

## Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education

John Borrows

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Résumé de l'article

Enseigner le droit autochtone dans une école de droit canadienne présente des défis et des opportunités importants. Le matériel du cours peut être organisé de façon conventionnelle ou innovatrice. Cet article explore les meilleures méthodes pour enseigner le droit autochtone. Les questions abordées par l'article incluent : si le droit autochtone devrait être enseigné à des communautés autochtones, si l'enseignement de ce droit est même approprié dans les écoles de droit, s'il est possible de catégoriser ce droit ou de l'enseigner en anglais, et s'il est possible de développer ce droit selon un seul modèle théorique ou de l'organiser selon les catégories de la common law. Bien que cet article suggère qu'on peut discuter du droit autochtone de différentes façons, incluant la méthodologie conventionnelle adoptée par les écoles de droit, il souligne que ce droit est le mieux enseigné selon une différente approche. Les traditions juridiques autochtones devraient être organisées en conformité avec les modèles autochtones. Parmi ces modèles, on retrouve les héros, les *tricksters*, les monstres et les gardiens. En utilisant ces exemples du droit Anishinaabe, cet article insiste que l'enseignement du droit autochtone devrait prendre des formes culturelles appropriées, qui élargissent plutôt que limitent la théorie et la pratique du droit autochtone.

# HEROES, TRICKSTERS, MONSTERS, AND CARETAKERS: INDIGENOUS LAW AND LEGAL EDUCATION

*John Borrows\**

Teaching Indigenous peoples' own law in Canadian law schools presents significant challenges and opportunities. Materials can be organized in conventional or innovative ways. This article explores how law professors and others might best teach Indigenous peoples' law. Questions canvassed include: whether Indigenous peoples' law should primarily be taught in Indigenous communities, whether such law should even be taught in law schools, whether it is possible to categorize Indigenous peoples' law or teach it in English, and whether it is possible to theorize Indigenous peoples' law within a single framework or organize the subject within common law categories. While this article suggests that Indigenous peoples' law can be discussed in numerous ways, including within conventional law school frameworks, it emphasizes that such law is best taught in other ways. Indigenous legal traditions should be organized in accordance with Indigenous frameworks. Some of these frameworks include Heroes, Tricksters, Monsters, and Caretakers. Using these Anishinaabe law examples, this article stresses how the teaching of Indigenous peoples' law should be done in culturally appropriate ways that open rather than confine fields of inquiry within Indigenous law and practice.

Enseigner le droit autochtone dans une école de droit canadienne présente des défis et des opportunités importants. Le matériel du cours peut être organisé de façon conventionnelle ou innovatrice. Cet article explore les meilleures méthodes pour enseigner le droit autochtone. Les questions abordées par l'article incluent : si le droit autochtone devrait être enseigné à des communautés autochtones, si l'enseignement de ce droit est même approprié dans les écoles de droit, s'il est possible de catégoriser ce droit ou de l'enseigner en anglais, et s'il est possible de développer ce droit selon un seul modèle théorique ou de l'organiser selon les catégories de la common law. Bien que cet article suggère qu'on peut discuter du droit autochtone de différentes façons, incluant la méthodologie conventionnelle adoptée par les écoles de droit, il souligne que ce droit est le mieux enseigné selon une différente approche. Les traditions juridiques autochtones devraient être organisées en conformité avec les modèles autochtones. Parmi ces modèles, on retrouve les héros, les *tricksters*, les monstres et les gardiens. En utilisant ces exemples du droit Anishinaabe, cet article insiste que l'enseignement du droit autochtone devrait prendre des formes culturelles appropriées, qui élargissent plutôt que limitent la théorie et la pratique du droit autochtone.

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## Introduction

My friends and I are teaching Indigenous law at the University of Victoria Faculty of Law.<sup>1</sup> We are also working with various communities across Canada in helping them to reinvigorate their constitutional, regulatory, and dispute resolution systems.<sup>2</sup> We understand that Indigenous legal traditions contain vast resources for assisting individuals and communities in reasoning through tough problems.<sup>3</sup> Despite centuries of dispossession, Indigenous legal traditions are vibrant sources of knowledge.<sup>4</sup> They pragmatically assist in finding answers to complex and pressing legal questions<sup>5</sup> and contain significant sources of authority.<sup>6</sup> They are precedential, that is, standard setting,<sup>7</sup> and generate criteria for making sound judgments.<sup>8</sup> Indigenous law helps produce binding measurements through persuasion and compulsion,<sup>9</sup> is attentive to ethical redress and

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- 1 For an earlier report of this work from over a decade ago, see John Borrows, “Creating an Indigenous Legal Community” (2005) 50:1 McGill LJ 153 [Borrows, “Indigenous Legal Community”].
  - 2 For further information about the University of Victoria Faculty of Law’s work with Indigenous communities, see the Indigenous Law Research Unit (ILRU), online: <www.uvic.ca/law/about/indigenous/indigenoulawresearchunit/index.php> [ILRU].
  - 3 For a detailed discussion of how Indigenous legal traditions provide intellectual resources for dealing with challenging questions in the area of violence against women, see generally Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 UBC L Rev 593; John Borrows, “Aboriginal and Treaty Rights and Violence Against Women” (2013) 50:3 Osgoode Hall LJ 699.
  - 4 For a discussion of the living resilience of Indigenous law, see generally Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007).
  - 5 For an example of Indigenous law that addresses complex legal questions, see John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash UJL & Pol’y 167.
  - 6 The authoritative nature of Indigenous law is addressed in Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 Indigenous LJ 1 at 8–13 [Friedland, “Reflective Frameworks”].
  - 7 The precedential nature of Indigenous law is found in Wapshkaa Ma’iingan (Aaron Mills), “Aki, Anishinaabek, kaye tahsh Crown” (2010) 9:1 Indigenous LJ 107 at 120–29.
  - 8 Examples of decision-making criteria drawn from Indigenous law are contained in Kundoqk, Jacquie Green, “Transforming Our Nuuyum: Contemporary Indigenous Leadership and Governance” (2014) 12:1 Indigenous LJ 33 at 50–54; Susanna Quail, “*Yah’guudang*: The Principle of Respect in the Haida Legal Tradition” (2014) 47:2 UBC L Rev 673 at 686.
  - 9 Indigenous legal orders are complex and use persuasion, egalitarianism, compulsion, domination, and many other forces. See Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 J Leg Pluralism & Unofficial L 1 at 25 (“indigenous law ... is not always the expression of harmonious egalitarianism. It often reflects narrow and parochial concerns; it is often based on relations of domination; its coerciveness may be harsh and indiscriminate; protections that are available in public forums may be absent”).

remedial actions when harm has occurred,<sup>10</sup> and facilitates genuine gift giving and bequests.<sup>11</sup> Indigenous laws can be constitutional.<sup>12</sup> They can support the creation of internally binding obligations.<sup>13</sup> Indigenous peoples' own legal systems also undergird the creation of intersocietal commitments with external bodies.<sup>14</sup> Evidence of Indigenous laws' force is found in various agreements related to consultation, accommodation, contractual matters, and treaties.<sup>15</sup> Indigenous laws are also a key ingredient in protecting group and individual privileges and freedoms.<sup>16</sup>

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- <sup>10</sup> For examples of remedies under Indigenous legal orders, see Aboriginal Human Rights Project, "First Nations Legal Traditions and Customary Laws and the Human Rights Complaint Process: A Story, Reflections, Questions, Suggestions and an Offering" at 4–7, online: <[www.mediatebc.com/PDFs/LRG2046-Aboriginal-Human-Rights-Project---final-re.aspx](http://www.mediatebc.com/PDFs/LRG2046-Aboriginal-Human-Rights-Project---final-re.aspx)>; Paul Jonathan Saguil, "Ethical Lawyering Across Canada's Legal Traditions" (2010) 9:1 *Indigenous LJ* 167 at 177–79.
- <sup>11</sup> The law of gifts and bequests within the Anishinaabe legal order can be studied in Melissa A Pflüg, "*Pimadaziwin*: Contemporary Rituals in Odawa Community" (1996) 20:4 *Am Indian Q* 489 at 492–95.
- <sup>12</sup> See generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*]. For examples of Indigenous laws that can be viewed as constitutional, see Paul Nadasdy, "The Gift in the Animal: The Ontology of Hunting and Human-Animal Sociality" (2007) 34:1 *American Ethnologist* 25 at 29 ("social relations' between human beings ... and other-than-human 'persons' are of cardinal significance"); 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 at 63; Cary Miller, "Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities, 1820–1832" (2002) 26:2 *Am Indian Q* 221.
- <sup>13</sup> Internal obligations within Indigenous legal orders as they relate to external action are described in Larry Nesper, "Law and Ojibwe Indian 'Traditional Cultural Property' in the Organized Resistance to the Crandon Mine in Wisconsin" (2011) 36:1 *Law & Soc Inquiry* 151 at 159; Bruce M White, "A Skilled Game of Exchange: Ojibway Fur Trade Protocol" (1987) 50:6 *Minnesota History* 229 at 234.
- <sup>14</sup> Examples of Indigenous law being used for intersocietal relations are found in Sari Graben, "Lessons for Indigenous Property Reform: From Membership to Ownership on Nisga'a Lands" (2014) 47:2 *UBC L Rev* 399 at 424–30; Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 *Law & Soc'y Rev* 719 at 720–21.
- <sup>15</sup> The role of Indigenous law in agreement making is evident in Robert A Williams, Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford University Press, 1997); Val Napoleon, "Indigenous Law and the Impact Benefit Agreements" in Ariel Dylan & Bartholemew Smallboy, eds, *Indigenous Peoples and Impact Benefit Agreements* (provisional title) [forthcoming].
- <sup>16</sup> For a discussion of how the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 relates to Indigenous law and individual and group rights protections, see David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012).

My colleagues and I are united in our desire to introduce students to both the broad outlines and subtle complexities of Indigenous peoples' own legal traditions. We are also united in our commitment to be open to constructive critique. We strive to respect different visions concerning our work. We also try to encourage one another. Sometimes law professors fail to attend to this vital human need. Indeed, law journal articles aimed at encouragement seem far less prominent than other forms of review.

One question our work has prompted relates to the organization of student materials. This might seem like a mundane issue, but it has significant implications. The conceptualization of Indigenous law has a direct impact on how people receive and apply it. Law professors both *reflect* and *generate* law in conveying legal traditions.<sup>17</sup> In another context, judges and lawyers do the same thing.<sup>18</sup> No matter the legal tradition, law is a product of human agency; it is not an objective or neutral field.<sup>19</sup> Yet, as law teachers working with Indigenous communities, we have a distinct context. Indigenous peoples have long been colonized by other people's views of their best interests.<sup>20</sup> Indigenous social organization has been manipulated to serve interests that are not its own.<sup>21</sup> We do not want to replicate this pattern. We are responsible to the communities with which we work, often through explicit commitment. Many of us are Indigenous ourselves. We have deep roots in our home communities.<sup>22</sup> Most of us have

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<sup>17</sup> For a discussion of the role of law professors in law's development, see Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York: New York University Press, 2004). See also Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991).

<sup>18</sup> For a discussion of the role of human agency and action in legal advocacy and judgment, see generally Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167.

<sup>19</sup> On the subjective nature of legal reasoning and practice, see William Twining, *Karl Llewellyn and the Realist Movement*, 2nd ed (New York: Cambridge University Press, 2012) at 153–69; Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2012) at 12; John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) at 72.

<sup>20</sup> See generally Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: MG Hurtig, 1969); Sally M Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968–70* (Toronto: University of Toronto Press, 1981).

<sup>21</sup> The manipulation of Indigenous social and family organization by government bodies is discussed in 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* (Winnipeg: TRC, 2015) at 47, online: <[www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec\\_Summary\\_2015\\_05\\_31\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf)>.

<sup>22</sup> Indigenous peoples' roots are often deeply tied to the land (see e.g. Basil H Johnston, *By Canoe and Moccasin: Some Native Place Names of the Great Lakes* (Lakefield, Ont: Waapone, 1986)).

also spent our lives interacting with Indigenous groups. Moreover, our students' future successes may be largely dependent on our proper framing of the law.

Thus, the question of how to organize student materials has high stakes and is deeply personal. It is also fraught with potential for the abuse of power.<sup>23</sup> We have paid particular attention to gender in this regard, among other issues.<sup>24</sup> Like all other societies on Earth,<sup>25</sup> Indigenous peoples are flawed;<sup>26</sup> they possess and require law to deal with their disorders. There is also profound wisdom and great beauty within Indigenous societies. They have significant legal insight about how to relate to one another and the Earth. As teachers of Indigenous law, we attempt to keep our eyes wide open to Indigenous societies' and laws' complexities. The study and practice of Indigenous law is a rich field of inquiry. We are very enthusiastic about our work. We think it makes a positive difference. We believe it sits at the crossroads of Indigenous law's revitalization.

Our efforts to organize materials and facilitate student engagement with Indigenous laws can occur on various scales. It can embrace the entire field of Indigenous peoples' own laws, writ large, on global and national scales.<sup>27</sup> It also involves work with specific systems of Indigenous law at a First Nation, band, village, settlement, or clan level.<sup>28</sup> We have been asked if it is possible to organize materials across Indigenous legal systems. We have ourselves wondered if generalities at more abstract levels can be identified. At present, we have largely shied away from this task, though I have tentatively identified various sources of Indigenous

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<sup>23</sup> For a discussion of the role of power in legal scholarship, see Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999).

<sup>24</sup> See Snyder, Napoleon & Borrows, *supra* note 3.

<sup>25</sup> For two important examinations that detail Indigenous peoples' legal relationship to the family of nations, see S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (Oxford: Oxford University Press, 2004); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

<sup>26</sup> For a discussion of the complex nature of Indigenous societies, the challenges they face, and the flaws they exhibit, see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 7 [Borrows, *Freedom*].

<sup>27</sup> See generally John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [Borrows, *Recovering Canada*]; Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225.

<sup>28</sup> See ILRU, *supra* note 2. See also First Nation-specific projects in Indigenous Law Research Unit, University of Victoria, Indigenous Bar Association & Truth and Reconciliation Commission of Canada, "Accessing Justice and Reconciliation Project" (2014), online: <[www.indigenousbar.ca/indigenoulaw](http://www.indigenousbar.ca/indigenoulaw)> ["AJR Project"].

laws.<sup>29</sup> Moreover—in an article in this special issue—my colleagues Val Napoleon and Hadley Friedland have created a methodology for working with diverse traditions through stories.<sup>30</sup> This article represents a further small addition to this generalist literature. Despite forays into larger fields, most of us feel more comfortable working with particular legal systems, such as Mi'kmaq, Anishinaabe, Sewepmec, Tsilhqot'in, Salish, Inuit, or Métis legal traditions.<sup>31</sup> However, even in this work, we are at the start of our journey. There are still huge questions about how to best accomplish our task.

This article considers questions related to the development of effective organizational approaches for teaching students Indigenous peoples' laws. This is both a theoretical and pragmatic concern (though the effective real-world application of Indigenous law is our primary objective). This article concludes that answers to these questions are complex and will never be answered with exactness. At the same time, it suggests that standards of perfection and exactness should not undermine best efforts to serve Indigenous communities and to strengthen Canadian law more generally.

In making these points, this article addresses six challenges encountered in organizing the teaching of Indigenous laws. It closes by using Anishinaabe law examples to illustrate how law might be arranged in culturally appropriate ways that open rather than confine fields of inquiry.<sup>32</sup> The categories of Heroes, Tricksters, Monsters, and Caretakers are considered as possible subject-matter fields for teaching Anishinaabe law. In this light, this article suggests that it is possible to identify patterns for learning Indigenous law that are sensitive to Indigenous systems and that also help students orient themselves to these fields.

## I. Challenges in Organizing the Teaching of Indigenous Peoples' Own Laws

Most of the colleagues, students, and communities with whom we work realize our work has limitations. I frankly acknowledge that I cannot satisfactorily answer every important question in my field. In fact, I believe I fail most glaringly when considering our most pressing issues. This is a deep problem for me as a teacher and practitioner of An-

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<sup>29</sup> See Borrows, *Indigenous Constitution*, *supra* note 12, ch 2.

<sup>30</sup> Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725.

<sup>31</sup> See "AJR Project", *supra* note 28.

<sup>32</sup> Anishinaabe law is shaped by distinct worldviews; for a discussion of these views, see Lawrence W Gross, *Anishinaabe Ways of Knowing and Being* (Surrey, UK: Ashgate, 2014).



ishinaabe law. But I am not alone. I believe that this challenge is experienced in every legal tradition, by every legislator, judge, lawyer, law professor, Elder, chief, council member, clan mother, and Indigenous law keeper—even if they do not admit it.

