹⁸⁸ Inuit leader, public intellectual and satirist Zebedee Nungak reframes the worry as an interrogative: "Is the present system flexible enough to allow accommodation of what can appear to be cultural incompatibilities? Will the system endure encroachment upon its well established traditions to integrate aspects of a culture, language and lifestyle foreign to itself? At what point would acceptable tinkering become regarded as unacceptable radical surgery?"¹¹⁸⁹

Nungak and these elders all seem to be articulating a concern about the possibility of constitutional capture. A form of legal pluralism that takes up difference only at the level of leaves is unlikely to find acceptance with them. But most legal pluralists would agree that 'systems of' law refers to more than the set of laws existing within a community at a given point in time. Borrows identifies some of this tension's particulars beyond specific laws when he asserts that "the challenge in braiding Indigenous law with international and national law"¹¹⁹⁰ is

¹¹⁸⁶ Elder Harry Bone (16 June 2018).

¹¹⁸⁷ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 23.

¹¹⁸⁸ *Ibid* at 24.

¹¹⁸⁹ Zebedee Nungak, "Fundamental Values, Norms, and Concepts of Justice – Inuit of Nunavik" in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993) 86 at 89-90.

¹¹⁹⁰ Borrows, "Introduction: Challenging Law" at 3.

that “authority, responsibility, obligation, enforcement and persuasion, *inter alia*, may be differently construed in Indigenous contexts.”¹¹⁹¹

I earlier stated that I take Jeremy Webber to be among the most thoughtful and rigorous of contemporary legal pluralists. In chapter three at section (b)(ii)(2), I explained that he invokes the notion of ‘legal grammars’ in his consideration of how distinct systems of law might interact. In what I take to be the most important passage of his work on this point, he states:

It is useful, then, to recognize three levels of normative determination in customary legal orders. First, there is coordination, which emphasizes the need for a common order of norms and thus for a social process by which norms can be determined. This process in turn means that norms will have some autonomy from the will of individuals. Second, there is the language through which norms are expressed—the terminology, the conceptual structure, the basic architecture that determines who are subjects of legal rights, what counts as an object of legal rights, and so on—in other words, the grammar of the law, in which rules and principles are framed and through which coordination is achieved. Third, there are the particular debates that occur using these concepts—debates that weigh those concepts, deploy them, regulate disputes, and through which the concepts themselves are continually adjusted and refined.¹¹⁹²

Webber’s first level seems to contemplate what my model of the legality tree presents as two levels: leaves and branches, law and legal traditions. However it isn’t clear that Webber’s second level and my bottom two levels—trunk and roots, lifeways and lifeworld—do the same work. His description of his second level clearly includes something of trunk and roots. Webber is unequivocal that the second level conditions the range of possibility for the first level, above. But I worry that terms like “language” and “grammar” are too squishy to account for what seems to be at stake in the elders’ worries. When Webber refers to the second level’s “conceptual structure”, I think he’s identifying what I mean by constitutionalism. But in redescribing constitutionalism in the idiom of grammar, he occludes the centrality of constitutional *logics*. Yet constitutional logic is what’s most critically at stake in the prospect of a pluralist relationship; it’s the site of Christie’s snare, the place of constitutional capture.

With constitutionalism indirectly and thus only partially invoked (i.e. constitutional structures but not the constitutional logics to which they give form¹¹⁹³), what’s missing in Webber’s account is the *ground* which serves as an interpretive boundary for law, sustaining the integrity of a system undergoing constant change. Instead one finds discourse all the way down: the interpretive limit on law is its genealogy of past usages.¹¹⁹⁴ Logic in the sense I mean it doesn’t appear, and the resulting interpretive groundlessness means that given sufficient time,

¹¹⁹¹ *Ibid.*

¹¹⁹² Webber, “The Grammar of Customary Law” at 620-621; citation removed.

¹¹⁹³ Amazingly, Webber actually gives Anishinaabe kinship as an example of what he has in mind by “the linguistic analogy”: grammars / conceptual structures. *Ibid* at 619.

¹¹⁹⁴ In fairness, Webber casts the notion of discourse broadly. First, he has in mind not only how we speak with words but also with actions: “social practices serve as an essential touchstone for the evolution of the law.” *Ibid* at 622. Second, he has in mind not just the history of past uses (substance through time), but also the rules which allow for intelligible use in each instance. *Ibid* at 618. The particular point at which I suspect Webber and I may disagree is whether it can be said that these rules amount to a logic. I acknowledge seeing glimmers of what I would call a logic, but not enough to persuade me of its active role in Webber’s analysis. Further, I suspect that Webber wouldn’t *want* to accept the logical-structural kind of constitutional foundation I argue for.

‘Anishinaabe’ could come to *mean* ‘liberal’. Given the brutal, ongoing impact of colonialism on indigenous subjectivity, this provocative hypothetical might not be so far-fetched.¹¹⁹⁵

I suspect that change across constitutional logics crosses the boundary the elders want to draw. For instance, in taking up the question of cultural change, Ed Onabigon explained:

Ask the Elders to show you the old ways, and adapt the principles that we had way back when. Even our Native traditions and culture are forever changing. It’s fine that we do the ceremonies, but we have changed, so we have to adapt; at the same time, never forgetting where we come from. Respect, truth, honesty, all the good seven teachings of the Seven Grandfathers, Grandmothers - with them, we remember our basic connection to the Creator and his creation.¹¹⁹⁶

There’s nothing here opposed to Webber’s Wittgensteinian account of change.¹¹⁹⁷ Surely it’s the case that a community’s genealogy of usages-in-practice helps direct the course of its cultural change. Yet in Onabigon’s view there’s clearly *more* operative in directing change than discourse: there’s also the fact that what ‘Anishinaabe’ means is grounded in Creation’s way (and by implication, in mutual aid). In the result, I worry that even a pluralist account as sophisticated as Webber’s can’t stave off the spectre of constitutional capture.

It follows that I reject the entire literature on parallel justice systems, for the metaphorical parallelism it invokes is to presumptively legitimate state systems of law. The refusal of states to account for their acquisition of sovereignty in the face of indigenous constitutionalisms seems rather to locate them in a relation of perpendicularity to indigenous interests. A central case in point is this literature’s divisive question of whether the *Charter* ought to apply to indigenous systems of law and governance.¹¹⁹⁸ This query deeply misrepresents the scale of difference at issue, which isn’t narrowly between individual and collective conceptions of rights, but distinct constitutional logics and their corollary structures. Tully is right to remind us that “the world of constitutionalism is not a universe, but a multiverse: it cannot be represented in universal principles or its citizens in universal institutions.”¹¹⁹⁹ It’s easy to lose sight of this reality, to get caught up in what Sákéj Henderson calls the “pretense of benign translatability”¹²⁰⁰ across distinct “constitutional wordworlds”.¹²⁰¹

¹¹⁹⁵ Little Bear, “Jagged Worldviews Colliding” at 84-85; Tully, *PPNK* 2 at 116-117; Coulthard, *Red Skin, White Masks* at 39.

¹¹⁹⁶ Onabigon, “Elder’s Comments” at 282.

¹¹⁹⁷ Webber, “The Meanings of Consent” at 32-35.

¹¹⁹⁸ There are many thoughtful works on this topic. See for instance Kerry Wilkins, “... But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government” (1999) 49:1 UTLJ 53; Kent McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms” (1996) 34:1 Osgoode Hall LJ 61; Teresa Nahanee, “Dancing with a Gorilla: Aboriginal Women, Justice and the Charter” in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993) at 359; Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Canada Communication Group, 1996); Bill Rafoss, “First Nations and the Charter of Rights” in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing Ltd., 2008) ch 11; David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012).

¹¹⁹⁹ Tully, *Strange Multiplicity* at 131.

¹²⁰⁰ 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.

¹²⁰¹ *Ibid.*

I rejected assimilation models on the ground that they necessarily violate the principle of constitutional dialogue. For legal pluralism models the situation is more complex. In each case we must consider an aspect of *constitutional contingency*. To see this, we turn to comparative legality. Legal pluralism works if and only if legality similarity obtains between the systems of law brought into a pluralist relationship. Thus liberal systems of law (which share a contractarian constitutional logic) may enter into relationships of legal pluralism, and likewise for rooted systems of law (which share a mutual aid constitutional logic). The same should hold true for the possibility of legal transplants and for polyjurality generally.

But where the situation is one of legality difference—where one legal system is liberal and the other rooted—then legal pluralism is incoherent. One can't cause systems of law to communicate with one another across distinct logics. In such a circumstance, 'pluralism' is more properly imperialism, what Tully calls a form of "indirect rule"¹²⁰² because it translates one of the systems of law through the constitutional logic of the other, which is to say that it *reconstitutes* the other in its own constitutional image ("privileging the folk categories of western law", to quote Simon Roberts' deliberately destabilizing phrase).¹²⁰³ It might justify its act of translation by reference to the necessity for intelligibility of law, but we should be clear about what's being claimed (and hence what may be resisted) in such a proposition. Its justification isn't for legal pluralism (the hoped-for outcome), but for constitutional capture (the means of producing it). Thus in the case of indigenous peoples (mutual aid) and settler peoples (contractarianism), legal pluralism models also fail the principle of constitutional dialogue.

iii. Hybridity Models

A third approach centres poststructural insights: that since identity is socially constructed, and since the action of the social is discourse, we must dutifully attend to who speaks and to how the narratives that get told work power over different subject positions (by their locations, embodiments, histories, etc.). The resulting complexity of identity has resulted in a decentring of the self, and the concomitant need to foreground worries about essentialism—an enormous contribution to law and governance. However, reciprocal to poststructuralism's anti-essentialist ethos is its commitment to hybridity. This is taken as axiomatic: since the social is diverse, socially-constructed identities are always plural.

There are two registers in which we might take up the possibility of indigenous-settler hybridity for the purpose of reconciliation. First there's the conventional sense of the identity of persons, which undergirds any discussion about culture. But we can also imagine a second sense which regards the identity of law specifically and directly. In either register, the claim is that the object of study is now so thoroughly shot through by the other that no hard boundaries between self and other are tenable. Where boundaries are porous and identities consequently blended, positions like Larry Chartrand's, "I have no issue with borrowing from other cultures but let us begin first with our own",¹²⁰⁴ may be read as fundamentalist.

Critically, a normative claim attaches to this ontological one. This state of free play is a triumph over essentialism. It promotes liberty and is thus to be celebrated. In a preliminary

¹²⁰² Tully, *PPNK* 2 at 211-212, 259-260.

¹²⁰³ Simon Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain" (1998) 30:42 *J Leg Pluralism* 95 at 105.

¹²⁰⁴ Chartrand, "Eagle Soaring" at 84.

fashion I've already stated that, moved by my reading of Daphne Odjig's view of cultural change, I think the normative claim is far too simplistic. I'd like now to develop that view.

1. Legal Hybridity

For the simple reason that it's more readily dealt with, let's first take up hybridity vis-à-vis law.¹²⁰⁵ In two deeply influential works, John Borrows has forcefully made the case that Canadian constitutionalism has both the philosophical resources and the doctrinal flexibility to accommodate indigenous law—and not only as a system of law (i.e. legal pluralism as between Canadian and indigenous systems of law) but also as a new form of hybridized Canadian law.¹²⁰⁶ But the fact that Borrows has laboured so meticulously to make the case that such a development should happen underscores his sense that Canadian law isn't already so shot through by indigenous law that it no longer makes sense to speak of each as distinct objects.

Given the colonial context, can the same be said of indigenous law? Given Canada's claim to exhaust all constitutional space within its borders and the powerfully constrained legal space that it affords indigenous law (for instance, criminal law diversion and alternative sentencing programs¹²⁰⁷), one might have the sense that indigenous law is indeed so shot through by liberalism that it no longer makes sense to speak of it as a distinct system of law.

Borrows is clear that such a perspective betrays a jaundiced view of indigenous law.¹²⁰⁸ It assumes that indigenous law is necessarily discernible and practicable within the 'public' life of indigenous communities. Such a presumption flies in the face of a rooted conception of law. Indeed, nothing about a rooted conception of law transpires in an imagined public. For rooted law, no such space exists; no such space is needed. Thus while it remains indisputable that there are contemporary indigenous public practises deeply impacted by Canadian liberalism, they aren't sad versions of rooted law; they're different in kind, although perhaps informed by it.

Liberalism has certainly made the contemporary practice of mutual aid and law-as-judgment considerably more challenging, and has also significantly reduced the numbers of rooted law practitioners. However it hasn't even begun to change what rooted law is. This is the non-combination point once more: rooted and liberal constitutional logics may translate and subsume (i.e. capture) each other, but cannot combine. Any claim as to a hybridized state of settler-indigenous law is false in that it occludes logical-structural difference.¹²⁰⁹

2. Personal Hybridity

We still have the more challenging hybridity model to consider. It says there are no longer clear boundaries between indigenous and settler subjects, whether persons or peoples. Since there are no longer identifiable subjects on behalf of whom to take up the problem of colonialism, in an important sense it's not clear that there is a problem.

¹²⁰⁵ John Ralston Saul famously (and controversially) drew on the notion of *métissage*, in the express sense of hybridity, to make his case for the fusion of Canadian and indigenous legal forms. See John Ralston Saul, *A Fair Country: Telling Truths about Canada* (Viking Canada, 2008).

¹²⁰⁶ See generally Borrows' comprehensive (and in the case of *CIC*, systematic) arguments in this vein in Borrows, *Recovering Canada* and Borrows, *CIC*.

¹²⁰⁷ An excellent resource is Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich Publishing, 1998).

¹²⁰⁸ Borrows, *Recovering Canada* at 26-27.

¹²⁰⁹ See Williams, *Kayanerenkó:wa* at 139, n 188.

Several scholars have suggested that cultural hybridity presents an appealing option for indigenous peoples. Gordon Christie's formulation of the point is particularly clear:

Critical theorists attack the liberal notion of the self, the independent and prior entity which has beliefs and values, substituting in its place the fluid, dynamic and experientially-determined self. There are no "essential interests," no aspect of the self that is necessary or fixed, as the self is conceived as entirely contingent, a mere vessel for "possibility" itself. This can be a very attractive notion of self for contemporary Aboriginal people, for it permits an unlimited amount of free play to infuse the modern self-identity of Aboriginal individuals. In this modern world of inter-mixed and inter-mingled cultures, with Indigenous peoples around the world struggling to maintain their identities in the face of massive cultural shock and relentless efforts at cultural assimilation, Aboriginal people can grasp onto this critical notion of the self, protecting the sense that there still are many Aboriginal people surviving in the midst of the larger cultural milieu. Just as there is no self that is fixed and determinate, there is no culture that is fixed and determinate—the edges of selves and cultures are blurred, with even the centres open for revision, as cultures meet and interact.¹²¹⁰

Alan Cairns lays bare the appeal in his argument that a poststructural view of identity "is naturally more congenial to Aboriginal peoples than the assimilation interpretation, for it means that cultural change is normal rather than threatening."¹²¹¹ He specifies: "In a sense, it is not that the process of cultural transformation has changed, but that we now think of it differently. Driving a car, watching television, drinking Pepsi, going to university, are no longer thought of as signs of assimilation, but as responding to a changing environment, as simply indicating contemporary ways of being Aboriginal."¹²¹² So the non-threatening nature of colonial change follows from the fact that indigenous peoples are exercising control over how they imagine the process. The critical difference, then, is choice. Cairns draws this point out expressly:

when cultural change derived from cultural contact [see how colonialism has dropped out, because it now makes an unwarranted presumption about power] is relabelled cultural growth, it gives priority to the choosing, incorporating Aboriginal person, community, or nation. The move from being assimilated to that of an agent transforming one's own culture or one's individual personality by incorporating outside influences, as everyone else is doing, is from being a vessel filled by others to an in-charge actor scanning the options.¹²¹³

Finally, Cairns observes that "From this perspective, being Indian, Inuit, or Métis is not defined by fidelity to past cultural practices. Aboriginality is not frozen, but rather is evolving, adapting, and choosing."¹²¹⁴

Tully, too, seizes upon the consumptive characterization of self-determination, but is decidedly uncelebratory about it. His account of personal hybridity discloses the neoliberal snare, and its bait—the corresponding freedom to choose one's own identity—as neoliberalty:

One may now turn one's individual or collective life into a democratic enterprise; deliberating about, taking on and revising a wide range of careers, work relationships, consumption patterns,

¹²¹⁰ Christie, "Law, Theory and Aboriginal Peoples" at 110.

¹²¹¹ Cairns, *Citizens Plus* at 104.

¹²¹² *Ibid.*

¹²¹³ *Ibid* at 104-105.

¹²¹⁴ *Ibid* at 104.

lifestyles, identities and voluntary associations around gender, cultures, languages, hybridity and the environment, and being free to change these as one chooses. Citizens, individually and in groups, enjoy the market ‘freedoms of the moderns’, especially of mobility, consumption and change, and are free to invent themselves as they move from role to role, and thus to live life like an actor, as Nietzsche predicted.¹²¹⁵

a. From Universal Subject to Universal Subjectivity

While Cairns and Tully differ sharply on whether the radical free choice characteristic of personal hybridity promotes freedom, they seem to agree that it represents neoliberality. In the quotations above are references to individualism, autonomy, consent, progress and commodification. While having de-centred an essentialized indigenous self, the poststructural conception of identity, of which personal hybridity forms a vital part, has dug even further into radical individualism.¹²¹⁶ It smacks of liberal orthodoxy, which leaves me, like Tully, distinctly uncelebratory. Perhaps we might more properly think of poststructuralism’s orientation to hybridity as a specification of liberal subjectivity, and not as the alternative which it would have us believe it is. This is an insight Christie unpacks:

If Aboriginal people are both individually and collectively little more than contingently arranged characteristics, all of them “up for grabs,” what ultimately is the marker of difference between Aboriginal and non-Aboriginal societies and the people that make them up? Here we witness critical theories in their attempt to slide *universal* claims under the cultural chasm separating Aboriginal and non-Aboriginal societies, threatening the very existence of Aboriginal peoples *as Aboriginal peoples*. Unlike the threat from liberal theory, which demands that Aboriginal peoples see themselves as autonomous entities engaged within the liberal project, critical theory demands that Aboriginal peoples see themselves as products of free play. This *extends the sense of freedom at play in liberal theory*; as individuals themselves resist being cast in stone, freedom is extended along lines laid out by critical theorists’ adherence to deeper skeptical beliefs.¹²¹⁷

Tully takes up the same tension in dialogue with James Clifford’s work. In his way of putting the point, Clifford “reduces post-modern societies to a homogenous culture of contingent and dissolving differences”,¹²¹⁸ and he concludes “dissolving this difficulty, and the demands it has engendered, into a homogenous ‘post-cultural situation’ is to finesse rather than face the problem post-modernism sets out to address.”¹²¹⁹

In my own way of articulating the problem, postmoderns are right to decry the claimed universality of the subject liberalism imagines, but wrong to resolve that problem by resort to a universal subjectivity. The result is to push the problem of false universality one level of complexity down. The movement from liberalism’s universal *subject* to poststructuralism’s autonomous universal *subjectivity* is a sophisticated liberal iteration. Far from being so shot through by the other that no real boundary remains, a hybrid subject’s otherwise porous boundary remains closed to rooted difference. Hybridity fails the test of indigenous-settler reconciliation for the same reason the previous two categories did: it translates the other into itself, insisting that a constitutional monologue is a meaningful form of speech.

¹²¹⁵ Tully, *PPNK* 2 at 104.

¹²¹⁶ Pihama, “Asserting Indigenous Theories of Change” at 198.

¹²¹⁷ Christie, “Law, Theory and Aboriginal Peoples” at 110; initial emphasis in original; second emphasis added.

¹²¹⁸ Tully, *Strange Multiplicity* at 46.

¹²¹⁹ *Ibid.*

iv. Sovereign Nation Models

Amongst indigenous peoples in Canada today, the claim that we're sovereign nations is both powerful and commonplace. Indeed, it's not overstating matters to say that both terms, nationhood and sovereignty, are among the most important in the lexicon of indigenous advocacy, mobilization, and resistance today. They're deployed not only in political, activist, and academic contexts, but also often in the ordinary course of community life.

The central notion is that nationhood and sovereignty work together to carve out space for indigenous lives lived on their own terms, freed from colonialism. There are diverse ideas as to how exactly they work together and how they might accomplish such an aim. But in the main, the view that non-violent indigenous-settler relationships will require *that* settlers respect indigenous nationhood and sovereignty is widely held and argued.

In what follows I advert to the considerable complexity around indigenous peoples' uses of these two terms, by clarifying their analytic significance. I begin by briefly unpacking the relationship between the two terms. I then offer a critique of them and consider ways that indigenous thinkers have sought to modify and respond to it.

The basic relation between nationhood and sovereignty is that the former is a form of collective self, and the latter is a political claim—a strong one—about authority which attaches to it. I'm deliberately avoiding the issue of which comes first as I think nothing relevant to our purposes turns on it. I'm also not claiming that sovereignty is the only political claim that nations might make vis-à-vis authority. Non-indigenous persons and groups have sometimes made softer claims to authority *of* indigenous nations, but they aren't relevant to our driving question.¹²²⁰ What I'm interested in, and what I don't mean to leave open, is the element of necessity in the corollary that sovereignty is vested in nationhood.

The basic relation I'm suggesting finds expression in statements like "Without nations, we are not sovereign"¹²²¹ and "Sovereignty is the most critical force animating a nation."¹²²² In an influential essay by Taiaiake Alfred,¹²²³ the relation is taken to be so obvious that it goes unarticulated. The nearest Alfred comes to drawing it out is in a passage about "the cooptation of indigenous nationhood and the creation of assimilative definitions of sovereignty",¹²²⁴ when he says "In Canada the movement has taken the form of a struggle for revision of the constitutional status of indigenous nations, focused on forcing the state to break from its imperial position and recognize and accommodate the notion of an inherent authority in indigenous nations."¹²²⁵

The general move—and Alfred's powerful essay is a paradigm case—is to plumb the notion of sovereignty deeply (whether for unique applications of sovereignty to indigenous nations or for distinct indigenous conceptions of sovereignty), but to simply assume indigenous nationhood. I think this is a critical error. There's much at stake in why one might insist upon the language of nationhood and not peoplehood or tribalism, etc. The distinction is an obvious one. The discourse of peoples and tribes may be readily absorbed into the political community of a colonizing other: the very relation that the language of sovereignty is intended to prohibit. One might argue that this is what happened in the Marshall trilogy of cases in the United States

¹²²⁰ As I've earlier discussed, Will Kymlicka offers a theoretical account for such a distinction in his suggestion that indigenous peoples in Canada are a form of Canadian national minority.

¹²²¹ Monture, "Notes on Sovereignty" at 198.

¹²²² Stark & Stark, "Nenabozho Goes Fishing" at 21.

¹²²³ Alfred, "Sovereignty".

¹²²⁴ *Ibid* at 40.

¹²²⁵ *Ibid*.

(through the notion of domestic dependency),¹²²⁶ the *Quebec Secession Reference* (through the notion of “internal self-determination”¹²²⁷), and in the *United Nations Declaration on the Rights of Indigenous Peoples*¹²²⁸ (which preserves “the territorial integrity or political unity of sovereign and independent States”¹²²⁹).

1. National Boundaries

Nationhood, it is hoped, avoids running this risk. But how might this be so? The answer lies in the idea of a boundary, of which nations are conventionally imagined to possess at least two sorts: membership and territory. In both cases, the idea is that national boundaries assert the edges of authority. They represent a line across which none may pass, absent the nation’s consent. That authority—the power to consent or dissent, to include or exclude—is asserted as sovereignty. Alfred writes: “*Sovereignty*. The word, so commonly used, refers to supreme political authority, independent and unlimited by any other power.”¹²³⁰ Sovereignty is a claim which enjoys so much appeal precisely because it’s how nations assert their boundaries as against all comers. Sovereignty, then, is a *representation* of the boundary. But the contours of nationhood are where the boundary actually resides.

This distinction has two vitally important consequences. First is what we might call the *indivisibility consequence*. If the boundary existed within sovereignty, then indigenous nations might have claimed it in some cases and not in others. We might have made exceptions as we saw fit, dividing nationhood according to our purposes. But since, rather, the boundary defines *who we are*, it’s inescapable. We presuppose it with every utterance. And as an aspect strictly of subjectivity, the boundary is indifferent to the particulars of any object. Nationhood is itself regardless of who seeks to compromise it, and whether by access into or by domination over it.

Second is the *liberal subjectivity consequence*. That the authority so fervently sought inheres in the form of subjectivity under discussion (nationhood) and not the political claim it enables (sovereignty) is to centre a form of subjectivity, the central feature of which is the moral authority to exclude all others from access. That is, *sovereignty is to nations as autonomy is to persons*.¹²³¹ Persons and nations are, respectively, individual and collective forms of the same kind of self-determining¹²³² subjectivity. Nationhood is the word for an autonomous conception

¹²²⁶ *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832). It must be noted that in these cases the word ‘nation’ is used, but the repeated word ‘tribe’ is what gives its rendering.

¹²²⁷ *Reference Re Secession of Quebec* [1998] 2 SCR 217 at paras 126-130.

¹²²⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess., Supp No 49, Vol III, UN Doc A/61/49 (2008) 15.

¹²²⁹ *Ibid* at art 46(1).

¹²³⁰ Alfred, “Sovereignty” at 33; emphasis in original.

¹²³¹ I believe this is what empowers Paul Nadasdy’s argument that those who outwardly reject the politics of recognition presuppose its necessity insofar as their political claims are for sovereignty. Autonomy is useless if not respected by those its purpose is to constrain, and it can’t be respected if unrecognized. See Paul Nadasdy, *Sovereignty’s Entailments: First Nation State Formation in the Yukon* (Toronto: UTP, 2017) [Nadasdy, *Sovereignty’s Entailments*] at 14-18, 66-72.

¹²³² Tully explains how ‘self-determination’, for all its importance to contemporary indigenous political advocacy, is the language of civil freedom / modern subjectivity, which includes the liberal subject. Tully, *PPNK* 2 at 251, 212.

of peoples, which accounts for its emphases on boundary and consent: the liberal form of subjectivity, now expressed as a collective subject.¹²³³

Heidi Stark expresses this insight clearly: “Sovereignty in contemporary understandings has often been applied to mean that nations are autonomous and independent, self-governing, and generally free of external interference.”¹²³⁴ Thus if we were to follow nationhood through the belonging analytic, we should expect to find that it animates a liberal conception of freedom (centrally, the negative liberty Stark describes) and a liberal notion of belonging.

2. Sovereignty’s Over-inclusivity

Taken together, these two consequences disclose a critical defect in sovereign nationhood models of indigenous-settler relationship: sovereignty claims too much. Indigenous nations (and individual members within them) frequently want to claim a hard boundary—the liberal subjectivity consequence—as against their colonizers. They invoke sovereignty specifically to this effect. But the indivisibility consequence means that they aren’t free to divide the boundary between self and other as they see fit, uniquely targeting, for instance, settler constitutional imposition. As part of a statement about who they are and how they exist in the world, the boundary is indifferent to the fact that settlers are settlers. Rather, it holds as against everyone: not only settler groups, but all other human groups, as well as animal, plant and spirit communities, and more generally, earth (i.e. the sovereignty thesis). This is directly counter to the Cree teachings of Stan McKay. He acknowledges the imperative need for indigenous peoples to get out from under colonial control, but his emphasis is on quite another point:

While this is a necessary part of the growth and healing of the aboriginal people, our spiritual teachers tell us we cannot stop with an image of sovereignty that ends when we regain our political power. Our spiritual calling is to continue the process until our pilgrimage brings us to the place of interdependence. This is the time for the many peoples of the earth to acknowledge our family relationship, which includes us all.¹²³⁵

We have to consider indigenous replies to sovereignty’s over-inclusivity problem. But if none succeed in addressing it, then sovereign nationhood models seem to fail the test of indigenous-settler reconciliation. Whether they respect the first principle turns on the orientation of the parties. It’s entirely possible to invoke sovereignty as a ‘turn away’ from any sort of relationship with settler society, beyond the bare fact of colonialism.¹²³⁶ But indigenous nations might also assert sovereignty as a prelude to a nation to nation relationship of the sort worked out through a liberal conception of treaty (and hence, constitutional) dialogue. I address this possibility in the next section.

¹²³³ I realize that nationalism and liberalism differ in respect of their geneeses, in that nations need not arise from a political choice (as in the case of ethnonationalism). While this distinction is doubtless of enormous importance for liberals and for nationalists, it doesn’t seem to matter for our purpose of indigenous-settler reconciliation. Insofar as a nation shares in the contractarian constitutional logic and in the sovereign-citizen structure of the state, it shares in what I’ve called the liberal mode of constitutionalism and can be engaged with accordingly.

¹²³⁴ Stark, “Nenabozho’s Smart Berries” at 342; citations omitted.

¹²³⁵ McKay, “Calling Creation into Our Family” at 33-34.

¹²³⁶ Glen Coulthard helpfully discusses ‘the turn away’ in the thought of Taiaiake Alfred and Leanne Simpson in Coulthard, *Red Skin, White Masks* at 154-155. As I understand him, Coulthard isn’t suggesting that either Alfred or Simpson advocate for *no* relationship with settler society.

What's clear, however, is that until reformed or removed, the liberal subjectivity consequence causes sovereign nationhood models to fail the second principle. It's a contradiction in terms to be disconnected from earth and reconciled to its ways. That's what earth reconciliation entails: not only moving earth from object to subject, but also and more importantly, being and acting in the earthway. Yet liberal subjectivity (and hence a liberal conception of freedom) presupposes alienation from earth. Liberal subjects might at least mount arguments to the effect that they respect earth, but not earthways. This they may not do without abandoning their project.

