

# FINDING A PATH TO RECONCILIATION: MANDATORY INDIGENOUS LAW, ANISHINAABE PEDAGOGY, AND ACADEMIC FREEDOM

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*The Truth and Reconciliation Commission has called on law schools in Canada to make Indigenous law a mandatory component of legal education. In its final report, the Commission provides the outline of a rationale in support of this call to action. This paper builds on that outline by grounding the Commission's rationale in the jurisprudence on section 35(1) of the Constitution Act, 1982. Articulating a comprehensive rationale is useful for at least three reasons. First, such a rationale can underpin a response to the claim that a required Indigenous law course lacks value for those students who do not intend to practise Aboriginal law. Second, the format and pedagogy used to teach Indigenous law as a mandatory subject should be informed by the rationale underlying the call to action. Third, this rationale dispels the concern that mandating the study of Indigenous law violates academic freedom.*

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*La Commission de vérité et réconciliation a demandé aux facultés de droit canadiennes d'exiger que le droit des autochtones fasse partie intégrante de la formation de leurs étudiants. Dans son rapport définitif, la Commission donne un aperçu des raisons justifiant cet appel à l'action. L'auteure s'appuie sur ces grandes lignes pour étayer les justifications de la Commission par une analyse de la jurisprudence relative au paragraphe 35(1) de la Loi constitutionnelle de 1982. Selon l'auteure, il convient d'étoffer ces justifications pour au moins trois motifs. Premièrement, celles-ci peuvent donner du poids aux arguments avancés pour contredire ceux qui prétendent qu'un cours obligatoire de droit des autochtones ne serait d'aucune valeur pour les étudiants n'ayant pas l'intention d'exercer ce type de droit. Deuxièmement, les raisons sous-tendant l'appel à l'action devraient servir de fondement pour l'élaboration du cadre du cours obligatoire et des outils pédagogiques connexes. Troisièmement, de telles justifications dissipent les inquiétudes voulant que l'inclusion obligatoire de cette matière au curriculum porte atteinte au principe de la liberté de l'enseignement.*

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## 1. Introduction

Faculty and administrators on university campuses across Canada are talking about “indigenizing the academy.”<sup>1</sup> Calls to indigenize legal education in particular are mounting. In 2013, the Canadian Bar Association adopted a resolution urging legal academics “to recognize and value Indigenous legal traditions within the Canadian legal system” and resolved to support initiatives that advance Indigenous legal traditions, including training for law students.<sup>2</sup> More recently, the Truth and Reconciliation Commission of Canada released 94 calls to action aimed at promoting reconciliation between Indigenous and non-Indigenous peoples in Canada.<sup>3</sup> Call to action #28 states:

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<sup>1</sup> See Adam Gaudry, “[Paved with Good Intentions: Simply Requiring Indigenous Content is Not Enough](#)” (13 January 2016), *ActiveHistory.ca*, online: <activehistory.ca/2016/01/paved-with-good-intentions-simply-requiring-indigenous-content-is-not-enough/> [Gaudry]; “[Indigenizing the Academy: The Way Forward](#)” (June 2016), *CAUT / ACPPU*, online: <www.caut.ca/bulletin/articles/2016/06/indigenizing-the-academy-the-way-forward> [“The Way Forward”]; Douglas Quan, “[‘Indigenization’ Hits Campuses Aiming to Give Students ‘Baseline Knowledge’ About First Nations, Metis and Inuit](#)”, *National Post* (18 December 2015), online: <nationalpost.com> [Quan].

<sup>2</sup> Canadian Bar Association, Council of the Canadian Bar Association, [Resolution 13-03-M: Indigenous Legal Traditions](#), Mid-Winter Meeting held in Mont-Tremblant, QC (16–17 February 2013) (John DV Hoyles), online: <www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2013/Indigenous-Legal-Traditions/13-03-M-ct.pdf>.

<sup>3</sup> Truth and Reconciliation Commission of Canada, [Truth and Reconciliation Commission of Canada: Calls to Action](#) (Winnipeg: TRCC, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\_to\_Action\_English2.pdf>.

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.<sup>4</sup>

Reactions to the notion of mandatory Indigenous content range from enthusiastic,<sup>5</sup> to concerned but generally supportive,<sup>6</sup> to vehemently

<sup>4</sup> *Ibid* at 3.

<sup>5</sup> See Aidan Currie, “[Carolyn Bennett Joins Call for Mandatory Aboriginal Studies Course: Indigenous and Northern Affairs Minister Signs U of T NSA Petition](#)”, *The Varsity* (1 February 2016), online: <thevarsity.ca>; Annette Trimbee and Wab Kinew, “[Why Canada’s Universities Should Mandate Indigenous Courses](#)”, *The Globe and Mail* (10 December 2015), online: <theglobeandmail.com>; Jeremy Webber, “[The Law Schools and the Future of Indigenous Law in Canada](#)”, *Slaw* (4 August 2015), online: <www.slaw.ca> [Webber]; Chelsea Nash, “[Mandatory Indigenous Classes Stir Debate on Implementation](#)”, *The Charlatan* (11 February 2016), online: <www.charlatan.ca> [Nash] (quoting Mac Orlando); Emily Colero, “[U of T Strikes Truth and Reconciliation Steering Committee: Native Students’ Association Supports Mandatory Indigenous Studies Credit](#)”, *The Varsity* (25 January 2016), online: <thevarsity.ca> (quoting Matthew Cappella); Michelle Gaudet, “[Implement Mandatory Indigenous Studies the Right Way: SFU Administration Should Tailor this Subject to Each Specific Faculty](#)”, *The Peak* (22 February 2016), online: <www.the-peak.ca> [Gaudet]; Nancy Macdonald, “[Required Reading: Making Indigenous Classes Mandatory: At Lakehead University and the University of Winnipeg, Students Must Take a Course in Indigenous Courses to Graduate](#)”, *Maclean’s* (19 November 2015), online: <www.macleans.ca> (quoting Kevin Settee and Cynthia Wesley-Esquimaux); Danielle Lorenz, “[Why Indigenous Studies Programs Are Valuable For Gen Y](#)” (16 June 2009), *Talent Egg*, online: <talentegg.ca/incubator/2009/06/16/why-indigenous-studies-programs-are-valuable-for-gen-y/>; Danielle Lorenz, “[Why Indigenous Studies Classes Are Even More Important Today](#)” (11 February 2013), *Talent Egg*, online: <talentegg.ca/incubator/2013/02/11/indigenous-studies-classes-important-today/>; Mary Jane McCallum, “[When History Needs an Intervention](#)” (15 January 2016), *ActiveHistory.ca*, online: <activehistory.ca/2016/01/when-history-needs-an-intervention/> [McCallum].