No matter the tradition, our knowledge and experience fall short of our actual needs. We frequently experience gaps between what is known to be effective and our own ignorance. This is why we need one another when we teach and practise law. Law is practised relationally.<sup>33</sup> Others can help us to identify, clarify, and address gaps in our ideas and practices that we might not even appreciate.<sup>34</sup> I hope this invitation helps others to physically (not just intellectually) join us, or other Indigenous communities, or both, in doing the concrete work of revitalizing Indigenous law. Readers are invited to get involved and work with communities in their own respectful, varied ways.<sup>35</sup>

When considering the question about whether and how we might organize Indigenous law teaching materials, I have benefited from the insights of my colleagues Val Napoleon,<sup>36</sup> Hadley Friedland,<sup>37</sup> Sarah Morales,<sup>38</sup> Aaron Mills,<sup>39</sup> Johnny Mack,<sup>40</sup> Kerry Sloan,<sup>41</sup> Kinwa Bluesky,<sup>42</sup>

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<sup>33</sup> See generally Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011).

<sup>34</sup> There is a significant role for scholars in other national contexts to engage with Indigenous legal orders in Canada (see e.g. Christine Zuni Cruz, "Law of the Land: Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 315).

<sup>35</sup> For a broader experience reflecting on the need to learn Indigenous law, see The Honourable Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Speech delivered at the Continuing Legal Education Society of British Columbia Conference, Vancouver, 16 November 2012), online: <[www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648](http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648)>.

<sup>36</sup> See Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009) [unpublished]; Napoleon & Friedland, *supra* note 30.

<sup>37</sup> See Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Sauleaux Societies—Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta Faculty of Law, 2009) [unpublished] [Friedland, *Wetiko Principles*]; Napoleon & Friedland, *supra* note 30.

<sup>38</sup> See Sarah Noël Morales, Snuw'uyulh: *Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria Faculty of Law, 2014) [unpublished].

<sup>39</sup> See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

Andrée Boisselle,<sup>43</sup> Aimée Craft,<sup>44</sup> Danika Littlechild,<sup>45</sup> Robert Clifford,<sup>46</sup> Hannah Askew,<sup>47</sup> Nancy Sandy,<sup>48</sup> Rebecca Johnson,<sup>49</sup> Gillian Calder,<sup>50</sup> Jeremy Webber,<sup>51</sup> Heidi Stark,<sup>52</sup> Jim Tully,<sup>53</sup> and others too numerous to mention. I have also received invaluable feedback from my students. Fam-

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<sup>40</sup> See 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.

<sup>41</sup> See Kerry Sloan, “‘A New German-Indian World’ in the North-West: A Métis Deconstruction of the Rhetoric of Immigration in Louis Riel’s Trial Speeches” in Hans V Hansen, ed, *Riel’s Defence: Perspectives on His Speeches* (Montreal: McGill-Queen’s University Press, 2014) 166.

<sup>42</sup> See Kinwa Kaponicin Bluesky, *Art as My Kabeshinan of Indigenous Peoples* (LLM Thesis, University of Victoria Faculty of Law, 2006) [unpublished].

<sup>43</sup> See Andrée Boisselle, “Beyond Consent and Disagreement: Why Law’s Authority Is Not Just about Will” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 207.

<sup>44</sup> See Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich, 2013).

<sup>45</sup> See Danika Billie Littlechild, *Transformation and Re-Formation: First Nations and Water in Canada* (LLM Thesis, University of Victoria Faculty of Law, 2014) [unpublished].

<sup>46</sup> See Robert Clifford, Book Review of *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* by Glen Sean Coulthard, (2015) 30:2 CJLS 318; Robert YELKÁTFE Clifford, “WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL- (Goldstream River)” (2016) 61:4 McGill LJ 755.

<sup>47</sup> See Hannah Askew, “Indigenous Legal Traditions and the Challenge of Intercultural Legal Education in Canadian Law Schools”, Ontario Bar Association, online: <[www.oba.org/CBAMediaLibrary/cba\\_on/pdf/Foundation/StudiesFellowshipHannaAskew.pdf](http://www.oba.org/CBAMediaLibrary/cba_on/pdf/Foundation/StudiesFellowshipHannaAskew.pdf)>.

<sup>48</sup> See Nancy Harriet Sandy, *Reviving Secwepemc Child Welfare Jurisdiction* (LLM Thesis, University of Victoria Faculty of Law, 2011) [unpublished].

<sup>49</sup> See Lori Groft & Rebecca Johnson, “Journeying North: Reflections on Inuit Stories as Law”, Accessing Justice and Reconciliation, online: <[indigenousbar.ca/indigenoulaw/wp-content/uploads/2014/05/Groft-and-Johnson-Journeying-North.pdf](http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2014/05/Groft-and-Johnson-Journeying-North.pdf)>.

<sup>50</sup> See Gillian Calder, “‘Finally I Know Where I Am Going to Be From’: Culture, Context, and Time in a Look Back at *Racine v. Woods*” in Kim Brooks, ed, *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press, 2009) 173.

<sup>51</sup> See Jeremy Webber, “The Public-Law Dimension of Indigenous Property Rights” in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart, 2013) 79.

<sup>52</sup> See Heidi Kiiwetinepinesiiik Stark, “Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada” (2012) 36:2 Am Indian Q 119.

<sup>53</sup> See James Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom*, vol 1 (Cambridge: Cambridge University Press, 2008) at 221–88.

ily members are also an important source of support and information. We are not of one mind—there are different approaches and schools of thought in our work and not everyone agrees with one another. This adds to the liveliness of our inquiries.

As a collective enterprise, it is possible to organize materials to help students take up the practice of Indigenous law. In fact, Indigenous laws cannot be taught and practised without some form of organization. Yet we recognize many challenges in doing so. Some of our questions include: (1) Should the teaching of Indigenous law remain primarily within Indigenous communities? (2) Should the teaching of Indigenous law occur in law schools? (3) Is it possible to categorize Indigenous law? (4) Should Indigenous law be taught in English? (5) Can Indigenous law be organized by one theory or approach? and (6) Can Indigenous law be organized by common law categories? Each of these issues is briefly canvassed to outline our current thinking, as I understand it, concerning how each question might be addressed.

#### *A. Should Teaching Indigenous Law Remain Primarily within Indigenous Communities?*

First, in terms of leaving the teaching of Indigenous peoples' laws primarily within communities, we believe this will continue to occur even if we add our voices to the mix. Our efforts are bound to be minor compared to what happens within communities. This is our experience thus far and we expect that it will continue. The deep, broad, and rich experience of learning and practising law within Indigenous communities will never be replicated by law schools. We do not have the skill to manoeuvre within or across traditions in this way. We do not have the resources or the reach to displace Indigenous peoples practising Indigenous law in their own contexts.

Moreover, we do not aspire to make law schools' voices dominant in teaching Indigenous law. In fact, such an outcome would be deeply disturbing. We aim to be a resource and aid to communities. Our goal is self-determination. Of course, as law professors, we want to transform how people see, and act in relation to, Indigenous law. We have lofty goals in this regard. Law schools can play an important role in enhancing, initiating, and even developing such laws. At the same time, law schools can never sustain these efforts on their own recognizance. Thus, we generally only work with legal traditions in communities of which we are a part, or through invitation to assist a specific community in their own efforts to revitalize law.

For instance, the Indigenous Law Research Unit (ILRU) at the University of Victoria Faculty of Law has generally worked with communities that have responded to our invitation or requested our participation.<sup>54</sup> The Indigenous Law Clinic operates in the same way. Professor Val Napoleon, who is the Law Foundation Chair in Aboriginal Justice and Governance, heads the ILRU. She is Cree, Dunne-Za, and Gitksan and has a lifetime of experience working with First Nations and Métis communities. She has collaboratively developed a detailed methodological approach that places Indigenous ethical protocols and protections at the centre of the ILRU's service.<sup>55</sup> Furthermore, my work with University of Victoria Professor Heidi Stark (Anishinaabe) has flowed from Anishinaabe communities' requests. In fact, our research has been led by them. In one example, the Sakimay (Saulteaux Anishinaabe) First Nation in Saskatchewan has devoted the lion's share of resources to our project. They invited us to work with them without any solicitation on our part. The vitality of the project is dependent on their ongoing activities, insights, and creativity. The project began without us and will continue long after we have gone. It is an independent site of law, as is the case with all our projects.

Despite present practice, the University of Victoria's work in teaching and researching Indigenous law will no doubt eventually extend beyond invitation-only requests. There must be room for arm's length support, self-generated initiative, and incisive critique. The University of Victoria is an academic institution after all; it will retain its independence. At the same time, it is clear that Indigenous communities will remain in control of their own laws even when law schools offer their advice and expertise. We hope our self-generated actions, while vital in their own right, never become dominant or even prominent in our work.

Thus, in deliberating about whether teaching Indigenous laws should be primarily left to communities, our answer is unequivocal: yes. In fact, we believe this is exactly what has been taking place in our work. We have no reason to believe this will change in the future. In fact, as we succeed in strengthening communities in our own small ways, they are likely to become increasingly more independent and autonomous. If law schools ever become the primary producers and practitioners of Indigenous legal knowledge writ large (which is highly unlikely), we should all use our collective and individual powers to reverse this process. Reinvigorating Indigenous legal process is a substantive legal activity. It is relational. You

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<sup>54</sup> See "AJR Project", *supra* note 28.

<sup>55</sup> See ILRU, *supra* note 2; Indigenous Law Research Unit, "Revitalizing Indigenous Law and Changing the Lawscape of Canada" at 7, online: <communityresearchcanada.ca/res/download.php?id=5123>.

cannot generally facilitate Indigenous law practice without Indigenous peoples themselves leading such a practice.

### *B. Should Indigenous Law Be Taught in Law Schools?*

Second, in terms of not teaching Indigenous peoples' law in law schools, we genuinely considered but rejected this option. We had law school-wide and community meetings that put this question squarely on the table. We generated and received many good reasons not to proceed. They included deep discussions of the following claims: Indigenous law does not exist; teaching Indigenous law in a law school setting would lead to cultural appropriation and violate intellectual property law; it is generally culturally inappropriate to learn Indigenous law in a classroom setting; the model for learning may be or may seem too integrative (perhaps even assimilative); Indigenous law should be autonomous and stand on its own; and the institutional costs (faculty and staff time, salaries, scholarships, bursaries, travel costs, accommodation expenses, space, and the administrative complexities of running such a venture) are too high. We discussed the emotional and physically demanding nature of teaching Indigenous law when colonialism continues to dominate state-Indigenous relationships.

In considering whether to teach Indigenous law in law schools, we explored societal concerns too. We talked about how popular attitudes toward Indigenous peoples and their laws might constrain our efforts.<sup>56</sup> We examined the impact this could have on student job placement and our own professional opportunities. We also talked about structural and individual racism in society and how it might operate to diminish the teaching and practice of Indigenous law.<sup>57</sup> We talked about dysfunction and incivility within some Indigenous communities and how it could affect our

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<sup>56</sup> For popular discussions of Indigenous peoples in Canada that express concern about Indigenous laws, see generally Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000); Gordon Gibson, *A New Look at Canadian Indian Policy: Respect the Collective—Promote the Individual* (Fraser Institute, 2009); Melvin H Smith, *Our Home or Native Land?: What Governments' Aboriginal Policy Is Doing to Canada* (Altona, Man: Friesen, 1995).

<sup>57</sup> For a discussion of the barriers Indigenous lawyers can face in employment, see Law Society of British Columbia, "Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers" (2000), online: <[www.lawsociety.bc.ca/docs/publications/reports/AboriginalReport.pdf](http://www.lawsociety.bc.ca/docs/publications/reports/AboriginalReport.pdf)>; Law Society of Upper Canada, "Final Report: Aboriginal Bar Consultation" (2009), online: <[www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487118](http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487118)>.

work.<sup>58</sup> We wrote books and law review articles on the subject. We made presentations to law societies, bar associations, judges, students, and communities. These discussions are ongoing, and we strive to make them a permanent part of our law school's life.

In this spirit, we drafted, debated, and redrafted the structure of the joint Indigenous Law/Common Law Program to teach Indigenous peoples' own laws.<sup>59</sup> The Faculty Council at the University of Victoria eventually agreed to approve in principle a joint degree in Indigenous law and the common law (JD/JID). Approval of the degree, in fact, is contingent on securing funding to operate the ambitious nature of the Program, which has costs above and beyond normal law school scales. This is because of the absolute requirement of working with communities throughout Canada and beyond and of paying Indigenous legal practitioners at appropriate law school scales.

Furthermore, in considering the second question of not teaching Indigenous law in law schools we considered the problematic message this sends. It makes it appear as though the common law and civil law are the only two legal traditions operative throughout the land. We do not want to privilege this point of view. It is underinclusive. In fact, it is wrong.<sup>60</sup>

Law schools misdirect students if they do not recognize Indigenous law's force across Canada. They fail to convey a correct picture of the country's legal structure. This does not equip students for future practice. Most every area of law intersects with Indigenous peoples' own law at particular times and places. We want to highlight Indigenous law's place in our land. In doing this, we do not want to detract from common law and civil law development. In fact, we want to strengthen these systems. We generally want to demonstrate how the practice of Indigenous law can further open avenues to regulate society effectively and to resolve disputes in many spheres of human activity.

### *C. Is It Possible to Categorize Indigenous Law?*

Third, we also considered what would happen if we did not organize Indigenous laws in presenting them to students. Some people strongly implied and directly cautioned us against attempts to organize knowledge in this way. We requested and received an external review of our proposal

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<sup>58</sup> See Val Napoleon, "Demanding More from Ourselves: Indigenous Civility and Incivility" in Dimitrios Karmis et al, eds, *Civic Freedom in an Age of Diversity* [forthcoming in 2016].

<sup>59</sup> This process is described in Borrows, *Indigenous Constitution*, *supra* note 12 at 228–36.

<sup>60</sup> See *ibid.*

to develop and teach an Indigenous law degree. This review was conducted by leading theorists of legal pluralism from other countries.<sup>61</sup> They were very supportive of our work on most points. At the same time, they articulated a concern related to categorizations we might choose. We also received this caution from several university colleagues in our own and other disciplines. Surprisingly, we did not hear this concern expressed by Indigenous communities with which we worked. Perhaps this is due to our Indigenous partners' self-selected participation. It may also be the case that communities are less concerned with categorization when they help guide how, and to what extent, systematization will occur.

Nevertheless, we take the question about categorization seriously. At first this question led us to wonder if it was even possible to categorize Indigenous approaches to legal practice. There is a great diversity of legal traditions among First Nations, Métis, and Inuit communities. In fact, we struggled with the issue of categorization itself, even within a legal tradition. Some traditions, like those of the Algonkian speaking nations with which we work, are linguistically verb-based languages.<sup>62</sup> Nouns or words that categorize the world into persons, places, or things are not a dominant way of organizing life. Practitioners of Anishinaabe law have asked how law can be categorized when our own language seems to counsel against noun-based conceptualizations. Yet, even as we asked the question, we remembered that language itself is an organized system of communication. Patterns of thought are evident in the expression of every particle, word, phrase, sentence, and opinion. There seems to be no escaping the need for organization in presenting thought and representing action within Indigenous linguistic and legal worlds.

Since organization is always present within Indigenous societies, our question became the following: what is the best way to organize the presentation of Indigenous law for new students? Answers to this question occupy the second half of this article.

Confusion would abound if materials and approaches were not organized. This confusion would feed stereotypes that Indigenous peoples do not have law. Students would get lost in trying to make sense of their own practice of Indigenous law. Those who went back to their communities would multiply the bewilderment and uncertainty. We did not want this to occur. We want students to identify and apply sophisticated variations and subtleties within Indigenous legal traditions. We want people to prac-

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<sup>61</sup> Reviewers were Sally Engle Merry and William Twining.

<sup>62</sup> For a discussion of the importance of Indigenous languages and law, see James [sákéj] Youngblood Henderson, "Mikmaw Tenure in Atlantic Canada" (1995) 18:2 Dal LJ 196 at 216–36.

tise these laws in all their complex diversity. What we strive to avoid is misunderstanding. The practice of Indigenous law should not be mysterious; we want to avoid any mystification of these traditions.

Indigenous peoples possess and can further develop real-world approaches to regulate behaviour and resolve disputes. Thus, we have taken a strong stand in asserting that Indigenous laws must be organized in their presentation. We do this even as we are deferential to community approaches to the precise forms of organization for student learning. Of course, we have different views within our group. There are also differences of opinion among First Nations about how best to do this. We want the organizational patterns chosen for teaching Indigenous law to be consistent with the tradition we are teaching. We do not want to awkwardly import categories or approaches from other fields or traditions.