3. Anti-colonial Language Games

Unsurprisingly, indigenous nationalist-sovereigntists haven't generally accepted the argument I've presented, but have demonstrated sensitivity to its force. No one wants to be caught in, to use Gordon Christie's language once more, the liberal snare. Much of this sensitivity has been demonstrated through identification that terms like 'sovereignty' have a western origin and that if we're to use them for our own ends, we shall have to stipulate novel uses of them. I confess that at the outset of my PhD, there are some words so closely associated with liberalism—'autonomy', chief among them—that I could only hear them in a liberal frame.¹²³⁷ Thankfully my perspective has broadened. This is in part due to James Tully's work explaining that words find their meaning in their use,¹²³⁸ but I owe perhaps an even greater debt to Heidi Stark. Through many probing conversations, her challenges expanded my narrow understanding.

The situation I apprehend today consists of, first, the conventional (and I think 'liberal' is a better characterization than is 'Western' of contemporary convention) uses of terms, and second, the creative indigenous interventions which modify their meanings in particular instances.¹²³⁹ As for the first point, Tully explains that "popular sovereignty, people, self government, citizen, agreement, rule of law, rights, equality, recognition and nation"¹²⁴⁰ are examples of terms whose uses have now become so conventionalized that it's easy to mistake the limited range of their contemporary usage as their only possible usages.¹²⁴¹ Dale Turner urges caution on the reciprocal point: "We can invoke terms like kinship, spirituality, and 'Original Instructions' all we want, but they will do little political work for us as long as the discourses of rights, sovereignty, and nationhood remain inextricably embedded in the philosophical, ideological, religious, social, and economic realities of the dominant colonial culture."¹²⁴²

The second point is merely the continuation of the argument undertaken regarding 'justice' as harmony and rooted invocations of 'rights' as responsibilities. This strategy involves indigenous peoples stipulating alternative meanings for established concepts.¹²⁴³ Just as we saw

¹²³⁷ One can see shades of this way of thinking in Menno Boldt & J Anthony Long's treatment of sovereignty in Menno Boldt & J Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" (1984) 17:3 CJPS 537. In fairness, this article was published in September 1984 and was an important contribution at that time.

¹²³⁸ I have in mind here Tully's work drawing on Wittgenstein's notion of language games. See for instance Tully, *Strange Multiplicity* at 103-116 and especially Tully, *PPNK 1* at ch 2.

¹²³⁹ See for instance, Monture, "Power, Identity, and Indigenous Sovereignty" at 158; Monture-Angus, *Journeying Forward* at 35-36.

¹²⁴⁰ Tully, *Strange Multiplicity* at 36.

¹²⁴¹ Nadasdy, *Sovereignty's Entailments* 11.

¹²⁴² Turner, *This Is Not a Peace Pipe* at 116.

¹²⁴³ See for instance, Simpson, "Looking after Gdoo-naaganinaa" at 39, n 7.

with ‘rights’, it’s clear that many elders use ‘sovereignty’ in a sense which isn’t the conventional one. For instance, elders James Cote, Elmer Courchene, and William G. Lathlin explain that “This was the first relationship – First Nations peoples’ relationship with the Creator, when he gave our people laws and principles to practice our sovereignty”¹²⁴⁴ and “During this time in our history First Nations peoples were sovereign peoples. It was when First Nations peoples practiced our sovereignty by making our own laws; a time when First Nations sovereignty arose from ties to the land, from that relationship to our Mother, the earth”.¹²⁴⁵

These passages bind sovereignty inextricably to relationships with Creation—with Creator and with earth. In another passage illustrative of a pointed shift in usage, elder Dennis White Bird (Naawaakomiigowinin) says “The Treaty relationship is based on the following principles: respecting each other’s sovereignty, developing a kinship-based relationship with Newcomers, reciprocity through sharing of each other’s best gifts, and mutual obligation to uphold the Treaty.”¹²⁴⁶ Here former Treaty Commissioner White Bird has placed sovereignty within the earthway context of mutual aid (and even within its structure, kinship), giving ‘sovereignty’ a very different meaning indeed.

Senator Murray Sinclair, at the time Associate Chief Judge of the Provincial Court of Manitoba, engaged in a similar reinvention of liberal understandings of some basic Canadian legal terms. For instance, he suggested that indigenous peoples accepted individual autonomy and negative liberty as ways of thinking about persons and freedom: “The principle of non-interference is consistent with the importance Aboriginal Peoples place on the autonomy and freedom of the individual, and the avoidance of relationship-destroying confrontation.”¹²⁴⁷ However, his other-regarding walkback from negative liberty is, to say the least, remarkable: “Most Aboriginal societies value the interrelated principles of individual autonomy and freedom *consistent with the preservation of relationships and community harmony, respect for other human (and non-human) beings, reluctance to criticize or interfere with others, and avoidance of confrontation and adversarial positions.*”¹²⁴⁸ Leanne Simpson presents a similar conception of ‘autonomy’,¹²⁴⁹ and Sa’ke’j of dignity.¹²⁵⁰ Many liberals wouldn’t even recognize autonomy and dignity within these relational limits.

4. Novel usages of ‘Nationhood’ and ‘Sovereignty’ Must Respect Earth Reconciliation

These examples of redefinition demonstrate how creative indigenous peoples have been in confronting colonial power. Indigenous peoples are free to invent any new way of using an established term, subject to their own histories.¹²⁵¹ But such usages are of no consequence unless

¹²⁴⁴ Cote et al, *Gakina Gidagwi’igoomin Anishinaabewiyang* at 9.

¹²⁴⁵ *Ibid* at 10.

¹²⁴⁶ *Ibid* at 80.

¹²⁴⁷ Sinclair, “Aboriginal Peoples, Justice and the Law” at 179.

¹²⁴⁸ *Ibid*; emphasis added.

¹²⁴⁹ Simpson, *Dancing On Our Turtle’s Back* at 53.

¹²⁵⁰ James (Sa’ke’j) Youngblood Henderson, “The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems” in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2018) 9 at 9.

¹²⁵¹ Joanne Barker, “For Whom Sovereignty Matters” in Joanne Barker, ed, *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005) 1 at 21.

they move beyond the conventional, liberal usage: only if they do so is it possible for them to respect the second principle of indigenous-settler reconciliation. To know whether they do so, we shall need to have the non-liberal analytic sense of the term articulated.¹²⁵²

To return to our focus on ‘nationhood’, this will necessarily include the articulation of an alternative kind of boundary. The new usage of the term might radically reconceive of how the boundary functions such that we have to change our thinking about boundaries in order to identify it as one—mutual aid does this—but it must furnish us *some* answer. If it doesn’t, we have no reason to accept that the term has succeeded in its user’s aspirations. I’d like to look more closely at a couple of nationalist-sovereigntist models which do just that—go beyond merely claiming a novel word usage to unpacking *how* it works, and thus why others might consider using it this way too.

a. Taiaiake Alfred’s Anti-State Sovereignty

Let’s first consider Alfred’s influential essay, “Sovereignty”. This essay is notable for several reasons. First, Alfred is certainly conscious of the danger of the liberal snare. He flatly states “‘sovereignty’ is inappropriate as a political objective for indigenous peoples”¹²⁵³ which must be rejected.¹²⁵⁴ He worries that so few have questioned how this “European term and idea” came to be so embedded in indigenous political consciousness, or what the implications of having adopted this “European notion of power and governance” are.¹²⁵⁵

Second, at the heart of Alfred’s critique is a deeply held regard for earth. On his account, indigenous peoples perceive and connect with land in a unique way. He explains:

Conventional economic development clearly lacks appreciation for the qualitative and spiritual connections that indigenous peoples have to what developers would call ‘resources.’

Traditional frames of mind would seek a balanced perspective on using land in ways that respect the spiritual and cultural connections indigenous peoples have with their territories, combined with a commitment to managing the process respectfully and to ensuring a benefit for the natural and indigenous occupants of the land.¹²⁵⁶

We clearly see in this passage that earth (plants, animals, land) has been moved from object to subject: no longer merely ‘resources’, but rather ‘occupants of the land’ in their own right. Alfred almost pushes further still when he writes “In most traditional indigenous conceptions, nature and the natural order are the basic references for thinking of power, justice, and social relations.”¹²⁵⁷ This statement seems sufficient to draw out the further, critical insight that earth is not only a subject, but a way.

¹²⁵² In a fascinating but all too short essay, Ned’u’ten scholar June McCue began to do just this with respect to a Ned’u’ten conception of sovereignty. Her emphasis is less on political claims against others, and much more about how her people’s systems of law and governance allow them to sustain themselves as a people through time. There’s a decisive emphasis in her preliminary thoughts on earth as a way of being, and I note her express reference to practices of gifting in this respect. See June McCue, “New Modalities of Sovereignty: An Indigenous Perspective” (2007) 2 Intercultural Hum Rts L Rev 19 at 24-28.

¹²⁵³ Alfred, “Sovereignty” at 38.

¹²⁵⁴ *Ibid* at 41.

¹²⁵⁵ *Ibid* at 39.

¹²⁵⁶ *Ibid* at 45-46.

¹²⁵⁷ *Ibid* at 45.

Instead, however, Alfred uses this statement to identify a contrast with his real target, the state as an inappropriate form of community. That target comes sharply into focus when he says:

One of the main obstacles to achieving peaceful coexistence is of course the uncritical acceptance of the classic notion of sovereignty as the framework for discussions of political relations between peoples. The discourse of sovereignty has effectively stilled any potential resolution of the issue that respects indigenous values and perspectives. Even ‘Traditional’ indigenous nationhood is commonly defined relationally, in contrast to the dominant formulation of the state: there is no absolute authority, no coercive enforcement of decisions, no hierarchy, and no separate ruling entity.¹²⁵⁸

This statist view of authority is explicitly contrasted with indigenous conceptions of authority. Alfred offers two clear articulations of this point:

Is there a Native philosophical alternative? And what might one achieve by standing against the further entrenchment of institutions modeled on the state? Many traditionalists hope to preserve a set of values that challenge the destructive, homogenizing force of Western liberalism and materialism: they wish to preserve a regime that honours the autonomy of individual conscience, noncoercive forms of authority, and a deep respect and interconnection between human beings and the other elements of creation.”¹²⁵⁹

In revisiting the same aspect of his argument, he restates the point:

Indigenous perspectives offer alternatives, beginning with the restoration of a regime of respect. The idea contrasts with the statist solution, still rooted in a classical notion of sovereignty that mandates a distributive rearrangement but with a basic maintenance of the superior posture of the state. True indigenous formulations are nonintrusive and build frameworks of respectful coexistence by acknowledging the integrity and autonomy of the various constituent elements of the relationship.¹²⁶⁰

Finally, this contrast sets up Alfred’s solution to the problem of sovereignty’s participation in constitutional capture:

The challenge for indigenous peoples in building appropriate postcolonial governing systems is to disconnect the notion of sovereignty from its Western legal roots and to transform it. It is all too often taken for granted that what indigenous peoples are seeking in recognition of their nationhood is at its core the same as that which countries like Canada and the United States possess now.¹²⁶¹

Alfred’s argument, then, is just the sort which we’ve been exploring. He wants to assign a new meaning to sovereignty—one specifically suited to the anti-colonial impulse of indigenous political goals. It’s an argument which I admire. Alfred thoughtfully diagnoses the problem and rather than simply offering a counter-usage of the problematic term, he labours to establish its logic. This is the purpose of stating, in the passage excerpted above, that among what he would

¹²⁵⁸ *Ibid* at 41-42.

¹²⁵⁹ *Ibid* at 45.

¹²⁶⁰ *Ibid* at 46.

¹²⁶¹ *Ibid* at 42.

call ‘traditionalists’, “Nationhood is commonly defined relationally”, and of the associated consequence that we “might even rethink the need for formal boundaries and precedents that protect individuals from each other and from the group.”¹²⁶² I take that it’s also the impetus for his efforts to tie his egalitarian description of traditionalist conceptions of authority to earth.

Alfred unequivocally understands rootedness. This is clear at many points I’ve identified in this text and perhaps even more so in *Wasáse*.¹²⁶³ Additionally, through opening *Wasáse* and *Peace, Power, Righteousness* with the Haudenosaunee Thanksgiving Address, Alfred grounds both works in Creation.¹²⁶⁴ Yet he doesn’t seem to let his understanding of rootedness drive his project. Rather than taking as the genesis for transformative action a personal practice of self-governance (which Anishinaabeg call *bimiwinitiziwin*), Alfred argues for the leveraged, specifically *collective* power of a nation acting in unison. Instead of acting in “atomized formations”,¹²⁶⁵ effective action requires an “organizational approach”,¹²⁶⁶ “consensus mobilization”,¹²⁶⁷ and “reinforced solidarity”,¹²⁶⁸ all of which leads towards “an anti-state movement”.¹²⁶⁹ Stated as a proposition, “we need to work together to reformulate not only our identity but our politics to support coordinated action against the colonial system”¹²⁷⁰ and he identifies four aspects central to such a program.¹²⁷¹

Alfred has been remarkably successful in these aims, having inspired a generation of indigenous scholar-activists to action. And yet the shift from individual to collective action seems to have moved earth from object to subject, but not also to *way*—not, that is, to lifeway. Something like mutual aid is doubtless Alfred’s goal, but not his means of achieving it.

This helps us to see that despite its ardent anti-liberal impulse, it’s not clear that Alfred’s counter-usage of ‘nationalism’ entirely avoids the liberal snare. We can see the tension in a couple of ways. The first regards his conception of nationhood, seen in his sustained valorization of individual autonomy throughout the block quotations above. In light of this commitment, the relationality he wants to attach to nationhood—and its attendant possibility of rethinking “the need for formal boundaries” protecting individuals reads as a specification of autonomy, not an alternative to it. Based on this way of thinking about persons, I’d expect Alfred to explain interdependence as a form of relationship between autonomous beings (whether individuals or nations). The indivisibility consequence means that the liberal subjectivity retained within Alfred’s nationalism will find expression in any claim to revised sovereignty which it mounts.

Second, the ambit of Alfred’s argument is too small. Rooted communities have powerful reason to reject the state as a form of political authority. Alfred’s assessment is dead-on, but doesn’t quite go far enough. The justification for state rejection isn’t that the state is a colonial wrong in and of itself, but rather that it’s the structure of the contractarian constitutional logic imposed as settler supremacy’s third form of violence. An imposed constitutional *logic* is ground zero for colonial violence to indigenous constitutionalisms, where indigenous conceptions of authority reside. In focussing directly on the structure through which that logic finds expression,

¹²⁶² *Ibid* at 48

¹²⁶³ Alfred, *Wasáse* at 31, 206, and especially 236, 240, 250 (in which he expressly refers to human roots into earth).

¹²⁶⁴ *Ibid* at 13-16; Alfred, *Peace, Power, Righteousness* at 1.

¹²⁶⁵ Alfred, *Wasáse* at 231

¹²⁶⁶ *Ibid.*

¹²⁶⁷ *Ibid* at 208.

¹²⁶⁸ *Ibid* at 231

¹²⁶⁹ *Ibid* at 206.

¹²⁷⁰ *Ibid* at 231

¹²⁷¹ *Ibid* at 232.

Alfred spares much of the logic from the ambit of his critique. I suspect that the reason for this result is that throughout his essay, Alfred describes indigenous conceptions of authority in substantive terms, not in logical-structural ones.¹²⁷² But if authority is a constitutional good, then it exists at the logical-structural level of legality. By expressly tying Alfred's analysis to rooted constitutionalism, I hope to have further developed its impact.

b. Heidi Stark's Treaty Transnationalism

Before leaving the section on sovereign nationhood models, there's another indigenous nationalist whose work is important for this study. Heidi Kiiwetinepinesiik Stark's use of 'nationhood' has shown me how it's possible for nationalists, too, to treat earth as a *way* in which peoples constitute themselves, avoiding constitutional capture.

To begin, Stark seems to accept the relationship between nationhood and sovereignty that I've suggested: "Anishinaabe leaders often sought recognition and protection of their nationhood, and thus their sovereignty".¹²⁷³ Of this latter term, she asserts "Although the term originated in Europe, what it describes at its core is intrinsic to all peoples. Thus, contemporary understandings of sovereignty reference the unique traits of a nation that enable their self-governance."¹²⁷⁴ Reflecting on sovereignty in another context, she again voiced that "Although the term is often attributed to the Westphalian state system derived from European theological and political discourse, it describes at its core the intrinsic political authority that enables the self-governance of all nations."¹²⁷⁵

Second, Stark openly casts her use of 'nationhood' in the discourse of autonomy,¹²⁷⁶ but not in the conventional liberal sense.¹²⁷⁷ In fact much of her scholarship is committed to articulating a conception of indigenous national boundary not characterized by the hard in/out line critical to a liberal subject. For instance, Stark writes that "A dense web of clans, kinship ties, and loyalties to non-Anishinaabe nations existed *within* nationhood, not as forces that opposed it."¹²⁷⁸ This claim is vital to understanding Stark's work: these various collective assemblages operate not only as constraints on national autonomy, but also constitute aspects of *what autonomy means*. To be autonomous means to be in part constituted by the other, albeit particular others and in particular ways: hence *transnational* collective identities.

Yet Stark is unequivocal that the collective assemblages (and in particular, kinship) which traverse national boundaries *do* serve to constrain a nation's liberty. The resulting form of autonomy is thus one which takes that its relational responsibilities are as foundationally important as is its capacity to exclude others from its agency (non-interference). First we must see how this tension bears out in Stark's scholarship, and second, we need to see what Stark makes of it vis-à-vis reconciliation with Creation's way.

¹²⁷² Alfred, "Sovereignty" at 40, 41, 42, 43, 45, 48, 49.

¹²⁷³ Stark, "Marked by Fire" at 125.

¹²⁷⁴ Stark, "Nenabozho's Smart Berries" at 341; citations omitted.

¹²⁷⁵ Stark & Stark, "Nenabozho Goes Fishing" at 21; citation omitted.

¹²⁷⁶ Stark, "Respect, Responsibility, and Renewal" at 159, n 11; Stark, "Marked by Fire" at 126, 128, 129, 131, 135, 136, 139, 141, 142, 143; Stark, "Nenabozho's Smart Berries" at 342, 346; Bauerkemper & Stark, "The Trans/National Terrain of Anishinaabe Law and Diplomacy" at 11, 12, 14.

¹²⁷⁷ For one thing, she speaks of "Animal and Star nations". Stark, "Respect, Responsibility, and Renewal" at 147. See also Simpson, "Looking after Gdoo-naaganinaa" at 31, 33, 34, 35, 37, 38, speaking of animal and fish nations.

¹²⁷⁸ Stark, "Marked by Fire" at 122-123; emphasis added.

Of central importance to Stark's novel usage of 'nationhood' is a link she makes between kinship and treaty: "Anishinaabe national political autonomy coalesced around a land tenure system that allowed for extended kin to access territories and resources. Kinship, often coupled with a shared identity framed by language, stories, and practices, allowed Anishinaabe nations to facilitate alliances across national lines with other Anishinaabe and Native nations."¹²⁷⁹ But this is soft-peddling the kinship-treaty relation. In other places, Stark's much clearer that a coming into being of kin relations doesn't merely "allow for", but rather *necessitates* treaty relations.

The element of necessity is critical to Stark's argument about nationhood, because it's what discloses that her use of autonomy isn't aimed at liberty. Rather, transnational kinships constrain a nation's options even absent its consent. Stark articulates this anti-liberal emphasis on national *responsibility*¹²⁸⁰ when she explains that Canadian and American efforts "to establish and fix Anishinaabe boundaries often resulted in Anishinaabe assertions of their preexisting relations with other nations, which would be affected by these arbitrary lines. These expressions demonstrate how kinship operated across national lines, *binding autonomous nations in their obligations to others*."¹²⁸¹ The following is perhaps her clearest formulation:

The ability of kin obligations to transcend national lines enabled and at times necessitated allied nations to confederate. As kinship obligations transcended national lines, Anishinaabe nations had to consider how these preexisting kin obligations would be impacted by any new treaty partnerships. While recognizing the individual autonomy of each nation, these allied polities were also cognizant of their responsibilities to one another as unified peoples.¹²⁸²

In another work, Stark (with co-author Joseph Bauerkemper) offers a wonderful example of what she means.¹²⁸³ She turns to a Basil Johnston story to draw out the foregoing set of ideas. Maudjee-kawiss was an Anishinaabe whose task was to patrol his people's border with the Bear Nation. An incident precipitated by Maudjee-kawiss's theft of an important item led to him killing a member of the Bear Nation. Rather than return-killing, the family of the slain Bear agreed to adopt Maudjee-kawiss (i.e. kinship), bringing him into both their family and the Bear Nation. In the critical passage, Stark draws out the necessary movement from kinship to treaty, and with it, her novel conception of (trans)nationhood:

While Maudjee-kawiss was adopted into the Bear Nation, his Anishinaabe affiliations—along with all responsibilities thereof—were not severed. Instead he returned to his people to solicit their consent and approval of this union. He recognized that his adoption into the Bear Nation would not only place significant obligations on him, it would also inaugurate broader kinship obligations between the Bear Nation and the Anishinaabeg. Indeed Maudjee-kawiss's adoption established no less than a material alliance between the Anishinaabeg and the Bear Nation. In

¹²⁷⁹ *Ibid* at 128.

¹²⁸⁰ It seems to me that Stark uses 'responsibility' in two distinct senses in her work. I'm drawing only on her transnational use of that term, in which nations have regard for transnational collective assemblages (such as kinship groups) even *without choosing* to accept responsibility to them. However I note that Stark also deploys 'responsibility' to describe what I'd prefer to call obligation: the form of other-regard which exists between autonomous bodies (such as nations) by virtue of their *consent*. Treaty construed as contract is such an example. See Stark, "Marked by Fire" at 142, 143; Bauerkemper & Stark, "The Trans/National Terrain of Anishinaabe Law and Diplomacy" at 11, 12 (the first full paragraph presents both senses of 'responsibility'), 15, n 4.

¹²⁸¹ Stark, "Marked by Fire" at 129; emphasis added.

¹²⁸² *Ibid* at 134-135.

¹²⁸³ Bauerkemper & Stark, "The Trans/National Terrain of Anishinaabe Law and Diplomacy".

addition, this diplomatic engagement allowed for the exchange of political thought and practice, as reflected in the exchange of sashes. In essence, the adoption of Maudjee-kawiss into the Bear Nation and their gift of sashes as recording devices to the Anishinaabeg was a treaty.¹²⁸⁴

Stark seems to have avoided liberal constitutional capture. It remains for us to understand whether her non-liberal usage of ‘nationhood’ invokes Creation’s way and thereby respects the second principle of indigenous-settler reconciliation. In two recent articles, Stark has taken up the question of the role of earth/Creation in her thought on indigenous nationalism and sovereignty. We can see Stark extending her existing work in this direction in a discussion about indigenous perspectives found in treaty speeches, in which she refers to “the complex nexus of relationships that not only transcended national boundaries on the ground, but that also transcended the hierarchical notions of humanity that too often fail to reflect our commitments and responsibilities to all of creation.”¹²⁸⁵ In the same essay, she talks about interdependence with others and with creation, and she seems to do so in a way that asserts non-groundlessness:

Each time the Anishinaabe entered into a political practice with another nation, each time they told their children the stories of their creation, each time the Anishinaabe uttered the place names that delineated their relationship to their land, Anishinaabe sovereignty was transformed. This is largely because to be sovereign—or to enact sovereignty—necessitated the recognition of our interdependence, our connection to one another and creation, and our relationships. However, while this process of transformation is about growth and adaptation, it is important not to lose sight of the origins and foundations of this important political concept as we grow and transform.¹²⁸⁶

In another article (co-authored with her brother, Kekek Jason Stark), Stark deploys the form of an *aadizookaan* about Nanabozho to make her point.¹²⁸⁷ The article goes a long way in taking up the question of earth reconciliation. In summing up its argument, the Starks meditate from Nanabozho’s standpoint. As he might see things, they reflect, indigenous peoples ought to take up the question of authority (whether between persons or nations) less in the sense of a hard boundary which might try to divide it with certainty, and more in the sense of *how* we relate to one another. In particular, they suggest Nanabozho encourages us to place less investment in:

the world of courts and congresses, instead focusing on a relationship of laws and ethics and right behavior toward one another. He wanted us not to focus on *who* had authority to make decisions, but instead to consider *how* we might act. He hoped to bring forward the older ways of relating to one another that were built into the early treaties with creation. He imagined a relationship that focuses not on the rights retained or attained via treaties, but rather on the responsibilities and duties we have to one another and to creation. These are the relationships Indigenous people want with other sovereign political entities – relationships oriented toward a mutual future.¹²⁸⁸

Here the normative balance seems to have tilted such that responsibility now leads entitlement (rights) in importance. This is perhaps to be expected from an argument which describes “the older treaties with creation” as providing “ways of relating to one another”

¹²⁸⁴ *Ibid* at 3.

¹²⁸⁵ Stark, “Nenabozho’s Smart Berries” at 347.

¹²⁸⁶ *Ibid* at 353

¹²⁸⁷ Stark & Stark, “Nenabozho Goes Fishing”.

¹²⁸⁸ *Ibid* at 24; citations removed, emphasis in original.

(emphasis mine). Stark is clear that Creation consists of non-human subjects whose agency and whose interests must be respected, but is she also suggesting that Creation is a *way* in which nations might constitute themselves and interact with one another? I was left wondering whether in the final sentence of the passage above she might even be pointing towards something like mutual aid.¹²⁸⁹ I suspect she is. In a still more recent essay, Stark unequivocally grounded treaties Anishinaabeg have with Canadians and with Americans in Creation, arguing that what Anishinaabeg have done with these settler nations is a reproduction of what Creation has already done with us.¹²⁹⁰ Moreover, the reproduction serves to ground settler nations, too, in Creation.¹²⁹¹ The result is a move “away from a rights discourse that precludes us from focussing on treaties as relationships”,¹²⁹² into “relationships that must be nurtured and renewed.”¹²⁹³

In sum, whether indigenous nationalist-sovereigntist proposals respect the two principles of indigenous-settler reconciliation turns in large measure on how ‘nationhood’ and ‘sovereignty’ are used. There’s no issue with the principle of constitutional dialogue. Unlike the previous categories of models so far explored, for sovereign nationhood models the tension lies rather with the principle of earth reconciliation. Conventional civic uses of ‘nationhood’ presume a liberal subjectivity. As such, no matter how emphatically or reverentially they invoke earth, they don’t (and can’t) contemplate it as a *way* of constituting a people. Thus any indigenous community which (even if only strategically) invokes nationalism for the purpose of its hard-bounded capacity to exclude settler imposition will fail the second principle.

However in exploring Stark’s work, I’ve come to appreciate the possibility that there may be indigenous nationalists who can present indigenous-settler reconciliation models which are also reconcilable to earth. To the extent that such models exist, it seems they do so in proportion to which their discursive invocation of autonomy approaches something like what I’ve called radical interdependence, and thus as the implicit constitutionalism of ‘nationhood’ nears something like mutual aid.

v. Treaty Models

Finally we come to treaty, arguably the most complex kind of model for indigenous-settler reconciliation because of its myriad usages. ‘Treaty’ has one meaning in respect of the sovereignty thesis, another in respect of the humility thesis, and still another in respect of a combination of liberal and rooted communities trying to work out how to relate to one another.

In the first two kinds of cases, treaty takes the way that persons constitute community and replicates it as between peoples. Treaty is conventional constitutionalism operating on a larger organizational scale: treaty constitutes community *of communities*. Liberal communities thus approach the prospect of treaty with a contractarian expectation, as a negotiation process between autonomous parties (generally but not necessarily nations) that leads towards a contract specifying terms of belonging. Rooted communities instead see one another as unique disclosures of the earthway always already in relationship. Treaty refers to the deepening of such

¹²⁸⁹ See also, Stark, “Respect, Responsibility, and Renewal” at 146-147.

¹²⁹⁰ Stark, “Changing the Treaty Question” at 268.

¹²⁹¹ *Ibid* at 268, 270.

¹²⁹² *Ibid* at 275.

¹²⁹³ *Ibid*.

connections that occurs when parties intensify their earth-given mutual aid relationships by making them intentional, recognizing one another as particular forms of kin.¹²⁹⁴

The third situation differs. Since distinct forms of constitutionalism are operative within it, how to move from relations between persons to relations between peoples isn't clear; each community would do so in a different way. The question is how that tension gets resolved.

1. Treaty as Means of Constitutional Coordination

The first (contractarian) notion of treaty is of course the one used by international law today: treaties are exchange arrangements nations contract into for their mutual advantage, whether for economic benefits, the movement of peoples, non-violence, etc. While this way of thinking about treaty satisfies the principle of constitutional dialogue, it necessarily fails the second principle of indigenous-settler reconciliation for the same reason that others have failed: by definition it operates independently of the earthway.