<sup>6</sup> See “The Way Forward”, *supra* note 1 (quoting James Compton); Nash, *supra* note 5 (quoting Mac Orlando & Adam Gaudry); Kate McInnes, “[Should Native Studies Courses Be Mandatory?](#)”, *The Gateway* (19 January 2016), online: <thegatewayonline.ca> (quoting Dwayne Donald); Gaudet, *supra* note 5; Sophie Sutcliffe, “[Should Indigenous Courses Be Mandatory in University?](#)”, *The Ubyssy* (21 December 2015), online: <ubyssey.ca> (quoting Daniel Justice) [Sutcliffe]; Mande McDonald “[Unsafe Space: The Danger of Mandatory Indigenous Studies Courses](#)”, *Northern Public Affairs* (18 February 2016), online: <www.northernpublicaffairs.ca>; McCallum, *supra* note 5; Rauna Kuokkanen, “[Reconciliation and Mandatory Indigenous Content Courses: What are the University’s Responsibilities?](#)” (17 March 2016), *Decolonization, Indigeneity, Education & Society* (blog), online: <decolonization.wordpress.com/2016/03/17/reconciliation-and-mandatory-indigenous-content-courses-what-are-the-universitys-responsibilities/> [Kuokkanen]; Gaudry, *supra* note 1; Damien Lee, “[Indian in a Jar?](#)”, *Zoongde* (blog), online: <zoongde.com/2015/02/21/indian-in-a-jar/>;

opposed.<sup>7</sup> Chief among the latter are claims that mandatory Indigenous content is at best a waste of time for students whose careers will not deal with Indigenous issues,<sup>8</sup> and at worst a violation of academic freedom.<sup>9</sup> This paper responds to these claims within the context of legal education—more specifically, it defends the claim that the study of Indigenous law should be a mandatory component of legal education.

As Adam Gaudry recognizes, “a clear and well-articulated rationale” is key to effectively implementing an Indigenous content requirement at a Canadian university.<sup>10</sup> Detractors will fill a perceived void on this issue with the assumption that no such rationale exists and therefore students who are not interested in Indigenous issues should not be forced to study Indigenous law.<sup>11</sup> The Canadian Bar Association and the Truth and Reconciliation Commission have each pointed towards a rationale for making the study of Indigenous law a mandatory component of legal education. Section 2 develops this rationale and argues that knowledge of Indigenous law is required by more than just those who intend to practice in the area.

Understanding the rationale underlying the call for a required course on Indigenous law is important for another reason: it will inform the pedagogy employed within such a course. Section 3 explores this issue and suggests ways to structure a mandatory Indigenous law course, based on my experience teaching the only mandatory, stand-alone course on Indigenous law in a Canadian law school.<sup>12</sup>

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Moira MacDonald, “[Indigenizing the Academy](#),” *University Affairs* (6 April 2016), online: <[www.universityaffairs.ca/features/feature-article/indigenizing-the-academy/](http://www.universityaffairs.ca/features/feature-article/indigenizing-the-academy/)> (quoting Andrea Bear Nicholas) [MacDonald]; Quan, *supra* note 1 (quoting Jill Scott).

<sup>7</sup> See “[Aboriginal Courses are Relevant to Students, So Make Them a Priority: Effective and Useful Courses Require a University-Wide Strategy](#),” Editorial, *The Queen’s Journal* (8 January 2016), online: <[www.queensjournal.ca](http://www.queensjournal.ca)> [“Aboriginal Courses are Relevant”]; McInnes, *supra* note 6 (quoting an anonymous student); Brent Venton, “[Clipping Freedom, Ideas at U of W](#),” *Winnipeg Free Press* (12 January 2015), online: <[www.winnipegfreepress.com](http://www.winnipegfreepress.com)> [Venton].

<sup>8</sup> See “Aboriginal Courses are Relevant,” *supra* note 7. The articulation of this argument is consistent with the finding that among law students who did not intend to take a course taught from the perspective of those who “have historically lacked power in society,” the top reason given was that those surveyed “do not believe these courses will provide them with useful legal skills”: Natasha Bakht et al, “Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education” (2007) 45:4 *Osgoode Hall LJ* 667 at 672, 710 [Bakht et al].

<sup>9</sup> See Venton, *supra* note 7.

<sup>10</sup> Gaudry, *supra* note 1.

<sup>11</sup> See “Aboriginal Courses are Relevant,” *supra* note 7.

<sup>12</sup> See MacDonald, *supra* note 6. MacDonald identifies two law programs in Canada that have “mandatory courses on indigenous legal issues”—the University of British Columbia and Lakehead University. To my knowledge, the University of British Columbia course covers

Section 4 rebuts the claim that mandating the study of Indigenous law violates academic freedom. This claim may seem compelling as long as the concept of academic freedom is left undefined and allowed to expand to encompass not only the rights but also the wishful thinking of academics. However, when some precision is introduced into the analysis of academic freedom, it becomes clear that the concern is baseless. Section 4 argues that mandating the teaching of Indigenous law within a law program no more violates academic freedom than does the mandating of constitutional law, property law, or any other currently required law school course.

## 2. Rationale for Mandatory Indigenous Law Content

Some detractors' arguments are rooted in a misapprehension about the rationale underlying the call for mandatory Indigenous content. Understanding the true rationale, then, is vital to dispelling these arguments.

Law students sometimes complain that a mandatory course on Indigenous law is a waste of their time because they have no intention of practicing in the area.<sup>13</sup> An unstated assumption of this argument is that no other compelling rationale exists, other than providing preparation for one's intended practice area, for making a course mandatory.