As teachers, we want to ensure that students can find accessible techniques to access and remember what they are learning. After all, we do not want their exposure to Indigenous peoples' own law to be merely an academic experience (though we definitely desire a rich academic engagement too). Communities, students, and teachers have expectations that the graduates of our programs will eventually practise Indigenous law. While it is possible, it is nevertheless difficult to practise something you cannot understand and explain. Much of a student's practice will be immersive and will develop unarticulated patterns of behaviour that go beyond the disciplines revealed in our processes.<sup>63</sup> This is the case when one practises the common law or the civil law too. At the same time, it is essential to explain a system's main contours as well as its precise details. This will help to reinvigorate Indigenous law in contemporary settings throughout Canada today. Organization is a starting point, not an end point. Organization can facilitate further development, as long as the law's openness as a creative human endeavour is part of the message we impart to students.

#### *D. Should Indigenous Law Be Taught in English?*

A fourth issue to consider in organizing the teaching of Indigenous law is the fact that most students of Indigenous law speak English as their first language. Furthermore, many (and perhaps most) seasoned practitioners of Indigenous law in Canada also speak English. While students, Elders, and Indigenous law keepers can translate from Indigenous languages, and perhaps even actively learn to develop fluency in them, English is not going to go away in this process.

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<sup>63</sup> See Matthew Wildcat et al, "Learning from the Land: Indigenous Land Based Pedagogy and Decolonization" (2014) 3:3 Decolonization 1 at 2–3.



I speak English as a first language. I am not a fluent Anishinaabe speaker. I can teach and understand Anishinaabemowin at a basic level. I stumble through conversations with great embarrassment. In other words, I do better than most. However, I know I speak Anishinaabemowin with an English accent. English linguistic sensibilities colour my speech despite great time and effort to adopt other conventions. Most of our students will not have any level of Indigenous language fluency. English thus becomes a default medium for preserving and invigorating Indigenous law in the present day for many people.

Given that so many Indigenous languages are endangered, Indigenous peoples' law might also become extinct if it is not taught in English. Indigenous language loss should not hasten the loss of Indigenous legal traditions. Again, I want to stress the point that every effort should be made to revitalize Indigenous language along with Indigenous law. This does not have to be a zero-sum activity, in which every gain for Indigenous law comes at the expense of Indigenous language. Learning Indigenous law can heighten the ability and the motivation to learn the Indigenous language of which the law is a part. This is my experience and it must be a vital part of our efforts.

At the same time, if we defer to people who object to teaching Indigenous law in English, we lose a vital resource for Indigenous law's revitalization. In fact, Indigenous law might never be taught within law schools if Indigenous language fluency is a requirement. This would signal a colonial victory. Indigenous languages have been ravaged by explicit state policies aimed at their elimination. These trends can be reversed; indeed, we are making important progress in some places in reinvigorating Indigenous language learning.<sup>64</sup> We need to see the same result in regard to our laws, and more so. English can be a medium for the revitalization process, as imperfect as it may be. As an Anishinaabe colleague, Professor Brenda Child, once told me: "After 400 years, English is now an Anishinaabe language too."<sup>65</sup> I believe this to be true, as Anishinaabe people use this language to advance self-determination and other pressing objectives. We must embrace English, along with Indigenous languages, as we fight to

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<sup>64</sup> See Statistics Canada, "Aboriginal Languages in Canada: Emerging Trends and Perspectives on Second Language Acquisition", by Mary Jane Norris, Canadian Social Trends, Catalogue No 11-008 (Ottawa: Statistics Canada, 2007) at 19, online: <[www.statcan.gc.ca/pub/11-008-x/2007001/pdf/9628-eng.pdf](http://www.statcan.gc.ca/pub/11-008-x/2007001/pdf/9628-eng.pdf)> ("[i]n 2001, more people could speak an Aboriginal language than had an Aboriginal mother tongue (239,600 versus 203,300). This suggests that some speakers must have learned their Aboriginal language as a second language. It appears that this is especially the case for young people").

<sup>65</sup> This point is taken up in Lindsay Borrows, *Otter's Journeys: Indigenous Law and Language Revitalization* [under consideration, UBC Press].

ensure that Indigenous peoples enjoy the self-determining right to develop their legal traditions in ever-unfolding new contexts.

*E. Can Indigenous Law Be Organized by One Theory or Approach?*

A fifth issue to consider in organizing the teaching of Indigenous law relates to diversity. There are many Indigenous legal systems.<sup>66</sup> Many theories abound about how to best organize law within and across systems. Disagreement is pronounced. I want to suggest that this can be a healthy phenomenon. A variety of approaches can indicate the vitality of a field. Law is not just formed through agreement—it is also the product of disagreement and vigorous dissent.<sup>67</sup> Indigenous peoples the world over are just as likely to dispute one another's viewpoints as they are to agree. As long as these disputes can be processed and temporarily resolved before contestants run off in a hundred directions with their own interpretation of how the dispute was settled, you have a system of law.<sup>68</sup>

The point I am making here, about the organization of Indigenous legal practices, is that there will be schools of thought across and within the traditions. Some theorists and practitioners of Indigenous law believe that they can organize the entire field, much as some Western legal theorists attempt the same thing in their studies and practice. Other schools of thought believe such attempts are misleading, and even downright dangerous. These people will worry about attempts to discipline a field by looking to first order principles, which may be unrecognizably abstracted from the day-to-day work of law in particular communities. I share this concern and tend to resist first-order reasoning. At the same time, grand theorists may think the granulation of legal theory within a particular legal tradition (Salish, Cree, Inuit, Métis, etc.) is too postmodern, postcolonial, or post-Indian. People will join these debates from various perspectives, not just in dichotomous ways. They will subtly add nuance and reject dichotomous and binary thinking—or not.

Approaches to the organization of Indigenous law will continue to fall along a spectrum.<sup>69</sup> Different people and communities occupy different po-

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<sup>66</sup> See Val Napoleon, "Thinking About Indigenous Legal Orders" (2007) Research Paper for the National Centre for First Nations Governance, online: <[fngovernance.org/ncfng\\_research/val\\_napoleon.pdf](http://fngovernance.org/ncfng_research/val_napoleon.pdf)>.

<sup>67</sup> See Jeremy Webber, "The Meanings of Consent" in Webber & Macleod, *supra* note 43, 3 at 13, 16.

<sup>68</sup> See *ibid* at 22–33.

<sup>69</sup> For one such representation of this spectrum, see the chapters in Avigail Eisenberg et al, eds, *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (Vancouver: UBC Press, 2014).

sitions along this spectrum. Sometimes people will even take positions that occupy or arrange the field in contradictory ways (let us not forget that the same thing occurs when theorizing about the common law or the civil law).

Thus, in organizing Indigenous legal traditions, we must take account of the fact that different schools of thought are part of the broader field of study. Some schools of thought may appear dominant in one period of time but not in others. Humans, including Indigenous humans, are fluid, flexible, fickle, changeable, as well as staunchly conservative. Professors of Indigenous law are likewise hard to pin down. In my view, we must not assume there is one way of organizing the materials we teach to our students or of practising law in our communities.

### *F. Can Indigenous Law Be Organized by Common Law Categories?*

The last point to note for present purposes is that the categorization of Indigenous law into common law or civil law categories may be problematic. This approach risks the crass manipulation of Indigenous legal worldviews to fit Euro-Canadian legal boxes.<sup>70</sup> Of course, there is room for comparison between legal systems, as Indigenous practitioners learn by way of analogy, just as occurs in other systems.<sup>71</sup> Furthermore, Indigenous legal systems in Canada have been surrounded by and often saturated by Euro-Canadian legal thinking for centuries. As a result, Indigenous ways of organizing legal thought and practice often use common law or civil law language, but still retain significant differences when the category is populated by Indigenous thinking.<sup>72</sup>

For example, an Indigenous law of torts or involuntary obligations might contain very different understandings of who is your neighbour to whom you owe a duty of care: your neighbour might be a rock, plant, insect, bird, or animal in Anishinaabe law.<sup>73</sup> Those same life forms might also have obligations to humans that are enforceable within Indigenous law

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<sup>70</sup> See Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Richardson, Imai & McNeil, *supra* note 34, 195 at 214; Alex Tallchief Skibine, “Troublesome Aspects of Western Influences on Tribal Justice Systems and Laws” (2000) 1 Tribal LJ 1, online: <[www.lawschool.unm.edu/tlj/tribal-law-journal/articles/volume\\_1/skibine/index.php](http://www.lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/skibine/index.php)>.

<sup>71</sup> For an example of an Indigenous practitioner in the American tribal context, see Frank Pommersheim, *Tribal Justice: Twenty-Five Years as a Tribal Appellate Justice* (Durham, NC: Carolina Academic Press, 2016); Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995).

<sup>72</sup> See Borrow, *Indigenous Constitution*, *supra* note 12 at 96–101.

<sup>73</sup> See *ibid* at 30–31.

(and yes, I am purposely including rocks to highlight differences concerning legal personality within Anishinaabe law). Similarly, issues related to causation, remoteness, remedies, and damages might use common law categories, but the substantive results may vary considerably when studying Indigenous law.<sup>74</sup> This will change how students and lawyers generally understand tort law when examined through an Indigenous lens.

Speaking for myself, I think it is possible to organize the study and practice of some Indigenous legal traditions by common law or civil law categories. It is already being done in some quarters. For example, Anishinaabe people in the United States have entire tribal court systems that use these analogies.<sup>75</sup>

Indigenous legal reasoning is distinct, but Indigenous and non-Indigenous worldviews are not necessarily incommensurable.<sup>76</sup> They interact in many ways: through competition, parallel structures, intersectional nexus, inconsistencies, disagreements, harmonization, separation, and mutual disregard for the other's operation. The common law, civil law, and Indigenous law can interact in productive and mutually intelligible ways (though they need not have this relationship).<sup>77</sup>

At the same time, in making these connections we must not lose sight of the power imbalances that operate between the systems, as Indigenous peoples struggle to remove themselves from colonial relationships.<sup>78</sup> The common law and civil law are formally supported by the state;<sup>79</sup> Indigenous legal traditions are still the target of state termination.<sup>80</sup> The *Indian Act* largely attempts to remove Indigenous legal systems from the Canadian landscape, though there is room for the operation of custom even in

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<sup>74</sup> See *ibid* at 244–48.

<sup>75</sup> See generally Matthew LM Fletcher, “Toward a Theory of Intertribal and Intratribal Common Law” (2006) 43:3 *Houston L Rev* 701; Larry Nesper, “Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe” (2007) 48:5 *Current Anthropology* 675.

<sup>76</sup> For a discussion of the potential for reconciliation between Indigenous legal traditions and the common law, see generally Jeffery G Hewitt, “Reconsidering Reconciliation: The Long Game” (2014) 67 *SCLR* (2d) 259.

<sup>77</sup> See Borrows, *Recovering Canada*, *supra* note 27 at 5–12.

<sup>78</sup> See Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

<sup>79</sup> For an overview of civil law in the province of Quebec, see John EC Brierley & Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993). On the relationship between the common law and the state, see H Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005) at 95–96.

<sup>80</sup> See Gordon Christie, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions” (2007) 6:1 *Indigenous LJ* 13 at 17.

this instrument.<sup>81</sup> Furthermore, the interpretation of the North American roots of the common law and civil law's reception in Canadian systems largely ignores these prior legal systems, though cases like *Connolly v. Woolrich* formally recognize a more complex interaction.<sup>82</sup> These facts alone, in many instances, may cause Indigenous peoples to communicate the organization of their legal systems through categories that are not immediately correlated to Euro-Canadian legal traditions. The imbalance of power that exists between Indigenous law and other legal traditions counsels the need for great caution in working with Indigenous law through common law and civil law categorizations.<sup>83</sup>

I must say, however, that I do not find it offensive to compare and contrast Indigenous law with other legal traditions. In some instances, it can be very helpful to organize Indigenous law materials under the heading of property, tort, contract, criminal law, constitutional law, trust law, administrative law, family law, environmental law, and so forth.<sup>84</sup> I do not reject these categorizations because they are often used by Indigenous communities themselves when developing their own laws.<sup>85</sup> As long as communities lead in this way, I will continue to follow (even if through critical engagement) and work with these categories in teaching students about Indigenous law.

Nevertheless, despite all these very real challenges and possibilities, I think it is best to organize the teaching of Indigenous law in ways that are distinct from the common law or civil law.<sup>86</sup> Just because Indigenous law

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<sup>81</sup> See Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queen's University Press, 2009) at 114, 117–18, 134.

<sup>82</sup> (1867), 17 RJRQ 75 at 79, 11 LC Jur 197 (Qc Sup Ct), aff'd *Johnstone v Connolly* (1869), 17 RJRQ 266, 1 RL 253 (Qc QB).

<sup>83</sup> See generally Johnny Camille Mack, *Thickening Totems and Thinning Imperialism* (LLM Thesis, University of Victoria Faculty of Law, 2009) [unpublished]; Gordon Christie, "Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27:1 Can JL & Jur 259 at 278.

<sup>84</sup> See e.g. Matthew LM Fletcher, *American Indian Tribal Law* (New York: Aspen, 2011) [Fletcher, *Tribal Law*].

<sup>85</sup> See Justin B Richland & Sarah Deer, *Introduction to Tribal Legal Studies*, 2nd ed (Lanham, Md: Altamira Press, 2010); Carrie E Garrow & Sarah Deer, *Tribal Criminal Law and Procedure* (Walnut Creek, Cal: Altamira Press, 2004); Justin B Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008) [Richland, *Arguing with Tradition*].

<sup>86</sup> See KN Llewellyn & E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) at vi–x; Max Gluckman, *Politics, Law and Ritual in Tribal Society* (Chicago: Aldine, 1965) at xxii, 181–83; Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: University of Oklahoma Press, 1975); Antonia Mills, *Eagle Down Is Our Law:*

can be organized by common law categorization does not mean this should always occur. In my view, Indigenous law is often best organized for teaching purposes by applying organizational insights that flow from other schools of thought within the tradition. While the inner and outer boundaries of an Indigenous legal tradition will always be ambiguous, because we cannot say with certainty where its relationship to another tradition begins and ends, it is possible to discern distinctive ways of organizing law within these traditions. The remainder of this article is therefore devoted to organizing the teaching of Indigenous law through non-common law and non-civil law categories.

## II. Organizing Indigenous Law on Its Own Terms, as Best as We Can

Before I move on, I am going to repeat the last point, for emphasis. It is a pivotal turn in this article's thesis: since there are potential problems in organizing the study and practice of Indigenous law in Euro-Canadian terms, Indigenous legal traditions should be organized in "non-Western" terms. Again, I must stress that I do not reject comparison with other traditions. 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. I am merely making the point that I do not believe this should be a dominant way of proceeding. I do not want people to misinterpret my support for common law or civil law categorization as signalling a preference for such organization. The twin problems of power and cultural appropriateness should lead us to alternative constructions of Indigenous law wherever possible. Western law's colonial dominance along with the challenge of translating Indigenous law into other legal contexts suggest that concerted efforts should be made to organize the teaching of Indigenous law in more autonomous ways.

Of course, the organization of Indigenous law on its own terms should not prompt an originalist search for so-called authentic Indigenous traditions that existed prior to European contact.<sup>87</sup> Our search for Indigenous laws should not be limited to what was integral to distinctive cultures of historic Indigenous groups.<sup>88</sup> The revitalization of Indigenous law is not

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*Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at 141 [Mills, *Eagle Down*]; Raymond D Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009).

<sup>87</sup> See generally John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351.

<sup>88</sup> See *R v Van der Peet*, [1996] 2 SCR 507 at para 62, 137 DLR (4th) 289. For a critique of this view, see Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill

solely a section 35(1) exercise under the Supreme Court of Canada's *Van der Peet* framework.<sup>89</sup> The *R v. Pamajewon* case decided in *Van der Peet*'s wake does not recognize broad rights to self-government.<sup>90</sup> The resurgence of Indigenous law is much larger than section 35(1)'s current parameters. Section 35(1) will never be properly suited to revitalizing Indigenous law until self-determination informs the Court's approach to Aboriginal and treaty rights within Canada's constitution.<sup>91</sup>

Thus, Indigenous law cannot be categorized solely by what was of central significance to so-called Aboriginal people prior to European contact or the assertion of European sovereignty. Indigenous law includes practices, customs, and traditions that developed subsequent to these arbitrary and colonialist dates. Indigenous law as practised today may have connections to ancient history—or it may not. Law is fluid; it changes over time.<sup>92</sup> Law needs to address pressing contemporary issues in every generation to remain relevant.<sup>93</sup> I do not reject history or tradition in general terms. History's precedential, practical, and inspirational elements must be embraced. At the same time, working with Indigenous legal traditions on their own terms involves traditional, modern, and postmodern sensibilities.<sup>94</sup> Indigenous law should not be calibrated to "once-upon-a-time" practices as *Van der Peet* and its progeny require. Indigenous law must also be present and future oriented. Indigenous legal traditions exist to address current and future needs.