2. Treaty as Means of Constitutional Subjugation

The second, rooted, use of 'treaty' will need unpacking; I'll return to it shortly. Let's first take up the third sense of treaty, which refers to the subjugation of one constitutional order by another, absent regard for either its autonomy or its co-creativity. Colonialism in precisely this sense describes the conception of treaty Canada uses. 'Treaty', in Canada, refers to a particular kind of right internal to Canada's constitution, which indigenous peoples alone may claim.¹²⁹⁵ Treaty forms no part of the story settlers tell about how the genesis of Canada's constitutional order was justified in the face of existing indigenous ones.¹²⁹⁶

Before indigenous constitutional subjugation, the Crown recognized indigenous peoples as distinct political communities with whom it could enter into treaties for friendly relations, with whom it was necessary to coordinate constitutional orders. Sir William Johnson's papers contain statements to this effect, such as "I must beg leave to observe, that the Six Nations, Western Indians [Anishinaabeg], ettc, having never been conquered, either by the English or French, nor subject to the Laws, consider themselves as a free people."¹²⁹⁷

To take just one, but arguably the most important example, the Treaty of Niagara of 1764 bears out this view. The archival record establishes that both prior to¹²⁹⁸ and following¹²⁹⁹ the Niagara congress, indigenous parties didn't understand themselves to have forsaken their

¹²⁹⁴ Williams, *Kayanerenkó:wa* at 128. See also Miller, "Gifts as Treaties" at 222, summarizing from C A Gregory, for a more conventional economic casting of this point.

¹²⁹⁵ *Constitution Act, 1982*, being Part II of Schedule B to the Canada Act 1982, (UK) 1982, c11 at s 35(1).

¹²⁹⁶ There's a complicated treaty history here beyond the scope of this dissertation to engage. There's no single point at which indigenous constitutional subjugation occurred; it occurred at different times for different peoples. It must also be noted that from the Crown's perspective (and from its documentary record), the nature of treaty shifted multiple times. Thus what it calls peace and friendship treaties share little in common with what it calls Upper Canada treaties (which read like simple land transfers), or what it calls the numbered treaties. A thorough study of treaty must attend to these details. I'm not purporting to present any such study here. For my purposes, what matters is the course that such shifts took: toward constitutional subjugation.

¹²⁹⁷ "Sir William Johnson to the Lords of Trade [undated]." in EB O'Callaghan, ed, *Documents Relative to the Colonial History of the State of New York, Vol 7* (Weed, Parsons and Company, 1856) 661 at 665 [hereinafter, "NYCD"].

¹²⁹⁸ "Sir William Johnson to the Lords of Trade, Johnson Hall Nov^r 13. 1763" in *NYCD, Vol 7*, 572 at 575.

¹²⁹⁹ "Journal of Colonel Croghan's Transactions with the Western Indians" in *NYCD, Vol 7*, 779 at 784, 788.

constitutional integrity. The clearest statement that this reality was understood comes from Johnson himself, less than three months after the treaty relationship was formed. Writing to General Gage at the end of October, he said: “you may be assured that none of the Six Nations, Western Indians &^{ca}. ever declared themselves to be Subjects, or will ever consider themselves in that light whilst they have any Men, or an open Country to retire to, the very Idea of Subjection would fill them with horror.”¹³⁰⁰ A few lines later, he added:

it is necessary to observe that no Nation of Indians have any word which can express, or convey the Idea of Subjection, they often say, “we acknowledge the great King to be our Father, we hold him fast by the hand, and we shall do w^t. he desires” many such like words of course, for which our People too readily adopt & insert a Word verry different in signification, and never intended by the Indians without explaining to them what is meant by Subjection.”¹³⁰¹

Additional evidence for the fact that the relation term ‘father’ didn’t mean subjection to sovereign authority can be found in the fact that sometimes an indigenous group recognized multiple metaphorical fathers at once. For instance, while living at La Point on the Western end of Lake Superior, Johann Georg Kohl observed that the local Anishinaabeg “call everybody at all connected with government, Father, and, judging from the great number of fathers these children of the desert possess, they must be excellently taken care of. During the whole period of our payment the number of fathers, great and small, was astounding.”¹³⁰²

The next day Johnson wrote to the Lords of Trade decrying a treaty supposedly made at Detroit (Johnson wasn’t present) in which Colonel Bradstreet alleged that Wendat and Anishinaabeg made “expressions of subjection”.¹³⁰³ Contrasting this supposed understanding with the one achieved at the *Treaty of Niagara*, Johnson said:

“I Am well convinced, they never mean or intend, any thing like it, and that they can not be brought under our Laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and should it be fully explained to them, and the nature of subordination punishment ettc, defined, it might produce infinite harm.”¹³⁰⁴

In time, in consequence of how their respective constitutional logics operate, the strain of indigenous and settler notions of treaty mounts and resolves emphatically in favour of liberal communities. It’s straightforward to appreciate why. Where a liberal community assesses and pursues its own self-interest, and a rooted community assesses and pursues the interests that flow from a healthy, sustainable link between all parties, the interests of the liberal community will invariably prevail. Further, they’ll do so at the cost of the rooted community, which was never bargaining to expand nor even to secure its autonomy, but only presenting its gifts and its needs. From the vantage point of the liberal community, it looks foolish and naïve, too ignorant even to look out for itself. As the unbalanced exchange persists through time, a point is eventually reached at which the liberal community has *effectively* brought the rooted one under its power, even absent its consent (i.e. the third and first kinds of treaty relationship are not to be confused).

¹³⁰⁰ “William Johnson to Thomas Gage, Johnson Hall Octb^r. 31st. 1764”, in *The Papers of Sir William Johnson*, Vol 11, 394 at 395.

¹³⁰¹ *Ibid.*

¹³⁰² Kohl, *Kitchi Gami* at 13.

¹³⁰³ “Sir William Johnson to the Lords of Trade. Johnson Hall. October 30. 1764.” in *NYCD*, Vol 7, 670 at 674.

¹³⁰⁴ *Ibid.*

After this point has been reached, for the liberal community the unsettled meaning of treaty now shifts. In the new liberal constitutional order, treaty stipulates how the rooted community *forms part* of the liberal one. Bled of gifts and saturated in need, the rooted community lacks the practical power to resist. In circumstances where the liberal party understood the fact of constitutional difference and allowed the dynamic to continue, it's proper to call that dynamic *constitutional warfare* for its deliberate end is the liberal subjugation of rooted constitutionalisms.

Heidi Stark explains this violent shift in respect of the settlers' constitutional logic coming to dominate treaty practise and discourse:

Indigenous nations primarily saw treaties as living relationships, diplomatic processes that enabled the expansion of intricate kin-based networks situated within a relational paradigm that saw the world as a deeply interconnected and interdependent place. While treaty-making prior to the nineteenth century was primarily centered on the establishment of political, military and economic alliances between Indigenous nations and newcomers, by the nineteenth century treaty making had become a vehicle for nation-building for the US and Canada as these polities began articulating a national identity through the creation and expansion of a bounded state. Treaty making became the primary apparatus through which the US and Canada sought to legitimate and expand their land base. Nineteenth century treaty making became tied up in state interest to quiet Indigenous title. Thus treaties became about extinguishment of Indigenous title, with cession becoming the given, the presumed.

This transformation of the treaty process follows the eliminatory logic of settler colonialism. They reconstructed treaties away from Indigenous visions of living relationships toward a contractual event. Treaty became about certainty and finality for the two states.¹³⁰⁵

I would supplement Stark's view by adding that Canada's trying to accomplish two related goals with this shift. First, it's endeavouring to establish the dominance of its own constitutional paradigm. Second, in suggesting that indigenous peoples have been willing participants in this shift in constitutional logics, Canada's trying to pass off its subjugation of indigenous constitutional orders as a perverse form of constitutional coordination. It purports that treaties are agreements which indigenous peoples, in exercise of their sovereign autonomy, have negotiated with the Crown, and in which they transferred their lands and even their political autonomy to the Crown in exchange for a suite of benefits which constructively position them as Crown wards. Note how the reality of indigenous constitutionalism disappears in this story, such that in its contemporary telling, 'treaty' only arises as a post-constitutional fact (i.e. section 35), one oriented towards recognizing indigenous difference *within* the unjustified liberal constitutional order settlers engineered.

The history of Canada's constitutional conduct vis-à-vis the rooted constitutional orders of the indigenous peoples of Mikinaakominis, redoubled in its false telling of that history, is a model of constitutional warfare. The offensive idea that treaty refers to rights indigenous peoples might have within an imposed constitutional order, which without justification claims to have displaced their own constitutional orders, is its provisional victory. Rather than avoiding colonialism, the constitutional subjugation view of treaty instantiates it. It unequivocally fails the first principle of indigenous settler reconciliation.

¹³⁰⁵ Heidi Kiiwetinepinesiik Stark, "Criminal Empire: The Making of the Savage in a Lawless Land" (2016) 19:4 Theory & Event.

3. Treaty as Means of Constitutional Mutualism

Where all communities begin with the humility thesis, they naturally seek to constitute their cross-community relationship in respect of the earthway. Many elders identify what I'll call the 'Earth-Forever' understanding, which appears throughout the numbered treaties, with this fact.¹³⁰⁶ Elder Fred Kelly connects the Earth-Forever understanding expressly with sacred law, which, recall, is a way of speaking about indigenous constitutionalism:

So when I said last time, 'as long as the sun shines, the rivers flow and the grass grows', those are not just poetic terms of the 'noble savage'. Those are invocations of *sacred law*, meaning that the Grandfather that lights the day, as long as he is bringing life and shining upon, on a, on a daily basis—and he's still here—and then the Grandmothers look after the waters, so that 'as long as the rivers flow', and Grandmother Earth, as long as she brings forth life and the plants, the trees, all the sources of our medications and life, and livelihood. So those are still alive, so that means that the treaty is well, [and] was intended to be dynamic and everlasting: as long as those references would last, as long as they were made.¹³⁰⁷

Elder Bone seems to share the understanding that treaty is based in sacred law: "As I have said before, *Gaagige-Onaakonigewin* (eternal law) is the highest of all of the original instructions. The eternal law is designed to keep our relationship with the Creator open and communicative in order to continue living on the earth and maintain the cycle of creation. The Treaty phrase is an eternal law and is the basis of our understanding of the Treaty promises and relationship."¹³⁰⁸ Elder Bone unpacks the Earth-Forever understanding in respect of a pipe teaching.¹³⁰⁹ In noting that its first direction/principle is to Creator and its second is to Earth¹³¹⁰, he grounds treaty in the earthway. Like elder Kelly, elder Bone takes a further step, directly referencing constitutionalism in his conception of treaty:

So the treaty is more than the words that mentions us. It talks about—in the spirit part of it—it talks about who we are as nations: the seven principles, the gifts the Creator has given to us: our relationship with the Creator, to the land, and to us as people, and the languages that we speak, our teachings, our history and our way of life. So I think it's important to discuss that because it's the source of who we are. The government has their own source; they know where they come from, how their law was formulated, how their constitution was established. They have their own source. So do we as First Nations people.¹³¹¹

¹³⁰⁶ Hyslop et al, *Dtantu Balai Betl Nahidei* at 174 (Anishininiw elder Saul Harper speaking). *Ibid* at 175 (Anishinaabe elder Lawrence Smith speaking); Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang* at 98 (elder D'Arcy Linklater speaking).

¹³⁰⁷ Interview of elder Fred Kelly by Commissioner Loretta Ross, "Episode 12". See also Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang* at 41-43; elder Fred Kelly speaking.

¹³⁰⁸ Hyslop et al, *Dtantu Balai Betl Nahidei* at 175.

¹³⁰⁹ Interview of elder Harry Bone by Commissioner Loretta Ross, "Episode 1: A First Nations' Perspective on Treaties with Elder Harry Bone" on *Let's Talk Treaty*, Treaty Relations Commission of Manitoba, online: <<http://www.trcm.ca/multimedia/lets-talk-treaty/>> [Interview of elder Harry Bone by Commissioner Loretta Ross, "Episode 1"].

¹³¹⁰ *Ibid*.

¹³¹¹ Interview of elder Harry Bone by Commissioner Loretta Ross, "Episode 2: The Spirit and the Intent of Treaties with Elder Harry Bone", on *Let's Talk Treaty*, Treaty Relations Commission of Manitoba, online: <<http://www.trcm.ca/multimedia/lets-talk-treaty/>> [Interview of elder Harry Bone by Commissioner Loretta Ross, "Episode 2"].

More direct still, he adds “Treaties are normally considered as our first law, as our constitution, our framework of who we are as nations and as people.”¹³¹² Where treaties are understood to be grounded in sacred law—and through it, Creation’s way—this statement makes perfect sense.¹³¹³

In the subsections which follow, I explore various features of treaty mutualism in an effort to disclose it more clearly. Given the scale of my project, regrettably these are mostly these are just sketches, but I hope they’re sufficient to establish the coherence of treaty mutualism.

a. Treaty and Mutual Aid

Within a rooted community, we’d expect to find this earthway grounding reflected in the constitutional logic of mutual aid and its correlate structure, kinship. In the inter-community context of treaty, the same expectation holds.¹³¹⁴ In the following sequence of quotations, elder Bone explains with increasing levels of clarity how an Anishinaabe conception of treaty *means* mutual aid. In the first instance, he clarifies that the word for treaty in *Anishinaabemowin* means relationship: “The very word about treaties, ‘ago’idiwin’, meaning relationship. Making relationships with one another, that’s what the treaty means”.¹³¹⁵ In his next iteration, he builds in the notion of mutual creative contribution: “Treaty, the Anishinaabe word ‘ago’idiwin’, simply means working together as people. Working together as people, as nations.”¹³¹⁶ In his third iteration, he refers to both the positive and negative formulations of the rooted constitutional logic analytic, saying “Treaty is about relationship. It’s about sharing. And also it’s about responsibilities, both for the government and our side as well. Obligations to do something for our people. That’s what treaty is all about.”¹³¹⁷

While elders often speak of sacred law, they obviously don’t speak about the constitutional logic analytic or of mutual aid; these are just ways I find helpful to talk about what I’ve come to understand—for the most part, from elders. But the understanding that treaty is grounded in Creation’s way and that treaty is therefore a relationship of intentional gift-giving and need-meeting is widespread. In the following comment, Anishinaabe elder Florence Paynter describes all three aspects (gift→gratitude→reciprocity) of the positive analytic:

That’s the way I understand it: as long as the water flows and as long as the sun rises. And this is what I mentioned earlier when you give thanks to the grandfather sun in the morning, he too was put here by the Creator for a purpose. He was instructed this is what you’ll do, you will treat the Anishinaabe and you will keep him warm with your sun rays. The sun has never forgotten to rise; he (sun) reminds us of that promise. And in return we too have to give thanks to him and watch for him as he rises each morning.¹³¹⁸

¹³¹² Interview of elder Harry Bone by Commissioner Loretta Ross, “Episode 1”.

¹³¹³ Mainville, “Treaty Councils and Mutual Reconciliation” at 177

¹³¹⁴ Elder Dave Courchene presents this view in a reflection on the Manitoba Indian Brotherhood’s *Wahbung*, arguing for a return to a treaty relationship grounded in the pipe and in love of the earth. Dave Courchene Jr (Nii Gaani Aki Innini / Leading Earth Man), “A Return to the Beginning for Our Tomorrows” in Dave Courchene Jr, Janet Fontaine & Kathi Avery Kinew, eds, *Our Tomorrows, Today: Wahbung 1971* (Winnipeg: Manitoba First Nations Education Resource Centre Inc, 2017) [Courchene, “A Return to the Beginning for Our Tomorrows”] 45 at 49, 50.

¹³¹⁵ Interview of elder Harry Bone by Commissioner Loretta Ross, “Episode 1”.

¹³¹⁶ *Ibid.*

¹³¹⁷ *Ibid.*

¹³¹⁸ Hyslop et al, *Dtantu Balai Betl Nahidei* at 174.

Elders just as often identify the negative mutual aid analytic (need→responsibility → reciprocity) in the context of treaty. Thus Anishinaabe elder Flora Traverse explains: “For sure, as long as the sun shines and the grass; as long as the grass grows. Yes, there is countless of grass that grows everywhere and this sun, he still works to this day. This is what was considered along with the grass. As well *if we asked for something we’re supposed to be given it*; our resources and everything.”¹³¹⁹ Anishinaabe elder Ernest McPherson likewise shares:

I think about it today, they really secured it so we do not lose the Treaty. The Treaty, they call it. That is why they used the sun and they used the water as it now flows and in the summer time, again the grass grows. That is how not to lose the Treaty, not to disappear. If the sun does not shine, no one will be alive. They were very smart when they set that up. But we lost many things that were promised to us. They were given fishing nets, tools for gardening every summer *whenever they needed them*. They were given these things.¹³²⁰

One of the ways which Anishinaabe elders sometimes express the negative analytic in respect of treaty is to insist that rather than contractual exchange, treaty is intended to provide parties with *more* than what they already have. Thus elder Paynter explains “To have treaty is a recognition and an acknowledgment of what we had, but it also means ‘in addition to what you have, this, this is the treaty that we are making with you.’”¹³²¹ Elder Bone likewise teaches that “The written text of the treaty is on top of what we already have”¹³²² and that “At the time of treaty, the government, or the commissioners, they simply told the chiefs ‘what I’m offering you is on top of what you already have.’”¹³²³

During the Treaty #6 negotiations, Lieutenant Governor Morris did just that. Addressing a group of “Crees, Chippewayans, Assiniboines and Chippewas”¹³²⁴, he conjured an image of a road connecting the plains all the way to the Great Lakes. He explained: “All along that road I see Indians gathering, I see gardens growing and houses building; I see them receiving money from the Queen’s Commissioners to purchase clothing for their children; at the same time I see them enjoying their hunting and fishing as before, I see them retaining their old mode of living with the Queen’s gift *in addition*.”¹³²⁵

b. Treaty and Kinship

In the address quoted above, Morris also stated “The instructions of the Queen are to treat the Indians as brothers, and so we ought to be”¹³²⁶ and “I see the Queen’s Councillors taking the Indian by the hand saying we are brothers”.¹³²⁷ If the mutualism view of treaty follows the logic of mutual aid, it will be structured as kinship—which one readily finds in archival materials and in elders’ teachings. I mention the point only briefly here. I’ve already discussed the extension of

¹³¹⁹ *Ibid*; emphasis added.

¹³²⁰ *Ibid* at 149; emphasis added.

¹³²¹ Interview of elder Harry Bone and Elder Florence Paynter by Commissioner Loretta Ross, “Episode 14: Treaties & the Anishinaabe Language with Elder Bone and Elder Paynter”, on *Let’s Talk Treaty*, Treaty Relations Commission of Manitoba, online: <<http://www.trcm.ca/multimedia/lets-talk-treaty/>>.

¹³²² *Ibid*; see also Hyslop et al, *Dtantu Balai Betl Nahidei* at 93, elder Bone speaking.

¹³²³ Interview of elder Harry Bone by Commissioner Loretta Ross, “Episode 2”.

¹³²⁴ Morris, *The Treaties of Canada* at 230.

¹³²⁵ *Ibid*; emphasis added.

¹³²⁶ *Ibid* at 231.

¹³²⁷ *Ibid*.

metaphorical kinship in the context of treaty and have already mentioned works which take up the kinship discourse of treaty in detail.¹³²⁸ One could easily write a dissertation on the rooted conception of treaty; I save that kind of close examination for others and for other occasions.

Nehetho elder D'Arcy Linklater offers some of the clearest statements I've encountered reflecting an understanding that treaty establishes kinship. He says "According to our Elders, the Queen's [representative] came there and adopted us and promised to look after us and she used the sacred elements to make that promise. The Elder mentioned the sun, the grass, the water and we are still crippled today."¹³²⁹ He also says "*Wahkotowin* (relationship) is very important to our people and at time of Treaty-making the Queen adopted us as her children to protect us and to take care of us"¹³³⁰ and that "We should talk about the Treaty and how the Queen became our relation. Relationship is sacred. She said that she would like to take care of her children."¹³³¹ Ininiw Elder William G. Lathlin similarly states "The Elders said that we adopted the King or Queen into our family. This was not told to the King or Queen. This is the only way we were able to relate to Treaty."¹³³²

The inflexibility of elder Lathlin's final comment, that kinship "is the only way we were able to relate to Treaty" might be contested by others, who've noted that elders sometimes describe treaties as a special (sacred) class of contract—and thus within the constitutional coordination treaty paradigm. Anishinaabe elder Dennis White Bird, a former Commissioner of the Treaty Relations Commission of Manitoba, offers terrific examples of this discursive tension. On some occasions, he's spoken of treaty in what seems unequivocally the language of contract: "You talk about spirit and intent and I think that is the spirit that the Creator placed us here with these gifts and that we would continue to have them forever. We have contractual obligations, we have promises, we have rights and where these rights come from are from the contract, from the agreement and I think that's what we need to look at."¹³³³ It's perhaps not easy to square the first sentence with the rest of the passage, but the emphasis on treaty-as-contract seems clear.

However on other occasions, elder White Bird has spoken in quite a different way. For instance, he has said "To the readers and our young people, it is my hope that you treasure these stories and teachings that give life to Treaty and that they contribute to helping you come closer to gaining an understanding of the spirit and intent of Treaty as a sacred relationship",¹³³⁴ and "All the stories and teachings that have been collected give life to Treaty; they give meaning to Treaty; and they reinforce the original spirit and intent of Treaty as a sacred relationship."¹³³⁵ Statements such as these two seem rather to cast treaty as a form of relationship.

How might we resolve the tension between elders' contractarian and relational representations of treaty? I suggest the conflicting logics problem is only apparent and that really it's just the language problem by now familiar. Indigenous elders, leaders, and others use the language available to them but intend meanings which aren't the conventional (liberal) ones.

There are other passages of elder White Bird's thought which suggest the likelihood of this possibility. In one instance, he explained that "We heard about early pre-contact inter-Tribal

¹³²⁸ Walters, "'Your Sovereign and Our Father'"; Craft, *Breathing Life Into the Stone Fort Treaty* ch 5; Miller, "Gifts as Treaties"; Johnson, *Two Families*.

¹³²⁹ Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang* at 138, square brackets in original.

¹³³⁰ *Ibid* at 58.

¹³³¹ Hyslop et al, *Dtantu Balai Betl Nahidei* at 159.

¹³³² Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang* at 69.

¹³³³ Hyslop et al, *Dtantu Balai Betl Nahidei* at 96.

¹³³⁴ Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang* at 92.

¹³³⁵ *Ibid* at 91.

Treaties such as those between the Anishinaabe and the Dakota and how they consecrated their agreements without paper. It was more of a spiritual commitment with the Creator and the beginning of new kinship relations.”¹³³⁶ Here he has used the language of “agreement”, suggestive of contract, but ultimately characterizes the treaty relation as a spiritual commitment and kinship. In an even more telling passage, elder White Cloud deploys the language of constitutional coordination / contract through references to mutual sovereignty and mutual obligations to describe what otherwise seems an unambiguous articulation of rooted constitutionalism, adverting both to mutual aid and to kinship: “The Treaty relationship is based on the following principles: respecting each other’s sovereignty, developing a kinship-based relationship with Newcomers, reciprocity through sharing of each other’s gifts, and mutual obligation to uphold the Treaty.”¹³³⁷

c. The Act of Constituting Treaty

The constitution of treaty consists of many practices beyond the exchange of material gifts.¹³³⁸ Albeit only briefly, I want to draw attention to two of them common to many indigenous people: *opwaaganan* (peace pipes) and wampum belts.¹³³⁹

Because the smoking of a pipe¹³⁴⁰ is an invocation of Gizhe Manidoo, it naturally takes a central role in the establishment of inter-community kinship: it purposefully grounds treaty in Creation’s way. Basil Johnston has written of pipes that:

Considered in its totality, the smoking represented man’s relationship to his maker, to the world, to the plants, to the animals, and to his fellow men; in another sense, it was a petition and a thanksgiving.

In each of the acts that made up the entire ceremony, the smoking was considered to be a symbolic declaration of the beliefs and understandings about life, death, and living.¹³⁴¹

Readers who wish to better understand the pipe should inquire with elders and pipe-carriers who know about them. I’m not a pipe-carrier. However noko is and I’ve often been blessed to have her open our discussions with a pipe. She’s shared a small slice of her *opwaaganan* teachings publicly, and they countenance both mutual aid and kinship:

The elements used thru the pipe ceremony are fire, tobacco, stone and wood representing the four directions, as well as the four races of man. Tobacco represents kindness, the bowl of the pipe is faith, the stem represents the honesty, and when the bowl and the stem being used together this represents sharing and caring. The bowl made of pipe stone represents faith, when the pipe is

¹³³⁶ *Ibid* at 91.

¹³³⁷ *Ibid* at 80.

¹³³⁸ While he doesn’t fully grasp the logic of treaty mutualism, readers wanting an introduction will find many historical examples in Wilbur R Jacobs, *Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748-1763* (Lincoln, NE: University of Nebraska Press, 1966).

¹³³⁹ A brief introduction to each is found in John Long, *Voyages and Travels of an Indian Interpreter and Trader* (London: Printed for the Author, 1791) at 46-47.

¹³⁴⁰ For a description of the physical characteristics of a peace pipe, see Frances Densmore, *Chippewa Customs* (Minnesota Historical Society, 1979 [1929]) 143-146 & Plate 52.

¹³⁴¹ Johnston, *Ojibway Heritage* at 135, but see generally from 134-141.

smoked you feel the faith. The sharing and caring are for our brothers and sisters, for whom the pipe is being smoked for.¹³⁴²

In the context of treaty specifically, she again emphasizes sharing and open-hearted connection, not the sharp dealing of contract:

When the Elders and Leaders were negotiating with white people in regards to land claims and the exploration of resources, the Elders and Leaders were told that whatever resources or land agreements came out of their talks they would share with them. The agreements made between both parties were always sealed with a pipe ceremony, the Elders and Leaders truly believed that thru the ceremony performed with the pipe that the agreement came from the heart and was a “true” promise or agreement. This is still done in today’s society.¹³⁴³

Another tool often used by Anishinaabeg (and many other indigenous peoples) to facilitate the constitution of treaty is *wampum*. ‘Wampum’ refers to cylindrical beads made from whelk and quahog shells, which come generally in two colours: white and blue through near-black (but typically purple). Once formed, the beads are woven together with plant fibre or sinew into strings or ‘belts’ (not intended to be worn). The colour differentiation is used to represent images symbolic of specific meanings. At the most basic level, Gilles Havard states that “the colour white signified peace and life, purple symbolized mourning, and a belt painted red meant war.”¹³⁴⁴ However, much more complicated meanings and messages also formed part of these mnemonic devices. Indeed, they often embodied the heart of a treaty relationship. For some peoples, wampum belts are thus an integral part of the oral tradition of knowledge retention and transmission. A belt is later ‘read’ publicly by its keeper, using the metaphorical images to prompt his narrative of the understanding it represents.¹³⁴⁵

In a vivid and wonderfully clear letter penned in 1836, Sir Francis Bond Head, Lieutenant-Governor of Upper Canada, explained to Lord Glenelg, Colonial Secretary, both the practice and significance of wampum belts in constituting treaty kinship:

Whenever the belt is produced, every minute circumstance which attended its delivery, seems instantly to be brought to life, and such is the singular effect produced on the Indian’s mind by this Talisman, that it is common for him whom we term “the savage” to shed tears at the sight of a wampum which has accompanied a message from his friend.

I have mentioned these facts, because they will explain the confident reliance the Indians place on the promises which accompanied the delivery of wampums, were made to them by our Generals during, and at the conclusion of the American wars.¹³⁴⁶

¹³⁴² Mainville, *Traditional Native Culture and Spirituality* at 1-2.

¹³⁴³ *Ibid.* Nokomis also shared with me about the truth-telling aspect of the pipe ceremony: Teaching of elder Bessie Mainville (28 August 2013) Mitaanijigamiing First Nation.

¹³⁴⁴ Gilles Havard, Phyllis Aronoff & Howard Scott, trans., *Montreal, 1701: Planting the Tree of Peace* (Recherches amérindiennes au Québec and McCord Museum of Canadian History, 2001) at 25.

¹³⁴⁵ Alan Ojiig Corbiere offers an excellent overview of this practice, with many helpful images, in Alan Ojiig Corbiere, “‘Their own forms of which they take the most notice’: Diplomatic Metaphors and Symbolism on Wampum Belts” in Alan Ojiig Corbiere et al, eds, *Anishinaabewin Niiwin: Four Rising Winds* (M’Chigeeng, ON: Ojibwe Cultural Foundation, 2014) ch 3.

¹³⁴⁶ Frances Bond Head, *Letter from Bond Head to Glenelg, 20 November 1836*, in Francis Bond Head, *Communications and Despatches Relating to Recent Negotiations with the Indians and Arrangements for the Future Settlement of the Tribes in this Province* (Office of the British Colonist, 1838) at 6.