Both the Truth and Reconciliation Commission and the Canadian Bar Association articulate rationales for their respective calls to action and resolution. In its discussion leading up to calls to action #27 and #28, the Commission documents the actions taken, arguments advanced, and positions adopted by judges and lawyers (both Crown and some of those representing survivors) that created barriers to survivors receiving redress for

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both Canadian law as it affects Indigenous peoples and Indigenous laws, and as such is not a stand-alone course on Indigenous law. Other law schools are planning or in the process of implementing mandatory Indigenous content. For example, Ottawa University's Faculty of Law is implementing an Indigenous law stream in September 2016, in which a "small cohort of self-selected first year students" will receive a curriculum that incorporates Indigenous laws: see Sarah Morales & Angela Cameron, "[Small Steps on the Path Towards Reconciliation at the University of Ottawa Faculty of Law](http://reconciliationsyllabus.wordpress.com/2016/07/08/small-steps-on-the-path-towards-reconciliation-at-the-university-of-ottawa-faculty-of-law/)" (8 July 2016), *ReconciliationSyllabus*, online: <[reconciliationsyllabus.wordpress.com/2016/07/08/small-steps-on-the-path-towards-reconciliation-at-the-university-of-ottawa-faculty-of-law/](http://reconciliationsyllabus.wordpress.com/2016/07/08/small-steps-on-the-path-towards-reconciliation-at-the-university-of-ottawa-faculty-of-law/)>; Larry Chartrand, "[Indigenizing the Legal Academy from a Decolonizing Perspective](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631163)" (2015) Ottawa Faculty of Law Working Paper No 2015-22, online: <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2631163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631163)> [Chartrand]. McGill University's Faculty of Law is introducing a mandatory property law course that covers common law, civil law, and Indigenous law principles of property law: see Robert Leckey, "[Integrating Property](http://reconciliationsyllabus.wordpress.com/2016/05/07/integrating-property/)" (7 May 2016), *ReconciliationSyllabus*, online: <[reconciliationsyllabus.wordpress.com/2016/05/07/integrating-property/](http://reconciliationsyllabus.wordpress.com/2016/05/07/integrating-property/)>.

<sup>13</sup> See "Aboriginal Courses are Relevant", *supra* note 7.

the harms they suffered<sup>14</sup> and exhibited a lack of knowledge of the residential school experience.<sup>15</sup> These events provide a rationale for certain aspects of calls to action #27 and #28, such as requiring lawyers and law students to learn the history and legacy of residential schools and to receive training in intercultural competency, but it is not clear how they provide a rationale for requiring students and lawyers to learn Indigenous law specifically. For that, we must turn to Volume Six of the Report, where the Commission explains that the residential school system was one manifestation of Canada's policies of cultural genocide and assimilation.<sup>16</sup> Reconciliation requires replacing these colonial policies with recognition of Aboriginal peoples' right to self-determination,<sup>17</sup> which includes the right to revitalize and implement their own laws and governance systems.<sup>18</sup>

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<sup>14</sup> Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol 5, *Canada's Residential Schools: The Legacy* (Montreal & Kingston: McGill-Queen's University Press, 2015) at 204–06, 208–09 [T&RC, *The Legacy*].

<sup>15</sup> See especially *ibid* at 204: The Truth and Reconciliation Commission's description of the "crumbling skull" argument successfully employed by the Crown against survivors. According to this argument, damages awarded to survivors who suffered abuse at residential schools should be limited because the survivors had "crumbling skulls" insofar as they were already damaged by coming from troubled homes and so they would have experienced problems later in life even if they had not experienced abuse at residential school. As the Commission notes: "The court did not appear to consider the possibility that the life and home situation upon which it relied to reduce the plaintiff's damages may have themselves, been the result of residential school experiences, or past government actions" at 204.

<sup>16</sup> Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6, *Canada's Residential Schools: Reconciliation* (Montreal & Kingston: McGill-Queen's University Press, 2015) at 19, 20 [T&RC, *Reconciliation*].

<sup>17</sup> *Ibid* at 20. On this point, the Truth and Reconciliation Commission quotes Elder Fred Kelly, who explains: "If reconciliation is to be real and meaningful in Canada, it must embrace the inherent right of self-determination through self-government envisioned in the treaties" (*ibid* at 34). The Truth and Reconciliation Commission also endorses the findings of the UN Expert Mechanism on the Rights of Indigenous Peoples in its 2013 study entitled "Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples", including the finding that "The right to self-determination is a central right for indigenous peoples from which all other rights flow. In relation to access to justice, self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws" (*ibid* at 49–50).

<sup>18</sup> *Ibid* at 28. For a discussion of the need to use Indigenous law to inform the understanding of "reconciliation", see T&RC, *Reconciliation*, *ibid* at 11–12, 16, 46. "The Commission defines *reconciliation* as an ongoing process of establishing and maintaining respectful relationships" (*ibid* at 11). Dawnis Kennedy argues that what constitutes respectful relations cannot be determined solely with respect to Canadian law; Indigenous legal orders "are integral to understanding what constitutes respectful relations with Indigenous peoples and their legal orders": Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation

This conclusion is consistent with the Supreme Court of Canada's section 35 jurisprudence. According to the Supreme Court, reconciliation is the fundamental purpose underlying section 35 of the *Constitution Act, 1982*,<sup>19</sup> which recognizes and affirms the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”<sup>20</sup> Although section 35 provides constitutional protection for Aboriginal and treaty rights, it does not define those rights; that task has fallen to the courts.<sup>21</sup> The Supreme Court has held repeatedly over the past twenty-five years that the laws of Indigenous peoples must inform the content and interpretation of section 35 rights.<sup>22</sup> These exhortations occurred as early as 1990 in *R v Sparrow*<sup>23</sup> and as recently as 2014 in *Tsilhqot'in Nation v British Columbia*.<sup>24</sup> Given the Supreme Court's insistence on the importance of interpreting section 35 rights through the lens of Indigenous laws, section 35 could have the potential to foster the kind of reconciliation described by the Truth and Reconciliation Commission.

And yet, despite these long-standing and oft-occurring exhortations, courts have just as often failed to give effect to Indigenous law when adjudicating Aboriginal and treaty rights disputes.<sup>25</sup> Val Napoleon and Hadley Friedland describe the courts' general lack of serious engagement with Indigenous law as follows:

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without respect? Section 35 and Indigenous Legal Orders” in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77 at 79–80 [Kennedy]. For discussions of reconciliation in the context of Indigenous–non-Indigenous relations, see Mark D Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 at 170; Jeffery G Hewitt, “Reconsidering Reconciliation: The Long Game” (2014) 67:2 SCLR 259.

<sup>19</sup> See *R v Van der Peet*, [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289 [*Van der Peet*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, [2005] 3 SCR 388; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

<sup>20</sup> *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>21</sup> See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 125.

<sup>22</sup> See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 11 [Borrows, *Indigenous Constitution*].

<sup>23</sup> [1990] 1 SCR 1075 at 1112, 70 DLR (4th) 385.

<sup>24</sup> 2014 SCC 44 at paras 34, 35, 41, [2014] 2 SCR 257 [*Tsilhqot'in Nation*]; see also *Van der Peet*, *supra* note 19 at para 40; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 147, 148, 153 DLR (4th) 193 [*Delgamuukw*].