Recognizing Indigenous laws' contemporary nature gives practitioners and teachers of these traditions some licence to work creatively in their fields. Common law lawyers understand that legal practice can be as

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LJ 993; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 *Am Indian L Rev* 37 [Borrows, "Frozen Rights"].

<sup>89</sup> See Borrows, "Frozen Rights", *supra* note 88 at 64.

<sup>90</sup> [1996] 2 SCR 821, 138 DLR (4th) 204. For critical commentary on this case, see Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42:4 *McGill LJ* 1011 at 1030.

<sup>91</sup> See Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012) at 53–58, 119–22.

<sup>92</sup> For the original description of Canada's constitution as a living tree, see *Edwards v Canada (Attorney General)*, [1930] AC 124 at 136, 1929 UKPC 86. For an excellent history of the case, see Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007). An example of contemporary references to the living tree is found in *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698.

<sup>93</sup> See generally Jack M Balkin, *Living Originalism* (Cambridge, Mass: Harvard University Press, 2011) at 75; Graeme Mitchell et al, eds, *A Living Tree: The Legacy of 1982 in Canada's Political Evolution* (Markham, Ont: LexisNexis Canada, 2007) at 577–624.

<sup>94</sup> See Borrows, *Recovering Canada*, *supra* note 27 at 75.

much an art as a technical skill when hard questions arise. Gaps in ideas and experience require innovation and broader vision. This is not to say that legal practitioners can make up anything they want and expect their inventions to be binding. Practitioners have to find a “fit” between the innovation they are proposing and a more general understanding of the field.<sup>95</sup> There is a discipline to practising Indigenous law.<sup>96</sup> Part of this discipline is guided by the constraints, limitations, and idiosyncrasies of broader, more nebulous understandings of the tradition.<sup>97</sup>

Practitioners and teachers have to be persuasive when working with legal traditions.<sup>98</sup> They must find ways to bridge older ways with contemporary needs, given that no system is complete “on its own terms.”<sup>99</sup> Thus, in suggesting that Indigenous law must be organized on its own terms, I am not arguing for a frozen-in-time, anachronistic view of law that builds on troubling stereotypes and misleading generalizations regarding Indigenous peoples.<sup>100</sup>

### A. *Learning from the Windigo: Categorizing Anishinaabe Law*

Let me illustrate one way we might organize the teaching of Anishinaabe law that does not correlate (at first) with common law or civil law categorizations. This idea builds on Professor Hadley Friedland’s LLM thesis on *Wetiko* (or Windigo) legal principles.<sup>101</sup> In preparing her thesis, Friedland worked with Cree Elders in central and northern Alberta. She asked them how Cree law is used to protect children from sexual

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<sup>95</sup> For a discussion of fit or cultural match in another context, see Manley A Begay, Jr et al, “Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?” in Miriam Jorgenson, ed, *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007) 34 at 46–52. For a discussion of the question of fit in an Indigenous law context, see Frank Pommersheim, “Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie” (2002) 31 *Ariz St LJ* 439 at 455–59.

<sup>96</sup> See Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking” (2007–2008) 32:2 *Am Indian L Rev* 319 at 376, 381, 386.

<sup>97</sup> See Justin B Richland, “What Are You Going to Do with the Village’s Knowledge? Talking Tradition, Talking Law in Hopi Tribal Court” (2005) 39:2 *Law & Soc’y Rev* 235 at 237.

<sup>98</sup> The role of persuasion in law is developed in Herbert M Kritzer, “The Arts of Persuasion in Science and Law: Conflicting Norms in the Courtroom” (2009) 72:1 *Law & Contemp Probs* 41.

<sup>99</sup> For a discussion of “gaps” and law, see Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed (New York: Oxford University Press, 2009) at 53–77.

<sup>100</sup> This idea is one of the main points in Borrows, *Freedom*, *supra* note 26 at 128–60.

<sup>101</sup> See Friedland, *Wetiko Principles*, *supra* note 37.



and other violence. She posed the question: “How do we protect those we love, *from* those we love?”<sup>102</sup> In pursuing this question, Friedland learned that Cree people deal with violence through a category encapsulated by the word “Wetiko”. Wetikos (Windigos in Anishinaabe) are characters who harm themselves or others through violently consumptive behaviours.<sup>103</sup> For those who become Windigos, there is often a cannibalistic wasting of themselves and others.<sup>104</sup> In historical terms, this consumption often involved eating human flesh because starvation was a frequent contributor to social and psychological problems.<sup>105</sup> In more recent times, a Windigo is someone who devours parts of our human nature that are necessary to be healthy and self-sustaining. A Windigo can be someone who is consumed by obsessive thoughts related to sexual or other acts of violence. Windigos can also be institutions or individuals who selfishly cannibalize our social, emotional, economic, or environmental infrastructure.<sup>106</sup>

In her thesis, Friedland wrote:

Some people talk about the *wetiko* as strictly a psychological concept, or as a spiritual concept. I am going to talk about the *wetiko* as a legal concept or category. I will talk about an “ideal type” (a pure or simple form of) *wetiko* as a cannibal and I will talk about the *wetiko* as a broad legal concept—a category that covers more behaviours

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<sup>102</sup> *Ibid* at 12 [emphasis in original].

<sup>103</sup> See Jack D Forbes, *Columbus and Other Cannibals: The Wétiko Disease of Exploitation, Imperialism, and Terrorism*, revised ed (New York: Seven Stories Press, 2008) ch 2.

<sup>104</sup> See e.g. Carolyn Podruchny, “Werewolves and Windigos: Narratives of Cannibal Monsters in French-Canadian Voyageur Oral Tradition” (2004) 51:4 *Ethnohistory* 677; Robin Ridington, “Wechuge and Windigo: A Comparison of Cannibal Belief among Boreal Forest Athapaskans and Algonquians” in Robin Ridington, ed, *Little Bit Know Something: Stories in a Language of Anthropology* (Iowa City: University of Iowa Press, 1990) 160; Nathan D Carlson, “Reviving Witiko (Windigo): An Ethnohistory of ‘Cannibal Monsters’ in the Athabasca District of Northern Alberta, 1878–1910” (2009) 56:3 *Ethnohistory* 355.

<sup>105</sup> See Morton I Teicher, “Windigo Psychosis: A Study of a Relationship Between Belief and Behavior among the Indians of Northeastern Canada” in Verne F Ray, ed, *Proceedings of the 1960 Annual Spring Meeting of the American Ethnological Society* (Seattle: University of Washington, 1960); Lou Marano, “Windigo Psychosis: The Anatomy of an Emic-Etic Confusion” (1982) 23:4 *Current Anthropology* 385; Robert A Brightman, “The Windigo in the Material World” (1988) 35:4 *Ethnohistory* 337; Robert A Brightman, David Meyer & Lou Marano, “On Windigo Psychosis” (1983) 24:1 *Current Anthropology* 120; Richard J Preston, “The Witiko: Algonkian Knowledge and Whiteman Knowledge” in Marjorie M Halpin & Michael M Ames, eds, *Manlike Monsters on Trial: Early Records and Modern Evidence* (Vancouver: University of British Columbia Press, 1980) 111. For a critique of this literature, see Friedland, *Wetiko Principles*, *supra* note 37 at 24–35.

<sup>106</sup> See John Borrows (Kegeedonce), *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) at 216–27 [Borrows, *Drawing*]; Leanne Simpson, *The Gift Is in the Making: Anishinaabeg Stories* (Winnipeg: Highwater Press, 2013) at 46–48.

than actually killing and eating other people. This includes many terrible ways people are dangerous and harmful to themselves and others. We can use the “ideal type” *wetiko*—the cannibal, as an analogy (something that is the same as, or similar to something else) for people who use, harm, or destroy others to satisfy their own appetites or wants. Or we can think about the destructive and often horrific violence and victimization described above as a behaviour that fits within a broad *wetiko* legal category.<sup>107</sup>

This insight helped me to see Anishinaabe law in a new light. I see that Anishinaabe law can be organized in similar ways. Cree and Anishinaabe people share linguistic and cultural roots.<sup>108</sup> Anishinaabe people also have many “cases/stories” about how they deal with Windigos (which largely discuss how they can be healed). These narratives are organizational tools. They communicate ways of perceiving and responding to harm in a structured manner. This systematization provides disciplinary pathways for reasoning about how best to deal with violence. These narratives contain resources for regulating behaviour and resolving disputes. While they have other functions in different contexts, as Friedland acknowledged, I also recognized them as legal resources. Friedland went on to explain:

If we look at the *wetiko* concept as a legal category, it becomes even clearer why people who are familiar with it would use it to describe a relatively diverse set of observable behaviours. The idea of one legal category encompassing a broad range of harmful behaviours should not be terribly hard to understand for anyone who has researched the contemporary western legal concept of “sex offender”. There is clearly a range of offending behaviours, and a range of offenders, but this does not detract from our belief that the term represents a real phenomenon. Police and other professionals use the term “sex offender” to describe both a teenager who exposes himself to younger children and a “serial homicidal sex offender” who rapes his victims before beating them to death. There are many variations and gradations between these two examples of dangerous, harmful and taboo behaviours. In addition, the concept changes over time. For example, the Canadian *Criminal Code* now contains the offence of “luring a child” which requires the use of the internet. Obviously, this behavioural manifestation of a sexual offence could not have even existed 50 years ago. There is no logical reason to think the *wetiko* concept could not have similar breadth and fluidity over time, and a fair amount of evidence ... shows that it did (and does).<sup>109</sup>

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<sup>107</sup> Friedland, *Wetiko Principles*, *supra* note 37 at 16.

<sup>108</sup> See Randy Valentine, *Nishnaabemwin Reference Grammar* (Toronto: University of Toronto Press, 2001) at 16.

<sup>109</sup> Friedland, *Wetiko Principles*, *supra* note 37 at 39–40 [footnotes omitted].

Friedland effectively illustrates how Cree people organize legal problems through narrative. This is a key to understanding *one* way of structuring the teaching of Indigenous law.

Approximately twenty years ago, I published an article in the *McGill Law Journal* that used traditional Anishinaabe stories to examine First Nations law.<sup>110</sup> I suggested that

[First Nations stories] function together to guide people in the resolution of disputes. First Nations frequently access their historic experiences and cultural epics in order to formulate and apply their own law. The values underlying the stories are often advanced by respected individuals and elders and are expected to be of precedential value in conducting First Nations through contemporary challenges.<sup>111</sup>

Friedland's categorization of one type of narrative (Windigo) helps me see what I observe in Anishinaabe communities in an even broader light.<sup>112</sup> Val Napoleon has also taken up similar themes in her graphic comic *Mikomosis and the Wetiko*, which also uses the Windigo category to explore how Cree people reason using Cree law.<sup>113</sup>

### ***B. Heroes, Tricksters, Monsters, and Caretakers***

With a broader context now in place, I am now prepared to directly answer the question posed at the beginning of this article: how might teachers of Indigenous law best organize their materials? Here is an answer: we should ask Elders and Indigenous legal practitioners about how they categorize law (as Friedland did).<sup>114</sup> Furthermore, teachers and students could look for clues about the organization of Indigenous law in the broader narrative structures that discipline such narratives.

I must stress that narrative is only *one* way of systematizing student experience in transmitting Indigenous law. Some learning will resist categorization. Additionally, libertarian, anarchist, and contrarian lines of

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<sup>110</sup> See John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 *McGill LJ* 629 [Borrows, "With or Without You"].

<sup>111</sup> *Ibid* at 653.

<sup>112</sup> See Hadley Friedland, "Reflective Frameworks", *supra* note 6 at 31–38.

<sup>113</sup> See Val Napoleon et al, *Cree Law: Mikomosis and the Wetiko* (Victoria: University of Victoria, 2013). See also Emily Snyder et al, *Mikomosis and the Wetiko: A Teaching Guide for Youth, Community, and Post-Secondary Educators* (Victoria: Indigenous Law Research Unit, 2014) at 11, online: <[www.indigenousbar.ca/indigenoulaw/wp-content/uploads/2013/04/Mikomosis-and-the-Wetiko-Teaching-Guide-Web.pdf](http://www.indigenousbar.ca/indigenoulaw/wp-content/uploads/2013/04/Mikomosis-and-the-Wetiko-Teaching-Guide-Web.pdf)>.

<sup>114</sup> Working with Anishinaabe Elders has been discussed in Michael D McNally, *Honoring Elders: Aging, Authority, and Ojibwe Religion* (New York: Columbia University Press, 2009). See also Friedland, *Wetiko Principles*, *supra* note 37 at 39–40.

thought are found within Indigenous communities. These must be preserved and strengthened. There is even a category of practitioners in Anishinaabe circles whose members work in contrary ways: they are called Windigokaan.<sup>115</sup> Indigenous people occupy different points along political spectrums.<sup>116</sup> Some are conservative, others are liberal, while yet others resist capitalism and adopt or reject alternative forms of Indigenous political classification. Materials will be organized differently (or not at all) as practitioners and teachers follow competing and crosscutting schools of thought. Not every law professor organizes their presentations of law in the same way and, as I have argued earlier, the same is true of Indigenous legal traditions.

For instance, I would not want narrative to overtake customary law as *the* privileged source of authority in Indigenous law.<sup>117</sup> I would also lament the loss of Indigenous law's spiritual sensibilities.<sup>118</sup> Furthermore, positivistic proclamation continues to be a powerful source of law within Indigenous communities.<sup>119</sup> This is why communities use bylaws, regulations, declarations, and rules to create order among their citizens. Moreover, deliberation and wide-ranging debate generates most law within Indigenous communities. The results of this activity may later be recorded in agreements,<sup>120</sup> treaties,<sup>121</sup> judgments,<sup>122</sup> statutes,<sup>123</sup> songs,<sup>124</sup> and sto-

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<sup>115</sup> For a discussion of Windigokaan in Anishinaabe societies, see Shawn Smallman, *Dangerous Spirits: The Windigo in Myth and History* (Victoria: Heritage House, 2014) at 36–37.

<sup>116</sup> The variety of Indigenous political positions is discussed in Sandy Grande, *Red Pedagogy: Native American Social and Political Thought* (Lanham, Md: Rowman & Littlefield, 2004).

<sup>117</sup> See Vine Deloria, Jr & Clifford M Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983) at 122 (lawyers' narratives tend to dominate Indigenous communities in unhealthy ways when providing advice about Indigenous law). See also Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579.

<sup>118</sup> The issues in this and subsequent sentences related to the sources of law are discussed in Borrows, *Indigenous Constitution*, *supra* note 12 at 23–58.

<sup>119</sup> See Mark D Walters, "'According to the Old Customs of Our Nation': Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847" (1998) 30:1 Ottawa L Rev 1 at 24–43.

<sup>120</sup> See Christopher Alcantara, *Negotiating the Deal: Comprehensive Land Claims Agreements in Canada* (Toronto: University of Toronto Press, 2013).

<sup>121</sup> See JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).

<sup>122</sup> For the work of tribal courts as interpretive communities, see Fletcher, *Tribal Law*, *supra* note 84; Richland & Deer, *supra* note 85; Garrow & Deer, *supra* note 85; Richland, *Arguing with Tradition*, *supra* note 85; Austin, *supra* note 86.

<sup>123</sup> Nunavut exemplifies how Inuit law can find its way into statutory instruments. To see how the concept of *Inuit Qaujimagatuqangit* has been embedded in statute, see *Mid-*

ries<sup>125</sup> as well as on wampum belts,<sup>126</sup> scrolls,<sup>127</sup> totem poles,<sup>128</sup> button blankets,<sup>129</sup> rocks,<sup>130</sup> paper,<sup>131</sup> and other media.<sup>132</sup> People also reference “the sacred” in some instances to develop law.<sup>133</sup> My favourite source of Indigenous law flows from observation and deliberation concerning the environment. Indigenous peoples use events in the natural world as a resource for understanding how they should act in their own sphere.<sup>134</sup> Law

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*wifery Profession Act*, SNu 2008, c 18; *Education Act*, SNu 2008, c 15; *Official Languages Act*, RSNWT 1988, c O-1, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Inuit Language Protection Act*, SNu 2008, c 17.