Writing in the same letter, he added:

These rude ceremonies had probably little effect upon our officers, but they sunk deep in the minds of the Indians; the wampums thus given have been preserved, and are now entrusted to the keeping of the great orator Sigonah, who was present at the council I attended on the Manitoulin Island in Lake Huron, and in every sense these hieroglyphics are moral affidavits of the bye-gone transactions to which they relate—on our part, little or nothing documentary exists—the promises which were made, whatever they might have been, were almost invariably verbal; those who expressed them are now mouldering in their graves. However, the regular delivery of the presents proves and corroborates the testimony of the wampums, and by whatever sophistry we might deceive ourselves, we could never succeed in explaining to the Indians of the United States that their Great Father was justified in deserting them.¹³⁴⁷

Finally, again writing about the Anishinaabeg, Bond Head dramatically declared that:

An Indian's word, when it is formally pledged, is one of the strongest moral securities on earth; like the Rainbow, it beams unbroken when all beneath is threatened with annihilation. The most solemn form in which an Indian pledges his word is by the Delivery of a Wampum belt of shells; and when the purport of this symbol is once declared, it is remembered and handed down from father to son with an Accuracy and Retention of Meaning which is quite extraordinary.¹³⁴⁸

There are of course many other devices used to facilitate the constitution of treaty relationships; I spoke here only of two of the dominant ones to begin to sketch out the practice of rooted treaty-making. It should be clear how they help establish both the logic and structure of rooted constitutionalism. Charles Kawbawgam offers among the clearest expressions of that fact: "The meaning of the pipe and also of the belt of wampum was that these were a pledge of everlasting peace and bound the brothers to help anyone of them that might be in trouble, for by this treaty the four tribes made an eternal brotherhood."¹³⁴⁹

I hope my brief review of these two treaty practices is sufficient to allow me to extend my legality tree metaphor to treaty. For instance, in certain regions of Mikinaakominis there are fungi which assist in sustaining communities of trees. They do this by connecting symbiotically to a tree's underground roots. The resulting union is called a *mycorrhiza*. We might analogize these fungi to wampum belts and to peace pipes, who help us to create and to maintain treaty relationships grounded in the earthway. As mycorrhiza enter into symbiotic relationships with the roots of multiple (and often different *kinds* of) trees, they become complex *mycorrhizal networks*. Like wampum belts and peace pipes assisting in the genesis and renewal of a treaty confederacy, mycorrhizal networks enable community members to share their gifts (in the case of trees, vital nutrients) throughout the network, for distribution to those most in need.¹³⁵⁰

¹³⁴⁷ *Ibid* at 6. The issue under discussion is whether the Anishinaabeg who travelled north from the American side to receive gifts each year could be omitted from the delivery list.

¹³⁴⁸ *Ibid* at 5.

¹³⁴⁹ Kawbawgam, "The League of the Four Upper Algonquian Nations" at 112.

¹³⁵⁰ For the ecology of this phenomenon, see Suzanne W Simard et al, "Reciprocal transfer of carbon isotopes between ectomycorrhizal *Betula papyrifera* and *Pseudotsuga menziesii*" (1997) 137 New Phytologist 529; Kevin J Beiler et al, "Architecture of the wood-wide web: Rhizopogon spp. genets link multiple Douglas-fir cohorts" (2010) 185 New Phytologist 543. More accessible for non-scientists will be Dan McKinney & Julia Dordel, "Do Trees Communicate?" (29 July 2012), online: *YouTube* <<https://www.youtube.com/watch?v=iSGPNm3bFmQ>>, in which Dr. Suzanne Simard explains how trees' mycorrhizal networks function (i.e. how trees communicate).

d. Openness, Contingency and Dynamism: Treaty's
Intentional Co-creativity in Practice

I argued earlier that the putative dynamism which (non-originalist) liberals attach to the possibility of constitutional reinterpretation presupposes a provisionally closed and settled status quo. In contrast, rooted constitutional orders are always provisionally open and contingent. Given the messiness co-creativity occasions, the dynamism of rooted constitutionalism never pauses. If treaty is a form of constitutionalism, then the same must hold true for a rooted conception of treaty: the act of constituting treaty is never finished.

Once more, a proper study of this query is beyond our focus. But I think we might still develop a sketch of how rooted treaty dynamism is born out. Because mutual aid relationships are always in flux, they're in constant need of renewal. Treaty peoples seek to attend to changes in their respective gifts and needs through regular gatherings enabling communication and adaptation in their relationship. The necessity of renewal is built into the metaphor of the Silver Covenant Chain, which must be frequently polished lest it tarnish, or rust and break.¹³⁵¹

In the case of treaties between indigenous peoples and the British Crown, ongoing gatherings, initially and for decades following, took the form of an annual delivery of presents (which is what Bond Head and Glenelg were discussing above), the cost of which was staggering.¹³⁵² Perhaps one of the most effective ways to appreciate the openness, contingency and dynamism of a rooted conception of treaty is to take account of indigenous reactions to the Crown's failure to continue gifting, behaving as the parent it promised to be. These reactions demonstrate that the ongoing practice of fatherly/motherly gifting was so important to indigenous 'children' that when those practices ceased, so too did kinship, and with it, treaty.

A failure to gift wasn't a problem that Anishinaabeg had with their French father.¹³⁵³ After the fall of New France in 1760, Anishinaabeg expected that if the British King now wished to be called father, he must act the part. Following the constitutional logic of mutual aid, that meant ensuring a generous distribution of presents. Thus, Borrows has observed:

In the early stages of First Nation/settler association, the English failed to comprehend some of the diplomatic fundamentals that First Nations required in the definition of their constitutional relationship. One example of the British failure in this regard concerned the presentation of gifts. The French had followed the diplomatic formalities which constitutionalized First Nation/settler relations and were thus able to maintain peace by supplying gifts to all their First Nation allies. Therefore, when the British did not meet all the conditions that First Nations established for co-existence, conflict resulted.¹³⁵⁴

Alexander Henry provides a wonderful illustration of this tension, and it draws upon the significance of both pipes and wampum. Henry was a trader and, in 1761, the first British citizen

¹³⁵¹ Assembly of First Nations, "The Silver Covenant Chain of Peace and Friendship Belt" (undated), online: *Assembly of First Nations* <<http://www.afn.ca/uploads/files/cfng/sccpfb.pdf>>.

¹³⁵² Duncan Campbell Scott, "Foreward" in Percy F Godenrath, compiler, *Catalogue of the Manoir Richelieu Collection of North American Indians (1830-1840)* (Montreal: Canada Steamship Lines, 1932) at 2.

¹³⁵³ Johnston, "Aboriginal Traditions of Tolerance and Reparation" at 150-151. See Colonel Croghan reflecting directly on this difficulty in "Journal of Colonel Croghan's Transactions with the Western Indians" in *NYCD, Vol 7*, 779 at 787-788.

¹³⁵⁴ John Borrows, *Constitutional Law from a First Nations Perspective: Self-Government and the Royal Proclamation* (1994) 28:1 UBC Law Rev 1, 13; citation omitted.

at Michilimakinac following European regime change. Conscious of local sensitivities to his nationality, Henry ordered his men to conceal his English identity upon arrival at the Fort.¹³⁵⁵

In an account of his time there, Henry describes a day that he expected he might lose his life. At 2 PM one afternoon, 60 Anishinaabeg led by *ogimaa* Minivanana, each with a tomahawk and knife,¹³⁵⁶ entered the home where Henry was staying and seated themselves on the floor.¹³⁵⁷ Minivanana set the tone noting that the English are indeed brave for daring to venture amongst their “enemies”.¹³⁵⁸ The Anishinaabeg then began smoking their pipes, whilst Henry waited in horror.¹³⁵⁹ Henry failed to record whether he participated (although presumably it was the point). Upon completing the ceremony, Minivanana, “taking a few strings of wampum in his hand”, delivered the following address. Note the significance he places upon the absence of gifts (mutual aid) and his non-recognition of a father-child relationship (kinship) between his people and the British King, resulting in his emphatic denial of treaty relations:

Englishman, it is to you that I speak, and I demand your attention!

Englishman, you know that the French king is our father. He promised to be such; and we, in return, promised to be his children. This promise we have kept.

Englishman, it is you that have made war with this our father. You are his enemy; and how, then, could you have the boldness to venture among us, his children? You know that his enemies are ours.

Englishman, we are informed that our father, the king of France, is old and infirm; and that being fatigued, with making war upon your nation, he is fallen asleep. During his sleep, you have taken advantage of him, and possessed yourselves of Canada. But his nap is almost at an end. I think I hear him already stirring, and inquiring for his children, the Indians; and, when he does awake, what must become of you? He will destroy you utterly!

Englishman, although you have conquered the French you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread, and pork and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.

Englishman, our Father, the king of France, employed our young men to make war upon your nation. In this warfare, many of them have been killed; and it is our custom to retaliate, until such time as the spirits of the slain are satisfied. But, the spirits of the slain are to be satisfied in either of two ways; the first is the spilling of the blood of the nation by which they fell; the other, by covering the bodies of the dead, and thus allaying the resentment of their relations. This is done by making presents.

Englishman, your king has never sent us any presents, nor entered into any treaty with us, wherefore he and we are still at war; and, until he does these things, we must consider that we have no other father, nor friend among the white men, than the king of France; but for you we have taken into consideration that you have ventured your life among us, in the expectation that we should not molest you. You do not come armed, with an intention to make war; you come in peace, to trade with us, and supply us with necessaries, of which we are in want. We shall regard

¹³⁵⁵ Alexander Henry, *Travels and Adventures in Canada and the Indian Territories Between the Years 1760 and 1776* (T Riley, 1809) at 38.

¹³⁵⁶ *Ibid* at 41.

¹³⁵⁷ *Ibid* at 42.

¹³⁵⁸ *Ibid*.

¹³⁵⁹ *Ibid*.

you, therefore, as a brother; and you may sleep tranquilly, without fear of the Chipeways. As a token of our friendship, we present you with this pipe, to smoke.¹³⁶⁰

Equally significant, because Minivanana observed that Henry came to “supply us with necessities, of which we are in want”, he *found* a way to relate to him, calling him (and perhaps adopting him) as a brother, offering him a pipe.

Another example which demonstrates the scale of Anishinaabe resistance to the decline of British participation in rooted constitutional relations is found in Sir William Johnson’s letters to the Lords of Trade during Pontiac’s War. In one telling instance, Johnson wrote:

In 1761, I had in a great measure removed these prejudices at the Conference which I then held with the Ottawa Confederacy at the *Détroit* and delivered them a handsome present (which is the surest method of proving the reality of Words to Indians) but as these Nations are Warlike, numerous and accustomed to receive considerable gifts & good treatment from the French for permitting them to occupy the several posts, to the Northward, & Westward of the Detroit, which custom I was in no wise enabled to continue to them, they began to look on our friendship as not very interesting, & indeed in general they have but an imperfect idea of friendship, unless they reap some considerable advantages from it,—The too general opinion which has lately prevailed, that they were an Enemy of very little power, or consequence & not worth our attention occasioned their being treated throughout the Country with a neglect, which never fails being resented by them.¹³⁶¹

After describing the impacts of Pontiac’s war thus far—the blockading and destruction of forts, the annihilation of military units, the taking of provisions, the destruction of settlements and the murder of “Traders and others, spreading an universal pannic [sic] throughout the Frontiers,”¹³⁶² Johnson suggested that the impact of changing course—of direct engagement in mutual aid relations—would be so powerful that it could dissolve the entire conflict:

I am of opinion all these evils have arisen from our considering the Indians as incapable of doing us much damage which was the cause of our treating them with indifference and neglect, so, to remove the prejudices they have entertained and secure their Confidence and esteem, no method will prove effectual, unless that of rewarding those who shall remain our friends with some marks of Favor by occasionally supplying their wants as they shall appear to deserve it, this will excite an emulation in those who are still wavering, and satisfy the doubts of those who suspect the reality of our inclination towards them, without which, meer [sic] words have in general not much weight with a People who judge by our actions and not our language to them....¹³⁶³

Constituted as children, Anishinaabeg expected to have their changing needs met by their British father. When he failed to do so, their willingness to end the relationship evidences that a rooted treaty is always becoming, and as such, is only ever as strong as the messy practice of mutual aid connecting it to earth.

In contrast with the settled contractarian vision of treaty, for many indigenous peoples today the open, dynamic, *living* nature of treaty remains central. Written terms merely reflect the

¹³⁶⁰ *Ibid* at 43-45.

¹³⁶¹ “Sir William Johnson to the Lords of Trade” in *NYCD*, vol 7, 525 at 525-526.

¹³⁶² *Ibid* at 526.

¹³⁶³ *Ibid* at 526-527.

respective needs of the parties at one moment in time.¹³⁶⁴ Elder D'Arcy Linklater says of his Nehetho people in Treaty #5 that "our people, negotiators at that time, they looked at this treaty process to recognize and protect their rights. To provide the future and wellbeing of their people. And to define the ongoing relationship between First Nations and the Crown. You know, it was not frozen in time."¹³⁶⁵ Elder Harry Bone offers much the same message. "We can never lose the original insight of our Treaties",¹³⁶⁶ he says, "Because we were people, capable of doing whatever we wanted, capable of looking after ourselves, adapting to the world and evolving as time goes."¹³⁶⁷ But I'm especially keen on elder Fred Kelly's articulation of treaty dynamism. Speaking of Treaty #3, he says "it was to be dynamic, it was to be adaptive. It was to be continuing, until the Creator decides otherwise. So it's an ongoing relationship that we have."¹³⁶⁸ Note well: contrary to stereotypes that sacred law is fundamentalism, Elder Kelly's insistence on the dynamism and adaptation of treaty is a direct consequence of its rootedness in sacred law.

That's all that I think this dissertation reasonably allows me to say about treaty.¹³⁶⁹ I hope it's sufficient to show that one conception of treaty, treaty mutualism, satisfies both principles of indigenous-settler reconciliation. It's the only model of indigenous-settler relationship which I'm confident does so, although I think Heidi Stark's work shows that nation-to-nation models might also do so insofar as they approximate something like treaty mutualism.

With the two principles of indigenous-settler reconciliation satisfied, at last we have an answer to the constitutional conundrum of how to place our remaining rocks. The elusive path both indigenous and settler has been disclosed: we can reconcile our colonial relationship by constituting ourselves as kin, doing our best to match our respective communities' gifts and needs throughout time in a relationship of treaty mutualism. Neither of our communities shall ever stop changing, which is the point of living relationships. But the relentless change of our becoming shall always be grounded here, in Mikinaakominis.

¹³⁶⁴ Mainville, *Manidoo Mazina'igan* at 133.

¹³⁶⁵ Interview of elder D'Arcy Linklater by Commissioner Loretta Ross, "Episode 9: Treaty 5 & Nishchawayasihk with Elder D'Arcy Linklater" on *Let's Talk Treaty*, Treaty Relations Commission of Manitoba, online: <<http://www.trcm.ca/multimedia/lets-talk-treaty/>>.

¹³⁶⁶ Hyslop et al, *Diantu Balai Betl Nahidei* at 93.

¹³⁶⁷ *Ibid.*

¹³⁶⁸ Interview of elder Fred Kelly by Commissioner Loretta Ross, "Episode 12".

¹³⁶⁹ In a longer study, we would see how a rooted conception of treaty maps also to the upper levels of the rooted legality tree. In a dialogue facilitated by the Ontario Human Rights Commission, one indigenous person said "The Supreme Court of Canada talks about the rights of Indigenous people before the English and the French, and that always puzzled me. I've never met someone who spoke the old language who talks about 'rights.' When I'm talking about treaty rights, I talk about relationships, treaty relationships. Some people have never heard the concept of rights. It's responsibilities." Ontario Human Rights Commission, *To Dream Together* at 25.

8. Practical Barriers to the Pursuit of Rooted Legality Revitalization

My central purpose throughout has been to disclose rooted legalities. I first sought to do so within, and then between, communities that accept the humility thesis. I believe revitalized and nascent rooted legalities can transform the violence which characterizes indigenous-settler relations and human-earth relations into mutualism.

However, even if my argument has been persuasive, many may still be unwilling to support contemporary indigenous law revitalization, and may likewise be unwilling to root themselves in Mikinaakominis, shifting to a rooted treaty paradigm. For some, that resistance has its source in an unwillingness to have their settled interests (predominately, though not exclusively, in land) rendered uncertain. However others are less preoccupied with their own interests and are willing to place them in tension with the pressing interests of others, and with larger interests shared by all, like a healthy earth. For people who retain such openness, having their worries addressed may be sufficient to risk the first step. In any event, making that choice will require more than having seen my positive project clearly. To be moved to action, readers will need their residual worries addressed.

In this section I take up the most frequent and forceful concerns I've heard in dialogues informing my dissertation. Engaging these worries is imperative because the success of my political project depends upon my readers' support. Rather than trying to reform the state of its colonial violence (which would allow me to rely on the disproportionate systemic influence of a small number of engaged state actors), I appeal directly to persons. Transformative change in indigenous-settler and human-earth relationships has to happen in our own lives. I explain this approach in chapter nine, section (c)(1).

Many concerns regard a heightened suspicion of fundamentalism in indigenous law. The first section deals with four such worries. I show each to be unjustified, manageable, or equally inescapable for all societies and thus improperly pointed at indigenous ones. The second section takes up worries that rooted legalities inadequately attend to power. The first argues that rooted legalities simply reverse the poles of privilege and oppression vis-à-vis settlement status, and the second accuses mutual aid of a general indifference to power. The final section takes up worries about misreading. The first regards the earth and considers that mutual aid has it all wrong. The second suggests I've misrepresented the capacity of Canadian law for indigenous-settler reconciliation by too narrowly characterizing its adaptability. Of course, I hope to overcome all of these counter-arguments, eliminating the barriers to action they represent.

a. Critiques Suspecting Indigenous Legalities of Fundamentalism

If the case I've made for rooted legalities is sufficiently persuasive, then consequences beyond the end of the universal legalities fallacy should follow. For instance, it seems reasonable to hope for certain changes in how one criticizes indigenous law and its revitalization projects. The following suggested constraints address four of the most pressing concerns I've encountered which I haven't sufficiently addressed. All of them regard the spectre of fundamentalism.

Fundamentalism in law and governance is a serious risk that every society must manage. I began to take up the risk of fundamentalism in indigenous law near the outset. That cursory treatment was necessary to signal my deep commitment to anti-fundamentalism as I pursued an incommensurability thesis, and to pose my research question. But now that my positive project has been laid out, I should like to respond to worries about fundamentalism more fully.

There are at least four supposed grounds for heightened concern about fundamentalism in indigenous law. They're connected insofar as they're all worries about the deeply substantive character of rooted legality, and therefore its potential insensitivity to internal disagreement and a corresponding potential for dissenters to be treated unfairly.

i. Ecological Indigeneity and Romanticism

First, the intelligibility of law-as-judgment, and more generally, the coherence of rooted legalities, should occasion a dramatic reconsideration of the much maligned notion of the 'ecological Indian'. To be sure, all sweeping, romantic appeals to ecological indigeneity must be rejected. They're as false and they've been as damaging to indigenous interests as critics have long claimed.¹³⁷⁰ They support a belief in indigenous inhumanity, which emboldens settler supremacy. But as I've been arguing, many of us really do have a unique kind of connection with the earth,¹³⁷¹ vested not in mere appreciation of its beauty or in a merely rhetorical identity with it, but in the humility thesis.¹³⁷² Professor Rauna Kuokkanen explains:

To discuss, then, relationships with nature as part of indigenous worldviews is not to romanticize them. The relationships that indigenous peoples have forged with their environments for many centuries are a consequence of living off the land and depending on its bounty. They are a result of a clear understanding that the well-being of the land is also the well-being of humans.¹³⁷³

I've expanded this argument further still, having demonstrated a sense in which ecological indigeneity is anything but romantic, a sense which connects claims of ecological identity directly with indigenous constitutionalism. Indeed, I've intended that the greatest emphasis in my dissertation should be placed squarely on the *logic* of rooted constitutionalism, mutual aid, which sets the earthway as the organizing feature of rooted societies.

To the extent that I've succeeded, critics should now be cautious, rather than dismissive, in their examinations of claims that link ecology with indigenous identity. The presumptive dismissal of ecological indigeneity so common on Mikinaakomins today is ethnocentric.¹³⁷⁴ When an elder offers a statement which claims a connection between indigenous identity and earth, initially and until reasons provide otherwise, her words should be taken seriously. Before moving to dismissal, persons able to hear such statements only as romantic must now consider whether they're practising a form of ignorance, either unable or unwilling to reflect upon rooted constitutional difference, and thus unable to perceive how it effectively marshals, and manages

¹³⁷⁰ As one example, see Paul Nadasdy, "Transcending the Debate over the Ecologically Noble Indian: Indigenous Peoples and Environmentalism" (2005) 52:2 *Ethnohistory* 291. Nadasdy's argument is particularly forceful because of the breadth of his view. Rather than rejecting claims of ecological indigeneity on their merits, he rejects the terms of the debate from which they emerge on the grounds that it constitutes a kind of western chauvinism.

¹³⁷¹ James (Sákéj) Youngblood Henderson, "Insights on First Nations Humanities" (2005) 34 *J Indigenous Educ* 143.

¹³⁷² Robert Clifford comes close to something like this in Clifford, "WSÁNEĆ Legal Theory" at 771.

¹³⁷³ Kuokkanen, *Reshaping the University* at 42.

¹³⁷⁴ Frequently challenged academic works denying an ecological quality to indigeneity include Calvin Martin, "Epilogue: The Indian and the Ecology Movement" in *Keepers of the Game: Indian-Animal Relationships and the Fur Trade* (University of California Press, 1982) at 157; Shepard Krech III, *The Ecological Indian: Myth and History* (New York: WW Norton & Company, Inc, 1999).

within, the earthway.¹³⁷⁵ Professor Kirsten Anker's works on the relationship between indigenous law and western disenchantment are helpful here.¹³⁷⁶ Critics must take care to ensure that their claims don't ultimately rely on settler supremacy's occlusion of indigenous lifeways.

ii. Sacred and Natural Law Are Anti-democratic and Unchanging

A second concern regards the fact that indigenous law takes very seriously—indeed many elders and knowledge-keepers will say that it gives priority to—sacred and natural law. Critics interpret this claim as an erasure of the hermeneutic character of law, or that it concentrates interpretive authority too narrowly and thus absents the open, deliberative character of law.¹³⁷⁷ On this view, sacred and natural law become sources of oppression, privileging the interests of elites.

Sometimes this is exactly what happens. It's a genuine risk which will never relent, although there are better and worse ways of managing it. Perhaps the risk seems greatest in the relatively small number of instances where ceremony is allowed to play a significant role in the outcome of an issue, because of the concentration of epistemological authority in the one(s) conducting the ceremony. The form of knowledge at issue is not one to which all have access (or to which all have equal access), with obvious implications for deliberation and dissent. This is indeed a vexing issue, which admits of no easy answer.¹³⁷⁸

But this is effectively to say nothing. For it's *always* the case, in any kind of legal procedure, even those in which spirituality is (at least formally) given no legal capacity, that the procedure's epistemological commitments run the risk of abuses of power. It's precisely for this reason that, reflecting on the relation between power and written text, elder Harry Bone says "The white man, on the other hand, writes everything down, and then he changes it by re-writing it depending on what he will do, even that, and so we should be watchful of that".¹³⁷⁹ Elder Charles Kawbawgam shared a similar message more than 100 years earlier: "The reason that the Indians do not believe in 'papers' is that they learned from these happenings that 'papers' cannot be depended on, for the promise signed by the British in treaty, agreeing to make presents to the Indians 'as long as the sun rose and set,' was broken."¹³⁸⁰

From both elder Bone's standpoint and from Charles Kawbawgam's, it seems that rather than creating a forum for empowering deliberation, the purported certainty of written text is the very thing in which its potential for abuse consists. The false face of neutrality serves as cover for substantive commitment. For a starker example, consider Gerald Stanley's defence lawyer's

¹³⁷⁵ Ronald L Trosper provides a compelling response to arguments like those of Martin and Krech III by disclosing careful indigenous ecological practices in Ronald L Trosper, "The 'Noble Savage' Spin Game" in *Resilience, Reciprocity and Ecological Economics: Northwest Coast Sustainability* (New York: Routledge, 2011) ch 2.

¹³⁷⁶ Kirsten Anker, "Colonialism and Access to a Disenchanted Earth" in Yaëll Emerich & Laurence Saint-Pierre Harvey, eds, *Accès à la terre et enjeux sociaux: précarité, territorialité, identité / Access to Land and Social Issues: Precarity, Territoriality, Identity* (Montreal: Les Editions Thémis, 2018) 165; Anker, "Law as Forest".

¹³⁷⁷ Robert Clifford so clearly expresses this concern through Raven's interrogation of Cedar (and replies brilliantly) in Clifford, "Listening to Law" at 57-60.

¹³⁷⁸ For a thoughtful discussion about the tension between respect for ceremonial protocols and the imperative for critical reflection, see Kim Anderson et al., "Epilogue: Sitting in with Sisters" at 317-318.

¹³⁷⁹ Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang* at 24.

¹³⁸⁰ 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 at 125. The Kawbawgam ethnography was gathered by Homer H Kidder in the summers of 1893-1895 at the Kawbawgam house at Presque Isle, Michigan. "Introductory Note" in *ibid* at 23.

racialized use of peremptory challenges pursuant to s. 634 of Canada's *Criminal Code*,¹³⁸¹ and the predictable not-guilty verdict for Stanley's slaying of Colten Boushie. While it may be the case that the introduction of sacred and natural law somehow uniquely increases the risk of abuse of process, it's not at all clear that such is the case.

However in the majority of cases, the worry about sacred and natural law supporting fundamentalism is simply misplaced. As I've explained, in their dominant use sacred and natural law aren't meant to apply as sources of law (that is, they aren't substantive). Rather, they form part of the constitutional order which ultimately conditions law: they apply within a prior phase of legality altogether. So not only is deliberation upon sacred and natural 'law' *possible*, but also it's *necessary*, if sacred and natural 'law' are to find any expression as law at all.

Professor Aimée Craft recounts, in the report of her Anishinaabe water law project, that "Elders reminded us of the story of Nanaboozhoo, who was tasked to pass on the sacred laws to the Anishinaabe *who would interpret them and apply them in their own ways*."¹³⁸² Grand Council Treaty #3, an Anishinaabe government representing 28 First Nations in Treaty #3, likewise explains that "We will come to see that our Constitution allows us to make our own laws. And laws that we make as human beings are what we will refer to as *temporal laws* - made on earth by the people - written or unwritten as the case may be. But they must remain true to Eternal and Traditional Law."¹³⁸³

Importantly for this argument, the same elders who assert that sacred and natural law never change, insist that *we* do.¹³⁸⁴ For instance, Anishinaabe elder Ken Courchene says:

we continue to believe the ultimate authority is the Creator. Some people know them as *Gichi-Manidoo*, the Great Spirit and some say *Gizhe-Manidoo*, the Loving Spirit. In English terms he's called God, maker of Heaven and Earth, that's the authority we listen to, the ultimate authority. And we acknowledge that and that is our guide and has always been our guide. And we sought and continue to seek direction from *Gizhe-Manidoo* for all the changes we are going through as a people. That one thing is for sure, everything changes. There is no [one] thing that remains stagnant. If it stagnates, it's doomed to perish. We were told that from our dreams, our prophets and our visionaries so we changed. And we continue to change and we continue to evolve. We've been given a spirit to maximize whatever resources that we have and around us to ensure our survival.¹³⁸⁵

For greater certainty, the imperative to adapt includes indigenous law. Elder Fred Kelly shares:

Anishinaabe has been given the dispensation to take what our ancestors did from the supreme law and make it more applicable on a day-to-day basis, which becomes customary law, such as how

¹³⁸¹ *Criminal Code* (RSC, 1985, c C-46), s 634.

¹³⁸² Craft, *Anishinaabe Nibi Inaakonigewin Report* at 15; emphasis added.

¹³⁸³ Leon Jourdain, "Pazaga'owin" at 18. See also Anishinaabe Nation of Treaty #3, *Abinooji Inaakonigewin / Child Care Law*, 2005, preambular paragraph 8: "WHEREAS: The Anishinaabe people has since time immemorial passed down to successive generations, and adapted for each generation, temporal law consistent with traditional law to meet the needs of successive generations as they may arise". In the language of my legality tree, the phrase "temporal law consistent with traditional law" would be rendered as 'law reconcilable to constitutionalism'.

¹³⁸⁴ Relland, *Teachings of the Bear Clan* at 155.

¹³⁸⁵ Hyslop et al, *Dtantu Balai Betl Nahidei* at 148; square brackets in original.

you look after children, such as how you do certain things with respect to the seasons and what you have to do and what you -- all of those things that convert your life ways.¹³⁸⁶

Elder Harry Bone likewise emphasizes the role of agency and interpretation in his way of thinking about indigenous law, even as he asserts the force of sacred and natural law. He says “We have a connection to the Creator. We have a law to that: in English words, sacred law, then it’s natural law, then it’s human law. We have that sequence.”¹³⁸⁷ He’s careful to specify that regarding “human law, we are given a voice, the language. But there’s a number of things we’re also given: observation, to think and to analyze.”¹³⁸⁸ His is not a world of thoughtless pursuit of sacred injunctions. It’s a world of active engagement with how sacred law can guide our actions and choices through human-made law in the here and now.

Finally—and with tremendous importance for anxieties about indigenous law fundamentalism—the understanding of sacred and natural law as constitutionalism creates openness not only for the *participation* of persons of other faith or cultural traditions within indigenous law, but also for them to conceivably be *authorities* of it. I’ll be careful not to overstate this possibility; no doubt important qualifications limit it. However, the possibility is the point. For instance, with respect to natural law, elder Harry Bone shared the following:

There is one Elder I would like to reference from The Narrows region and she is actually a Christian and used the bible as her strength but she combined the original rights of our people and she expressed in our language, what the sun, the grass and the water means and the original Treaty making from what she heard from years ago. She was 89 years old. For some of us that really believe in our Treaties, this is the person that really told us who we really are.¹³⁸⁹

Nokomis is another such figure. With respect to substantive cultural knowledge, to the process and rationale for ceremonies she conducts, and to the worldview she manifests through her daily lifeway praxis, nokomis is among the most ‘traditional’ Anishinaabeg I know. For all of these reasons, she has often exercised leadership at Couchiching First Nation, for instance offering the opening invocation at our Pow wow, performing spring and fall ceremonies, serving on the Elders Council of Weechi-it-te-win Family Services, and leading community sharing circles. It also happens to be the case that when she was 19, she accepted Catholicism.