<sup>25</sup> For an exception, see *R v Meshake*, 2007 ONCA 337 at para 33, 85 OR (3d) 575 (applying Ojibway “custom”—or in other words, law—regarding the circumstances in which a member of one Ojibway nation may hunt in the territory of another Ojibway nation).

While Indigenous oral histories are now told in court, we have yet to see them actually make their way into judicial reasoning or into the written ratios in Canadian jurisprudence. It is one thing to simply listen to the stories and quite another thing to think with and through them, to identify the law they contain, and to apply them to pressing practical problems—thereby effecting practical consequences.<sup>26</sup>

Scholars have meticulously recounted the courts' numerous failures in this regard.<sup>27</sup> Two examples will suffice to illustrate the point.

First, the inability of the trial judge in *Delgamuukw v British Columbia* to comprehend the laws of the Gitksan and Wet'suwet'en peoples has reached legendary status, generating a cartoon bearing his likeness.<sup>28</sup> At trial, the Gitksan nation tendered their *adaawk* and the Wet'suwet'en nation tendered their *kungax*, which are oral traditions such as stories and songs detailing their connection to their territory,<sup>29</sup> in support of what was initially articulated as a claim for ownership of, and jurisdiction over, their territory and later amended to a claim for Aboriginal title.<sup>30</sup> Chief Justice Alan McEachern dismissed their claims after refusing to admit some of their oral traditions and giving no independent weight to others.<sup>31</sup> The Supreme Court of Canada held that Chief Justice McEachern's treatment of the oral traditions was an error and ordered a new trial.<sup>32</sup>

Val Napoleon comprehensively documents Chief Justice McEachern's struggles to treat the *adaawk* as law. For example, at one point Chief Justice McEachern became, in his own words, "alarmed" at how long it took the witnesses to tell their *adaawk*, and complained that the trial was proceeding at "less than a snail's pace."<sup>33</sup> According to Chief Justice McEachern, "I'm hearing so much detail that I doubt is going to be anything more than

<sup>26</sup> Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725 at 735 [Napoleon & Friedland, "Inside Job"].

<sup>27</sup> See Kennedy, *supra* note 18; Val Napoleon, "Delgamuukw: A Legal Straightjacket for Oral Histories?" (2005) 20:2 CJLS 123 at 133 ff [Napoleon, "Delgamuukw"].

<sup>28</sup> At trial, McEachern CJ tried to dissuade one of the Gitksan elders, Antgulilibix (Mary Johnson), from singing a song containing her *adaawk* as part of her testimony. He finally relented but cautioned: "It's not going to do any good to sing to me ... I have a tin ear": J Edward Chamberlin, "Close Encounters of the First Kind" in John Sutton Lutz, ed, *Myth and Memory: Stories of Indigenous-European Contact* (Vancouver: UBC Press, 2007) 15 at 24. The cartoon by Don Monet (1987) depicts McEachern CJ with a tin ear and is reproduced in Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 51.

<sup>29</sup> *Delgamuukw*, *supra* note 24 at para 13.

<sup>30</sup> *Ibid* at para 7.

<sup>31</sup> *Ibid* at para 107.

<sup>32</sup> *Ibid* at paras 107–08. To date, a new trial has not yet occurred.

<sup>33</sup> Napoleon, "Delgamuukw", *supra* note 27 at 139.



background assistance.”<sup>34</sup> Later, counsel for the Gitksan chiefs explained that the *adaawk* were being tendered for the proof of their contents, and not as mere evidence of the beliefs held by the Gitksan people. Chief Justice McEachern seemed to be perplexed by this statement and became fixated on the part of the *adaawk* where, as he put it, a “supernatural bear” destroyed a Gitksan village.<sup>35</sup>

As Napoleon notes, the point of recounting these incidents is not to vilify Chief Justice McEachern.<sup>36</sup> Indigenous laws were not a mandatory component of legal education when he attended law school. Presumably, he never took a course on Gitksan law, and no one ever taught him how to set aside his western ontology in order to engage with a different legal system based on a different ontology, one “where human and spirit worlds are interwoven, and all creation is spiritual.”<sup>37</sup> He never learned the skill of discerning the normative principles within the *adaawk* or how to analyze the details of the *adaawk* as lending support to those normative principles, in the way that students of the common law learn the skill of discerning the *ratio* within a decision and are shown how to analyze the facts and the issues in a way that sheds light on the *ratio*.

One may wonder whether the lack of comprehension displayed by Chief Justice McEachern is still an issue today. After all, the *Delgamuukw* trial took place between May 11, 1987 and June 30, 1990.<sup>38</sup> Canadian society has made great strides in the past twenty-five years regarding Indigenous issues, and we have had, since 1997, the benefit of the Supreme Court of Canada’s admonition in *Delgamuukw* that Chief Justice McEachern’s treatment of the oral traditions was an error.<sup>39</sup>

The answer can be found in the most recent Aboriginal title case, which involves the Tsilhqot’in Nation and serves as the second example. The trial judge, Justice Vickers, held that the evidence supported a declaration of

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* at 150.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid* at 151. See also *ibid* at 154: “What becomes clear from the transcript is that the Court was not able to hear or accept the *adaawk* as presented—a legal and political institution rather than a simple cultural artefact or chronological history record. The forms of expression, symbolism, and inter-connections between the worlds of spirits, humans, and animals proved to be beyond the grasp of the Court. Consequently, McEachern CJ characterized much of the *adaawk* as mythology, not history, and in the end accorded it no weight as evidence” [emphasis in original].

<sup>38</sup> *Delgamuukw v British Columbia* (1991), 79 DLR (4th) 185, [1991] 3 WWR 97.

<sup>39</sup> But see Napoleon, “*Delgamuukw*,” *supra* note 27 (arguing that “it is not at all clear that a new trial conducted according to the SCC’s directive would result in a substantively different decision” at 148).