<sup>124</sup> The role of songs in Anishinaabe law is discussed in Thomas Vennum, *The Ojibwa Dance Drum: Its History and Construction* (Saint Paul: Minnesota Historical Society Press, 2009) at 93–103; Frances Densmore, *Chippewa Customs*, reprint ed (Saint Paul: Minnesota Historical Society Press, 1979) at 95–97, 107. For the role of song in Indigenous legal traditions, which includes singing the law, see Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991) at 4–7.

<sup>125</sup> See Borrows, “With or Without You”, *supra* note 110 for a discussion of First Nations’ use of stories in legal contexts.

<sup>126</sup> See William N Fenton, “Structure, Continuity, and Change in the Process of Iroquois Treaty Making” in Francis Jennings et al, eds, *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse: Syracuse University Press, 1985) 3; 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.

<sup>127</sup> See generally Selwyn Dewdney, *The Sacred Scrolls of the Southern Ojibway* (Toronto: University of Toronto Press, 1975).

<sup>128</sup> For a discussion of First Nations’ use of totem poles as political and social communication devices, see Marius Barbeau, *Totem Poles According to Crests and Topics* (Ottawa: National Museum of Canada, 1950) vol 1; Michael D Blackstock, *Faces in the Forest: First Nations Art Created on Living Trees* (Montreal: McGill-Queen’s University Press, 2001) at xxiii–xxvi, 150–51.

<sup>129</sup> See Maxine Matilpi, *Button Blanket Pedagogy* (March 30, 2010) [on file with the author].

<sup>130</sup> See Ron Morton & Carl Gawboy, *Talking Rocks: Geology and 10,000 Years of Native American Tradition in the Lake Superior Region* (Minneapolis: University of Minnesota Press, 2003); Grace Rajnovich, *Reading Rock Art: Interpreting the Indian Rock Paintings of the Canadian Shield* (Toronto: Natural Heritage/Natural History, 1994).

<sup>131</sup> See Heidi Bohaker, “Reading Anishinaabe Identities: Meaning and Metaphor in *Nindoodem* Pictographs” (2010) 57:1 *Ethnohistory* 11.

<sup>132</sup> See *ibid.*

<sup>133</sup> See Fikret Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Philadelphia: Taylor & Francis, 1999); Michael Angel, *Preserving the Sacred: Historical Perspectives on the Ojibwa Midewiwin* (Winnipeg: University of Manitoba Press, 2002).

<sup>134</sup> See generally CF Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011).

is a human activity embedded in a larger natural world.<sup>135</sup> It relies on persuasion, discussion, argumentation, contestation, mediation, and coercion to bring insights from natural and sacred sources into the human realm. By distinguishing or drawing analogies<sup>136</sup> from the behaviour of water, wind, rocks, plants, insects, birds, and animals, Indigenous peoples generate standards for how humans should regulate themselves and resolve their disputes.<sup>137</sup>

I am asserting that the teaching of Anishinaabe law is best facilitated by understanding and working through Indigenous legal epistemologies<sup>138</sup> (or as the Anishinaabe would say *Anishinaabe gikendaasowinan* or *izhitwaawinan*). We must study the nature, sources, and limits of knowledge as articulated by Indigenous peoples themselves to best teach Indigenous law.<sup>139</sup> We must develop an understanding of how Indigenous peoples create and justify what they think they know to be true in their own terms.<sup>140</sup> When we pay attention to Indigenous epistemologies, we

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<sup>135</sup> See Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22; Mills, *Eagle Down*, *supra* note 86 at 38; Antonia Mills, ed, *‘Hang Onto These Words’: Johnny David’s Delgamuukw Evidence* (Toronto: University of Toronto Press, 2005) at 75–89. Each of these sources describes how crests, feasts, poles, and other legal markers are rooted in the natural world.

<sup>136</sup> For a general discussion of analogical reasoning, see Cass R Sunstein, “On Analogical Reasoning”, *Commentary*, (1993) 106:3 *Harv L Rev* 741.

<sup>137</sup> For discussions of these methodologies more generally, see Keith H Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque: University of New Mexico Press, 1996) at 8–22; Gregory Cajete, *Look to the Mountain: An Ecology of Indigenous Education* (Skyland, NC: Kivaki Press, 1994) at 23–38.

<sup>138</sup> See Kathleen E Absolon (Minogüzhigokwe), *Kaandossiwin: How We Come to Know* (Halifax: Fernwood, 2011) at 167–68.

<sup>139</sup> For a discussion of these methods in a broader context, see generally Wendy Makoons Geniusz, *Our Knowledge Is Not Primitive: Decolonizing Botanical Anishinaabe Teachings* (Syracuse: Syracuse University Press, 2009).

<sup>140</sup> See e.g. Gisday Wa & Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet’suwet’en Hereditary Chiefs in The Supreme Court of British Columbia* (Gabriola, BC: Reflections, 1989) at 26:

The pole which encodes the history of the House through its display of crests, also recreates, by reaching upwards, the link with the spirit forces that give the people their power. At the same time it is planted in the ground, where its roots spread out into the land, thereby linking man, spirit power, and the land so they form a living whole. Integral to this link and the maintenance of the partnership, is adherence to the fundamental principles of respect for the land and for its life forms.

will be in a better position to organize teaching materials for future Indigenous law practitioners.<sup>141</sup>

As I have been suggesting, Anishinaabe narrative is one (and only one) way to accomplish this task. As I think about how Anishinaabe narratives are organized, I recognize that they are correlated in different ways.<sup>142</sup> There is a creation story epic.<sup>143</sup> There is an extended chronicle of Nanaboozhoo and his travels.<sup>144</sup> There is a cycle of stories connecting Nanaboozhoo to his brother and broader family.<sup>145</sup> There are also stories about Nanaboozhoo that contain standards about how non-humans should relate to the natural world, and to one another.<sup>146</sup> Some of these stories are about how the winds, rocks, plants, birds, and animals counselled and interacted with humans in a time before time (*mewizha*).<sup>147</sup> These stories are often called *aadozookaanak*.<sup>148</sup> They are recited in different ways with different sequencing throughout Anishinaabe territories in Ontario, Manitoba, Saskatchewan, North Dakota, Minnesota, Wisconsin, and Michigan. There is another class of stories known as

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<sup>141</sup> For further discussions of Indigenous research methodologies, see generally Shawn Wilson, *Research Is Ceremony: Indigenous Research Methods* (Halifax: Fernwood, 2008); Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed (New York: Zed Books, 2012).

<sup>142</sup> See generally Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiiik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013).

<sup>143</sup> See 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 at 98 (“the natural things around us also had their own part in the ongoing Creation”).

<sup>144</sup> See generally Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 1 (Leyden: EJ Brill, 1917).

<sup>145</sup> See Basil Johnston, *The Manitous: The Spiritual World of the Ojibway* (New York: Harper Collins, 1995) at 17–96 [Johnston, *The Manitous*]. For commentary on Nanabush and kinship, see Robert Alexander Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation* (Winnipeg: University of Manitoba Press, 2013) at 23–42.

<sup>146</sup> See e.g. Keewaydinoquay Peschel, *Keewaydinoquay, Stories from My Youth*, ed by Lee Boisvert (Ann Arbor: University of Michigan Press, 2006) at 76–95.

<sup>147</sup> See e.g. Michael Pomedli, *Living with Animals: Ojibwe Spirit Powers* (Toronto: University of Toronto Press, 2014).

<sup>148</sup> See John D Nichols & Earl Nyholm, *A Concise Dictionary of Minnesota Ojibwe* (Minneapolis: University of Minnesota Press, 1995) *sub verbo* “legend”, “myth”. See also Timothy Cochrane, *Minong—The Good Place: Ojibwe and Isle Royale* (East Lansing: Michigan State University Press, 2009) at 42–54.

*dibaajimowinan*.<sup>149</sup> These narratives chronicle more recent events and they recall the names, places, and activities of people who may have lived in the more recent past.<sup>150</sup> Some of these cases involve human relationships prior to European arrival, while yet others relate to treaty and later colonial actors in their interactions with non-Anishinaabe people.<sup>151</sup>

*Aadozookaanak* and *dibaajimowinan* contain recognizable patterns of thought and action.<sup>152</sup> Many characters recurrently appear in different contexts to demonstrate how to regulate life and resolve disputes.<sup>153</sup> This is why they can provide resources for reasoning in a legal context, even as they function as entertainment-oriented, psychological, or spiritual narratives in other spheres.<sup>154</sup> They provide a basis for organizing the teaching of law.

In reviewing these narratives, I am struck by the persistent appearance of four character types: Heroes, Tricksters, Monsters, and Caretakers. Just as Friedland recognized in dealing with Windigos, these characters exist as ideal types; their actions can be compared and contrasted to contemporary behaviours and analogized or distinguished to guide present actions.<sup>155</sup> The principles generated from their activities can be applied to people today. Reference to these characters provides one way of organizing the vast body of Anishinaabe authority, as follows:

- Heroes are figures who brought us to the place we are. In applying these precedents, we can ask: how do we draw reasoning and standards for judgment from their activities?

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<sup>149</sup> See Basil H Johnston, *Anishinaubae Thesaurus* (East Lansing: Michigan State University Press, 2007) at 16; Margaret Noodin, “*Megwa Baabaamiiaayaayaang Dibaajomoyaang*: Anishinaabe Literature as Memory in Motion” in James H Cox & Daniel Heath Justice, eds, *The Oxford Handbook of Indigenous American Literature* (New York: Oxford University Press, 2014) 175 at 176.

<sup>150</sup> See e.g. Helen Agger, *Following Nimishoomis: The Trout Lake History of Dedibaayaan-imaanook Sarah Keesick Olsen* (Penticton: Theytus Books, 2008).

<sup>151</sup> See Niigonwedom James Sinclair, *Nindoodemag Bagijiganan: A History of Anishinaabeg Narrative* (PhD Thesis, University of British Columbia Faculty of Graduate Studies, 2013) [unpublished] at 30.

<sup>152</sup> See Jaime Cidro, “Nanabush Storytelling as Data Analysis and Knowledge Transmissions” (2012) 32:2 *Can J Native Stud* 159.

<sup>153</sup> This was the methodology used in Borrows, *Drawing*, *supra* note 106. This idea is also found in Thomas Peacock & Marlene Wisuri, *The Four Hills of Life: Ojibwe Wisdom* (Afton, Minn: Afton Historical Society Press, 2006).

<sup>154</sup> For a discussion of the layered nature of Anishinaabe narrative, see Mary B Black, “Ojibwa Taxonomy and Percept Ambiguity” (1977) 5:1 *Ethos* 90 [Black, “Percept Ambiguity”].

<sup>155</sup> See Friedland, Wetiko *Principles*, *supra* note 37 at 34.



- Tricksters are figures who turn the established order of life on its head to confirm, change, or transform generally accepted norms. In analogizing from their behaviours to our own, we can likewise ask: how do we draw reasoning and standards for judgment from their experiences?
- Monsters are figures of destruction and dissolution. There is value in considering: how do we draw reasoning and standards for judgment from their lessons?
- Caretakers are figures who encourage, mend, heal, reconcile, and make whole. As with the other figures, when considering their actions, we can ask: how do we draw reasoning and standards for judgment from their actions?

In applying these categories, I can imagine teaching a law school course or organizing an entire curriculum in Anishinaabe law on this basis. Of course, there are other ways of correlating materials, which combine other Anishinaabe legal methodologies. Despite other possible patterns, in the next few pages I briefly discuss legal lessons that may be learned by reference to these four categories and I indicate the kinds of cases that might fall within each order.

In reciting the cases/stories in each category, I do not have the space in an article of this brevity to provide the facts of each narrative. Unfortunately, this will make the stories much less interesting.<sup>156</sup> Nevertheless, those who are familiar with Anishinaabe law will understand the references below. For those unfamiliar with this tradition, the references to each case/story will sound obscure. It might be like reading about cases in a law review article that discusses a field in which you have no experience. For instance, if a writer were to discuss leading insurance, banking, or telecommunications cases, I would not immediately understand their references. I would have to do the additional work of reading the cases to which they refer. I might even have to undertake a more in-depth study of the field to accept or critique their categorical summaries. Until this occurred, I would not have the tools to evaluate their work. Some readers may have this experience in the next few paragraphs.

Fortunately, detailed studies of Anishinaabe law are being prepared by me and other legal academics.<sup>157</sup> Graduate students, professors, and

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<sup>156</sup> For a discussion on how stories are critical to the continual recreation of our social worlds, see generally Thomas King, *The Truth about Stories: A Native Narrative* (Toronto: House of Anansi Press, 2003).

<sup>157</sup> Work on Anishinaabe law is being advanced by Matthew Fletcher, Aaron Mills, Lindsay Borrows, Heidi Stark, Aimée Craft, Jeff Hewitt, Valerie Waboose, Darren O'Toole, and Hannah Askew, among others.

community practitioners are also engaged in this work.<sup>158</sup> Of course, the stories are more interesting when they are told in full. This is one of the reasons these stories have continuing currency within Anishinaabe communities.<sup>159</sup> They allow readers and students to learn each case and its relationship to other stories in greater detail and in context.<sup>160</sup> The purpose of this article, however, is not to analyze any one case in great detail and apply it to a particular dispute. This article is directed to the question of organizing entire fields of Anishinaabe law for teaching purposes, rather than digging deeper within one area of inquiry. Anishinaabe people already teach and practise law by reference to Heroes, Tricksters, Monsters, and Caretakers. I hope this brief overview introduces one way of organizing this legal tradition to a wider audience.

### 1. Heroes

Anishinaabe heroes are numerous.<sup>161</sup> Many inspiring figures have shaped our understanding of where we are today.<sup>162</sup> Anishinaabe heroes illustrate how humans can regulate behaviours, relate to their environments, and resolve their disputes.<sup>163</sup> In the creation cycle, Gizhe-manidoo is a pre-eminent hero who set in motion the systems that regulate our lives.<sup>164</sup> The turtle who gave his back to house the Earth and the muskrat who sacrificed himself to bring up soil to lodge on the turtle's back are also Anishinaabe heroes.<sup>165</sup> They sacrificed personal comfort and even life

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<sup>158</sup> See e.g. Deborah McGregor, "Coming Full Circle: Indigenous Knowledge, Environment, and Our Future" (2004) 28:3&4 *Am Indian Q* 385.

<sup>159</sup> See Sharla Peltier, *Valuing Children's Storytelling from an Anishinaabe Orality Perspective* (MEd Thesis, Nipissing University Faculty of Education, 2010) [unpublished] at 84–122.

<sup>160</sup> See Basil H Johnston, *Tales the Elders Told: Ojibway Legends* (Toronto: Royal Ontario Museum, 1981) at 7.

<sup>161</sup> See e.g. Anton Treuer, *The Assassination of Hole in the Day* (Saint Paul: Borealis Books, 2011) at 9–34; William W Warren, "History of the Ojibway Nation" in *Collections of the Minnesota Historical Society* (Saint Paul: Minnesota Historical Society, 1885) vol 5 at 41–53; Theresa M Schenck, *"The Voice of the Crane Echoes Afar": The Sociopolitical Organization of the Lake Superior Ojibwa, 1640–1855* (New York: Garland, 1997) at 71–83.

<sup>162</sup> See e.g. Thomas Peacock & Marlene Wisuri, *Ojibwe Waasa Inaabidaa: We Look in All Directions* (Afton, Minn: Afton Historical Society Press, 2002) at 112–32.

<sup>163</sup> See G Copway, *The Traditional History and Characteristic Sketches of the Ojibway Nation* (London: Charles Gilpin, 1850) at 97–118.

<sup>164</sup> See Basil H Johnston, *Think Indian: Languages Are Beyond Price* (Warton, Ont: Kege-donce Press, 2011) at 168–76.

<sup>165</sup> See Nicolas Perrot, "Memoir on the Manners, Customs, and Religion of the Savages of North America" in Emma Helen Blair, ed, *The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes* (Cleveland: Arthur H Clark, 1911) vol 1 at 30–37;

itself, in the case of the muskrat, so that others might live. The raven who searched for land and the wolf who searched the Earth after the land expanded fall into this category too.<sup>166</sup> They showed that creation is not finished; it is still ongoing.<sup>167</sup> Law is an open-ended, never-ending search for answers to human and other dysfunctions.<sup>168</sup>

The first animal ancestors of Anishinaabe clans or *doodem* also fulfill the function of bringing us to “where we are”. When my first ancestor the otter (*nigig*) died, it is said that all subsequent people from my clan owe their origin to our emergence from his carcass.<sup>169</sup> Anishinaabe people are in an evolutionary relationship with animals and are descended from them.<sup>170</sup> Each of these characters can provide important lessons about how Anishinaabe society is constituted. Each narrative communicates standards for judgment that can be applied today in organizing our societies and affairs. They illustrate how leaders should function in their spheres.<sup>171</sup> They show the open-ended nature of law as a part of the continuing creation of the world. These cases demonstrate how governance can be organized within and among families.<sup>172</sup> They explain how human constitutionalism is embedded in a broader natural-world context.<sup>173</sup>

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Pierre François Xavier de Charlevoix, *Journal of a Voyage to North America*, ed by Louise Phelps Kellogg (Chicago: The Caxton Club, 1923) vol 2 at 43.