I hope my claim that nokomis, a practising Catholic, is an exemplar of Anishinaabe *traditionalism* might allow me to push my defense of sacred/natural law against fundamentalism one step further. Analytic clarity here really matters, as the concept of traditionalism has great purchase on every reserve I know. In the academy, appeals to and from tradition are frequently read as conservative calls *against* external influence and consequent cultural adaptation; as calls *for* cultural stasis. And doubtless, this is what claimants sometimes intend. Sometimes, the claim that ‘Tom is traditional’ is a substantive one that means Tom is *not* Catholic, Anglican,

¹³⁸⁶ *Restoule v Canada*, Transcript of elder Fred Kelly at 2936-2937; more generally see 2933-2939. On every occasion I’ve had the privilege of hearing or reading elder Kelly present his four-part Anishinaabe law analytic, he’s been unequivocal that what he calls ‘temporal law’—the law we deliberate into validity today—is changeable. Some of these instances include Kelly, “Reconciling Sovereignties”; Interview of elder Fred Kelly by Commissioner Loretta Ross, “Episode 11”; Kelly, Comments at *As Long as the Sun Shines* at 107, 111.

¹³⁸⁷ Elder Harry Bone (16 June 2018).

¹³⁸⁸ *Ibid.*

¹³⁸⁹ Hyslop et al, *Dtantu Balai Betl Nahidei* at 176.

Evangelical etc., and perhaps also that he hasn't been corrupted by these morally undesirable settler influences. Gordon Christie offers a clear articulation of this worry:

Much as labels such as "Aboriginal" or "Native" are argued by some to be products of an "outsider" epistemology, the term "traditional" is argued by some to be merely another "political weapon." This term is used, some suggest, to generate a false idealized notion of some attribute we can apply to various "authentic" elements of Aboriginal society. So one hears talk of a "traditional" pipe ceremony, a "traditional" story, a "traditional" elder, all the while imagining that something substantive is being said about the pipe ceremony, the story, and the elder.¹³⁹⁰

But we make a grave error if in our rush to condemn fundamentalism, this is all that we allow folks to mean. On the reserve, reality is much more complicated:

the term "traditional" [...], used from the perspective of a Western conceptual world [...], obscures or confuses the way things are. The real problem, however, is with the lack of any serious attempt to consider, by those who wish to use such terms, the possibility that they might be contributing to confusion and/or obscurantism. Once one recognizes this as the problem, one can begin to wonder whether there is not some variant of "traditional" (and its usual contrast "modern") which is present in the conceptual scheme of *Aboriginal peoples*. This is a fairly simple matter to investigate—one need only talk to Aboriginal people.¹³⁹¹

Sometimes the claim, 'Tom is traditional', has a very different orientation: it means that whatever Tom's substantive commitments happen to be, he holds them—that is to say, thinks, feels, believes, and acts—within an Anishinaabe ECO-system, and concomitantly, as the subject of an Anishinaabe lifeway/constitutional order/sacred/natural law.¹³⁹² Tsalagi scholar Jeff Corntassel lends support for such a view when he cautions that "It's not enough to claim something is traditional – it should be embodied in your everyday actions *and follow an inherent indigenous logic*"¹³⁹³ (which I would specify as mutual aid). In this latter sense of traditionalism, Tom's spiritual commitments might factor into what assignments are made of him, but certainly aren't determinative of his belonging to one category over another.

Trish Monture did a superb job of explaining this use of 'traditionalism' when she said:

A word of caution is necessary regarding my use of the word traditional. This word is frequently misinterpreted in the mainstream discourse. It does *not* mean a desire to return through the years

¹³⁹⁰ Gordon Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36:3 Osgoode Hall LJ 447 at 465-466; citation removed [Christie, "Aboriginal Rights"].

¹³⁹¹ *Ibid* at 467.

¹³⁹² Daniel, *Finding Law about Life* at 45, n 69. See also Little Bear, "Aboriginal Relationships to the Land and Resources" at 19-20. Here Little Bear presents a desire to "remain the same"—in a context of having just discussed how change (he likes the word 'flux') is constitutive of his worldview.

¹³⁹³ Jeff Corntassel, "Renewal" in *Everyday Acts of Resurgence: Peoples, Places, Practices* (Olympia, Washington, Daykeeper Press, 2018) 33 at 35; emphasis added. Anishinaabe scholar (and my fellow community member) Jana-Rae Yerxa's poem "~Nibwaakaawin (Wisdom)" wonderfully illustrates this point. Yerxa asks her grandmother whether she would sit with her in ceremony, if she weren't wearing a skirt. In addition to answering that she would do so, her grandmother adds, "whatever you do has to have meaning for you". Jana-Rae Yerxa, "~Nibwaakaawin (Wisdom)", in *Everyday Acts of Resurgence: Peoples, Places, Practices* (Olympia, Washington, Daykeeper Press, 2018) 27. On my reading of the exchange, if the Anishinaabe practice (and indeed, rule) of ceremonial skirt-wearing has become divorced from an Anishinaabe justificatory logic, then it has become a practice sanctioned only on fundamentalist grounds, and those aren't grounds worth following. See also Simpson "Centring Resurgence" at 228.

to some historic way of life. Aboriginal traditions and cultures are neither static nor frozen in time. It is not a backward looking desire. Traditional ways have not been lost as some would assert, but the right to exercise these distinct ways of being and to have them recognized and respected has been overtly and covertly oppressed. Traditional perspectives include the view that the past and all its experiences inform the present reality.¹³⁹⁴

While recognizing that Monture had no intention of using this vocabulary in the way that I've stipulated its meaning, I nonetheless take as significant the emphasis she places on the distinction between "way of life" and historicity.¹³⁹⁵ She expressly separates authenticity from pastness, arguing that the appearance of pastness regarding indigenous ways of life is a misapprehension¹³⁹⁶; it's the logical consequence of the intentional suppression of their contemporary significance.¹³⁹⁷ The difference between the indigenous traditional and the mainstream (I would instead say liberal) traditional, then, isn't relevance in time but power.¹³⁹⁸ As "ways of life"—or lifeways—the indigenous *traditional* is the indigenous *constitutional*, and we have every reason to think that but for the "overtly and covertly" suppressive work of settler supremacy denying it's natural growth and flourishing, indigenous constitutionalism would be just as relevant today.¹³⁹⁹

Claims of and for traditionalism in this sense, then, aren't for a temporal return, but for a constitutional one. In his own words, this is what I understand elder Courchene to have been saying to me when, reflecting on how he's sometimes read by others, he said "You know there's such a misunderstanding: 'all he talks about is going back to the canoe and to the tipi.' And they've totally misrepresented what I'm trying to say. What I'm talking about is regaining the memory of the values—that are inclusive to all people."¹⁴⁰⁰ I take that this is the central point of the *biskaabiayang* Anishinaabe research methodology from my area discussed earlier. Finally,

¹³⁹⁴ Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women" at 238, n 6. See also Christie, "Aboriginal Rights" at 468 (including n 35).

¹³⁹⁵ Leanne Simpson likewise emphasizes the need "to reclaim the very best practices of our traditional cultures, knowledge systems and lifeways in the dynamic, fluid, compassionate respectful context within which they were originally generated." Simpson, *Dancing on Our Turtle's Back* at 18. See also *ibid* at 51.

¹³⁹⁶ See also Wendy Makoons Geniusz, *Our Knowledge Is Not Primitive: Decolonizing Botanical Anishinaabe Teachings* (Syracuse: Syracuse University Press, 2009) at 8.

¹³⁹⁷ See also Clifford, "Listening to Law" at 59-60. Note that a relegation of indigenous tradition to pastness is what we see in the Supreme Court of Canada's seminal *Van der Peet* decision:

This position [taken in *Mabo*] is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition"—that which is "handed down [from ancestors] to posterity", *The Concise Oxford Dictionary* (9th ed 1995),—implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.¹³⁹⁷ *R v Van der Peet* at para 40, citing from Brennan J's majority decision in *Mabo v Queensland [No 2]* at p 58.

¹³⁹⁸ Starblanket and Stark, "Towards a Relational Paradigm" at 181. Starblanket and Stark explain how power is organized in respect of a progress narrative. They argue that "the conceptual boundaries that result from the perceived dichotomy between tradition and modernity" emphasize "the incompatibility between Indigenous peoples' ancestral cultural practices and the conditions that shape our lives today." *Ibid* at 193; see also *ibid* at 196.

¹³⁹⁹ I mean to include those of us living in urban environments. While unequivocally there are unique and invaluable teachings to be acquired directly 'on the land' and in immersive Anishinaabe environments like reserves, there's no reason we can't practise mutual aid, structured through kinship, in urban spaces. I know many who do.

¹⁴⁰⁰ Elder Dave Courchene Jr (24 February 2018).

Cree / Saulteaux scholar Gina Starblanket seems to offer a similar message. Indigenous resurgence, in its best conception, is about “actions that are geared towards going *home*.”¹⁴⁰¹ To speak of one’s constitutional order is to speak of the community with which one belongs.

iii. The Spirituality Which Permeates Indigenous Law and Legal Traditions Prohibits Reasoning and Speaking Across Difference

Much like Richard Rorty’s argument that religion is a conversation-stopper,¹⁴⁰² a third worry about fundamentalism in indigenous law regards not the recognition of sacred *sources* of law specifically, but the permeation of spirituality throughout indigenous law and legal process generally. The result, it’s argued, is the paralysis of deliberative processes, and for two reasons. The first is concerned with the *scale* of difference that spirituality admits. Gordon Christie refers to “the bottomless divide between the world-views of Aboriginal peoples and the Western world.”¹⁴⁰³ The chasm of ECO-system difference is said to be unbridgeable—perhaps generally, but in any event, certainly within the context of a conflict resolution process. Even if each side can be convinced of the reasonableness of the epistemology of the other, within any time frame that connects with the immediacy of the conflict, the gulf between is just too wide to be crossed.

The second reason even more specifically regards what’s taken to be the relationship between spirituality and reason. It’s the epistemological worry that if spirituality is admitted into the process (think for instance of ceremony), then the provision of reasons becomes meaningless, because the justificatory standard of knowledge for each party is neither shared nor reasonable. Seeing this, each side no longer expects the other to accept its forms of argumentation as persuasive (much less the substantive reasons it offers in any instance), and moves to impose itself upon them. The view from above which seems to follow is that in the best case, spirituality absents intellectual rigour from debate, and in the worst, it vitiates reasoned engagement altogether: parties reduce themselves to dueling fundamentalisms, shouting mere beliefs at one another in a competition where rightness turns on volume.

The second reason for this worry can be addressed by identifying its partiality (and possibly its ethnocentrism, although that would depend, case by case, on the facts). Creek-Cherokee literary theorist and critic Craig Womack challenges the presumed monopoly of secular reasoning on rigour:

I am not a secular critic. I do not believe that secular criticism is inherently more analytical or that religious criticism is, by default, only committed to faith instead of reason. It is the quality of the criticism that counts, and secular criticism is no more guarantee of objectivity than religious criticism is assurance of bias.¹⁴⁰⁴

Implicit in this quotation is a comment on the ambiguity of the word ‘reason’. By way of analytic clarity, Womack appears to suggest, and I agree, that ultimately ‘reason’ refers to the provision

¹⁴⁰¹ Gina Starblanket, “Resurgence as Relationality” in Jeff Corntassel et al, eds, *Everyday Acts of Resurgence: Peoples, Places, Practices* (Olympia, Washington, Daykeeper Press, 2018) 28 at 30; emphasis added.

¹⁴⁰² Richard Rorty, “Religion as a Conversation Stopper” in *Philosophy and Social Hope* (New York: Penguin, 1999) 168 [Rorty, “Religion as a Conversation Stopper”].

¹⁴⁰³ Christie, “Law, Theory, and Aboriginal Peoples” at 100-101.

¹⁴⁰⁴ Craig S Womack, “Theorizing American Indian Experience” in Craig S Womack, Daniel Heath Justice & Christopher B Teuton, eds, *Reasoning Together: The Native Critics Collective* (Norman: University of Oklahoma Press, 2008) 353 [Womack, “Theorizing American Indian Experience”] at 367.

of reasons and an assessment of their persuasive force.¹⁴⁰⁵ Critically, the provision of reasons which involve spirituality only appears as anti-reason from within a particular epistemological tradition which recognizes only the intellectual aspect of one's self as meaningfully involved in the provision of reasons.¹⁴⁰⁶ Although contractarianism builds community on this understanding, many lifeways which follow other logics do not.¹⁴⁰⁷ I've argued that mutual aid, and thus law-as-judgment, requires whole person reasoning, and that this engages four modalities of reason.

As regards the spiritual modality of reason, Anishinaabe philosopher Dale Turner says "From an indigenous perspective, when we think about thinking it is impossible for us to avoid the centrality of the spiritual in how we perceive the world."¹⁴⁰⁸ Of course, one might still fail in his effort to reason persuasively by pointing no further than to a sacred text (whether an actual text, a person, etc.) for his authority. But this isn't a failure of reasoning *spiritually*; it's a failure of reasoning *simpliciter*. No one who isn't already committed to reasoning from within a given interpretive tradition will accept that tradition's foundational texts as authoritative *without reasons to do so*—whether the tradition is a spiritual, psychological, legal, economic, or sociological one. Each of us will necessarily fail to be persuaded by such appeals, since we don't receive them as appeals *of* reason, but rather as positional statements attended by yearning.

It's important for liberals to apprehend this point with respect to ceremony, which is presumed to have no internal analytics of its own, or at least none conducive to deliberation. But when ceremony is done properly, it has a logic! Reflecting on the relationship between living in community and learning Anishinaabe law, nokomis once explained to me "We know the special times for ceremonies, for celebrations, and what happens in them. We saw it and heard it. Knowing it that way, we knew how to respect—*there was a reason*."¹⁴⁰⁹ The imperative need to understand how and why ceremony proceeds in the way it does is why the Elders Council of Weechi-it-te-win Family Services (of which noko is part) just published a booklet explaining the ceremonies it uses.¹⁴¹⁰ It states: "A primary message from the Weechi-it-te-win Elders Council is this: 'children must understand what is being done for them.'"¹⁴¹¹

The fact that our contemporary spiritual practices have sometimes been severed from their justifications speaks not of the rigour of our ceremonies as legal traditions, but rather of the impact of settler supremacy on indigenous legalities. For when our communities are healthy, our ceremonies function within their logics. Each kind of ceremony—whether pow wow, *wiindaawasowin* (name-giving), *jiisikaan* (shake tent), *madoodiswan* (sweat lodge), or any other—operates according to reasons particular to our unique lifeways. Courts are no different, as Leroy Little Bear has so skilfully demonstrated.¹⁴¹²

¹⁴⁰⁵ See also Tully, *Strange Multiplicity* at 108.

¹⁴⁰⁶ Rorty denies the possibility of any safe ground to retreat to; the provision of reasons is all there is. As such, he takes the view that only those claims based in Enlightenment philosophy "are appealing to reason, whereas the religious are being irrational, is hokum." Rorty, "Religion as a Conversation Stopper" at 172.

¹⁴⁰⁷ Anthony Laden offers a fascinating, thoughtful and distinctly *social* conception of reasoning which treats reasoning subjects as persons in their wholeness and not merely as minds seeking sound conclusions. See Anthony Simon Laden, *Reasoning: A Social Picture* (Oxford: OUP, 2012).

¹⁴⁰⁸ Turner, *This Is Not a Peace Pipe* at 114.

¹⁴⁰⁹ Elder Bessie Mainville (19 August 2013); emphasis added. I've also often been struck by the wisdom of grandmother Sherry Copenace in this regard. She's so deeply committed to Anishinaabe legal traditions, including so many of our ceremonies, all the while asking unflinching questions about them.

¹⁴¹⁰ Elders Council with Copenace, *Cultural Protocols Booklet*.

¹⁴¹¹ *Ibid* at 8.

¹⁴¹² Leroy Little Bear, "Dispute Settlement among the Naidanac" in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 341.

I've argued that the logic at issue is mutual aid. Consistent with this claim, insofar as I know, in every instance Anishinaabe ceremonies serve the purpose of bestowing a gift, of articulating a need, of expressing gratitude, or of accepting responsibility. Both the ECO-system reasons which justify ceremonies as legal traditions and the particular reasons which ceremonies present for legal action in particular instances are unlikely to be persuasive for subjects constituted outside of mutual aid (and in any event, within a liberal community). But the more critical point I'm trying to emphasize is the inverse. For subjects of mutual aid communities, ceremonial practices may justifiably (that is, for persuasive reasons) serve as legal traditions, and ceremonies may provide persuasive reasons for specific legal action in particular instances.

For both levels of ceremonial justification, I've been careful to say that reasons provided *may* be persuasive. I've no intention of mounting a blanket defence of indigenous ceremony. Again, ceremony, like any other legal process or institution, is capable of enacting fundamentalism.¹⁴¹³ I've experienced this in my own life. My point is simply that there's no necessary connection between ceremony and fundamentalism; that understood from within its own constitutional context, ceremony can be just as rigorous as other forms of reasoning.

The scale-of-ECO-system-difference ground of concern is more challenging. It seems to me there can be no doubt that admitting ontological and cosmological difference into the work of constitutionalism and of law incalculably complicates the prospect of even provisional normative resolutions. Presumably, the fact that working across differences so deep is such challenging work is why James Tully has spent so much of his career working through the dialogue conditions which support workable relationships, and why John Borrows has spent so much effort decrying legal and constitutional fundamentalism in myriad forms.

But to put the matter plainly, other than sitting with the awful mess and seeing what can be made of it, what other option is there? Do proponents arguing that spirituality should be shelved mean to suggest there's a meta-ontological space to which all may retreat for safe deliberation? What happened to the omnipresence of power?

The conventional, liberal move in response to this problem is a light and mirrors show: render liberal ontology invisible so that it seems to do no work, such that the other side contents itself to present its difference further up the legality tree. Instead of dealing transparently with the intractable messiness of a plurality of ECO-systems, we instead account for difference at the level of purportedly neutral systems of law and politics. But the branches only seem neutral because the roots and trunk fixing them to particular grounds have been hidden from view.

Isn't this what the request for indigenous peoples to shelve their spiritual difference seeks to accomplish? Isn't it a request to keep one's spiritual self tidily in her private sphere, sparing law and politics—the world of public deliberation under liberal constitutionalism—from its inconvenient influence? If so, then the request to bracket indigenous ontological and cosmological difference is in reality one more colonial attempt at liberal constitutional domination. It's an ambush that proceeds under cover of peace. What presents itself as the mutually-respecting, mutually-benefiting path forward is in reality covert constitutional warfare.

Against such a reality, it may be that the more challenging work of attending to cosmological difference is also, counter-intuitively, the more pragmatic choice. For Bruno Latour, the cost of letting the coup proceed is prohibitive: "peace proposals make sense only if the real extent of the conflicts they are supposed to settle is understood. A detached and, let us say, inexpensive way of understanding enmity, a Wilsonian indifference to its complexity, may

¹⁴¹³ Lindberg, "Miyo Nêhiyâwiwin (Beautiful Greeness)" at 64.

further infuriate the parties to a violent dispute.”¹⁴¹⁴ In a fiery critique of Ulrich Beck’s cosmopolitanism, Latour expands upon his concern about the move to cosmological erasure:

When men of good will assemble with their cigars in the Habermas Club to discuss an armistice for this or that conflict and they leave their gods on hooks in the cloakroom, I suspect that what is under way is not a peace conference at all. There are Versailles that beget Munichs that beget Apocalypse. How is it that Beck believes religion is ignorable? Again, there is no cosmos in his cosmopolitanism: he seems to have no inkling that humans have always counted less than the vast population of divinities and lesser transcendental entities that give us life.¹⁴¹⁵

Contrary to shelving’s supposed deliberation-enabling overture, normative diversity isn’t a superficial phenomenon. It connects leaves and branches all the way down to our roots, and even the ground beneath them. In Latour’s turn of phrase, “it is not humans who are at war but gods.”¹⁴¹⁶ That insight leads emphatically to the final fundamentalism concern I wish to take up.

iv. Creationism at the Root Causes Arbitrary Exclusion

A fourth concern regards the role that creation stories play in structuring indigenous law. This worry is similar to the previous two, but more severe for the reason that, here, spirituality is said to perform a *structural* exclusion. Consider, for instance, the following reflections on the Mi’kmaw creation story.

Mi’kmaw Elder, scholar and hereditary chief Stephen Augustine says, “The Creation story explains my ancestors’ interpretation of how the Mi’kmaw world was created and how the first Mi’kmaw people came into being.”¹⁴¹⁷ However, “The creation story has more depth than a simple tale about our origins: since time immemorial it has been the vessel of our clan’s history, our system of values, our modes of governance and our relationships with each other.”¹⁴¹⁸ That is, the value of our creation story, far from merely aesthetic, is that it structures the whole of our society, law and governance included. James (Sa’ke’j) Youngblood Henderson and Jaime Battiste seem to share that view: “The creation story of the Mi’kmaq explains the origins of the Mi’kmaw knowledge, way of life, sovereignty, and legal traditions.”¹⁴¹⁹ Readers wanting to better understand these claims may be interested in the Mi’kmaw creation story.¹⁴²⁰

These creationist foundations for constitutional ordering trigger the worry that a substantive commitment at the roots of a society structurally precludes the even application of its law to all. What we earlier called foundations fundamentalism is thought to prejudice the interests (including of belonging) of all those who don’t claim the given creation story as their own—whether they be community members who’ve adopted an alternative substantive tradition (Christianity, Judaism), non-community cultural insiders (Mi’kmaq from another reserve), or total outsiders (Gitksan, settler Canadians, or Norwegians passing through Mi’kma’ki).

¹⁴¹⁴ Bruno Latour, “Whose Cosmos, Which Cosmopolitics?: Comments on the Peace Terms of Ulrich Beck” (2004) 10:3 Common Knowledge 450 [Latour, “Whose Cosmos, Which Cosmopolitics?”].

¹⁴¹⁵ *Ibid* at 456.

¹⁴¹⁶ *Ibid*.

¹⁴¹⁷ Augustine, “Negotiating for Life and Survival” at 17.

¹⁴¹⁸ *Ibid*.

¹⁴¹⁹ James (Sa’ke’j) Youngblood Henderson & Jaime Battiste, “How Aboriginal Philosophy Informs Aboriginal Rights” in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: OUP, 2013) 66 at 77.

¹⁴²⁰ Mi’kmaw professor and educator Marie Battiste’s offers an account of it in Battiste, “Nikanikinútmag.”

My first reply seeks only to constrain this worry. Imagine it were conceded that creation stories, if treated narrowly but strictly as *substantive* sources for constitutionalism and law, would entrench exclusion at a foundational level. But rooted communities aren't theocracies: as I've explained at length in the case of Anishinaabeg, rooted societies neither have, nor desire, centralized bodies of governance to enforce doctrine. In the result, belief in Anishinaabe creation stories isn't, in any formal sense, enforced. Rather, the force of a creation story is exercised through a community's daily praxis: the constitutional structuring of relationships between members which allows them to sustain themselves as community.¹⁴²¹ What conformity demands of individuals then isn't narrow adherence to the narrative representation of a lifeworld, but rather careful attention to how that general lifeworld is organized as a particular lifeway.

Note that my eschewal of narrative grounds of belonging for constitutional ones isn't a reduction to politics. Belonging in the rooted sense turns upon neither whom one claims nor whom one is claimed by (this exchange of claims looks suspiciously like a contract to me). Belonging isn't a function of claiming. It's a matter of lived relationships, of being-with.¹⁴²²

This shift from lifeworld to lifeway is significant. It means that a lineal Anishinaabe descendent who claims an extrinsic creation story, or who confides that she just doesn't know her creation story, isn't thereby excluded from belonging. Whether her lifeworld difference excludes her *in the rooted sense*, which is the question posed, turns on whether her creation story (which may be implicit and unknown to her) empowers her to walk the giftway. I think it's common today for someone to act in accordance with a particular indigenous ECO-system and the constitutional order it empowers and constrains, without ever knowing the creation story beneath, or even while claiming a different creation story. Again, legitimacy turns only on the reconcilability of her constitutional praxis to the story below: roots condition trunks.

If his actions aren't reconcilable, then he isn't living mutual aid and I do take the view that he isn't Anishinaabe in the rooted sense of the word (which leaves unimpaired his capacity to claim belonging in liberal and other senses). Thus if one brings a liberal (individually autonomous) subjectivity into a mutual aid (radically interdependent) society, he can't expect to function effectively or to be treated in any way which he recognizes as coherent, much less fair.

This leaves open the question of what happens when someone is unwilling or unable to reconcile his substantive tradition to mutual aid. This question provokes my deeper reply to the charge of foundations fundamentalism. As I said near the outset of chapter three, the accusation should be met with a confident affirmation that structural preclusion is *exactly* what's happening here. But now I may add that it's happening because it's what legality necessitates. Having a creation story structure law (via constitutionalism and legal traditions) is what every society does and has always done, because it's all that any society can do.

The challenge for critics is to realize that one's own society isn't excepted from this circumstance. There's no system of law without a lifeworld—and therefore exclusions—beneath

¹⁴²¹ Clifford, "WSÁNEĆ Legal Theory" at 768.

¹⁴²² Entry into a state of being-with others might still turn on 'claiming' in the sense of adoptions etc., but this is ownership in an awfully thin sense, for it's entirely parasitic on the kinship practice of mutual aid. An example of my own might prove helpful. I hardly knew my lineal nokomis and today I know her better through stories than I do from time spent being-with her. The woman I've throughout called nokomis, Bessie Mainville, adopted me as her grandson in August of 2013 and a name came with the adoption. Several times over two years she had mentioned to me that adoption was on her mind. One morning I was to be her helper at a naming ceremony and she asked me to come early. When I arrived she shared that there would be two ceremonies today: the naming and an adoption. In a sense, one might say noko 'claimed' me that morning, but a condition of possibility of that claiming was the fact that we'd already been living in the kinship of grandmother-grandson for years.

it.¹⁴²³ The difference between those societies for which we can see the problem and those for which we can't isn't freedom, but transparency. Indigenous societies have often owned the legal and constitutional work their creation stories do with great pride.

Meanwhile, the consequence of sustained non-transparency of a society's ECO-system commitments costs its members dearly. It cheats them of perspective, impoverishing their ability to dialogue meaningfully with those of us living in other worlds. And for the many that don't have the privilege of ignoring the role of ontology in the governing constitutional and legal orders, the lack of such perspective presents as an insufferable conceit. The presumption that one's own view of persons and of peoples is (or ought to be) a universal one causes vast minds to say narrow things, sometimes as claims about the whole of humanity.

Consider Charles Taylor, slipping from his characteristic thoughtfulness: "Anthropology, like any other social science, can't do without some notion of rule. Too much of human social behaviour is 'regular,' in the sense not just of exhibiting repeated patterns, but also of responding to demands or norms that have some generalizable form."¹⁴²⁴ Sometimes the mistaken universality presents less as an oversight, more as a declaration. From a rooted standpoint, the lines with which John Rawls opens *A Theory of Justice* are wanting in humility:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.¹⁴²⁵

Rawls' opening salvo on utilitarianism swallows indigenous difference with its intended target.

A still more flagrant presumption of identity between one's own perspective and the universally reasonable presents where the mistake is self-consciously defensive yet remains unapologetic. Consider Michael Ignatieff presenting his view that because of how agency works, the necessary individuality of rights-claims isn't a uniquely Western quality but a universal one:

The basic intuition of rights talk is that each of us is an end in ourselves, not a means to an end. This is because each of us wishes to frame our own purposes and achieve them in so far as we can. These purposes are valuable to us because they are expressive as well as instrumental. When we achieve them, we express our identities as well as serve our interests. *That's why agency is so valuable to us. I don't think this individualism is Western or time-bound. It's just a fact about us as a species: we frame purposes individually, in ways that other creatures do not.*¹⁴²⁶

Having offered my two-tiered defense of creationism in rooted, and specifically, indigenous, legal orders, and having then briefly discussed the easy erasure of any semblance of liberal ontology from liberal systems of law, I hope I won't be accused of deflecting when I suggest that the real story vis-à-vis creationism's influence over law may be about *liberal* fundamentalism. Liberalism's misrecognition of ontology as substantive (and not narrative) difference—conflating roots with leaves—is the heart of the problem here.

¹⁴²³ Tully, *Strange Multiplicity* at 56-57.

¹⁴²⁴ Charles Taylor, *Philosophical Arguments* (Cambridge: HUP, 1997) ch 9 at 174.

¹⁴²⁵ Rawls, *A Theory of Justice* at 3.

¹⁴²⁶ Ignatieff, *The Rights Revolution* at 24; emphasis added.

For instance, that one should feel comfortable in simply assuming the universality of the normative concepts with which he's most familiar—in the foregoing examples, rules, justice, and rights—strikes me as fundamentalist. One need not hold that his own way is the only reasonable and worthy way, in order to participate in fundamentalism. It seems to me it's sufficient for one to hold out his way, including its preferred concepts, as uniquely qualified to accommodate all others; as a way into which their difference may be translated without relevant consequence.

The fundamentalism of such a view consists in the fact that it requires its holder to close himself to difference—the kind of difference which matters most. The proposed translation of difference only appears non-violent when the ECO-system beneath it goes unacknowledged, and concomitantly, translators fail to see that the language they mistake as universal is expressive of an ECO-system (their own).¹⁴²⁷ It matters not whether in any instance liberalism's ontology misrecognition is intentional; fundamentalism is indifferent to intention.