Aboriginal title in some areas within the territory claimed by the Tsilhqot'in Nation, but declined to make the declaration on procedural grounds.<sup>40</sup> The Supreme Court of Canada, in contrast, granted the declaration of Aboriginal title over most of the area designated by Justice Vickers.<sup>41</sup> Justice Vickers' attempt to engage with the law of the Tsilhqot'in Nation was admirable. He paid tribute to the wisdom of the Tsilhqot'in peoples' oral traditions.<sup>42</sup> He recognized that "[i]n order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization,"<sup>43</sup> and that this can entail setting "aside some closely held beliefs about the reliability of oral history evidence."<sup>44</sup> He was conscious of the need to avoid an ethnocentric approach.<sup>45</sup> He exhibited a keen self-awareness about his own personal bias in favour of historical accounts based on western-derived, written documents as opposed to Indigenous oral histories,<sup>46</sup> and endeavoured to overcome that bias:

There is always a Eurocentric tendency to look for and rely on the written word. Try as one might, it is difficult to read these words and not see in them events as they really were. To follow this path in a trial of this nature would relegate oral history and oral tradition evidence to some lesser level of importance, contrary to the directions of the Supreme Court of Canada. Important as the historical documents are, I have attempted at all times to give equal weight to the oral history and oral tradition evidence.<sup>47</sup>

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<sup>40</sup> *Tsilhqot'in Nation*, *supra* note 24 at para 7.

<sup>41</sup> *Ibid* at para 153. At the Supreme Court of Canada, the Tsilhqot'in Nation sought a declaration of Aboriginal title over the areas where Vickers J held that Aboriginal title would have been established if not for the procedural issue, with the exception that the Tsilhqot'in Nation did not seek a declaration of Aboriginal title over the areas consisting of privately owned lands or that were under water (*ibid* at para 9).

<sup>42</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 20, [2008] 1 CNLR 112 [*Tsilhqot'in Nation trial*].

<sup>43</sup> *Ibid* at para 132.

<sup>44</sup> *Ibid* at para 133.

<sup>45</sup> *Ibid* at para 196.

<sup>46</sup> For a general discussion of Vickers J's treatment of the oral histories of the Tsilhqot'in Nation, see Dwight G Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation and British Columbia*" (2008) 41 UBC L Rev 249 at 266–71.

<sup>47</sup> *Tsilhqot'in Nation trial*, *supra* note 42 at para 203. Similarly, in a motion decision, Vickers J developed a procedure for assessing the admissibility of oral history and traditions, and in so doing emphasized that that procedure "is really no different than similar procedures in other cases where a trial judge is called upon to decide whether the proffered evidence is to be admitted": *William v British Columbia*, 2004 BCSC 148 at para 16, 24 BCLR (4th) 296 [*Tsilhqot'in Nation motion*]. For a comment on this decision, see Dwight G Newman, "*Tsilhqot'in Nation v. British Columbia* and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History" (2005) 43 Alta L Rev 433.

Justice Vickers' decision, however, is lacking the same awareness of the Eurocentric tendency to privilege the common law over Indigenous law.<sup>48</sup> He provides a list of the stories told to him by Tsilhqot'in witnesses<sup>49</sup> but only takes the most preliminary steps toward identifying normative principles within those stories.<sup>50</sup> Instead, the focus of his summary is on the extent to which the stories refer to specific locations within the area claimed by the Tsilhqot'in Nation.<sup>51</sup> He seems to assume that the stories are relevant to the issue of sufficiency of occupation merely insofar as they identify places the Tsilhqot'in people may have occupied.<sup>52</sup> There is no concerted effort to identify Tsilhqot'in laws about land use within the stories and then apply those laws to inform the analysis of sufficiency of occupation.<sup>53</sup> For example, Justice Vickers recognizes that the Tsilhqot'in people "are charged with the responsibility of respecting all of the land,"<sup>54</sup> but he does not go on to inquire how this normative principle affects the Tsilhqot'in Nation's land use, such as whether it requires not occupying or only minimally occupying certain areas.<sup>55</sup> In contrast, in his article, "Making the Round: Aboriginal

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<sup>48</sup> Similarly, for an analysis of the way in which the Supreme Court of Canada failed to engage with the Tsilhqot'in Nation's law of consent in its decision in *Tsilhqot'in Nation*, see Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873.

<sup>49</sup> *Tsilhqot'in Nation trial*, *supra* note 42 at paras 433–35.

<sup>50</sup> See *ibid* at paras 666–71. Similarly, in the motion decision, Vickers J describes the Tsilhqot'in Nation's creation stories as having a spiritual dimension, but not as a source of law: *Tsilhqot'in Nation motion*, *supra* note 47 at para 21.

<sup>51</sup> *Tsilhqot'in Nation trial*, *supra* note 42 at paras 653–71.

<sup>52</sup> See also John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 (arguing that Tsilhqot'in law played a key role in the trial decision, specifically in "establishing [the] sufficiency of Indigenous social organization necessary to prove title" at 718–19).

<sup>53</sup> The Supreme Court of Canada instructs trial courts to do precisely this in *Delgamuukw*, *supra* note 24 (holding that "if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use" at para 148). Similarly, Vickers J considers an expert report on Tsilhqot'in laws prepared by Hamar Foster, but most of the laws discussed in the report appear to be about something other than land use: *Tsilhqot'in Nation trial*, *supra* note 42 at paras 426–32. The report does state that Tsilhqot'in "chiefs had specific lands within Tsilhqot'in territory and that these lands descended on some sort of hereditary principle" (*ibid* at para 429). From this, Vickers J concludes that "Tsilhqot'in people did consider the land to be their land. They also had a concept of territory and boundaries" (*ibid*). However, this conclusion does not seem to factor into his analysis of the sufficiency of the Tsilhqot'in Nation's occupation.

<sup>54</sup> *Tsilhqot'in Nation trial*, *supra* note 42 at para 669.

<sup>55</sup> To be fair, it is possible to infer the operation of Tsilhqot'in law in at least one aspect of Vickers J's reasoning. When assessing the sufficiency of occupation, Vickers J concludes that at the time of the assertion of sovereignty, the Tsilhqot'in Nation had cultivated fields (an indication of occupation under the common law), even though they were not cultivated by European standards (*ibid* at para 959). Rather, these "cultivated fields" were areas where

Title in the Common Law from a Tsilhqot'in Legal Perspective", Alan Hanna provides precisely the type of analysis that Justice Vickers' decision lacks.<sup>56</sup> Hanna's article shows how the legal principles contained within Tsilhqot'in stories establish the validity of the Tsilhqot'in Nation's claim to their land.<sup>57</sup> Hanna also demonstrates that the Tsilhqot'in origin story establishes the jurisdiction of the Tsilhqot'in Nation over their land, and does not merely document places occupied by the Tsilhqot'in Nation.<sup>58</sup>