<sup>166</sup> See Michelson, *supra* note 144 at 153–59.

<sup>167</sup> See Deborah McGregor, “Anishinaabe Environmental Knowledge” in Andrejs Kulnieks, Dan Rononhiakewen Longboat & Kelly Young, eds, *Contemporary Studies in Environmental and Indigenous Pedagogies: A Curricula of Stories and Place* (Rotterdam: Sense, 2013) 77 at 78.

<sup>168</sup> For a deeper discussion of how legal scholarship has wrestled with the inherent imperfections of ordering human behaviour through law, see Martha-Marie Kleinhans & Roderick A Macdonald, “What is a *Critical Legal Pluralism*?” (1997) 12:2 *CJLS* 25.

<sup>169</sup> See Perrot, *supra* note 165 at 37:

After the creation of the earth, all the other animals withdrew into the places which each kind found most suitable for obtaining therein their pasture or their prey. When the first ones died, the Great Hare caused the birth of men from their corpses, as also from those of the fishes which were found along the shores of the rivers which he had formed in creating the land. Accordingly, some of [them] derive their origins from a bear, others from a moose, and others similarly from various kinds of animals. ... You will hear them say that their villages each bear the name of the animal which has given its people their being—as that of the crane, or the bear, or of other animals.

<sup>170</sup> See *ibid* at 62.

<sup>171</sup> See generally Cary Miller, *Ogimaag: Anishinaabeg Leadership, 1760–1845* (Lincoln: University of Nebraska Press, 2010).

<sup>172</sup> See generally Laura Peers & Jennifer SH Brown, “There Is No End to Relationship Among the Indians’: Ojibwa Families and Kinship in Historical Perspective” (2000) 4:4

Likewise, narratives related to Nanaboozhoo and his brothers also contain many references to a hero figure.<sup>174</sup> Nanaboozhoo is the fourth but most prominent brother in this cycle of stories.<sup>175</sup> Nanaboozhoo can be a hero, though he is often more of a trickster, and his role as such will be discussed in the next section. Nanaboozhoo's father is Epingishmook and his mother is Winona.<sup>176</sup> His parents demonstrate our constitutional entanglements with the past, even as such entanglements do not overdetermine how we might act today. For instance, both of Nanaboozhoo's parents eventually die and they have little involvement in his life.<sup>177</sup> In fact, Nanaboozhoo is raised by his grandmother Nokomis, who becomes one of the Caretaker figures discussed in the final category below.<sup>178</sup> Nanaboozhoo has three older brothers who bring gifts to the world as heroes, though they each have trickster-like qualities too.<sup>179</sup> While these are male figures, gender does not function as a constraint in applying legal principles gleaned from their lives. Each of these figures is a transformer, after all.

Madjiikewiss is Nanaboozhoo's oldest brother.<sup>180</sup> He was a warrior and diplomat. He brought knowledge of other Indigenous peoples to the Anishinaabe. From his travels, the Anishinaabe learned about other peoples' laws and sometimes made these practices their own. Madjiikewiss also brought treaties to the Anishinaabe.<sup>181</sup> He learned about the practice of creating wampum belts from other people (the bears) and introduced this practice to them through great heroic deeds.<sup>182</sup> Madjiikewiss also became the leader of the Bear Nation. His actions set a pattern for chieftainship and leadership among the Anishinaabe. Legal lessons related to treaties,

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History Family 529; Donald J Auger, *The Northern Ojibwe and Their Family Law* (PhD Dissertation, Osgoode Hall Law School, 2001) [unpublished].

<sup>173</sup> See Winona LaDuke, "Traditional Ecological Knowledge and Environmental Futures" (1994) 5:1 *Colo J Intl Env'tl L & Pol'y* 127 at 128.

<sup>174</sup> See e.g. Alethea K Helbig, ed, *Nanaboozhoo: Giver of Life* (Brighton, Mich: Green Oak Press, 1987).

<sup>175</sup> See Johnston, *The Manitous*, *supra* note 145 at 50–95.

<sup>176</sup> See Basil Johnston, *Ojibway Ceremonies* (Lincoln: University of Nebraska Press, 1982) at 165–66 [Johnston, *Ojibway Ceremonies*].

<sup>177</sup> See "The Birth of Nanabushu" in Michelson, *supra* note 144 at 3.

<sup>178</sup> See Brenda J Child, *Holding Our World Together: Ojibwe Women and the Survival of Community* (New York: Viking, 2012) at 15–16.

<sup>179</sup> See Johnston, *The Manitous*, *supra* note 145 at 17–49.

<sup>180</sup> See Basil Johnston, *Ojibway Heritage* (Toronto: McClelland and Stewart, 1976) at 151–53 [Johnston, *Ojibway Heritage*].

<sup>181</sup> See Johnston, *The Manitous*, *supra* note 145 at 17–25.

<sup>182</sup> See Pomedli, *supra* note 147 at 26.

governance, diplomacy, and war can be drawn from the cases describing his life. Nanaboozhoo interacts with his other two brothers, Pakwiss<sup>183</sup> and Chiibayoozhoo,<sup>184</sup> who also bring other leadership, governance, and dispute resolution issues to light.<sup>185</sup>

In other stories related to plants, insects, birds, and animals, lessons about treaties, governance, diplomacy, and dispute resolution abound.<sup>186</sup> The skunk is a hero as he sacrifices himself to Nanaboozhoo for food in return for his descendants having protective smells and stripes.<sup>187</sup> Heroic deeds by eagles,<sup>188</sup> cranes,<sup>189</sup> robins,<sup>190</sup> seagulls,<sup>191</sup> woodpeckers,<sup>192</sup> and other birds teach the Anishinaabe about family law duties and relationships in numerous forms.<sup>193</sup> The same goes for most other life forms. When a person schooled in Anishinaabe law sees a plant, insect, bird, or animal, they may also see a case, a set of legal teachings, and principles to guide their own relationships.<sup>194</sup>

Heroes also manifest legal principles related to broader economic and social obligations.<sup>195</sup> Reciprocity and redistribution of wealth receive significant emphasis in Anishinaabe law, along with fierce competition and

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<sup>183</sup> See Johnston, *The Manitous*, *supra* note 145 at 26–35; Philip P Mason, ed, *Schoolcraft's Ojibwa Lodge Stories: Life on the Lake Superior Frontier* (East Lansing: Michigan State University Press, 1997) at 117–19.

<sup>184</sup> See Johnston, *The Manitous*, *supra* note 145 at 36–49.

<sup>185</sup> See *ibid* at 21–24.

<sup>186</sup> See Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring, 2011) at 74–83.

<sup>187</sup> See Patronella Johnston, *Tales of Nokomis* (Toronto: Charles J Musson, 1970) at 5–7 [P Johnston, *Tales of Nokomis*].

<sup>188</sup> See “The Man Who Was Taken Away by the Great Eagle” in Howard Webkamigad, *Ottawa Stories from the Springs* (East Lansing: Michigan State University Press, 2015) at 86–98.

<sup>189</sup> See Schenck, *supra* note 161.

<sup>190</sup> See Mentor L Williams, ed, *Schoolcraft's Indian Legends* (East Lansing: Michigan State University Press, 1956) at 106–08.

<sup>191</sup> See Basil H Johnston, *Honour Earth Mother* (Lincoln: University of Nebraska Press, 2003) at 88–94, 106–10 [Johnston, *Honour Earth Mother*].

<sup>192</sup> See Basil H Johnston, *The Bear-Walker and Other Stories* (Toronto: Royal Ontario Museum, 1995) at 49–53.

<sup>193</sup> See Pomedli, *supra* note 147 at 204–07.

<sup>194</sup> See Geniusz, *supra* note 139 at 118–20.

<sup>195</sup> An historic account of the complex nature of these obligations and the sacrifice required is discussed in Eric M Redix, *The Murder of Joe White: Ojibwe Leadership and Colonialism in Wisconsin* (East Lansing: Michigan State University Press, 2014) at 9–14.

the protection of individual wealth and initiative.<sup>196</sup> Narratives that communicate these principles include heroes from more recent *dibaajimowinan*.<sup>197</sup> These founding fathers and mothers function as exemplars in relation to governance and leadership decisions and thus the principles reflected in their actions can be applied or distinguished to activities taking place in the present day.

## 2. Tricksters

Tricksters challenge established orders.<sup>198</sup> They can turn them upside down to confirm, change, or transform generally accepted norms within society. As already noted, Nanaboozhoo (Nanabush) is the pre-eminent Anishinaabe trickster. As I wrote in *Recovering Canada*,

[t]he Trickster offers insights through encounters that are simultaneously altruistic and self-interested. ... “The Trickster, The Teacher is a paradox: Christ-like in a way. Except that from our Teacher, we learn through the Teacher’s mistakes as well as the Teacher’s virtues.” In his adventures, Nanabush roams from place to place and fulfils his goals by using ostensibly contradictory behaviours such as charm and cunning, honesty and deception, kindness and mean tricks. The Trickster also displays transformative power as he takes on new personae in the manipulation of these behaviours and in the achievement of his objectives. Lessons are learned as the Trickster engages in actions which in some particulars are representative of the listener’s behaviour while in others they are not. The Trickster encourages an awakening of understanding because listeners are compelled to confront and reconcile the notion that their ideas may be partial and their viewpoints limited. Nanabush can kindle these understandings because his actions take place in a perplexing realm

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<sup>196</sup> See Mary B Black, “Ojibwa Power Belief System” in Raymond D Fogelson & Richard N Adams, eds, *The Anthropology of Power: Ethnographic Studies from Asia, Oceania, and the New World* (New York: Academic Press, 1977) 141 at 146–47 [Black, “Ojibwa Power”]; Edmund Jefferson Danziger, Jr, *The Chippewas of Lake Superior* (Norman: University of Oklahoma Press, 1979) at 11–20, 23; Charles E Cleland, *Rites of Conquest: The History and Culture of Michigan’s Native Americans* (Ann Arbor: University of Michigan Press, 1992) at 60.

<sup>197</sup> The following books are about the lives of Anishnaabe heroes over the past 250 years and illustrate through stories their care of and obligations to their people: Donald B Smith, *Mississauga Portraits: Ojibwe Voices from Nineteenth-Century Canada* (Toronto: University of Toronto Press, 2013); Cecil King, *Balancing Two Worlds: Jean-Baptiste Assiginack and the Odawa Nation, 1768–1866* (Saskatoon: Saskatoon Fastprint, 2013); Winona LaDuke, *The Winona LaDuke Reader: A Collection of Essential Writings* (Stillwater, Minn: Voyageur Press, 2002); Dennis Banks, *Ojibwa Warrior: Dennis Banks and the Rise of the American Indian Movement* (Norman: University of Oklahoma Press, 2004).

<sup>198</sup> See generally Deanna Reder & Linda M Morra, eds, *Troubling Tricksters: Revisioning Critical Conversations* (Waterloo: Wilfrid Laurier Press, 2010).

that partially escapes the structures of society and the cultural order of things.<sup>199</sup>

Law needs critique to be healthy and self-reflexive.<sup>200</sup> It requires recognition that viewpoints may be partial, that bias and limited perspectives can negatively affect judgment.<sup>201</sup> People within a legal tradition must be able to challenge effectively older ways of doing things.<sup>202</sup> Individuals and societies can get stuck in unhealthy patterns in relating to one another and the broader world.<sup>203</sup> When this occurs, authoritative mechanisms drawn from within a tradition, or from another tradition, can breathe new life into a society.<sup>204</sup> It can cause people to abandon discriminatory, unproductive, inefficient, or unreasonable laws.

In the legal realm, the Trickster “reveals the cultural construction and contingency of law.”<sup>205</sup> This is why an entire category of law can be taught through these stories. Nanaboozhoo’s narratives expose Anishinaabe law’s hidden cultural assumptions and disorders. In so doing, Anishinaabe people gain access to the world of dissenting opinions, minority reports, and oppositional viewpoints within their legal tradition. Discord, dissention, and disagreement are not outside Anishinaabe law. Conflict and differentiation are firmly rooted within it, thus providing access to creative and innovative ways of recalibrating regulatory and adjudicatory decisions.

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<sup>199</sup> Borrows, *Recovering Canada*, *supra* note 27 at 56 [footnotes omitted].

<sup>200</sup> For an exploration of critique at the intersection of law and narrative, see Desmond Manderson, “Modernism and the Critique of Law and Literature” (2011) 35 *Austl Fem LJ* 107; Martha Minow, “Introduction: Robert Cover and Law, Judging, and Violence” in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 1.

<sup>201</sup> See Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42:1 *McGill LJ* 91.

<sup>202</sup> For the importance of internal critique within Indigenous communities, see Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham, NC: Duke University Press, 2014); Emma LaRocque, *When the Other Is Me: Native Resistance Discourse, 1850–1990* (Winnipeg: University of Manitoba Press, 2010); Jill Doerfler, *Those Who Belong: Identity, Family, Blood, and Citizenship Among the White Earth Anishinaabeg* (East Lansing: Michigan State University Press, 2015).

<sup>203</sup> For discussions of unhealthy patterns of Indigenous life within and between peoples, see Coulthard, *supra* note 78 at 105–30; Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich, 2011) at 17–21; Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 40–45.

<sup>204</sup> For a discussion of the need to draw on ideas that are outside of one’s conventional repertoires of thought, see Joseph Henrich, Steven J Heine & Ara Norenzayan, “The Weirdest People in the World?” (2010) 33:2/3 *Behavioral & Brain Sciences* 61; Steve Russell, *Sequoyah Rising: Problems in Post-Colonial Tribal Governance* (Durham, NC: Carolina Academic Press, 2010) at 141–49.

<sup>205</sup> Borrows, *Recovering Canada*, *supra* note 27 at 57.

Cases that bring Nanaboozhoo's critical insights to light include his conflicts with Michi-bizhew,<sup>206</sup> his fights with his father (Epingishmook),<sup>207</sup> his rebellion against Nokomis,<sup>208</sup> and his slaying of Toad-Woman.<sup>209</sup> While Anishinaabe people aspire to bestow respect on their Elders and Caretakers, these narratives suggest that obedience to older, recognized authorities should not be blindly given.<sup>210</sup> While Nanaboozhoo's actions are not universally exemplary, as he is as likely to perform comic or cruel as opposed to kind deeds in these narratives, they do suggest the need to work through issues in context.<sup>211</sup> This approach counsels against an automatic reliance on the application of generally accepted principles as we regulate or adjudicate matters in our society.<sup>212</sup> They also caution us against placing too much trust in our own stories, including stories involving the Trickster.

In other contexts, I have also written about Nanaboozhoo's actions in stealing fire,<sup>213</sup> creating butterflies,<sup>214</sup> making and breaking treaties with the deer,<sup>215</sup> breaking the ducks' necks,<sup>216</sup> attempting to deceive the wolves,<sup>217</sup> and chastening the animals for wrongly blaming the rabbits for the roses' scarcity and near demise.<sup>218</sup> These stories also alternatively portray Nanaboozhoo in both a good and a bad light. They make the point

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<sup>206</sup> See Theresa S Smith, *The Island of the Anishnaabeg: Thunderers and Water Monsters in the Traditional Ojibwe Life-World* (Moscow, Idaho: University of Idaho Press, 1995) at 104.

<sup>207</sup> See Johnston, *Ojibway Heritage*, *supra* note 180 at 151.

<sup>208</sup> Nokomis is Nanaboozhoo's grandmother (see Michelson, *supra* note 144 at 451–56).

<sup>209</sup> See *ibid* at 145–58.

<sup>210</sup> See Roger Spielmann, *'You're So Fat!': Exploring Ojibwe Discourse* (Toronto: University of Toronto Press, 1998) at 130–38 (for a discussion of conditions concerning agency in relation to complaints).

<sup>211</sup> See Gerald Vizenor, "A Postmodern Introduction" in Gerald Vizenor, ed, *Narrative Chance: Postmodern Discourse on Native American Indian Literatures* (Norman: University of Oklahoma Press, 1989) 1 at 13 (the Trickster is "a 'doing,' not an essence, not a museum being, not an aesthetic presence"). See also Gerald Vizenor, "Trickster Discourse" (1989) 5:1 *Wicazo Sa Rev* 2 (for discussion on "trickster discourse" in Native American narratives).