¹⁴²⁷ The majority decision in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, authored by McLachlin CJ and Rowe J, exemplifies this form of fundamentalism *par excellence*. First, the Court insisted that without modifying its existing framework it could adequately account for the Ktunaxa freedom of religion claim. We see this position develop through two critical passages. The Court asserts, “We note that with respect to the section 2(a) claim, the Ktunaxa stand in the same position as non-Aboriginal litigants.” *Ibid.* at para 58. Second, the Court states “the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place. The chambers judge indicated that Mr. Luke came to this belief in 2004 but whether this belief is ancient or recent plays no part in our s. 2(a) analysis. The *Charter* protects all sincere religious beliefs and practices, old or new.” *Ibid.* at para 69. This second statement's ostensible purpose is to affirm the inclusiveness of Mr. Luke's late-coming sincerely held beliefs, but this is its secondary task. The statement's primary purpose is to flatten difference between conceptions of religion, and consequently, of religious belief and practice. While there are countless religions the Court must treat equally, in a break of spectacularly good fortune, there's only one *sense* of religion which holds them all, and thus which it must navigate.

This fiction transitions into my second point, that the Court closed itself to the Ktunaxa difference which matters most. The Court's pretence of even-handedness in its treatment of the Ktunaxa section 2(a) claim only appears fair because of its unscrupulous decision not to even acknowledge (much less engage with) the Ktunaxa ECO-system which renders its claim coherent. The critical passage is the following:

Section 2(a) protects the freedom to pursue practices, like the wearing of a kirpan in *Multani* or refusing to be photographed in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567. And s. 2(a) protects the right to freely hold the religious beliefs that motivate such practices. In this case, however, *the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it.* That claim is beyond the scope of s. 2(a). (*Ibid.* at para 71; emphasis added).

The Court's ethnocentrism consists in its characterization of the Ktunaxa concern with Kławla Tukłwak?is' (Grizzly Bear Spirit's) development-based displacement as a claim for the protection of “the object of beliefs” (*Ibid.*, para. 71), which it says would unduly expand the scope of section 2(a). But the Court's distinction between protection of the *object* of the beliefs one holds and protection of one's freedom *to* believe is only stable within a particular conception of religion: transcendence. In transcendent religions, such as the Abrahamic religious traditions, the object of religious belief is by definition at some remove from the belief itself.

Indigenous spiritual traditions, however, are immanently rooted in earth (the Ktunaxa set this out clearly in their factum: *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (factum of the appellants [*Ktunaxa Nation*, factum] at paras 72-74). Indigenous ‘religions’ have no churches, mosques, or synagogues in which to manifest the expected form of religious practice. We have none because we need none and we need none because *the earth is infused with spirit*. See Gespe'gewa'gi Mi'gmawei Mawiomí, *Nta'tugwaqanminen* at 59. Critically, the fact of our spiritual immanence—that our beliefs are *grounded* and in *specific* places at that—collapses the distinction the Court arrogantly holds as universal.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567 at para 32 holds that “‘Trivial or insubstantial’ interference is interference that does not threaten actual religious beliefs or conduct.” Yet

b. Critiques That Rooted Legalities Inadequately Attend to Power

The worries in this section regard the operation of power in rooted legalities. The first targets the context of colonialism and the violence which set my project in motion. It asks whether, rather than addressing the problem of violence in indigenous-settler relationships, my proposal (and in particular, the principle of earth reconciliation) merely reverses the poles. The second concern regards mutual aid's engagement with power more generally. It addresses what some may regard as a conspicuous absence of engagement with power (other than settler supremacy) throughout my argument, and queries why this is so. In particular, this worry is whether mutual aid (or my account of it anyhow) inadequately accounts for power between persons and peoples.

My replies are grounded in the earthway analytics I've developed. Concerns about power must reflect what rooted peoples seek to accomplish and will be irrelevant to the extent that they fail to advert to this starting point (although it's of course open to anyone to mount an argument for the irrelevance of the humility thesis to their critique).

i. 'Reverse' Colonialism

This dissertation calls for the replacement of liberal legalities—from sovereignty thesis through to law-as-rules—by rooted ones. A question might naturally arise then as to whether my emphasis on dialogue is disingenuous cover for the hegemonic constitutional warfare I've rejected. Perhaps the middle path represents a possibility I haven't openly contemplated: *indigenous* supremacy and a consequent relationship of 'reverse'-colonialism.

It may appear as though there's genuine cause for such worry. For instance, Anishinaabe elders of Manitoba have shared their perspective that:

The Anishinaabeg Elders have a specific term for the Treaty relationship – *Waakoodiwin*. It speaks to the way the Treaty had brought together the Anishinaabeg and the Crown. The term is interpreted as follows: we Anishinaabeg had plenty to offer and we were willing to share with you. However, the Newcomers have feasted at our table for so long they have forgotten whose home this truly is.¹⁴²⁸

If the notion of "our table" and the claim that there are particular peoples "whose home this really is" are jurisdictional claims—claims to superior legal and political authority sourced in firstness—then it would seem the worry may have legs. For such claims would then seem to

as the Ktunaxa have so painfully laid out (*Ktunaxa Nation* factum at paras 10, 22, 24, 25), their actual beliefs in Kławła Tukłutak?is *are* the very thing at issue. As an inherently (unchangeably) place-based being, the development of a ski resort will displace Kławła Tukłutak?is not only from a specified location which constitutes an object of religious veneration, but also from his *specifically spiritual* reality, and thus from any relevant sense of believability.

The majority understood this problem and decided that Canadian constitutional law doesn't care. The Ktunaxa expressed the impact on their immanentist beliefs to the Court when they said that the ski lodge will cause Kławła Tukłutak?is to leave forever. *Ktunaxa Nation*, factum at paras 10, 22, 24. Moldaver and Côté JJ in their dissent also gave voice to the immanent-transcendent distinction and the work it does in the case of Kławła Tukłutak?is. *Ktunaxa Nation v British Columbia* at paras 127, 128, 131. The majority declined even to advert to their argument, much less to counter it, preferring to simply silence Ktunaxa ECO-system difference. This is liberal fundamentalism. *Ktunaxa Nation v British Columbia* is a cowardly decision. Because the Court had the appropriate information carefully laid out for it, it's right and fair to say that in this case the Court was manipulative in its reasoning, and as such this decision dishonors the Bench.

¹⁴²⁸ Hyslop et al, *Dtantu Balai Betl Nahidei* at 131, editors Joe Hyslop, Harry Bone et al speaking.

attribute to the elders a zero sum view of autonomous territorialities. Ensnared within such a view, the quotation is a trump claim and its success is intended to come at the direct cost of settler interests.¹⁴²⁹ But have we reason to think this is what the elders mean?

I think we have excellent reasons to think it isn't. We have reason to think, rather, that "home" and its (now formerly) ever-full table is the place where we can share, relate, grow and create together. I believe this is the perspective that Nehiyaw lawyer Harold Johnson points us towards when he says to settlers "Traditionally, my family members have viewed every assumption of superiority by your family as a sign that you knew nothing. They assumed that, with time and patience, your family would develop in its understanding and you would give up this misguided notion."¹⁴³⁰ He expands upon his meaning:

When your family arrived in the southern part of this territory, there were several families already co-existing here. The Nehiyaw, the Dakota, the Anishinabae, and the Métis families had worked out between them how they would live together under the Creator's law. None of these families either exercised or expected to exercise authority over the others.

When your family arrived here, *Kiciwamanawak*, we expected that you would join the families already here, and, in time, learn to live like us. No one thought you would try to take everything for yourselves, and that we would have to beg for leftovers. We thought we would live as before, and that you would share your technology with us. We thought that maybe, if you watched how we lived, you might learn how to live in balance in this territory. The treaties that gave your family the right to occupy this territory were also an opportunity for you to learn how to live in this territory.¹⁴³¹

On Johnson's view, the table is earth community following its original instructions to offer up its gifts, "home" is the earth, and those "whose home this truly is" are all of those who constitute themselves within its way. The way "to live in this territory" is to accept the humility thesis, the condition of possibility of constitutional mutualism—treaty.

I suggest this is the critical point to understanding what the Manitoba elders mean. It's certainly the critical point to understanding my emphatic rejection of the characterization of my project as reverse-colonialism. In being asked to leave liberalism on the trail behind, settlers aren't asked to accept, in Rawls' way of putting the problem, anyone else's comprehensive moral doctrine. But there is something asked of them: they're asked to accept the humility thesis, and in so doing, to join the family of Mikinaakominis communities living at home together.¹⁴³²

¹⁴²⁹ This is a point worth pausing on. With extraordinary irony, the reversal-of-polarities fear can only be realized insofar as indigenous peoples are constrained to articulate their aspirations and goals within settler legality. Its disjunctive constitutional logic, legal traditions and laws casts indigenous desires as claims and frames them in respect of competing autonomies. In the result, indigenous gain stands in direct proportion to settler loss. Arguably this dynamic is at its most pointed where indigenous claims are for restitution: the return of stolen land.

¹⁴³⁰ Johnson, *Two Families* at 20.

¹⁴³¹ *Ibid* at 20-21. See also *Restoule v Canada*, Transcript of elder Fred Kelly at 2939-2941.

¹⁴³² Leroy Little Bear says "From a Native point of view, the expectation was that non-Indian society would arrive, and as we have done for thousands of years now, become incorporated into our relational network." Little Bear, "Aboriginal Relationships to the Land and Resources" at 19. He adds: "When our people talk about spirit and intent of treaties, we're talking about the way it has always been. In other words, a guarantee that we were going to remain the same, to be able to continue and respect creation through this inter-relational network. The expectation was that non-Indian society was going to incorporate into that network." *Ibid* at 19-20. Heidi Stark goes further, saying that Anishinaabeg accepted responsibility for how well settler peoples fit into the existing treaty order. Stark, "Changing the Treaty Question" at 268, 270. Harold Johnson makes a similar point, saying to settlers, "Your *Constitution* cannot abrogate treaties because your *Constitution* is your treaty right." Johnson, *Two Families* at 92.

Some liberals will receive this expectation as an imposition since it constrains their field of choice. In addition to my response in chapter seven, sections (a)(ii)(4)(a)-(d) and concluded in chapter seven at section 6(a)(iii), it seems to me such objectors face a series of challenges. First is a misunderstanding as to the nature of the putative imposition. I'm uninterested in comprehensive moral doctrines other than to offer a conception of legality which enables folks to argue for or against them in a way my ancestors and elders might recognize and with which they might identify. My eye has always been on the *how* and *why* of social order, not the *what* of it. This stance turns on the notion of constitutional logics (and their correlate structures), and so I've laboured to draw a distinction between substantive difference and logical-structural difference. If the substantive level of difference is all one can see, he isn't aware of the liberal filter constraining his mind's eye.

Of course, this reply might merely push the worry further down. Even if she accepts my first answer, an objector may now be concerned with imposition at legality's logical-structural level. However, it seems to me that Johnson's message pre-empts this concern. In accepting the humility thesis, no community is asked to accept another's authority or model; each community is allowed to interpret the earthway for itself. In Elder Dave Courchene's words, "Just as the pine tree never tries to convince the oak tree to change its ways, so it is that the original People never tell each other what they should do and believe. We welcome each other, each following our special ways."¹⁴³³ We've all done so, and, accordingly, have constituted ourselves in quite different ways. Barring other stresses, the fact of our constitutional difference is a challenge we can ordinarily manage, precisely for the reason that each of our unique constitutional orders is a disclosure of creation's way, our common home. With that thought in mind, recall once more *ogimaa* Potts' beautiful description of the humility thesis and the mutualism it empowers:

I remember once coming across an old white pine that had fallen in the forest. In its decayed roots a young birch and a young black spruce were growing, healthy and strong. The pine was returning to the earth, and two totally different species were growing out of the common earth that was forming. And none was offended in the least by the presence of the others because their own identities were intact.¹⁴³⁴

The third challenge also denies that an expectation of humility thesis acceptance supports an inference of reverse-colonialism. Such a claim is incoherent without a rooted imposition upon Canada's constitutional order. This isn't what I call for. My proposal for transformative change fails not only to call for constitutional imposition, but for systemic engagement altogether. Rootedness forsakes appeals to systems of power (such as constitutionally-empowered governments) and instead appeals directly to the power-in-persons, insisting they self-select for change. My proposal aspires to liberal erasure, but not by way of a takeover. It sacrifices the efficiency of a coup for the reliability and stability of messy organic growth from below.

ii. Mutual Aid's (False) Indifference to Power

Throughout this dissertation I've attended closely to how power operates as between distinct legalities, especially as regards the prospect of constitutional capture. I've also addressed a worry about individual freedom, explaining that the absence of autonomy as a way of imagining

¹⁴³³ Courchene, "A Return to the Beginning for Our Tomorrows" at 6.

¹⁴³⁴ Potts, "Growing Together From the Earth" at 199.

individual interests doesn't imply a disregard for those interests. But these two discussions sum up my engagement with power so far. Any effort to take privilege and oppression seriously as between differently situated subjects has been absent, and this choice may have created legitimate worries. Readers may have formed a preliminary view that I take mutual aid to be indifferent to power, or worse, that I mistakenly hold that it serves as a wand resolving all questions of privilege and oppression. Albeit understandable, neither view is correct. My approach has been deliberate and now I'd like to explain why I believe it has been necessary.

1. Power is a Function of Lifeworld

In 2001, an 'inter-philosophy dialogue' took place in Winnipeg on the subject of liberalism and aboriginal rights. Attendees included indigenous and settler scholars, and elders, who played a prominent role. The event was notable for the level of conflict it contained which is clearly noted in Professor David Kahane's foreword to the conference proceedings.¹⁴³⁵ Kahane's remarks centre on the foregrounding that elders gave to their worldviews and the amount of space they took up in communicating them. As Kahane shifts his attention from the conference dynamics to what they taught him about the nature of inter-philosophy dialogue, he asserts:

there are no neat world views awaiting our interpretations, but complex histories and counter-histories, discourses and counter-discourses, hybridity and contestation. Generalizations have their purposes, whether these are about Indigeneity, about Western world views, about colonial mindsets, or whatever; but these purposes are ethical and political ones, and need to be unpacked and defended. So we need to bring an inquisitive ear to characterizations of the world views that inter-philosophy dialogue is meant to bridge.¹⁴³⁶

Kahane's judgment reflects a widely-held view in the humanities and social sciences that since power serves a framing purpose, it must be a front-loaded (and ongoing) consideration in any inquiry. This postmodern view presupposes that while knowledge is situated, power itself is a universal currency translatable across all subject positions. Attending to power means investigating its *distributions* across differently situated subjects (and enabling conditions, etc.).

Albeit well-intentioned, the assumption nonetheless strikes me as imperial. Discursive power isn't a universal currency and treating it as though it were privileges a particular conception of power, occluding others. Power is never *just* power; rather, power is necessarily (to borrow language from James Tully) 'in the key of' a lifeworld. Power is a *function*. How one conceives of it turns on the particulars of the belonging analytic within which she stands and perhaps especially on one's conception of subjectivity. An analysis of power thus demands that one attend not only to the distribution of privilege and oppression across distinct *subject positions*, but also across *conceptions of subjectivity*. Thus one might take up power as a function of autonomous, individual subjects *or* of co-creative, radically interdependent ones. Because each kind of subjectivity produces distinct *kinds* of subject positions, *what it means* to attend to power will differ within their respective lifeworlds.

Further, these differences in how power operates will be carried upwards through each legality tree, such that at the level of trunks one can speak of power as a function of liberalism

¹⁴³⁵ David Kahane, "Foreword" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: OUP, 2013) xi.

¹⁴³⁶ *Ibid* at xii-xiii.

versus power as a function of mutual aid. Paul Kahn's insight that "Proving yet again that liberalism follows from a certain understanding of the autonomy of the moral subject is hardly a convincing argument to those who accept neither that view of the subject nor the primacy of reason among the possible forms of argument"¹⁴³⁷ is apposite.

If power is a function of lifeworld, then any analysis of it that fails to align with the lifeworld of its object of critique is incoherent and imperial. *Incoherent* in that its application assumes lifeworld understandings which don't obtain, resulting in nonsense outputs; *imperial* for acting as if they applied anyhow: to act in such a way is to assert the dominance of one lifeworld over another.¹⁴³⁸ Thus it would have been a critical (and darkly ironic) error for me to have begun my inquiry into rooted legality by foregrounding considerations about power. Since the analytics of rootedness had yet to be articulated, I'd have been considering power as a function of liberalism (and more particularly, its postmodern refinement). In systematically overlooking power as a function of mutual aid, I'd have been enacting the violence I wish to help end.

2. Power within Rooted Constitutional Orders

The foregoing argument raises the pressing question of how power operates within a rooted constitutional order. This is an enormous inquiry going well beyond the bounds of this dissertation. I hope that if others find this research helpful, they might soon take it up. In future projects, I'll certainly do so too. However it's appropriate for me at least to outline some preliminary thoughts about the direction that such inquiries might take.

a. Practical Power

In a rooted lifeway, practical power is far more significant than discursive power.¹⁴³⁹ The main reason for this is the obvious one. Practical power is demonstrable and applied, which is what mutual aid requires.¹⁴⁴⁰ One is free to the extent that he has capacity to offer gifts and to receive them. The more successful his practice of co-creativity, the more he's relied upon and the more reliably he may turn to others: the greater his power.

A second reason is the ontological fact of transformation which characterizes earth cycles and geographies and thus the nature of rooted community movement and composition throughout them. Borrows states that in "Anishinaabemowin the world is understood as being in constant motion."¹⁴⁴¹ Similarly, the medicine power of various *manidoog* and healers allows them to transform their physical shapes and to alter the world around them.¹⁴⁴² In a world always

¹⁴³⁷ Paul Kahn, *Putting Liberalism in Its Place* (Princeton University Press, 2005) at 7-8. I've always understood Kahn's use of "reason" here to mean Rawlsian public reason, and thus I don't understand him to suggest that non-liberals appeal to non-reason in their forms of argument. On the contrary, I take the fact that they reason differently to be precisely his point.

¹⁴³⁸ I describe this dominance as 'imperial' generally, not 'colonial' specifically, because it holds for some non-indigenous subjects (for instance, folks who aren't indigenous to Turtle Island but have rooted themselves in it).

¹⁴³⁹ Mary Black-Rogers showed this for the Anishinaabeg. See Mary B Black, "Ojibwa Power Belief System" in Raymond D Fogelson and Richard N Adams, eds, *The Anthropology of Power: Ethnographic Studies From Asia, Oceania, and the New World* (New York: Academic Press Inc, 1977) ch 11.

¹⁴⁴⁰ In the context of spiritually-endowed gifts, Black-Rogers writes "a person's blessings are a private matter, not talked about or known except through demonstration or attribution". *Ibid* at 149.

¹⁴⁴¹ Borrows, "Earth-Bound" at 51.

¹⁴⁴² This fact is omnipresent throughout Anishinaabe *aadizookaanan*. See also Mary B Black, "Ojibwa Taxonomy and Percept Ambiguity" (1977) 5:1 *Ethos* 90 [Black, "Ojibwa Taxonomy and Percept Ambiguity"].

becoming, one can't take apparent physical forms simply as given. Where uncertainty, contingency and difference are baseline assumptions of an ECO-system, weathering the sea of change is an omnipresent challenge. To this end, practical power proves invaluable.

In contrast, representations about power—discourse—are often regarded as mere talk and treated with a degree of skepticism.¹⁴⁴³ My favorite example comes from the Anishinaabe *aadizookaan* of the flood. The Underwater Panther wonders: are you really a tree stump or just Nanabozho pretending to be one? I can't know until I test you.

We might also consider that the absence of the enabling conditions of discursive power helps to explain its diminished significance. Discursive power requires a deep sense of certainty for its coherence, even though its object is to decentre truth. There's a (life)world of difference between an ontological condition of transforming, becoming identities and an ontological condition of stable identities, *knowledge of which* is socially constructed and thus contingent on one's subject position.¹⁴⁴⁴ One can't meaningfully represent an object always in motion and it doesn't occur to one to try. In the absence of a taxonomy of stable, knowable objects to be socially positioned, of a narrative of objective truth to be decentred, of a benign state with centralized authority to be resisted, of citizenship's uniform distribution of freedom to be refuted, of the neutrality of public space to be denied, and in short, of an ECO-system expectation for certainty to be *made* contingent, the conditions enabling discursive power's effectiveness don't exist. Analyses of power within rooted legalities must reflect the heightened importance of practical power and the diminished significance of discursive power.

b. Discursive Power

Despite its diminished significance, discursive power remains important. A starting point is that in rooted contexts, discursive power must track the rooted conception of freedom, co-creativity, which mutual aid seeks to realize. Thus the first thing one sees is that the primary axes of power shift from the conventional liberal (or postmodern) ones. Privilege and oppression turn on one's capacity for co-creativity, not on one's capacity for free choice. Since it's one's relationships which enable him to gift and to be gifted, the central line of inquiry will regard one's radically interdependent subject position. This differs markedly from an inquiry into how, for instance, one's *embodied* subject position may operate to facilitate or constrain her agency.¹⁴⁴⁵

Patricia Monture illustrates: "Gender is a state that balances Haudenosaunee social systems. My understanding always comes from a woman's place, a mother's place, an auntie's place, a sister's place, and a *kohkum*'s place. And each of these are sets of responsibilities, not

¹⁴⁴³ Relland, *Teachings of the Bear Clan* at 162; Borrows, *Freedom & Indigenous Constitutionalism* at 10-11.

¹⁴⁴⁴ For Anishinaabeg, and I suspect for many other rooted peoples, the former circumstance characterizes their ontology. Thus Mary Black-Rogers observed "Individuals of both groups of Ojibwa displayed the typical tendency to speak only for themselves and of the things they had known through experience. The experience of each individual being different, and also private, they explicitly anticipated that others' accounts would differ from their own, even on factual and cognitive matters." Black, "Ojibwa Taxonomy and Percept Ambiguity" at 91, n 1.

¹⁴⁴⁵ Note the implication for advocacy, support, and what might generally be called responsible action vis-à-vis one's settler subject position. The centre of one's attention necessarily shifts from the kind of support and labour that is appropriate of an *ally*, to the kind of support and labour that is appropriate of a *relative*. To be sure, subject position in the embodied sense can't drop out: in a liberal constitutional context, questions of voice, agency and erasure continue to loom large and it's properly the labour of settlers to confront these oppressions. However, this sort of consideration becomes second-order. What matters most, if one wishes to respect not only indigenous persons but also their legalities, is to live, think and act as a relative.

roles.”¹⁴⁴⁶ A few example queries might be whether, all else being equal, a particular sister’s capacity to gift and to be gifted is empowered to the degree that other similarly-situated sisters in the community are; whether sisters in a given community generally enjoy a capacity to gift and to be gifted as robust as that which brothers do; whether this sister enjoys a capacity to gift her siblings and to be gifted by them considered appropriate to sisters generally and not a mother (adverting to the possibility of the intermediate ‘older sister’ kin relation).

Critically, although power as a function of mutual aid gives priority to the fact of one’s radical interdependence and thus to relational subject positions like ‘sister’, it doesn’t erase the significance of one’s embodiments. Thus one might still raise a concern about gender, race, or age—these identifiers just don’t form part of the primary fault line along which power is distributed. In her study of Anishinaabe women, Anishinaabekwe scholar Brenda J. Child says “Ojibwe society considered gender roles to be mutually supportive”.¹⁴⁴⁷ Such a claim requires intensive study, but even if true, communities often fail to live up to their best aspirations.¹⁴⁴⁸ If a community found that a culture of sisterism, motherism, and daughterism flourished (forms of oppression which map only to women’s relational subject positions), its members would unequivocally need to pursue what clearly seems an issue of gender-based oppression.¹⁴⁴⁹

Finally, these lines of inquiry should be as complex as those pursued in a liberal context. Once more, the axes of privilege and oppression merely shift; oppression will remain in all constitutional orders, of any kind of legality.¹⁴⁵⁰ Obvious pressure points for rooted constitutional orders include the vulnerability into which persons without kin (or with only minimal kin) are placed and the implication that such a structural disempowerment has for the effectiveness of negative social force. These are serious vulnerabilities and they require further study.

3. Functionalism and Humility in Critical Engagement

Given the obvious relationship between discursive power and critique, the functionalism of power should impact the course of one’s critical engagement. Despite its aspiration to openness and whatever its object may be in a given circumstance, critique necessarily presupposes analytical starting points, which circumscribe the scope of its application. The poststructural stance that all views are situated must, therefore, self-reflexively apply to the activity of critique.

To be sure, critical interventions challenge (and often seek to negate) some of those analytic starting points. But conceiving of one’s positive project from within the failings of a given way of thinking and interacting sets it on quite a different course than does imagining a project proceeding from its own analytical starting points,¹⁴⁵¹ and as a vital but ultimately second-order concern, working through its relationship with a superimposed analytical order.¹⁴⁵²

¹⁴⁴⁶ Monture, “Power, Identity, and Indigenous Sovereignty” at 158.

¹⁴⁴⁷ Brenda J Child, *Holding Our World Together: Ojibwe Women and the Survival of Community* (New York: the Penguin Group, 2012) at 46. See also Kim Anderson, “The Dismantling of Gender Equity” in *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Sumach Press, 2008) at ch 4.

¹⁴⁴⁸ John Borrows, *Law’s Indigenous Ethics* (Toronto: UTP, [Forthcoming 2019]) at 239.

¹⁴⁴⁹ See comments of Nehetho/Ininiw elder Rose Hart / Black Bear Woman in Linklater et al, *Ka’esi Wahkotumahk Aski* at 85-86.

¹⁴⁵⁰ Borrows, *CIC* at 8.

¹⁴⁵¹ This tension is centred in Bruce G Miller, “Folk Law and Contemporary Coast Salish Tribal Code” (1995) 19:3 *Am Indian Cult Res J* 141. See also Margaret Noodin, *Bawaajimo: A Dialect of Dreams in Anishinaabe Language and Literature* (East Lansing: Michigan State University Press, 2014) at xvii.

¹⁴⁵² See Christie, “Culture, Self-Determination and Colonialism” at 17-18, 26.

a. Critical Humility

For this reason, I don't see the freedom-making potential of poststructural legal interventions in the way that so many of my peers and mentors seem to. For all their progressive energy and achievement, postmodern critiques remain responsive to—and thus at least in respect of their starting points, circumscribed by—the modern liberal analytics of reason and human chauvinism; autonomous personhood and self-determination; universal subjectivity and ahistoricism; liberty, formal equality, and contractarianism; the state, sovereignty and citizenship; the public/private sphere divide, public proceduralism and private substantive freedom; jurisdiction, the separation of powers and democratic freedom; rights discourse, legal rights, and an orientation to justice.

Any poststructural interrogation will challenge aspects of this liberal orthodoxy. And few of us would contest the necessity of situating one's indigenous law revitalization project within the messy colonial (liberal, neoliberal, etc.) here and now. But if we take that imperative to mean that one's critique must not only *account* for the complexity of colonial imposition, but must also provisionally *accept* its analytics in order to get out from under them, then critique is normalizing violence to indigenous lifeways and legalities.¹⁴⁵³

Significant implications attend the recognition that critical interrogations are always functions of analytical starting points. What counts as meaningful critical engagement in one analytical context (regardless of whether one agrees with any given intervention), may be problematic,¹⁴⁵⁴ perhaps incoherent, within another. In fact, a steadfast insistence on the need to attend to power in a familiar analytic key may inadvertently cause critics to overlook the way power's at work in a less understood (or even unrecognized) one.¹⁴⁵⁵ This may occur, for instance, in circumstances where a critic intervenes across distinct conceptions of subjectivity, of subject-object relationships, of valuations of certainty, or more generally, across lifeworlds.¹⁴⁵⁶

The conclusion to be drawn isn't that critical engagement in its best spirit is *humble*. Rather, critical engagement without critical humility *lacks rigour* because it will sometimes fail to identify difference at all.¹⁴⁵⁷ Critical modes of engagement like 'intervention' and

¹⁴⁵³ Gordon Christie is careful to guard against losing the difference, especially as regards indigenous scholars. See Christie, "Indigenous Legal Theory" at 217; Gordon Christie, "Critical Theory and Aboriginal Rights" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: OUP, 2013) 123 at 127, 134-135.

¹⁴⁵⁴ Christie, "Indigenous Legal Theory" at 213-214; Clifford, "Listening to Law" at 58.

¹⁴⁵⁵ Few would deny the importance of careful attention to distributions of power within political and economic spheres today. Regardless of whether I like it, in Canada my agency *is* filtered through them and it would be irresponsible of me not to attend to them. Yet I'm conscious that the world Canada structures for its citizens might have been ordered differently. There's no inherent connection between power and abstract and isolated political and economic spheres of activity.

It's with this consciousness of radical lifeworld difference in mind that Kenneth M. Morrison critiques Bruce Trigger's account of indigenous cultural adaptation. He argues that when Trigger "makes self-interest foundational" (i.e. as a claim which he intends should universally traverse ECO-systems), he also thereby "gives the impersonal political and economic aspects of European social life both behavioural and analytical primacy." Morrison, *The Solidarity of Kin* at 34 (see also 32). It's one thing to recognize that nobody serious about their political projects may fail to attend to the dominant means through which power operates today. It's quite something else to claim that power so conceived ought to serve as the dominant lens through which it's considered in any political project. It would be fascinating to see how critical legal studies might be re-imagined in respect of the relational kind of subjectivity that I've argued rooted legal systems contemplate.

¹⁴⁵⁶ Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" 17 Can JL & Soc 41 [Christie, "Judicial Justification"] at 67.

¹⁴⁵⁷ See Simpson, *Dancing on Our Turtle's Back* at 55.