The trial decisions of both *Delgamuukw* and *Tsilhqot'in Nation* illustrate the rationale for requiring the study of Indigenous laws in law school. Again, the point is not to disparage Justice Vickers—he had the best of intentions. The point is that discerning law within Indigenous stories, and then applying those laws to new facts, are skills. For those of us educated and immersed in a Eurocentric worldview, learning these skills will mean learning to set aside our default ontology, epistemology, ethic, and logic, and learning a different—sometimes fundamentally different—ontology, epistemology, ethic, and logic.<sup>59</sup> As Aaron Mills explains, the laws and legal institutions of any given society are generated from and conditioned by the constitutional order underlying those institutions and laws, and that constitutional order in turn is generated from and conditioned by the society's fundamental beliefs about the nature of reality, including its ontology, epistemology, and cosmology.<sup>60</sup> This is equally true of both western and Indigenous communities.<sup>61</sup> When we attempt to engage with another legal system without first understanding its underlying worldview,

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Tsilhqot'in people gathered medicinal and root plants and berries (*ibid*). In concluding that these areas constituted "cultivated fields", Vickers J noted that from the Tsilhqot'in perspective, the Tsilhqot'in Nation gathered the plants "in a manner that managed these resources to insure their return for future generations" (*ibid*). Although Vickers J refers to this normative principle as a 'perspective' as opposed to a 'law', it may be informing his willingness to apply a lower standard of occupation; the unstated reasoning may be that certain European notions of cultivation, such as those resulting in the depletion of soil, would violate Tsilhqot'in law, and so the Tsilhqot'in Nation should not be held to such a standard when assessing its sufficiency of occupation. Vickers J's reasoning on this point, however, is not explicit.

<sup>56</sup> Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2013-2014) 45:3 Ottawa L Rev 365.

<sup>57</sup> *Ibid* at 392–94.

<sup>58</sup> *Ibid* at 377–79.

<sup>59</sup> See Webber, *supra* note 5 (explaining that "we and [Indigenous law students] need to develop modes of translation between Indigenous and non-Indigenous institutions, so that non-Indigenous institutions can relate intelligibly to Indigenous modes of governance and structures can be established that mediate sensibly among our various legal traditions").

<sup>60</sup> See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 852, 854, 862–63 [Mills].

<sup>61</sup> *Ibid* at 852.

we (perhaps inadvertently) impose our own worldview, which results in a distorted conception of the other system.<sup>62</sup>

No amount of progressive-mindedness or liberal orientation alone will bestow the skills needed to work within a fundamentally different legal system or the knowledge of another nation's ontology, epistemology, ethic, and logic. Lawyers and judges are not going to acquire these skills or this knowledge through sheer force of will or by merely having an open mind when presented with Indigenous stories.<sup>63</sup> Justice Vickers did everything imaginable to maintain an open mind and a generous attitude toward Tsilhqot'in law. People need an opportunity to *engage* with the ontology, epistemology, ethic, and logic of the Indigenous nation in question, and they must be shown *how* to discern legal principles within Indigenous sources of law, such as stories, the natural world, or language.<sup>64</sup>

To summarize, the rationale for including Indigenous law as a mandatory component of legal education is that Indigenous laws should inform Canadian law, especially section 35 rights. And yet, despite the repeated emphasis on this principle, it has not yet been actualized. Both the Truth and Reconciliation Commission<sup>65</sup> and the Canadian Bar Association<sup>66</sup> recognize that, in many instances, judges have failed to give effect to Indigenous law. Further, we can draw a connection between legal education and the work of judges. No one knows, as a law student, whether one will eventually become a judge called upon to apply Indigenous laws. Students who have no interest whatsoever in Indigenous issues and have no intention of practising in the area of Indigenous legal issues may one day

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<sup>62</sup> *Ibid* at 851, 857, 883.

<sup>63</sup> See *Tsilhqot'in Nation trial*, *supra* note 42 (Vickers J seems to acknowledge that this is his experience during the trial when he writes: "Courts generally receive and evaluate evidence in a positivist or scientific manner: a proposition or claim is either supported or refuted by factual evidence, with the aim of determining an objective truth. However, in cases such as this, the "truth" which lies at the heart of the oral history and oral tradition evidence can be much more elusive" at para 137; and "It should also be noted that the teller of these oral traditions does not, as a matter of routine, offer an explanation of the meaning of any particular legend. The listener is left to distill and then apply the meaning to their own life. This is a lifelong process and is enhanced by maturity and reflection on one's various life experiences" at para 671).

<sup>64</sup> For a discussion of additional arguments in support of including Indigenous laws within legal education, see Chartrand, *supra* note 12 at 11–18.

<sup>65</sup> T&RC, *Reconciliation*, *supra* note 16 at 48.

<sup>66</sup> The Canadian Bar Association's resolution to support training for law students in Indigenous legal traditions explains that Indigenous legal traditions "are integral to the recognition and exercise" of the Aboriginal and treaty rights that have constitutional protection pursuant to section 35 of the *Constitution Act, 1982*, and yet "Indigenous legal traditions have not always been justly and equally applied in the Canadian legal system": Canadian Bar Association, *supra* note 2 at 1–2.

become judges. And as judges, they may be required to discern and apply Indigenous laws. Thus, students who have the least interest in Indigenous laws and have no intention of practising in the area of Indigenous legal issues need mandatory training in Indigenous law the most.

### 3. Indigenous Pedagogy

What might a mandatory course on Indigenous law within a law faculty look like? The rationale underlying a mandatory Indigenous law course should shape the pedagogy and content of such a course. Two aspects of the rationale established above are especially relevant. The first is to teach future lawyers and judges how to treat Indigenous law seriously as law: how to discern the normative principles within sources of Indigenous law such as stories, land, and language, and also how to apply those normative principles to novel fact scenarios.<sup>67</sup> A second purpose is to equip students with the tools to set aside their own ontology, epistemology, ethic, and logic, and begin to grasp the Indigenous ontology, epistemology, ethic, and logic that give rise to the Indigenous laws at issue. The following suggestions for achieving these goals are drawn from my experience teaching “Indigenous Legal Traditions”, which is a mandatory course for all first-year law students at the Bora Laskin Faculty of Law at Lakehead University.<sup>68</sup>

#### 3.1 Place-Based Learning

The content of my Indigenous Legal Traditions course includes Anishinaabe law and Métis law, given our location in Anishinaabe and Métis territory<sup>69</sup>

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<sup>67</sup> See 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 at 244; Hadley Friedland & Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015-2016) 1:1 Lakehead LJ 16 at 17.