<sup>212</sup> See Franchot Ballinger, *Living Sideways: Tricksters in American Indian Oral Traditions* (Norman: University of Oklahoma Press, 2004) at 15–18, 23–25.

<sup>213</sup> See Borrows, *Recovering Canada*, *supra* note 27 at 73–75.

<sup>214</sup> See Borrows, *Drawing*, *supra* note 106 at 14–16; Borrows, "Indigenous Legal Community", *supra* note 1 at 166–68.

<sup>215</sup> See Borrows, *Recovering Canada*, *supra* note 27 at 16–20.

<sup>216</sup> See *ibid* at 47–51.

<sup>217</sup> See *ibid* at 16–20.

<sup>218</sup> See *ibid* at 49–50.



that trust and fiduciary-like responsibilities must be subject to rigorous checks and balances.

The Trickster demonstrates that power can be exercised in ways that undermine relationships and threaten stability, safety, health, and security (as the treaty, duck, wolf, and roses cases show). At the same time, these cases illustrate that it can be important to encourage and authorize risk (as the stealing fire and creation of butterflies cases reveal). Societies cannot prosper if risk is eliminated, but neither are they healthy if the consequences of risk are not internalized. The need to harmonize checks and balances can be reasoned through by using principles that partially flow from Trickster cases. I note that this has occurred in the Anishinaabe Tribal Court context in the United States where Anishinaabe courts have drawn upon these stories to hold their leaders to standards of conduct that condemn and restrain self-serving over-reaching.<sup>219</sup>

### 3. Monsters

Monsters, like humans, are figures of destruction and dissolution. They can be devious, harsh, and malicious. They gratify themselves at others' expense and take pleasure in the resultant degradation. They destroy their environment in ways that make it difficult for others to thrive or survive. They violently lash out at their challengers. Humans, as monsters, attempt to destroy competitors' reputations and opportunities by characterizing them as religiously, economically, politically, socially, or otherwise different, dangerous, or deranged. Humans oppress their neighbours, acquaintances, and enemies in the name of freedom, liberty, and security. They kill, maim, ravage, violate, spoil, desecrate, and defile life and other beings' bodily integrity.

Humans are monstrous; they are figures of destruction and dissolution. They are metamorphic, in both meanings of the term.<sup>220</sup> Humans can

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<sup>219</sup> See e.g. *Champagne v The People of the Little River Band of Ottawa Indians* (2006), Case No 06-178-AP (Little River Band of Ottawa Indians, Tribal Court of Appeals). See also Fletcher, *Tribal Law*, *supra* note 84 at 405–12.

<sup>220</sup> See Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Routledge, 2002) at 169, citing JB Robinet, *Considerations philosophiques de la gradation naturelle des formes de l'être* (Paris: Charles Saillant, 1768) at 4–5:

[Monsters are] metamorphoses of the prototype just as natural as the others, even though they present us with different phenomena; ... they serve as [a] means of passing to adjacent forms; ... they prepare and bring about the combinations that follow them, just as they themselves were brought about by those that preceded them; ... far from disturbing the order of things, they contribute to it. It is only, perhaps, by dint of producing monstrous beings that nature succeeds in producing beings of greater regularity and with a more symmetrical structure.

also be beautiful, gentle, and nurturing, as I will explain in the next section.

Any legal tradition worth its salt must deal with the worst excesses of human nature.<sup>221</sup> It must deal with its monsters.<sup>222</sup> Responses to violence through coercion and persuasion are very present within the body of Anishinaabe law. There were serial killers, child abusers, kidnappers, predators, rapists, warmongers, and thieves throughout Anishinaabe history.<sup>223</sup> These same behaviours are found among our people today. In this respect, the Anishinaabe are like all people on Earth. Stories about how our communities dealt with monstrous behaviour are found throughout the corpus of Anishinaabe thought.

How a community deals with Monsters can provide a way to organize Indigenous law.<sup>224</sup> I have written about monsters in Anishinaabe law in three prior pieces. One involves a character known as Pauguk who kills his brother in order to seek the affection of his brother's wife.<sup>225</sup> In this event, Pauguk is unsuccessful in achieving his perverted goals despite his brother's death. The case contains principles about the importance of separation and self-narration in chronicling violence as a means to deter future instances of potential violence.

A second piece involving Monsters concerns domestic violence and murder of a woman by her partner. This is the "Rolling Head" story.<sup>226</sup>

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<sup>221</sup> See Andrew N Sharpe, *Foucault's Monsters and the Challenge of Law* (New York: Routledge, 2010) at 2 ("the legal idea of the monster offers to inform contemporary thinking in relation to outsiders and their legal regulation").

<sup>222</sup> Foucault claimed that monsters were made outsiders through social, political, and legal processes (see Luciano Nuzzo, "Foucault and the Enigma of the Monster" (2013) 26 Intl J Semiotics L 55).

<sup>223</sup> Canadian courts have also had to deal with "monsters" from time to time. For a sample of references from the Supreme Court of Canada and the Ontario Court of Appeal, see *Reference Re Steven Murray Truscott*, [1967] SCR 309 at 398, 62 DLR (2d) 545; *R v Trochym*, 2007 SCC 6 at para 168, [2007] 1 SCR 239; *R v Romeo*, [1991] 1 SCR 86 at 91, 62 CCC (3d) 1; *R v MC*, 2014 ONCA 307 at para 1, 308 CCC (3d) 318; *R v Giesecke* (1993), 13 OR (3d) 553 at 556, 82 CCC (3d) 331 (CA); *R v Simcoe* (2002), 156 OAC 190 at para 3, 53 WCB (2d) 120 (CA); *R v Klair*, 71 OR (3d) 336 at para 2, 2004 CanLII 8965 (CA); *R v O (MJ)*, 2008 ONCA 361 at para 116, 233 CCC (3d) 380; *KK v KWG*, 2008 ONCA 489 at para 154, 294 DLR (4th) 202.

<sup>224</sup> For attention to how other Indigenous communities have dealt with monsters, see generally Halpin & Ames, *supra* note 105.

<sup>225</sup> I wrote about Pauguk in Borrows, *Drawing*, *supra* note 106 at 75–90. For further information, see Williams, *supra* note 190 at 236; Johnston, *The Manitou*, *supra* note 145 at 195–219.

<sup>226</sup> I wrote about the Rolling Head story in Snyder, Napoleon & Borrows, *supra* note 3 at 640–44.

The case is frequently written and spoken in Anishinaabe circles.<sup>227</sup> It concerns one of the most chilling stories in all Anishinaabe law. It involves a man who suspects his wife of having an affair with another person. Her partner seeks out the woman and kills her, placing her head in a tree after his foul deed. When the man returns to bury the evidence of his actions, he finds that his partner's head is still animate. It rolls through the forest seeking revenge on him. She tells all in her wake of her partner's murderous actions. Not everyone in her path responds well to her suffering. The case also relates ways to help children caught in the cycle of family violence.<sup>228</sup> It is a powerful case that contains many resources for dealing with violence.

The third kind of case I have written about concerning Anishinaabe law and Monsters deals with Windigos.<sup>229</sup> Windigo stories are legion.<sup>230</sup> As already noted, Windigos literally and figuratively suck the life out of people to satisfy their own appetites. Historically, when Anishinaabe diets were very precarious, Windigos were known to cannibalize human flesh.<sup>231</sup> In present terms, Windigos are more likely to feed their appetites through murder, sexual violence, and predation on vulnerable people.<sup>232</sup> In some contexts, Windigos might even consume entire environments

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<sup>227</sup> For other accounts of the Rolling Head story, see Michelson, vol 7, part 2, *supra* note 144 at 405–13; Williams, *supra* note 190 at 213; William Berens & A Irving Hallowell, *Memories, Myths, and Dreams of an Ojibwe Leader* (Montreal: McGill-Queen's University Press, 2009) at 164.

<sup>228</sup> See Snyder, Napoleon & Borrows, *supra* note 3 at 640–44.

<sup>229</sup> I wrote about Windigos in Borrows, *Drawing*, *supra* note 106 at 216–27; Borrows, *Indigenous Constitution*, *supra* note 12 at 81–84; Borrows, “Indigenous Legal Community”, *supra* note 1 at 169–71.

<sup>230</sup> For a sample of Windigo stories, see Victor Barnouw, *Wisconsin Chippewa Myths and Tales and Their Relation to Chippewa Life* (Madison: University of Wisconsin Press, 1977) at 120–31; Robert E Ritzenthaler & Pat Ritzenthaler, *The Woodland Indians of the Western Great Lakes* (Garden City, NY: Natural History Press, 1970) at 151–52; Louis Bird, *The Spirit Lives in the Mind: Omushkego Stories, Lives, and Dreams*, ed by Susan Elaine Gray (Montreal: McGill-Queen's University Press, 2007) at 112–26; Carlson, *supra* note 104; Berens & Hallowell, *supra* note 227 at 98–100; Thomas Fiddler & James R Stevens, *Killing the Shamen* (Moonbeam, Ont: Penumbra Press, 1985).

<sup>231</sup> See Johann Georg Kohl, *Kitchi-Gami: Life Among the Lake Superior Ojibway*, translated by Lascelles Wraxall (Saint Paul: Minnesota Historical Society Press, 1985) at 356–57.

<sup>232</sup> For potential common law analogies to this concept, see AW Brian Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (Chicago: University of Chicago Press, 1984); Allan C Hutchinson, *Is Eating People Wrong?: Great Legal Cases and How They Shaped the World* (Cambridge: Cambridge University Press, 2011).

through their greed, lust, and desires for money, power, or prestige.<sup>233</sup> The display of addict-like consumptive behaviour is one of the characteristics of a person who becomes a Windigo.

Friedland's study of Windigos concludes that Cree law generally deals with such people by trying to heal them. This best reduces the threat they pose to others. Friedland makes the point that there are clear legal procedures for dealing with Windigos. Some of these involve leaders, medicine people, and family members engaging in decision making in regard to the Windigo which is collective, transparent, and open.<sup>234</sup> Some of the legal steps for dealing with Windigos include: (1) recognizing warning signs related to harm,<sup>235</sup> such as when people shun human contact, display a lack of self-care, hide their actions, and engage in supernatural obsessions;<sup>236</sup> (2) observing the developing or transpired behaviour by gathering evidence to determine whether someone fits the category;<sup>237</sup> and (3) determining appropriate responses to harm by carefully calibrating responses to fit the circumstances.<sup>238</sup> These responses can be organized along a spectrum of increasingly harsh treatment,<sup>239</sup> which includes kindness, care, questioning, healing, separation, supervision, banishment, and death.<sup>240</sup> Friedland notes that these principles are all coloured by the need to ensure individual and community safety.<sup>241</sup> When a Windigo is treated, there should be no tolerance for further harm to others.

Friedland's research also revealed that a community also has legal obligations to both potential and past victims of the Windigo. There are specific duties for the Windigo when inquiring into harm and administering legal sanctions. Obligations to the community include the responsibility to help and protect those who have been or may be harmed.<sup>242</sup> These obligations are linked to the ability of the "judges" within the system to seek help from those strong enough to heal or deal with Windigos. Decision makers who deal with Windigos also have the responsibility to warn indi-

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<sup>233</sup> See Johnston, *The Manitous*, *supra* note 145 at 235–37; Damien Lee, "Windigo Faces: Environmental Non-Governmental Organizations Serving Canadian Colonialism" (2011) 31:2 *Can J Native Stud* 133.

<sup>234</sup> See Friedland, *Wetiko Principles*, *supra* note 37 at 83–88.

<sup>235</sup> See *ibid* at 88–90.

<sup>236</sup> See *ibid*.

<sup>237</sup> See *ibid* at 90–94.

<sup>238</sup> See *ibid* at 94–95.

<sup>239</sup> See *ibid* at 95, 121.

<sup>240</sup> See *ibid* at 95–104.

<sup>241</sup> See *ibid* at 121–22.

<sup>242</sup> See *ibid* at 104–07.

viduals and communities about wrongdoers when their behaviour represents a threat to others.<sup>243</sup> On the other hand, obligations that decision makers have toward a Windigo include: (1) the Windigo's right to be heard; (2) the right to have their closest family members involved in deciding their treatment; (3) the preservation of the Windigo's life, liberty, and safety; (4) the right to be helped; and (5) the right to ongoing support.<sup>244</sup>

In my review of Anishinaabe Windigo law, I came to similar conclusions when considering legal processes that must be followed in dealing with people who threaten community and individual safety. These principles were discussed in *Canada's Indigenous Constitution* in the following terms:

It is important to focus on the process and principles that guided the actions [of dealing with Windigos], rather than on the specific outcome. Some might read this [Windigo] case as an example of ad hoc, "uncivilized" practices. But a vast literature shows this pattern of dealing over long periods of time, and in different geographic regions where the Anishinabek lived. Furthermore, psychological illness (from which the man was probably suffering) would now be handled very differently. The Anishinabek, like other peoples around the world, have developed a more refined understanding of mental disorders. They would *not* kill the man. However, the underlying principles in this account remain, even if the process does not lead to the same result. Even today people can still:

- 1 wait, observe and collect information,
- 2 consult with their friends and neighbours when it is apparent something is wrong,
- 3 help the person who is threatening or causing imminent harm,
- 4 if the person does not respond to help and becomes an imminent threat to individuals or the community, he or she can be removed so that he or she does not harm others (though, to re-emphasize, the act does not involve what the common law has labelled capital punishment),
- 5 help those who rely on that person by restoring what might be taken from them by the treatment,
- 6 invite both the community and the individual to participate in the restoration.

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<sup>243</sup> See *ibid* at 115–16.

<sup>244</sup> See *ibid* at 112–14.

These legal principles provide the important elements of the case, and they show what can be learned from looking at the past. Anishinabek peoples will likely find familiarity with many of these approaches in their contemporary lives. As the Supreme Court of Canada wrote in the *Rodriguez* case in 1993, when it comes to determining principles of fundamental justice, “[t]he way to resolve these problems is not to avoid historical analysis, but to make sure that one is looking not just at the existence of the practice itself ... but at the rationale behind that practice and the principles which underlie it.”<sup>245</sup>

It is clear that Anishinaabe people have well-established ways of dealing with Monsters. Attention to contemporary mental health care is one such practice.<sup>246</sup> The particular practices used to deal with Windigos will continue to change. At the same time, important principles for dealing with Monsters are very much a part of Anishinaabe law. They can be marshalled today within the Monster category and used to organize materials to teach students about this legal tradition.

#### 4. Caretakers

Caretakers are figures who encourage, mend, heal, reconcile, and make whole.<sup>247</sup> As with the other figures discussed in this article, we can draw standards for judgment from the actions found within their narratives.

In considering Caretakers, I must acknowledge that the categories presented in this article can collapse. Categories are not mutually exclusive. There is no part of human affairs that is not eventually connected to other human activities. “We are all related” is a common saying among Anishinaabe people (*nindinawemaganidok*).<sup>248</sup> Life’s holistic interconnectedness means that categories are only a starting point for finding resources to regulate society’s affairs and resolve disputes. In other words, Heroes, Tricksters, and yes, even Monsters, can sometimes be Caretakers.

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<sup>245</sup> Borrows, *Indigenous Constitution*, *supra* note 12 at 82–83, citing *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 592, 107 DLR (4th) 342.

<sup>246</sup> See James B Waldram, *Revenge of the Windigo: The Construction of the Mind and Mental Health of North American Aboriginal Peoples* (Toronto: University of Toronto Press, 2004) ch 11.

<sup>247</sup> For caretaking examples in an Indigenous context, see Oren Lyons, “Listening to Natural Law” in Melissa K Nelson, ed, *Original Instructions: Indigenous Teachings for a Sustainable Future* (Rochester, Vt: Bear and Company, 2008) 22; John Mohawk, “Clear Thinking: A Positive Solitary View of Nature” in Nelson, *ibid*, 48.

<sup>248</sup> For an example of Indigenous writing exploring relatedness, see Winona LaDuke, *All Our Relations: Native Struggles for Land and Life* (Cambridge, Mass: South End Press, 1999) at 2.

Tricksters can be Monsters and Heroes. Monsters, as with all categories, are not universally one thing. The categories are not hermetically sealed. Anishinaabe recognize great complexity in human affairs (indeed we always have). It is not realistic to expect that categories will be mutually exclusive in creating recognizable responses in dealing with harm.

The fact that legal categories are not exclusive should not undermine their use. Again, they are entry points for orienting practitioners to the range of responses they might engage when applying law. One only has to think about the common law to recognize that the failure to create watertight compartments between contract, tort, and property law is not fatal to creating effective legal systems.<sup>249</sup> As common law practitioners know, these categories are notoriously porous and involve overlapping issues. Property can be alienated by contract. Obligations related to nuisance and negligence can affect how property is used. There are thousands of interconnections between the categories, yet they still retain sufficient meaning to allow students to begin their study of law.