‘interrogation’, *even when they identify problems*, silence difference insofar as they superimpose analytic starting points of one system of law over their target’s in order to enable the application of their critique. Some may insist that the intensity of the problem serves as justification for its critique, but to identify the issue as a problem is already to enact the functionalism of critique. One doesn’t avoid this inconvenience by more forcefully announcing the wrongness as it appears within one’s own lifeworld.

b. On Radicalness

At least one specific consequence of critical humility is worth identifying expressly. One way discursive power is frequently manipulated is by ascribing radicalness to some (generally, undesired) object. Radicalism is an inescapably comparative term. It presupposes a common point of reference (frequently a standard for judgment) and defines itself in relation to it. That which is radical is that which departs significantly in degree from the baseline reference; we ascribe the quality of radicalness to something because of *how much* it departs from the given standard. Ascriptions of radicalness are powerful, then, because they designate the objects of their application as untrustworthy and dangerous by virtue of their marked difference.

The functionalism of critique allows us to see is that the baseline reference upon which the meaning of radicalism turns is part of an analytic ordering internal to a lifeworld, and hence a lifeway. Thus to claim radicalism of some object is to announce the ground upon which one stands and to identify that the object doesn’t stand with you. In a liberal lifeway, the baseline reference is the substantive neutrality of public space. A radical person is one who pushes his private notion of the good into public space, disrupting the neutral status quo. His means need not be violent or reckless. For instance, judges are called radical or activist by those who take them to be exercising policy preferences through their judicial function. Conservatives (in the sense of classical liberals) deploy the discursive power of radicalism when they accuse someone of representing ‘special interests’ in law or policy: ‘special’ insofar as they aren’t interests shared by all, and thus which aren’t reconcilable to the boundaries of public space.

For rooted lifeways, the baseline reference is earthway compliance. One is radical to the extent that she departs from its logic and/or structure. Thus one might be deemed radical if she shares so little of herself that she risks severing her kinships, or conversely, if she gives so much that she risks tilting the balance of inner harmony and breaks down.

The point of the comparison is the recursive quality of claims of radicalness. My hope is that folks might use this knowledge to deflate critiques when they’ve been improperly labeled by those who mistake a local baseline reference as a universal one. While a rooted kin-member called ‘radical’ by a liberal citizen can’t reply that his accuser is wrong (his practice of critical humility provides that within his accuser’s liberal’s constitutional context, his actions might well be radical), it empowers him to educate his critic, explaining that within the lifeway conditioning his actions, he isn’t radical at all.

c. Critiques Alleging Misreading

A third group of critiques suggests that a deep misreading has occurred, with misrepresentations resulting. The first of these regards how I characterize rootedness; the second, Canadian law.

i. The Hermeneutic Critique of Rootedness

Mutual aid presupposes a rooted ECO-system. What if it fatally misreads the story earth tells and that individualism, self-interest, expectation and competition (the sort of story that Darwin and Hobbes tell) better characterize the natural order—or rather, disorder—of life before and beyond the boundaries of human community? If this were so, it might be argued that the collapse of my entire project follows, or at least that it's mired in the fundamentalism I've rejected.

The hermeneutic objection misunderstands my justification for mutual aid. Although I'm deeply committed to the benefits of a phenomenological approach to earth, I've eschewed such a grounding for this project. Rather than justifying rootedness in respect of a story earth tells, I've justified rootedness in respect of the stories we tell of earth. At the root level of the legality tree one finds creation stories, not truth claims about creation. I've argued that we should constitute community in respect of the humility thesis not because it's *truer* than the sovereignty thesis, but because communities reconcilable to the earthway are *less violent*.

All of that being said—and although nothing in my argument turns on it, and although no deductive proof can be offered—my view is that we have good reason to infer that creation stories which disclose a rooted belonging analytic are also probably truer than ones which don't. It's striking that despite their stunning diversity, so many (future study may reveal all) indigenous peoples of Mikinaakominis seem to have had rooted communities. I note also the growing body of work in the earth sciences which points in a rooted direction. Tully provides an excellent overview of this literature in his remarkable essay, "Reconciliation Here on Earth".¹⁴⁵⁸

Finally, while the question of interpretation is always live, the interpretive act may not need to reach as far as some suppose. Within a liberal ECO-system, non-humans neither reason nor speak, and as such, the appropriate interpretive position of humanity vis-à-vis earth is paralysis. One can't even get started. Not so, however, for all peoples; Craig S. Womack stops just shy of calling such a stance ethically lazy.¹⁴⁵⁹ We've already discussed that for the rooted, non-humans have agency. Rooted humans are regularly in dialogues with earth. Borrows writes:

If trees, mushrooms, otters, and mosquitos are all endowed with agency, then the scope of our relationships take on different meanings. When we add the sun, moon, and stars to this list we may start to see and hear the world in a different way. *Each of these forces possesses powers of communication*, which humans can discern if they pay attention to their larger natural environment and are immersed in [Anishinaabe] linguistic and legal tradition for sufficient periods of time.¹⁴⁶⁰

I can relate with his message. This dissertation has brought me into many fascinating dialogues, and one of my most meaningful was with a wolf, another with a fox, and a third with a merlin: my friends on the hillside who taught me "to be proud of one another's guiding ways."¹⁴⁶¹ Finally, as I keep insisting, rooted experiences aren't reserved for indigenous people:

Trees are a powerful lesson in relating to the earth that we seem to have forgotten. With roots in the earth and branches in heaven, trees are an archetypal life form, the arc across which life's

¹⁴⁵⁸ Tully, "Reconciliation Here on Earth" at 96-103.

¹⁴⁵⁹ Womack, "Theorizing American Indian Experience" at 367.

¹⁴⁶⁰ Borrows, "Earth-Bound" at 52; emphasis added.

¹⁴⁶¹ Ron Geyshick, "Friends on the Hillside" in Ron Geyshick with Judith Doyle, *Te Bwe Win (Truth): Stories By An Ojibway Healer* (Toronto: Summer Hill Press Ltd., 1989) at 40.

energies travel, wedding earth and heaven in a dynamic, sustaining relationship. It is a relationship of give and take, an exchange of mutual benefits, which results in a slow but steady accumulation of the most profound kind of wealth – the creation of living matter. Maybe our inability to hear the tree’s message is self-induced, for ours is an alienation from the earth, not relationship ... of diminishing its wealth, not adding to it.¹⁴⁶²

ii. The Unacknowledged Power of Canadian Law Adaptability

Some have challenged my engagement with power in another respect, saying I’ve too narrowly characterized the potential of Canada’s common law and civil law traditions to change. The remarkable adaptability of these legal traditions, it’s argued, is more than capable of rising to the challenge of indigenous-settler reconciliation. I’m simply being impatient and uncharitable.

My first reply is a simple question: if these traditions are up to the task of indigenous-settler reconciliation, *why aren’t they achieving it?* From my viewpoint, neither one is even taking steps towards doing so (although Canadian common law openly represents otherwise).¹⁴⁶³ The critique seems precious in the face of the hard reality of where the doctrine lies.

My deeper reply turns on a false assumption the critique seems to make. The question of the capacity of Canadian common law and civil law traditions to change in ways that allow for respectful engagement with indigenous legal traditions and law is improperly framed as one of *degree*. The real issue is the *kind* of change they may contemplate. The wide-ranging interpretive possibility which may have once characterized these complex and storied legal traditions exists no longer; the boundary of interpretive possibility has been logically-structurally contained. In Canada, liberal constitutionalism now provides the hard edges past which common law and civil law creativity cannot pass.¹⁴⁶⁴ In short, neither the common law nor the civil law tradition has the resources to avoid the problem of constitutional capture.

¹⁴⁶² John Broadhead, “Islands at the Edge” in Islands Protection Society, *Islands at the Edge: Preserving the Queen Charlotte Islands Wilderness* (Vancouver: Douglas and McIntyre, 1984) 121-122.

¹⁴⁶³ The Supreme Court of Canada gives indigenous-settler reconciliation as the purpose of aboriginal rights: *R v Van der Peet*, [1996] 2 SCR 507 at para 31. Mark Walters tracks how the Court deploys ‘reconciliation’ in different ways in the section 35 jurisprudence to produce different results. See Mark D Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka and Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: OUP, 2008) 165.

¹⁴⁶⁴ If this weren’t so, I might have some hope for the institutions of Canadian law to perform reconciliation. For a more optimistic yet careful sense of this possibility, see Kirsten Anker, “Reconciliation in Translation: Indigenous Legal Traditions and Canada’s Truth And Reconciliation Commission” (2016) 33:2 Windsor Y B Access Just 15. One of my interlocutors who has sustained this critique (with great patience and kindness) is the Honourable Louis LeBel. I was extraordinarily fortunate to have been paired with him through the Pierre Elliott Trudeau Foundation’s mentorship program. I acknowledge the efforts he made to shift Canada’s aboriginal and treaty rights doctrine in ways that would have been much more open to indigenous conceptions of legal phenomena. Particularly significant is the aboriginal title component of his concurring judgment in *R v Marshall*; *R v Bernard* in which he said: aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights. *R v Marshall*; *R v Bernard*, [2005] 2 SCR 220, 2005 SCC 43 at para 27. See also paras 130, 131, 134, 136, and 138.

My point, however, is that even if LeBel J.’s reasoning had carried the day, the Court’s most sincere rendering of aboriginal conceptions of territoriality, land-use and property would nonetheless have been constrained by the interpretive boundaries of Canadian liberalism.

9. Consequences of This Study

I've now presented my argument about legality difference, disclosed the analytics of rooted legality in an effort to render it intelligible, applied all of this to indigenous-settler relationships, and considered objections to rooted legality revitalization for indigenous peoples and for all of us on Mikinaakominis. In the final chapter, I draw out my argument's most important consequences as best I can. I've organized them into three sections: consequences for how we imagine indigenous law, for the integrity of Canadian law, and for indigenous-settler reconciliation.

I proceed as quickly as clarity permits. The arguments have all been made; my purpose here is simply to draw them together (both 'all in one place' and 'into relationship with one another') and to begin to consider their application to some well-known challenges. They frequently run into one another in a way that's mutually reinforcing.

Finally, the relative strength of these consequences varies considerably. In some cases I think they flow directly from my argument; in others, they're only the beginnings of new arcs of inquiry reflecting my hopes rather than a view of what this dissertation has accomplished.

a. Consequences For How We Imagine and Perform Indigenous Law

The first of two central arguments in this dissertation is that indigenous law is only coherent when it lives within its own legality, and especially within its own constitutional order, since constitutionalism is the logic and structure which conditions law. In considering the consequences of this argument for how we imagine and perform indigenous law revitalization today, I begin my review with the earth and proceed up through the legality tree.

Especially in chapter six at sections (a) and (a)(ii)(1)-(2) I've tried to make available a way of understanding the earth (in which I include the ecosphere and the sun, moon and stars) and one's relationship to and within it. It's an understanding which contrasts sharply with the liberal understanding of earth and of human-earth relationships. I've been careful to insist that the earthway is an understanding available not only to indigenous peoples, but to everyone on Mikinaakominis. That emphasis is reflected in my language of 'rootedness' which is meant to convey an earthway praxis, and not indigeneity in particular.

A roots-level consequence of my argument is that one cannot reasonably expect either to learn or to practise indigenous law by engaging its sources from her current standpoint (including, importantly, by reading this dissertation). Rooted systems of law can't be understood without a much larger commitment being undertaken. Mental engagement is only one activity called for. One must be prepared to enter into, even if not to accept, the indigenous people's lifeworld. This requires a subjectivity reckoning, ordinarily accomplished in immersive whole-self experiences: again, one must be the law. A common starting point is the sweat lodge.

One must learn how to learn indigenous law, which is to say that one must first learn about that indigenous people's lifeway, lifeworld, and legal traditions. This is no small endeavour and it isn't one which settler peoples (or anyone else) have a right to. That being said, if invited to participate and learn, settlers and indigenous peoples from other communities can certainly come to understand and practise indigenous law.

Next is the trunk. One of the most significant consequences of my argument is the imperative to carefully attend to the problem of constitutional capture, the third form of colonial violence. In a world of legality difference, legal pluralism is a non-violent interaction if and only if the constitutional orders of each of the legal systems brought into relationship share the same

kind of legality. Where legality difference obtains, translation across constitutional orders reconstitutes law within the logic and structure of the constitutional order it's translated into. It's thus a misrepresentation to call the resulting output by its former name. We must vigilantly guard against such slippages, which occlude the violence of translation.

A second trunk-level consequence is implied within the first. To understand how law works—any system of law, not just indigenous ones—one must appreciate the logic and structure of the constitutional order which shapes it. It's insufficiently attentive to legality difference to speak of the cultural context below law in terms like 'tradition', 'culture', and 'sensitivity', which risk suggesting that ours is a world with no bottom. On such a view, change may be undesired but can never be illegitimate. *All* change is *just* change. In Robert Clifford's indigenous law idiom of song and echo, "many interpretations of modernity seem to privilege change in a way that does not adequately capture the significance of the song in this process."¹⁴⁶⁵

Such groundlessness-connoting terms purport to adequately account for the context beneath law even as they occlude the logical-structural work constitutionalism performs in shaping it. This is imperial: there's no space beyond the logic and structure of constitutionalism. If we aren't actively attending to the work it does for law, it's because we've hidden it from view. This is a dangerous position to enable, for it permits power to go unexamined and thus to work unconstrained. Some kinds of cultural change *are* illegitimate: the legitimacy of law is a matter of fidelity to legality. The legality tree explains that the legitimacy condition of each of its four levels is reconcilability to the level below (including roots to earth: the humility thesis).

The next set of consequences regard the branches. From my discussion on rooted legal traditions, I hope the following consequences might result. First, I hope readers appreciate the justification for the authority of elders implicit in this section, the responsibility genuine elders carry, and also why one needn't accept a claimed elder as an actual elder without reason to do so.

Second and more broadly, I hope my explanation and articulation in chapter six, section (c)(ii) of the embeddedness of indigenous legal institutions and processes in cultural practice more generally (elder Allan White says "There is no difference between these stories and the laws in them"¹⁴⁶⁶) enables readers to identify that when they witness ceremony, story-telling, or drumming, it may be that the work of law and governance is being enacted. Beyond this, I hope they might also begin to identify *how* these cultural practices are doing work, and at a minimum, to have ideas about what to listen and watch for in this regard.

A directly connected consequence follows for folks who disembed what they take to be extractable normative content from the indigenous cultural practice that holds it, and proceed to represent it in abstraction. If such law isn't usable until excised, I hope they're prepared to explain why it was placed inside of the story, song, prayer, etc. that they've taken it from.

Finally, indigenous communities who wish to revitalize their own systems of law shouldn't endeavour to do so directly, for doing so requires that they take law to mean rules. Instead, communities with this goal might put their efforts into revitalizing their own legal traditions,¹⁴⁶⁷ which will empower members to practise law-as-judgment.¹⁴⁶⁸

¹⁴⁶⁵ Clifford, "The Emerging People" at 84; citation removed.

¹⁴⁶⁶ Craft, *Anishinaabe Nibi Inaakonigewin Report* at 43.

¹⁴⁶⁷ Mainville, *Manidoo Mazina'igan* at 118; Jana-Rae Yerxa, "Gii-kaapizigemin manoomin Neyaashing: A Resurgence of Anishinaabeg Nationhood" (2014) 3:3 *Decolonization: Indigeneity, Education & Society* 159.

¹⁴⁶⁸ Clifford, "The Emerging People" at 112.

Having said this, I appreciate why so many indigenous communities choose to develop liberal constitutions,¹⁴⁶⁹ legal institutions and processes, and codes.¹⁴⁷⁰ A frequent topic in this regard is tribal courts. My knowledge is limited, but I'm inclined to agree with Trish Monture's blunt assessment that "There is no such thing as an Aboriginal court."¹⁴⁷¹ For an Anishinaabe conception of a 'trial', see Howard Webkamigad's remarkable text.¹⁴⁷² Yet faced with the colonial non-choice of voluntary liberal transformation or poverty, death, and hopelessness, it's plain to see why some indigenous communities move in this direction. I don't stand in judgment of them. On the contrary, the point of this dissertation is to offer indigenous communities struggling under the boot of colonialism tools with which to create real options.

Moving up the legality tree, we come to consequences that flow from the leaves. One of the more important consequences of this study, if its argument holds, regards the futility of the quest to find a definition of law that holds across diverse cultural contexts. If legitimacy is an internal consideration of legality, no such definition can stand. Debates about what sort of force Law requires are foolish: they're always debates about what sort of force law requires *within a particular legality*. By way of example, I've presented law-as-judgment or *inaakonigewin*, which in general doesn't rely on coercive force.

It follows that it should no longer be reasonable for Canadian legal actors (whether practitioners, decision-makers, educators, etc.) to try engaging with indigenous law directly. If (like everyone else) they don't first put in the effort to learn how to learn it, they'll invariably produce translations. This much deeper commitment is of course an examination that goes all the way down to the roots of legality, and then to the earth below them. While it's certainly important to appreciate that there are unique sources of rooted law,¹⁴⁷³ an understanding of indigenous law requires a much deeper study.

Third, I hope it can no longer be assumed that expressions of indigenous law as values like love and kindness are romantic drivel bereft of analytical salience. Anishinaabe professor Deborah McGregor cautions against such prejudgments: "concepts of love, kindness and generosity are not naive ideals in Anishinaabek society. These obligations and relationships are living examples of Anishinaabek natural law."¹⁴⁷⁴ While an absence of rigor remains a possibility, it's likely that such terms are being used in the course of law-as-judgment: "Loving responsibilities and obligations flow from natural laws and thus are not mandated by governments through legislation, policies, funding or programs. Instead, knowing our responsibilities gives us power to act."¹⁴⁷⁵ If so, the judgment must be evaluated on its merits, rather than dismissed out of hand because its substance reflects modalities of reason which lack legitimacy within a liberal legality. Sorting out the difference will require that one attune his ear to rooted legal discourse.

¹⁴⁶⁹ See for instance Gerald Vizenor, "Constitution of the White Earth Nation" (2009) 1:1 *Language Value* 51.

¹⁴⁷⁰ Kristen A Carpenter thoughtfully engages some of this complexity in Kristen A Carpenter, "Individual Religious Freedoms in Tribal Constitutional Law" in K Carpenter, M Fletcher & A Riley, eds, *The Indian Civil Rights Act At Forty* (UCLA American Indian Studies Center Publications, 2012) ch 9.

¹⁴⁷¹ Monture-Okanee, "Thinking About Aboriginal Justice: Myths and Revolution" at 225.

¹⁴⁷² Orator unknown, "How the Anishinaabe Used to Conduct Trials" in Howard Webkamigad, ed, trans., *Ottawa Stories From the Springs / anishinaabe dibaadjimowinan wode gaa binjibaamigak wodi mookodjiwong e zhinikaadek* (East Lansing: Michigan State University Press, 2015) 265.

¹⁴⁷³ Borrows, *CIC* at ch 2.

¹⁴⁷⁴ Deborah McGregor, "Indigenous Women, Water Justice and *Zaagidowin* (Love)" 30:2/3 *Canadian Woman Studies* 71 at 71.

¹⁴⁷⁵ *Ibid* at 73.

Fourth, given both the illegitimacy of coercion and the relentless practice of judgment that one experiences in a rooted legal system, discursive practices such as deference and equivocation ought not to be read as uncertainty, indecision, confusion, or unreliability. Rather, such ways of speaking, to the extent that they reflect the practice of law-as-judgment, may be actively attentive to kin-bound responsibilities within a rooted legal context.

Fifth, since the responsibilities law-as-judgment analyzes are internal to kinship roles, it's imperative that rooted law revitalization projects grapple with the often extensive damage to kinship ordering. This is a significant undertaking. The imposition of citizenship has for many indigenous persons and communities pushed kinship into liberalism's private sphere, and in some cases has rendered it largely non-functional.

Rooted peoples must imagine ways to revitalize (and in some cases, recreate) kinship from within a context of normalized disconnection: the routinely procedural, transactional, and anonymous interactions of citizenship. Some communities may find their contemporary kinships looking more like their historic ones than do others. During the (perhaps extensive) transition period from liberal to rooted legality, there's also the question of whether to try re-imagining contemporary forms of relationship (to pick one obvious example, employer-employee) in respect of kinship roles, and if not, what to do about them while we still need them.¹⁴⁷⁶

In closing this subsection, I'd like to shift my metaphor from tree to forest. I've tried to present an indigenous law analytics 'from the ground up'. In some sections, almost every concept introduced would benefit from closer attention. In a project of this scale, I'll have made many errors and oversights. But if I've made my case with sufficient rigour, I hope it follows that anyone who wants to imagine (or who purports to enable or to perform) indigenous law through an extrinsic analytics, such as a common law or civil law analytics, must first justify their approach. In a context of non-advertence to the internal analytics of indigenous law, it may have seemed reasonable to do so, but I hope that circumstance has now changed.

Second, I hope my engagement with the prospect of indigenous law fundamentalism in sections 2(a), 2(a)(i), and especially 8(a)(i)-(iv) shows that indigenous peoples are as susceptible to fundamentalism as are other peoples *and no more so*. The frequency and the intensity of attention one gives to the prospect of indigenous fundamentalism should reflect this reality.

Finally, since power is a function, one must ensure she always attends to it in the appropriate analytic register. In some circumstances, to fail to do so is, ironically, an exercise of power-over resulting in the erasure of indigenous agency. This will be the case where an indigenous person is acting within her rooted legality but is critiqued by the standards and along the axes of a liberal-postmodern one.¹⁴⁷⁷ At the same time, Canada isn't a rooted community and

¹⁴⁷⁶ While the radical individualism central to their account of mutual aid concerns me, Joanna Macy and Chris Johnstone offer a vision which may be productive for taking up the question of a transitional position. Macy & Johnstone, *Active Hope* at 89-91, 127-137, 204-206.

¹⁴⁷⁷ I have academic discourse particularly in mind here, but of course the issue is a live one within Canadian jurisprudence. See Lovelace, "Prologue. Notes from Prison"; Rachel Ariss with John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Halifax & Winnipeg: Fernwood Publishing, 2012) [Ariss with Cutfeet, *Keeping the Land*]; Daniel, *Finding Law About Life* at 2-3; Karen Drake, "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law" (2015) 11 McGill Int'l J Sust Dev L & Pol'y 183 at 210-217; *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 2008 WL 726951 (Ont SCJ) at 44. Most recently, the tension regards the Unist'ot'en camp in Wet'suwet'en traditional territory: Justine Hunter et al, "This pipeline is challenging Indigenous law and Western law. Who really owns the land?" The Globe and Mail (12 January 2019), online: <<https://www.theglobeandmail.com/canada/british-columbia/article-a-contested-pipeline-tests-the-landscape-of-indigenous-law-who/>>.

we must also attend to power in its liberal key. The complexity of this circumstance demands a practice of critical humility when one seeks to intervene.

b. Consequences For the Integrity of Canadian Law

Although it's outside my focus, I suspect some consequences of my argument for the integrity of Canadian law may be of concern to Canadians. Foremost among them, I've inferred that settler supremacy is a fundamental principle of Canadian constitutionalism. My argument isn't merely that Canadian constitutionalism has the *effect* of being colonial, but rather that as a principle actively applied in judicial reasoning, settler supremacy is part of the *means* of Canadian constitutionalism. Given the obviousness of this fact to many indigenous persons, I haven't given much of my limited space here to rigorously developing it. More work is certainly needed to deepen the critique. In particular, a close doctrinal examination of settler supremacy in how Canadian law regards the diverse interests of indigenous peoples would be helpful.

Second, reconciliation as between indigenous and settler peoples in Canada can never be achieved through the courts.¹⁴⁷⁸ No amount of judicial education will make the difference here, nor will indigenous appointments to the bench, including to the Supreme Court of Canada.¹⁴⁷⁹ Reconciliation isn't a matter of getting the doctrine (or for that matter, the legislation¹⁴⁸⁰) right. And it's very far from right: in Justice LaForme's words, "the roots of the Aboriginal law tree are rotten and are incapable of bearing anything that is sustainable. Our attempts to graft new and creative branches on to this tree - as we have witnessed since 1982 - will not bring health to the tree's roots".¹⁴⁸¹ A fix-the-broken-doctrine approach simply ignores the problem of constitutional capture: a (liberal) constitutional monologue is both logically and structurally precluded from engaging anti-colonially with indigenous peoples. It might address the first and second forms of colonial violence, but it has nothing to say about the third and forth forms.

Constitutional capture is also the cause of considerable conflation between so-called restorative justice purposes and processes with those of indigenous law. To be sure, rooted law is centrally concerned with the creation, maintenance, and (where damaged) restoration of harmonious relationships. But this is so because harmony, not justice, is what rooted constitutionalism is oriented towards. If Canada's living tree wants to host restorative transplants, it may of course do so—but critics are right to identify such transplants as incongruous exceptions to the logic and structure within which it grows and adapts. If an ostensible 'restorative' justice process is transplanted into a liberal ECO-system, a contractarian sense of community, impartial legal traditions, and law-as-rules, then preceding the word 'justice' with the descriptor 'restorative' is barely more than an exercise in relabeling.

Deploying restorative justice in an indigenous community doesn't transform a mere *relabeling* into a genuine *revitalization* of indigenous law. Indigenous communities may have excellent strategic reasons for accepting such programs, such as harm reduction or reduced

¹⁴⁷⁸ Mary Ellen Turpel, "HOME/LAND" (1991-1992) 10 Can J Fam L 17 [Turpel, "HOME/LAND"]. Turpel's conclusion suggests it's an open question as to whether courts' may acquire the requisite capability, but her argument doesn't seem to support that conclusion. See also Aboriginal Law Section, Ontario Bar Association, "A Conversation with Justice LaForme" (May 2013), online: *Ontario Bar Association* <http://www.oba.org/en/pdf/sec_news_abo_may13_jai_laf.pdf> at 2.

¹⁴⁷⁹ Chartrand, "Eagle Soaring" at 82.

¹⁴⁸⁰ Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi" at 58, 60.

¹⁴⁸¹ Harry S LaForme, "Resetting the Aboriginal Canadian Relationship: Musings on Reconciliation" (2013), online: *Ontario Bar Association* <http://www.oba.org/en/pdf/sec_news_abo_may13_laforme.pdf> at 11.

recidivism.¹⁴⁸² However they should be careful to insist that while *elements* of the program may ‘draw on’ indigenous law, insofar as the process and its outcomes are conditioned by liberal legality, they’re not practices *of* indigenous law. Without this clarification, a community allows Canada to count the program as an instance of its reconciliatory practice, even though everything about it is designed to capture indigenous constitutional difference.

The liberal logical-structural limitations of Canadian law have serious implications for institutional support and uptake of indigenous law. While Canada sustains its disinterest in indigenous constitutionalisms, there’s now a concerted effort by Canadian legal actors (law societies,¹⁴⁸³ bar associations,¹⁴⁸⁴ administrative tribunals,¹⁴⁸⁵ commissions,¹⁴⁸⁶ public inquiries,¹⁴⁸⁷ courts,¹⁴⁸⁸ judges in their independent capacity,¹⁴⁸⁹ and law schools¹⁴⁹⁰) to acknowledge and to engage with indigenous law.

The problem of constitutional capture has both ethical and logical implications for such efforts. Many of these institutions promote and/or take up indigenous law without taking these implications seriously, as if the heretofore absence of indigenous law can be treated as a simple

¹⁴⁸² Celeste McKay & David Milward, “Onashowewin and the Promise of Aboriginal Diversionary Programs” (2018) 41:3 Manitoba LJ 127.

¹⁴⁸³ The Law Society of Upper Canada, Professional Development and Competence Committee Report, “Tab 11.1: Indigenous Legal Issues Speciality” in *Report to Convocation, June 23rd 2016* at 391; Manitoba Bar Association, University of Manitoba Faculty of Law & Law Society of Manitoba, *Isaac Pitblado Lectures 2016: Pimohitéwin tati minowastánowahk (Journey to Reconciliation): Lawyers Called to Action*, Crystal Ballroom, The Fort Garry Hotel, Winnipeg, 4 and 5 November 2016; The Advocates’ Society, the Indigenous Association, and the Law Society of Ontario, “Guide for Lawyers Working with Indigenous Peoples” (2018).

¹⁴⁸⁴ Canadian Bar Association, “Resolution 13-03-M: Indigenous Legal Traditions” (16-17, February 2013), online: CBA <<http://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2013/Indigenous-Legal-Traditions/13-03-M-ct.pdf>>; Indigenous Bar Association, “Enriching Canada with Indigenous Laws and Perspectives: 26th Annual Fall Conference”, Delta Calgary South, 2-4 October, 2014.

¹⁴⁸⁵ *An Act to Amend the Canadian Human Rights Act*, Second Session, Thirty-ninth Parliament, 56-57 Elizabeth II, 2007-2008 s 1.2; Canadian Human Rights Commission, *Human Rights Handbook for First Nations* (Ottawa: Minister of Government Works and Public Services, 2011) 31; Canadian Human Rights Commission, *A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities* (Canada: Minister of Public Works and Government Services, 2013), online: <http://www.doyouknowyourrights.ca/sites/nai-ina/files/pdf/toolkit_trousse-eng.pdf>; Ontario Human Rights Commission, *To Dream Together*.

¹⁴⁸⁶ Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007); Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at paras 27, 28, 42, 45(iv), 50, 57, 86, 92(iii).

¹⁴⁸⁷ Hamilton & Sinclair, *Aboriginal Justice Inquiry* at ch 2, ch 7.