<sup>68</sup> I am deeply indebted to Aaron Mills for many aspects of both the substance and the structure of my course. My course is in many respects patterned after a course taught by Mills at the Bora Laskin Faculty of Law in the winter 2015 semester, which I attended. For a discussion of Mills’ course and the importance of teaching the underlying constitutional order and epistemology, ontology and cosmology of an Indigenous people in a mandatory course, see Mills, *supra* note 60 at 872–82.

<sup>69</sup> The claim that Thunder Bay, Ontario, is located within Métis territory is contentious. On the one hand, the Métis Nation of Ontario asserts that Thunder Bay is located within their traditional harvesting territories: “[Traditional Harvesting Territories Map](http://www.metisnation.org/registry/harvesting/harvesting-map/)”, *Métis Nation of Ontario*, online: <[www.metisnation.org/registry/harvesting/harvesting-map/](http://www.metisnation.org/registry/harvesting/harvesting-map/)>. Similarly, the Red Sky Métis Independent Nation asserts that Thunder Bay is located within the territory they traditionally and currently use: “[Who is Red Sky Métis Independent Nation?](http://www.redskymetis.ca/about-us/)”, *Red Sky Métis Independent Nation*, online: <[rsmin.ca/about-us](http://www.redskymetis.ca/about-us/)>. On the other hand, some members of Fort William First Nation—the Anishinaabe nation whose traditional territory includes Thunder Bay—have critiqued the claim that Thunder Bay is within Métis territory:

and given my identity as a citizen of the Métis Nation of Ontario and as a member of a Métis and Anishinaabe family. By focusing on the laws of the local Indigenous communities, I am adopting a place-based approach to learning, which is endorsed by the Truth and Reconciliation Commission and by Indigenous scholars.<sup>70</sup> A place-based approach allows members of the Indigenous community whose laws are being studied to be directly involved in shaping and delivering the course material.<sup>71</sup> This technique helps to lessen the risk of perpetuating a colonial approach that treats Indigenous peoples as subjects of study, as opposed to agents and knowledge-holders.<sup>72</sup> In other words, it can provide an opportunity for Indigenous peoples to exercise their right to self-determination.<sup>73</sup>

### 3.2 Epistemologies

An adequate account of an Anishinaabe ontology, epistemology, ethic, and logic is far beyond the scope of this paper. The most I will attempt here is to highlight some differences between western and Anishinaabe epistemologies for the sake of showing why and how western and Anishinaabe pedagogies differ.

Despite philosophical debates, the standard western conception of truth, the one accepted for practical purposes, is that truth is objective and absolute. True facts exist in the world independently of knowers. The scientific method is premised on this conception; by repeatedly refining our theories, we will draw closer to *the* truth. The corresponding pedagogy has been described by Paulo Freire as the banking system of education.<sup>74</sup>

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Waaseyaa'sin Christine Sy et al, "[Anishinaabe and Métis Territory?: An Ice Breaker](http://www.netnewsledger.com/2016/11/10/anishinaabe-metis-territory-ice-breaker/)" (10 November 2016), *NetNewsLedger*, online: <[www.netnewsledger.com/2016/11/10/anishinaabe-metis-territory-ice-breaker/](http://www.netnewsledger.com/2016/11/10/anishinaabe-metis-territory-ice-breaker/)>.

<sup>70</sup> T&RC, *The Legacy*, *supra* note 14 at 98–99; see e.g. Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Saskatoon: Purich Publishing Ltd, 2013) at 74 [Battiste].

<sup>71</sup> For example, local Elders as well as knowledge-holders and members of Fort William First Nation (located next to Thunder Bay) give talks in my course. I also bring the students to Fort William First Nation (see section 3.4, below, for further discussion). The Bora Laskin Faculty of Law has signed a Protocol Agreement with the four Indigenous nations most closely connected to the territory where we are located: the Anishinabek Nation (Union of Ontario Indians), Grand Council Treaty #3, Métis Nation of Ontario, and Nishnawbe Aski Nation. Pursuant to this agreement, our Faculty meets regularly with representatives of each of these four nations in order to discuss Indigenous issues within our Faculty.

<sup>72</sup> For discussions of this issue, see Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed (London: Zed Books Ltd, 2012); Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Halifax: Fernwood Publishing, 2008).

<sup>73</sup> See the text accompanying note 17, *above*.

<sup>74</sup> Paulo Freire, *Pedagogy of the Oppressed*, 30th Anniversary ed (New York: Bloomsbury Academic, 2013) at 72 [Freire].

Students, who lack knowledge, are empty vessels that can be filled with knowledge by passively receiving deposits of true facts from a teacher.<sup>75</sup> According to this epistemology, teachers are authorities who bestow knowledge by transferring true facts.<sup>76</sup> Standard western teaching methods, such as the lecture, reflect these assumptions. A lecturer is an authority who occupies a privileged place in the classroom, usually at the front—elevated by standing while students are seated. The lecturer states true facts that students receive. Once students are able to accurately repeat, or perhaps apply, the true facts, then they too have knowledge.

This can be contrasted with an Anishinaabe conception of knowledge and truth. Lana Ray and Paul Nicholas Cormier describe an Anishinaabe epistemology with the story, “Nanaboozhoo and the Maple Trees”:

A long time ago when the world was new, Gitche Manitou made things so that life was very easy for the people. There were plenty of animals, good weather, and the maple trees were filled with thick sweet syrup; they just had to break off a twig and collect it as it dropped off. Nanaboozhoo went to go see his friends the Anishinaabe, but when he arrived there was no one around—they were not fishing, working in the fields, or gathering berries. Nanaboozhoo finally found them in a grove of maple trees, lying on their backs with their mouths open, letting the maple syrup drip into their mouths.

Upon seeing this, Nanaboozhoo said, “This will not do.” He went down to the river and took a big basket made of birch bark, bringing back many buckets of water. He went to the top of the maple trees and poured the water in so that it thinned out, making the syrup thin and watery and just barely sweet to the taste. “This is how it will be from now on,” he said. “No longer will syrup drip from the maple trees. Now there will be only watery sap. When people want to make maple syrup they will have to gather many buckets full of the sap in the birch bark baskets like mine. They will have to gather wood and make fires to heat the stones to drop into the baskets. They will have to boil the water with the heated stones for a long time to make even a little maple syrup.[”]<sup>77</sup>

Ray and Cormier explain that the thick maple syrup is akin to knowledge,<sup>78</sup> and that western teaching and learning methods, such as being spoon-fed facts from a PowerPoint slide, are akin to lying on the ground and letting

<sup>75</sup> *Ibid.* See also Battiste, *supra* note 70 at 106.