Likewise, in Canadian constitutional law, we also do not search for “watertight” compartments in understanding our political relationships.<sup>250</sup> We tolerate double aspects and overlaps when laws are aimed at proper subject matters.<sup>251</sup> Moreover, constitutional law overlaps with administrative law, criminal law, and numerous other fields. There is no purity in categorizing Canadian law.

As such, the study of Anishinaabe law will also lead students into interlocking, overlapping, and holistic views of the field. While Heroes, Tricksters, Monsters, and Caretakers exist within Anishinaabe law, no person or institution is ever truly one thing. These narratives help us learn how to regulate life and resolve disputes in the midst of this complexity. We all have the potential to be Heroes, Tricksters, Monsters, and Caretakers. Sometimes, we find that we often do some of these things at the very same time. Anishinaabe law provides pathways for considering the nuances, subtleties, and intricacies of human strength and weakness and our responses to these activities.

Caretakers in Anishinaabe law include the animals who surrender their lives for the Anishinaabe, the water lily who watches over the people

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<sup>249</sup> See James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (New York: Oxford University Press, 2006); Christian von Bar & Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (Munich: Sellier, 2004).

<sup>250</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 148, [2014] 2 SCR 257.

<sup>251</sup> See *ibid* at para 129.

from the shores,<sup>252</sup> the seasonal personalities—particularly *niibin* and *biboon*'s contest that brings life to the Earth.<sup>253</sup> Caretakers are also found among the thunderers,<sup>254</sup> plants (*mandaamin*, *manoomin*, *ode'immin*, etc.),<sup>255</sup> and the actions of the birds (cranes, loons, eagles, etc.).<sup>256</sup> Mother Earth is a Caretaker.<sup>257</sup> The sun and the moon also encourage, mend, heal, reconcile, and make whole.<sup>258</sup> Each of the stories contains resources that can be analyzed by Anishinaabe people to guide them in regulating activities and resolving disputes.

The Anishinaabe language can also be drawn upon in all these categories to convey further information about how people should govern themselves.<sup>259</sup> Self-government and productive, healthy, and respectful relations with other communities are the aim and result of these laws. The names assigned to family members signal duties, obligations, and responsibilities in the law.<sup>260</sup> Just as a people in the common law have special legal duties by virtue of their status, callings, or employment,<sup>261</sup> so Anishinaabe people have legal obligations reflected in their roles.<sup>262</sup> In considering these roles, we should take special note of how they can change

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<sup>252</sup> See P Johnston, *Tales of Nokomis*, *supra* note 187 at 45–49.

<sup>253</sup> See Williams, *supra* note 190 at 39–40 (Schoolcraft describes the conflict as between winter and spring (*peboan* and *seegwun*)).

<sup>254</sup> See generally Smith, *supra* note 206.

<sup>255</sup> See Johnston, *Honour Earth Mother*, *supra* note 191 at 37–58; Johnston, *Ojibway Heritage*, *supra* note 180 at 32–45.

<sup>256</sup> See Johnston, *Honour Earth Mother*, *supra* note 191 at 83–110; Johnston, *Ojibway Heritage*, *supra* note 180 at 25–31.

<sup>257</sup> See Johnston, *Honour Earth Mother*, *supra* note 191 at 1–15; Johnston, *Ojibway Heritage*, *supra* note 180 at 22–26.

<sup>258</sup> See Johnston, *Honour Earth Mother*, *supra* note 191 at 13–14 (ceremonies related to the pipe are used to remember the healing powers of the sky beings); Johnston, *Ojibway Heritage*, *supra* note 180 at 134–40.

<sup>259</sup> See Brock Pitawanakwat, *Anishnaabemodaa Pane Oodenang: A Qualitative Study of Anishnaabe Language Revitalization as Self-Determination in Manitoba and Ontario* (PhD Dissertation, University of Victoria, 2009) [unpublished] at 201–03, 213–34.

<sup>260</sup> See Johnston, *Ojibway Ceremonies*, *supra* note 176 at 29–30; Densmore, *supra* note 124 at 52–58; Michelson, vol 7, part 2, *supra* note 144 at 331–35.

<sup>261</sup> See Dawn Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999) at 202–10.

<sup>262</sup> Historic responsibilities are discussed in Matthew LM Fletcher, “Laughing Whitefish: A Tale of Justice and Anishinaabe Custom” (2008) Michigan State University College of Law Legal Studies Research Paper Series, Research Paper No 06-16 at 10–11, online: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=1275391>. The resurgence of Anishinaabe responsibilities in one community is described in Matthew LM Fletcher, *The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* (East Lansing: Michigan State University Press, 2012) ch 1.



through time as one grows in age or family involvement.<sup>263</sup> We can also be critical of them, particularly if they replicate troubling gender stereotypes.<sup>264</sup> Law is fluid; it can change. We should also remember that individual freedom, choice, and agency are almost paramount in much of Anishinaabe life,<sup>265</sup> thus giving great room to shape (and sometimes even be excused from) obligations in a variety of circumstances.<sup>266</sup> Nevertheless, Anishinaabe language provides guidance for identifying legal duties.<sup>267</sup>

*Mindemoyehnyak* is the word for old women—they who keep the community together.<sup>268</sup> *Akiwenziiyak* are old men—they who are close to

<sup>263</sup> For a discussion of changing responsibilities through naming and fasting, see Sister M Inez Hilger, *Chippewa Child Life and Its Cultural Background* (Saint Paul: Minnesota Historical Press, 1992) at 35–48.

<sup>264</sup> For a discussion of this issue, see generally Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: UBC Press, 2010); Joyce Green, ed, *Making Space for Indigenous Feminism* (London: Zed Books, 2007); Emily Snyder, “Indigenous Feminist Legal Theory” (2014) 26:2 CJWL 365.

<sup>265</sup> Historical awareness of libertarian-like philosophies and practices amongst Anishinaabe peoples are evident in the following observations: “In a word, these Indians are perfectly convinced, that man is born free, and that no power on earth has a right to infringe his liberty, and that nothing can compensate the loss of it” (Charlevoix, *supra* note 165 at 29). See also Black, “Ojibwa Power”, *supra* note 196 at 146–47; Reuben Gold Thwaites, ed, *The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France 1610–1791* (Cleveland: Burrows Brothers, 1897) vol 6 at 243:

They imagine that they ought by right of birth, to enjoy the liberty of Wild ass colts, rendering no homage to any one whatsoever, except when they like. They have reproached me a hundred times because we fear our Captains, while they laugh at and make sport of theirs. All of the authority of their chief is in his tongue’s end; for he is powerful in so far as he is eloquent; and, even if he kills himself in talking and haranguing, he will not be obeyed unless he pleases the Savages.

<sup>266</sup> See George Copway, *Indian Life and Indian History* (Boston: Albert Colby, 1858) at 141.

<sup>267</sup> See Mark F Ruml, “The Indigenous Knowledge Documentation Project—Morrison Sessions: *Gagige Inaakonige*, The Eternal Natural Laws” (2011) 30:2 Religious Stud & Theology 155 at 163.

<sup>268</sup> Linguistic meaning told to author by Basil Johnston. See also (quoting Waagosh, Anton Treuer) Richard A Gresczyk, Sr, *Language Warriors; Leaders in the Ojibwe Language Revitalization Movement* (PhD Dissertation, University of Minnesota, 2011) [unpublished] at 173:

There are things that are secretly embedded in every word that we use in our language, things people do that they might not be aware of, an understanding or a perspective that is built into these words. Gichi-aya’aa (an elder, a great being) and mindimooyenh (one who holds things together describing the role of the family matriarch) describe those people[.] That says a lot. We don’t have to say respect your elders. It’s built into the words.

the Earth.<sup>269</sup> *Noose* are fathers—they who make it easier for the next generation to walk through the world.<sup>270</sup> *Ingashe* are mothers—they who raise others up.<sup>271</sup> Meanings can be derived from most kinship and age of life terms that indicate responsibilities.<sup>272</sup>

Again, it is important to restate and recognize the non-essentialized nature of these terms (they are verbs after all even when expressed as names, and as verbs they are always in motion, as is life itself). Nevertheless, despite their fluidity these terms and the responsibilities they connote are helpful entry (not end) points for working out legal regulations and dispute resolution principles. This needs to occur in contemporary terms through discussion, debate, confrontation, reconciliation, and other forms of interaction. Vulnerabilities and the potential for the abuse of power should never be put out of our minds. Nevertheless, understanding the words and stories connected to these responsibilities contain important legal resources, along with the other categories introduced in this section: Heroes, Tricksters, Monsters, and Caretakers.

## Conclusion

Lest anyone conclude that narratives are the only way to structure the teaching of Indigenous law (*they are not!*),<sup>273</sup> I want to remind readers that I am not averse to provisionally organizing this field by reference to common law or civil law categories. This is because I believe that any serious study of an Indigenous tradition, even in common law terms, will quickly

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For a discussion of older Ojibwe women in a community context, see Brenda J Child, *My Grandfather's Knocking Sticks: Ojibwe Family Life and Labor on the Reservation* (Saint Paul: Minnesota Historical Society, 2014); Agger, *supra* note 150 (describing the role of Ojibwe grandmothers in great detail).

<sup>269</sup> Linguistic meaning told to author by Basil Johnston. For the honorific explanation, see McNally, *supra* note 114 at 1; Rajnovich, *supra* note 130 at 20 (“[t]he word for old man is ‘akiwenzii’, containing the word for earth, ‘aki’, indicating he is getting closer to the earth, bent over”); Adam D DeWeese et al, “Efficacy of Risk-Based, Culturally Sensitive Ogaa (Walleye) Consumption Advice for Anishinaabe Tribal Members in the Great Lakes Region” (2009) 29:5 Risk Analysis 729 at 733 (“[t]he Anishinaabe words for old woman and old man, *Mindimooyehn* and *Akiwenzii*, are literally translated into ‘keepers of the stories’ and ‘keepers of the earth’”).

<sup>270</sup> Linguistic meaning told to author by Basil Johnston. *Oose* is the word for movement; *n* is the personal, first-person pronoun in Anishinaabemowin.

<sup>271</sup> Linguistic meaning told to author by Basil Johnston.

<sup>272</sup> See Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Saint Paul: Indian Country Press, 1979).

<sup>273</sup> See John Borrows, “Outsider Education: Indigenous Law and Land-Based Learning”, 33:2 Windsor YB Access Just [forthcoming in 2016].

depart from familiar Western legal approaches and reveal new insights once so organized. Common law and civil law categories may provide familiar points of reference, but they cannot control the organization of the field—the unique nature of Indigenous legal reasoning does not allow it.

Furthermore, I remind the reader that other sources of law continue to structure the transmission and practice of Indigenous law that exist beyond law schools' reach. Moreover, I am more attracted to other sources of law in teaching Indigenous legal traditions. For example, spirituality cannot be jettisoned as a legal resource for dealing with human dysfunction, even as we worry about how such approaches might be “offside” with the tenor of contemporary Western legal practice and open to abuse within particular communities. The Earth is also a source of law. As I noted, it is my favourite source of law, which is drawn from observing the natural world within Anishinaabe territories and through discussion with other community members analogizing and distinguishing what might apply to our own ideas and actions. I also believe that authorities that are embedded in customary law, positivistic law, and sacred law are exceedingly important and must be drawn on for yet other ways of organizing future Indigenous legal practice.

In this respect, I would like to explicitly draw out an implicit organizational point I used when discussing Anishinaabe law in *Drawing Out Law: A Spirit's Guide*.<sup>274</sup> While the book deployed a narrative structure to convey Anishinaabe legal principles, these narratives served to host a deeper structural motif. Drawing upon oral traditions and mnemonic devices that organize materials by the number four, the book's sixteen chapters were divided into four sections to communicate key aspects of the legal tradition. I point this out to say that the deployment of one organizational principle does not preclude the use of complementary and parallel teaching techniques. The cultivation of “percept ambiguity” is an important organizational force within Anishinaabe communicative life.<sup>275</sup> It is designed to enhance group participation and heighten an individual's choices in constructing their relations with others. In fact, in my view, Anishinaabe law is more interesting to learn and teach because it encourages this kind of “layering”. I do not believe the common law and civil law approach legal practice in this way. These traditions strive to eliminate ambiguity wherever possible. Anishinaabe law supports and even celebrates indirection, metaphor, ambiguity, and double entendre. We should remember this when creating categories for teaching. Layering activates the agency of the system's participants and dampens top-down decision

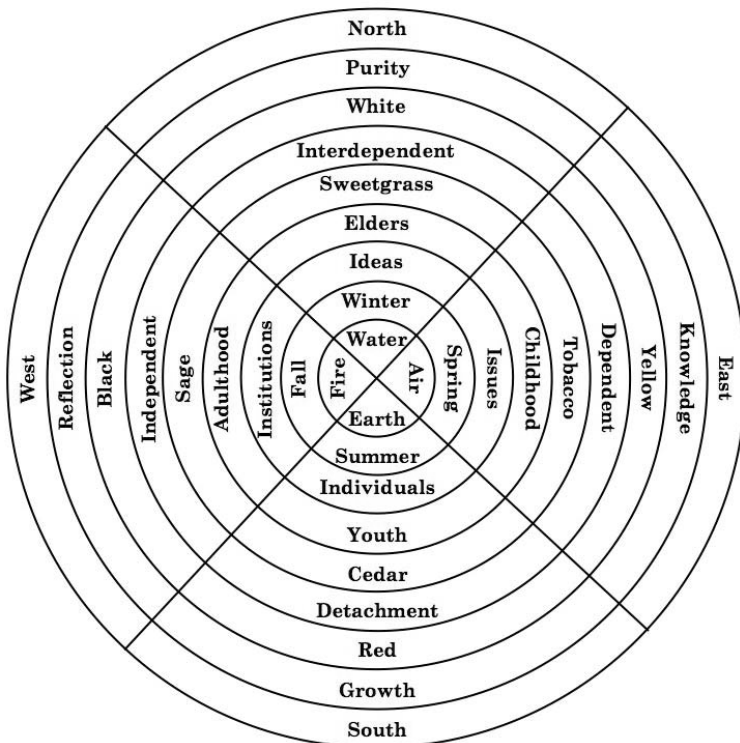
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<sup>274</sup> *Supra* note 106.

<sup>275</sup> Percept ambiguity is Mary Black's term (see Black, “Percept Ambiguity”, *supra* note 154 at 100–04).

making. This “check and balance” function (which empowers individuals to constrain elites) helps Anishinaabe practitioners stimulate choices for those involved within the system. In its strongest manifestations, such layering draws participants into a rich web of Anishinaabe thought that provides individuals with their own resources for harmonizing their conduct with others when interpreting the law.

In *Drawing Out Law*, this pattern may have been hidden from those unfamiliar with the tradition. I did not explicitly discuss these patterns in any detail. I deployed this method to encourage more active engagement for those familiar with Anishinaabe law. At the same time, I attempted to provide sufficient context for the uninitiated to help them gain a foothold. When learning Anishinaabe language, songs, ceremonies, and teachings, the layered presentation of information draws participants into dialogue with one another. It becomes a useful teaching tool to permit readers and listeners to engage with one another at levels beyond a story, principle, or teaching’s explicit meanings. The pattern, however, can also be explicitly identified for students who desire to participate in this aspect of legal discourse. In *Drawing Out Law*, the organizational pattern for learning Anishinaabe law was woven deeply into each chapter and across the entire book. The methodology consistently drew on and attempted to deepen the following reference points:



This chart might appear to be rigid or overly prescriptive when decontextualized from a narrative format. As noted, however, many Anishinaabe stories, songs, ceremonies, and teachings are organized in this pattern to allow participants to jump between insights and thus create new ways of respectfully interacting with the world. These patterns also help practitioners learn to memorize each law and teaching when they leave the classroom, lodge, council, or other teaching venue.

Finally, you may notice that within this article, as in my books, the number four has reappeared. We have considered Heroes, Tricksters, Monsters, and Caretakers; these characters can be added to the preceding list. As such, this entire article attempts to replicate organizational elements that could be deployed in teaching Anishinaabe law in a law school setting. Linear reasoning appears alongside cyclical patterns to illustrate my central themes. My larger point is that Indigenous law can and should be taught in organized ways—as long as such organization is attentive to the legal processes within each Indigenous tradition. Anishinaabe law will be organized differently than laws found in Salish, Cree, Métis, Haida, Maliseet, or any other Indigenous legal tradition. While forms of organization may vary by professor, school, and tradition, resources are very much at hand to make this process a rich and rewarding experience.

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