¹⁴⁸⁸ *R v Ippak*, 2018 NUCA 3, concurring reasons of Berger J at paras 56-106; *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732. Additionally, for the 2017 Supreme Court of Canada judicial appointment process that led to the appointment of the Honourable Sheilah Martin, the ‘Personal Skills and Experience’ section of the ‘Qualifications and Assessment Criteria’ provided that “Knowledge of indigenous legal traditions may also be considered.” Independent Advisory Board for Supreme Court of Canada Judicial Appointments, *Report on 2017 Process* (Canada, 17 January 2018) at 31.

Gordon Christie voices concerns over the capacity of Canadian courts to adequately and fairly adjudicate indigenous law: Christie “Judicial Justification” at 68-69. Borrows, too, recognizes a challenge here (Borrows, *CIC* at 140) but suggests that Canadian judges proceed. *Ibid* at 215.

¹⁴⁸⁹ Finch, “The Duty to Learn” at 2.1.1; Hon. John Reilly, Book Review of *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* by Grace Li Xiu Woo, (2012) 50:1 Alta L Rev 219.

¹⁴⁹⁰ Many Canadian law schools have taken up responsibility for teaching indigenous law. During my JD degree, I took courses on Anishinaabe law, Gitksan law and Haudenosaunee law at different law schools. McGill Law has recently built indigenous legal traditions into the transsystemic curriculum of its first year program. The University of Victoria’s JID program stands out for its comprehensive approach.

(liberal) problem of undue exclusion. A clear exception to my mind is the Ontario Human Rights Commission's 2018 report, *To Dream Together: Indigenous Peoples and Human Rights Dialogue Report*. While predictably I don't share the *Report's* position, I see plainly how intently it struggles to engage with indigenous legality from within its liberal institutional constraints. It's sensitive and bold, and I suspect will come to be seen as a trailblazing work.

c. Consequences For Indigenous-Settler Reconciliation

My second central argument, which builds from the first, urges a deep rethinking of what reconciliation means. Change of this scale should have consequences for all of us, and not only for what we think and how we act in regard to reconciliation, but more importantly, for how and why we do so. I take up these consequences for indigenous and settler persons separately.

i. Consequences for Indigenous Persons

As both my supervisors caution and as my elders have consistently taught and modelled for me, the means we employ in pursuit of change are constitutive of the ends we achieve. In calling for transformative change in the contemporary reconciliation claims and projects of indigenous peoples, I invite them to insist that reconciliation can only exist with our legalities at its centre. The question, then, is what are the transformative means which will constitute such a result?

It's often taken that since oppressions are enacted systemically, their transformation is to be achieved by systems-level engagement. A model articulation of such a view is as follows:

From the perspective of Indigenous philosophy, liberal accounts purporting to secure justice for Indigenous peoples actually justify ongoing non-Aboriginal violation of Indigenous peoples' rights. However, if Indigenous understanding of Aboriginal rights can inform liberal theory, and if the moral significance attaching to human rights in liberal theory can be transferred to Aboriginal rights, legal and political discourse in Canada would be radically transformed.¹⁴⁹¹

I suggest that the aspiration here given voice overreaches its capability. Constitutional capture means we'll never achieve the revitalization of indigenous legalities, and thus the transformation reconciliation requires, working within the bounds of Canadian constitutionalism.¹⁴⁹² We must stop striving for a more equitable relationship *within* Canadian constitutionalism and instead pursue a dialogue *across* our respective constitutional orders. To that end, since justice isn't the central purpose of rootedness, it must cease to be our central political project (exit all Crown negotiations and s. 35 claims which aren't merely strategic¹⁴⁹³).

¹⁴⁹¹ Sandra Tomsons & Lorraine Mayer, "General Introduction" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills: OUP, 2013) xxii at xxxi.

¹⁴⁹² For instance, Canada's aboriginal rights doctrine *literally* announces a commitment to constitutional capture. In the *Van der Peet* decision, the Court stated that the perspectives of indigenous peoples "must be framed in terms cognizable to the Canadian legal and constitutional structure." *R v Van der Peet* at para 49. See also *R v Marshall*; *R v Bernard* [2005] 2 SCR 220 at para 51 and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 50. See also *ibid* at para 32, where the Court speaks as if the *degree of care taken*, and not *the act of translation itself*, is where the risk of distortion lays. None of this is shocking; my point is that this sort of doctrine is exactly what must be expected: section 35 is part of Canada's constitution.

¹⁴⁹³ Section 35 contemplates both aboriginal rights and treaty rights. To be clear, only aboriginal rights claims could be pursued strategically (i.e. for instrumental purposes such as economic development, but not for justice). The

Some of the consequences which follow may be difficult to accept. Consider restitution for historic wrongs such as the theft of indigenous lands. Restitution is a means of achieving justice (corrective justice). The characterization of the theft of our lands as dispossession, and its correlate remedy as repossession, misconstrues the problem of our removal from our lands. From a rooted standpoint, what we've lost with the denial of free access to our traditional territories (whether by their alienation to third parties or by Canadian legislation limiting our use of 'Crown lands') isn't land *possession*, but land *connection*. We were never owners of earth;¹⁴⁹⁴ we've always been its relatives. What has been taken from us, then, is the freedom to live our kinship with earth.¹⁴⁹⁵ Repossession might facilitate this goal, but as ends they certainly aren't one and the same—and if means are constitutive of ends, this may prove to be a problem. As one example, the instrumental use of repossession may lead to instrumental (neoliberal) ends.¹⁴⁹⁶

Decolonization, too, is a project of corrective justice. It operates on the assumption that since colonization causes the unfreedom of indigenous peoples, therefore decolonization causes the freedom of indigenous peoples (since A causes not-B, therefore not-A causes B). The argument isn't sound. Indigenous freedom requires not only the negation of an imposed lifeway, but also the positive capacity to manifest indigenous peoples' own lifeways.¹⁴⁹⁷ A politics of undoing can't build such a project and isn't meant to.¹⁴⁹⁸ Again, in one sense it seems obvious that decolonization might facilitate this goal, but the ends aren't the same, so divergence is possible. To put the point plainly, none of the elders in my circle concern themselves with decolonizing; they're far too busy generating Anishinaabe lifeway. I take that this is also a core insight of the indigenous resurgence movement.¹⁴⁹⁹

The same tension can arise in the context of direct action. The argument against change from within the governing system is also the argument against at least one classic form of change from without it: revolutionary overthrow. While these respective means of achieving change look quite different, each fails for the same reason: they take the imposed constitutional order as their primary point of reference, rather than organizing their actions in respect of the lifeway they seek to generate.¹⁵⁰⁰ In Tully's words, "the means of violence and command relationships do not bring about peace and democracy. They too are constitutive means."¹⁵⁰¹

approach requires the abject abandonment of the pursuit of 'treaty rights' because rights distributed through an externally imposed constitutional order presupposes the subjugation model of treaty.

¹⁴⁹⁴ Anonymous elder #1 (23 August 2013); Anonymous elder #1 (15 June 2014); Teaching of anonymous elder #1 (21 January 2016) Fort Frances, Ontario; Teaching of anonymous elder #1 (1 December 2016) Mitaanjigamiing First Nation; Teaching of anonymous elder #1 (14 February 2017) Mitaanjigamiing First Nation.

¹⁴⁹⁵ Note well that territorial reconnection entails respect for relational boundaries as discussed in chapter 6, section (b)(ii)(1). Second, the distinction I draw between territorial reconnection and territorial repossession shouldn't be taken to imply that the latter is any less significant in its consequences for settler peoples. I haven't spoken to this issue one way or the other; my point is only to shift how one approaches it.

¹⁴⁹⁶ Calvin Helin, *Dances with Dependency: Indigenous Success through Self-reliance* (Vancouver: Orca Spirit Publishing & Communication, Inc, 2006); Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights*, 2nd Ed (Montreal & Kingston: MQUP, 2011).

¹⁴⁹⁷ Monture-Angus, *Journeying Forward* at 11.

¹⁴⁹⁸ Lovelace, "Prologue. Notes from Prison" at xvii, xviii.

¹⁴⁹⁹ Taiaiake Alfred, "What Is Indigenous Resurgence?" (1 October 2014), online (blog): *Tehaiá:iake* <<https://taiaiake.net/2014/10/01/presentation-on-indigenous-resurgence-fcss-calgary-2014/>>.

¹⁵⁰⁰ *Ibid*; Tully, "Richard Gregg and the Power of Nonviolence" at 12-13. See also Borrows, *Freedom & Indigenous Constitutionalism* at 84-102.

¹⁵⁰¹ James Tully, "On Global Citizenship" in Bert van den Brink et al, eds, *On Global Citizenship: James Tully in Dialogue* (New York: Bloomsbury Academic, 2014) ch 1 [Tully, "On Global Citizenship"] at 96. It follows that

To return to my initial point, note that the land restitution, decolonization, and revolutionary overthrow examples all pursue *systemic* change. They might work within the target system or they might seek to change it from outside, but in either case it serves as the first cause of action. As I've already suggested, I don't believe this is how transformative change is realized. Elder Dave Courchene teaches that "If we want real change to happen, it will come back to us individually to make that change. It will require only a few who have made a commitment to the heart. Natural law will then dictate the growth of that seed of a new life carried by the few."¹⁵⁰² Similarly, he advises: "The real work and effort is within ourselves. We've got a lot of work that we have to do."¹⁵⁰³ Elder Art Solomon, too, taught that "We can create a new world by starting with ourselves"¹⁵⁰⁴ and indigenous resurgence scholars Taiaiake Alfred and Jeff Corntassel likewise assert that "Indigenous pathways of authentic action and freedom struggle start with people transcending colonialism on an individual basis."¹⁵⁰⁵ That such a teaching is widely held by indigenous peoples is unsurprising, as it's simply another expression of the *bimiwinitiziwin* insight that one's contribution to community governance begins with careful attention to one's own behaviour.

If we want to revitalize our legalities we can't look to systems of power and hope that if we change them, they'll do it for us. We must *be* the change¹⁵⁰⁶ and we succeed by acting in and as the earthway. Leading settler scholarship on the nexus of nonviolence and indigenous-settler relations has come to the same insight. In his work on Richard Gregg, James Tully writes that "nonviolence is grounded in ethical self-change; self-change is grounded in practice; practice in self-sustaining communities; and self-sustaining communities in self-sustaining ecosystems."¹⁵⁰⁷

The resurgence literature provides that such a goal requires an inward turn to cultural revitalization.¹⁵⁰⁸ I would change only that the kind of revitalization required isn't 'cultural' generally, but 'legality' (and especially constitutional) specifically. Since our systems of law are embedded within legal processes and institutions alien to and suppressed by Canadian liberalism, we'll have to revitalize them. We can do that only if we understand the constitutional logic and structure which empowers and constrains them (which will help us to create new legal traditions if our existing ones disappear). We can only understand and identify with our constitutional orders if we understand the beautiful creation in which they're rooted. Once we're able to understand these things, we're able to see that we no longer need to unmake Canadian constitutionalism in order to be free. We can revitalize our rooted constitutional orders here and now, one co-creative act at a time, despite it.

forms of direct action consistent with rooted legalities, for which means meet ends, don't suffer this criticism. See Coulthard, *Red Skin, White Masks* at 169.

¹⁵⁰² Courchene, "Sharing Indigenous Knowledge".

¹⁵⁰³ Elder Dave Courchene Jr (24 February 2018).

¹⁵⁰⁴ Arthur Solomon, "We Can Change the World by Starting with Ourselves" in Michael Posluns, ed, *Songs for the People: Teachings on the Natural Way: Poems and Essays of Arthur Solomon* (NC Press Limited, 1990) 100 at 103.

¹⁵⁰⁵ Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism" (2005) 9 *Government and Opposition* 597 at 612.

¹⁵⁰⁶ Tully, "On Global Citizenship" at 94-100; Tully, "Reconciliation Here on Earth" at 93-94; Simpson, *Dancing on Our Turtle's Back* at 19.

¹⁵⁰⁷ Tully, "Richard Gregg and the Power of Nonviolence" at 7.

¹⁵⁰⁸ This literature is vast. Some works I've found engaging include Alfred, *Peace, Power, Righteousness*; Alfred, *Wasáse*; Simpson, *Dancing on Our Turtle's Back*; Corntassel, "Living in a Longer Now" at ch 5; Jeff Corntassel & Mick Scow, "Everyday Acts of Resurgence: Indigenous Approaches to Everydayness in Fatherhood" (2017) 19:2 *New Diversities* 55; Jeff Corntassel, "Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination" (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 86.

None of this is easy in a context of colonialism four kinds of violence deep. Most of our communities struggle and many of us suffer. It may seem silly and even impossible to focus on legality revitalization without a functioning economy or clean drinking water, and with a daily battle to keep a violent man away or to keep one's children from taking their own lives. These challenges are very real and for so many indigenous people, experienced daily.

In the face of a struggle for life and against frequent hopelessness, the prospect of legality revitalization may be overwhelming. And yet we can't look to anyone else to do it for us. We *must* be the change we wish to achieve. Clearly we can only hope to achieve it with adequate supports in place. The work of legality revitalization thus begins with identifying what those supports are, how to put (and keep) them in place, and how to empower community members to benefit from them once present. It's a long term project which, like all rooted things, must be approached holistically as part of community harmony.

It's also a project we must perform as a kind of dance, slipping between worlds with each precisely placed step. If we fail to be the change, we'll fail to revitalize our rooted legalities. Yet if we limit our attention to transformative change, our efforts won't be sustainable. For many of us, Canadian constitutionalism creates extraordinary suffering in our daily lives, which requires ongoing strategic engagement with Canadian law. We need to make some breathing room through what Joanna Macy and Chris Johnstone call "holding actions".¹⁵⁰⁹ To realize indigenous-settler reconciliation then, we shall have to move fluidly in both legalities and their respective registers of power.¹⁵¹⁰

I use the metaphor of dance to describe this bifurcating movement because I suspect that getting the steps right is more a matter of art than of science. As a poor dancer, I've sometimes failed in this. One of my best examples is the first book review I wrote.¹⁵¹¹ It was during my first year of doctoral work and I'd become so focussed on discursive power that it's all I could see. I attended dutifully to who is and isn't speaking, which narratives are being marshalled and which silenced. And I engaged with each text as though it came from nowhere; as if there was no co-creator standing behind it, holding it out as a gift.

This was a terrible instance to miss that fact because in both cases the books I stood in judgment of were the culmination of their respective authors' life's work. I ought to have offered them so much better than what I gave. Both authors—elder, Professor Emeritus and formerly Dean Cecil King, and (now) Professor Emeritus Donald B. Smith—reached out to me with remarkable grace and generosity. Each modeled how I ought to behave, without ever telling me to act differently. Beyond this, each offered gifts contributing to my dissertation research. I should hope to grow into as honourable a contributor to academia.

If being the change means carefully attending to our ways of thinking, acting, and generally, *being* in the world, it also means being-with others in a good way. Canada the nation state isn't living and isn't capable of earth connection, mutual aid or kinship. It isn't capable of being-with us, so we turn away, engaging it only strategically.¹⁵¹² However the same can't be

¹⁵⁰⁹ Macy & Johnstone, *Active Hope* at 28-29.

¹⁵¹⁰ In offering this insight, I'm mindful of Jeff Corntassel's clarification that "There's no 'walking in two worlds' philosophy here. My rootedness as a Tsalagi informs everything that I do." Corntassel, "Living in a Longer Now" at 88. I feel the same way. The engagement with liberal legality which I propose is purely strategic; my way of reasoning my way to action is Anishinaabe, and this doesn't vary, unless unknown to me.

¹⁵¹¹ Aaron Mills, Book review of Donald B Smith, *Mississauga Portraits: Ojibwe Voices from Nineteenth-Century Canada* (University of Toronto Press, 2013) and Cecil B King, *Balancing Two Worlds: Jean-Baptiste Assiginack and the Odawa Nation, 1768-1866* (Dr Cecil King, 2013), (2014) 38:4 Am Indian Cult Res J 173.

¹⁵¹² See Christie, "Indigenous Legal Theory" at 217.

said of its settler (or of its converted indigenous) subjects: Canadians. To turn away from our relatives because they've been misled into believing that they're superior to earth and to us is to act within their lifeworld of disconnection, not in ours of radical interdependence.

Treating liberals as relatives doesn't mean avoiding contention. On the contrary, it should mean requiring them to account for their status as beneficiary of settler supremacy, not only historically, but each new day. This is to state the obvious point that good relatives don't live in a relation of domination and violence with one another. The critical issue is how to go about presenting these challenges. Whether the gift is offered as a mundane dialogue over coffee or as a dramatic and large-scale confrontation over resource development, it must always be grounded in our lifeworlds, enacted through our practice of mutual aid, and reasoned through to actions instantiating our legal judgment.

Although it's both maddening and unfair, engaging these challenges requires tremendous forbearance and patience on our part. Against a context of deliberate uneducation, settler fragility is the very thing we must expect. Much of our work will necessarily be in education. While it isn't our job to undertake the work of decolonizing settlers—they must identify that need, claim responsibility for it, and support one another on that journey—I see it as our work to provide the education which will empower them to do so.¹⁵¹³ This is plainly unjust, yet if we don't make this commitment, even those settlers willing to change won't be able to do so.¹⁵¹⁴

At 38 years of age, my experience is limited but I've learned this much from my circle of elders: worry less about what to do about others, and more about how to be-with them.¹⁵¹⁵ The most effective way to elicit transformative change in someone is to honour their spirit, even if they've forgotten it or can no longer acknowledge it, and even if their cynicism has them scoffing at the idea of it. I can do this by sharing my gifts and appreciating theirs, which is to treat them as sacred persons. To be-with others in this way is to call the earth up through me and into them such that they begin to see how much they're part of and that, as co-creators, they actually matter to the world.

ii. Consequences for Settlers

For many settlers, a starting point will be to accept their status as settler and thus as beneficiary of settler supremacy. In some ways, that many continue to resist this acknowledgment seems perverse. Yet in others, a continued refusal seems logical. For instance, settlement status is

¹⁵¹³ I find myself very much in agreement, for instance, with Professor Karen Drake's proposal for mandatory indigenous legal education in Canadian law schools. See Karen Drake, "Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom" (2017) 95 Can Bar Rev 9.

¹⁵¹⁴ In sharing this view, I'm mindful of Jana-Rae Yerxa's refusal to allow regard for settler feelings to shape the course of her participation in settler education: "I am tired of the 'safe' strategy that focuses on educating settler folks about an 'Aboriginal experience', 'Aboriginal people' and 'Aboriginal history,' instead of settler colonialism, white supremacy and settler colonial violence. I am tired of this safe strategy because it is not safe for me as an Anishinaabe Kwe. It is safe for settlers." Jana-Rae Yerxa, "Refuse to live quietly!" (2005) 5:1 Settler Colonial Studies 100 at 101. I agree with Yerxa and I feel resentful when the expectation she describes is thrust upon me. Thus to be clear, my claim is that we (indigenous peoples) have a pragmatic responsibility to engage, but I'm certainly not suggesting that we do so in a manner which privileges settler comfort. I also don't mean to suggest that all of us bear this responsibility individually. We've all had different experiences with colonialism and I think it's up to those of us who are able to pick up this responsibility to do so.

¹⁵¹⁵ See generally Monture, "Notes on Sovereignty".

neither an enumerated nor an analogous ground under Canadian equality law¹⁵¹⁶ or Canadian human rights law¹⁵¹⁷ (which, not understanding the distinction between substantive and logical-structural difference, is where many Canadians would expect to find it).

After recognizing one's settler privilege, a second step would be to question everything he's been conditioned to take as simply natural and neutral about liberal legality, from his conception of persons and freedom through to his assumption that law necessarily means rules (even if its emphasis is elsewhere). The disclosure of settler supremacy should also result in a deep commitment to understanding, forbearance and patience in the face of indigenous seething anger, biting resentment, scathing judgment and devastating hopelessness. These affectations are the very thing to be expected; marshalling them as justification for non-effort *is* non-effort.

Another consequence of settler privilege has been much discussed: settlers should deploy their settler privilege in the interests of indigenous peoples. Examples might include identifying exclusions and demanding they be addressed, rendering indigeneity visible, confronting specific incidents of settler supremacy, demanding that inadequate basic living conditions on-reserve be immediately addressed, insisting on education about colonialism in elementary and high school curricula, and given how indigenous law must be revitalized, militating for dedicated and stable funding for both healing and cultural programming. At a general level, settlers should insist that putatively 'indigenous issues' are in fact 'Canadian issues' because they're caused by settler supremacy and because they impact upon all of us. Settlers afraid of overstepping their bounds should note that this means for many kinds of anti-colonial labour, settlers have not only the *capacity* but also the *responsibility* to act and aren't being good relatives if they fail to do so.¹⁵¹⁸

The foregoing suggested settler actions are all stop-gap or strategic; they seek to blunt colonial violence but lack capacity to transform it. For the transformative change reconciliation requires, there's a far more difficult challenge settlers must confront. On indigenous territories and within indigenous constitutional orders, it's not enough to make space for indigenous voices. If you're a settler, you're called to live lawfully on lands that were constitutionally ordered long before you or your ancestors arrived. Thus beyond helping indigenous voices to be heard, you must *live*—think, feel, and act—as if what we say matters for you, for your family and for your community. Work less in the abstract and removed way that systemic change contemplates, and more personally and immediately: change yourself. Live upon this land knowing that you do so in relationship to it and to all of us, as a relative. Learn to root yourself and then help other settlers to do so too. Create rooted communities and then join your older brothers and sisters of Mikinaakominis as treaty members of our shared earth community.

¹⁵¹⁶ Section 15(1) of the *Charter* enumerates "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" as prohibited grounds of discrimination (*CCRF* at s. 15(1)). The Supreme Court of Canada has expanded that list to include non-citizenship (*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *Lavoie v Canada*, [2002] 1 SCR 769), marital status (*Miron v Trudel*, [1995] 2 SCR 418; *Nova Scotia (Attorney General) v Walsh*, [2002] 4 SCR 325; *Quebec (AG) v A*, 2013 SCC 5), sexual orientation (*Egan v Canada*, [1995] 2 SCR 513; *Vriend v Alberta*, [1998] 1 SCR 493; *M v H*, [1999] 2 SCR 3; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120), and Aboriginality-residence regarding off-reserve Indians (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203).

¹⁵¹⁷ The *Canadian Human Rights Act* enumerates "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered" as prohibited grounds of discrimination. *Canadian Human Rights Act* (RSC, 1985, c H-6) at s 3(1).

¹⁵¹⁸ I think of Michael Asch as an exemplar of someone taking up this responsibility in his academic practice and I so appreciate the effort he's made to speak with settlers. See Asch, *On Being Here to Stay*.

If you're a settler who refuses to be the change, while I'm appreciative that you've read this far, you've missed the point. If I may borrow from Tom King's brilliant Massey Lectures, for the problem of (and one solution to) settler supremacy, "You've heard it now",¹⁵¹⁹ which eliminates defensible inaction. So far as I can see, the options which remain are all versions of participation, critique and rejoinder, and acquiescence.

¹⁵¹⁹ Thomas King, *The Truth About Stories: A Native Narrative* (Toronto: House of Anansi Press Inc, 2003) at 29, 60, 89, 119, 151, 167.

10. Andobawaajigen¹⁵²⁰

Sákéj Henderson shares the following reflection on what I would call settler supremacy:

Nothing will change without a transformation in the sphere of human consciousness. Nothing will change unless Indigenous peoples become the spiritual crossroads of new, postcolonial sensibilities about the environment, false power, and humanity. This is our contribution to the international families of nations: to understand that the colonial ideologies are still destroying the planet that was entrusted to us, and are still destroying the mass of humanity for merely personal interests.¹⁵²¹

With this study of rooted legality and its application as treaty mutualism I've tried to offer one vision of how that transformation could take place.

In offering it, I'm mindful of what it isn't. No one could read this project and implement rooted legality in their community. It isn't a community plan; individuals and communities need to imagine for themselves what it means to live within the earthway. In unfolding a vision of rooted legality, I hope to have made it easier for anyone who wants help to take a first step. Insofar as that goes, Gordon Christie has observed that:

Indigenous peoples in Canada find themselves living in a difficult time of transition, with identities partly constituted through generations of living within Canadian society and partly constituted by their ties to "traditional" Indigenous worlds. Reinvigorating legal traditions can play a profound role in laying out future paths that Indigenous nations might tread. It presents the enormous promise of reweaving threads connecting Indigenous communities to their traditional cultural fabric. Taking the wrong first step on this sort of path would be disastrous.¹⁵²²

As for stepping along the earthway, no individual or community will experience a sudden transformation from liberal to rooted constitutionalism. We can't place the stones with mechanical efficiency. We must lift them up as the gifts they are in a dance that generates rootedness even as it negotiates ongoing settler (and internalized indigenous) practices of colonialism. This dissertation is but a few early steps towards indigenous law revitalization.

And yet the work must begin with a vision. To my indigenous relatives specifically, they had best be visions we recognize as our own.¹⁵²³ I hope this one supports you in realizing yours. To all readers, I can't come close to doing for you what noko and others have done for me, but if this dissertation has answered the question it took up, anyone wanting to learn how to learn rooted law will at least have a place to start.

Miigwech. Miigwech. Miigwech.

¹⁵²⁰ I like Louise Erdrich's account of this term, which comes from Tobasonakwutiban, best:

Ojibwe is especially good at describing intellectual and dream states. One of Tobasonakwut's favorite phrases is *andopawatchigan*, which means "seek your dream," but is lots more complicated. It means that first you have to find and identify your dream, often through fasting, and then that you also must carry out exactly what your dream tells you to do in each detail. And then the philosophy comes in, for by doing this repeatedly you will gradually come into a balanced relationship with all of life. Louise Erdrich, *Books and Islands in Ojibwe Country* (Washington, DC: National Geographic Society, 2003) at 84.

¹⁵²¹ James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing Ltd, 2008) at 100-101.

¹⁵²² Christie, "Culture, Self-Determination and Colonialism" at 18.

¹⁵²³ Turpel, "HOME/LAND" at 18.

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Teaching of anonymous elder #1 (15 June 2014) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (30 August 2014) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (23 March 2015) via telephone.
Teaching of anonymous elder #1 (11 April 2015) via telephone.
Teaching of anonymous elder #1 (3 May 2015) via telephone.
Teaching of anonymous elder #1 (30 May 2015) via telephone.
Teaching of anonymous elder #1 (15 June 2015) via telephone.
Teaching of anonymous elder #1 (6 July 2015) via telephone.
Teaching of anonymous elder #1 (6 August 2015) via telephone.
Teaching of anonymous elder #1 (4 October 2015) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (25 October 2015) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (25 November 2015) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (12 December 2015) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (10 January 2016) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (21 January 2016) Fort Frances, Ontario.
Teaching of anonymous elder #1 (22 January 2016) Fort Frances, Ontario.
Teaching of anonymous elder #1 (6 February 2016) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (22 March 2016) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (6 June 2016) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (26 October 2016) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (9 November 2016) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (1 December 2016) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (6 February 2017) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (14 February 2017) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (4 August 2017) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (11 August 2017) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (16 September 2017) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (4 October 2017) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (29 November 2017) Mitaanjigamiing First Nation.
Teaching of anonymous elder #1 (30 March 2018) Fort Frances, Ontario.
Teaching of anonymous elder #1 (28 June 2018) Mitaanjigamiing First Nation.
Teaching of elder Bessie Mainville (18 August 2013) Couchiching First Nation.
Teaching of elder Bessie Mainville (19 August 2013) Couchiching First Nation.
Teaching of elder Bessie Mainville (22 August 2013) Couchiching First Nation.
Teaching of elder Bessie Mainville (28 August 2013) Mitaanjigamiing First Nation.
Teaching of elder Bessie Mainville (29 August 2013) Couchiching First Nation.
Teaching of elder Bessie Mainville (17 June 2014) Couchiching First Nation.
Teaching of elder Bessie Mainville (14 June 2015) via telephone.
Teaching of elder Bessie Mainville (25 October 2015) Couchiching First Nation.

Teaching of elder Bessie Mainville (24 November 2015) Couchiching First Nation.
 Teaching of elder Bessie Mainville (2 December 2015) Couchiching First Nation.
 Teaching of elder Bessie Mainville (6 January 2016) Couchiching First Nation.
 Teaching of elder Bessie Mainville (12 January 2016) Couchiching First Nation.
 Teaching of elder Bessie Mainville (19 January 2016) Couchiching First Nation.
 Teaching of elder Bessie Mainville (29 June 2016) Couchiching First Nation.
 Teaching of elder Bessie Mainville (19 October 2016) via telephone.
 Teaching of elder Bessie Mainville (10 December 2016) Neyaashing / the Point Park.
 Teaching of elder Bessie Mainville (12 March 2018) Couchiching First Nation.
 Teaching of elder Bessie Mainville (29 May 2018) Highway #71 between Onigaming First Nation and Rainy River First Nations.
 Teaching of elder Bessie Mainville (2 July 2018) Couchiching First Nation.
 Teaching of elder Bessie Mainville (4 July 2018) Couchiching First Nation.
 Teaching of elder Dave Courchene Jr (24 February 2018) Sagkeeng First Nation.
 Teaching of elder Harry Bone (8 January 2017) Winnipeg, Manitoba.
 Teaching of elder Harry Bone (13 March 2017) via telephone.
 Teaching of elder Harry Bone (16 June 2018) Winnipeg, Manitoba.
 Teaching of elder Harry Bone (21 February 2019) Lord Selkirk Highway (#75), between Winnipeg and Roseau River Anishinabe First Nation.
 Teaching of grandmother Sherry Copenace (24 June 2018) Ojibways of Onigaming First Nation.

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