<sup>76</sup> Freire, *supra* note 74 at 72.

<sup>77</sup> Lana Ray & Paul Nicholas Cormier, “Killing the Weendigo with Maple Syrup: Anishinaabe Pedagogy and Post-Secondary Research” (2012) 35:1 *Can J Native Education* 163 at 165 [Ray & Cormier], citing Michael J Caduto & Joseph Bruchac, *Keepers of the Earth: Native American Stories and Environmental Activities for Children* (Colorado: Fulcrum Publishing, 1989) at 145.

<sup>78</sup> Ray & Cormier, *supra* note 77 at 165.



maple syrup drip into one's mouth.<sup>79</sup> The process of turning the sap into syrup represents Anishinaabe knowledge.<sup>80</sup> Just as it takes many people actively working together to gather bucket after bucket of sap, collect wood, make a fire, and boil the sap for hours simply to make a small amount of syrup, so too does learning require both sustained personal engagement—or in other words, the active exercise of individual agency<sup>81</sup>—as well as working together within a community.<sup>82</sup>

This Anishinaabe epistemology corresponds to an Anishinaabe conception of truth. Basil Johnston explains that the Anishinaabemowin phrase “w'daeb-awae” means “he or she is telling the truth, is correct, is right.”<sup>83</sup> But the truth referred to in this phrase is not absolute; it is a qualified truth, one that is circumscribed by the speaker's experience, perception, and command of language at that time.<sup>84</sup> What one knows is a result of one's own lived experience and active personal engagement, and so one is always bounded by the limits of that experience. This conception helps to explain why an elder will often say that she or he does not know much.<sup>85</sup> Such statements are incongruous from within a western epistemology, according to which Anishinaabe elders are authorities on Anishinaabe traditions. But as Leanne Simpson explains, “you'll always hear from our Elders what appears to be them ‘qualifying’ their teachings with statements that position them as learners, that position their ideas as their own understandings, and place their teachings within the context of their own lived experience.”<sup>86</sup> Anishinaabe elders do not purport to fill their listeners like empty vessels with absolute truth, or in other words, to pour thick maple syrup directly into our mouths.

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<sup>79</sup> *Ibid* at 166–67.

<sup>80</sup> See Margaret Noori, “Beshaabiag G'gikenmaaigowag: Comets of Knowledge” in Jill Doerfler, Niigaanwehidam James Sinclair & Heidi Kiiwetinepinesik Stark, eds. *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) 35 (explaining that “there is no noun for ‘knowledge’ in the verb-based Anishinaabe language. In place of a single target word or definition, there are instead verbs bound with prefixes and suffixes indicating what is known and who is knowing” at 35).

<sup>81</sup> Ray & Cormier, *supra* note 77 at 165.

<sup>82</sup> *Ibid* at 170.

<sup>83</sup> Basil H Johnston, “Is That All There Is? Tribal Literature” (Spring 1991) No. 128 *Can Literature* 54 at 57 [Johnston].

<sup>84</sup> *Ibid*.

<sup>85</sup> Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Sauteaux Societies—Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] at 20, n 19 [Friedland, *The Wetiko*].

<sup>86</sup> Leanne Betasamosake Simpson, “Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation” (2014) 3:3 *Decolonization: Indigeneity, Education & Society* 1 at 11 [Simpson].

These fundamental differences between a western epistemology and an Anishinaabe epistemology provide an answer to the question of whether Indigenous law should be taught in a stand-alone mandatory course as suggested by the wording of call to action #28, or whether it should be integrated throughout the law school curriculum.<sup>87</sup>

In my view, this is a false dichotomy; we can pursue both options at the same time. Teaching Indigenous law only in a stand-alone course runs the risk of marginalizing both the content of such a course<sup>88</sup> and those who teach it.<sup>89</sup> As such, the project of integrating Indigenous law throughout a curriculum—especially throughout mandatory courses—has considerable value. Likewise, a mandatory stand-alone course in Indigenous law has at least as much value. It can provide the space and the time needed for identifying and isolating one's own ontological, epistemological, ethical, and logical assumptions, and for learning how to work from within a different ontology, epistemology, ethic, and logic, which is valuable for at least two reasons.

First, when the common law changes and develops to address society's evolving needs, it does so as a result of courts identifying the policy rationales underlying the black letter rules, and applying those underlying rationales or values to the new context. If Indigenous laws are to be permitted to develop in the same way and to truly function as law, they cannot be divorced

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<sup>87</sup> See Sutcliffe, *supra* note 6 (quoting “Daniel Justice, chair of the First Nations Indigenous Studies program at [the University of British Columbia]”, expressing the view that incorporating Indigenous content throughout a curriculum is preferable because otherwise some may feel that they have a “free pass” not to address Indigenous issues).

<sup>88</sup> See Lorne Sossin, “[The TRC Calls to Action & the pursuit of ‘Reconciliation’](#)” (18 October 2015), *Dean Sossin’s Blog* (blog), online: <[deansblog.osgoode.yorku.ca/2015/10/the-trc-calls-to-action-the-pursuit-of-reconciliation/](http://deansblog.osgoode.yorku.ca/2015/10/the-trc-calls-to-action-the-pursuit-of-reconciliation/)>.

<sup>89</sup> For an account of the personal and professional costs experienced by racialized professors, and specifically the backlash experienced by a law professor teaching social justice issues, see Rakhi Ruparelia, “Guilty Displeasures: White Resistance in the Social Justice Classroom” (2014) 37:2 *Dalhousie LJ* 815, especially section IV at 836–40. For an account of backlash from students experienced by a Cree professor when teaching a university course incorporating critical perspectives of Canadian and First Nations relations, see Priscilla Settee, *Pimatisiwin: The Good Life, Global Indigenous Knowledge Systems* (Vernon, BC: JCharlton Publishing, 2013) at 39 [Settee]. For an account of backlash from colleagues and administrators experienced by Indigenous professors attempting to introduce Indigenous content into their courses, see Frances Henry, “Indigenous Faculty at Canadian Universities: Their Stories” (2012) 44:2 *Can Ethnic Studies* 101 at 120–21 [Henry]. For an account of the backlash from non-Indigenous students experienced by Indigenous faculty, see Henry, *ibid* at 126–28.

from their underlying rationales or values, or in other words, from their ontologies, epistemologies, ethics, and logics.<sup>90</sup>

Second, the risk of integrating Indigenous law throughout the curriculum without a mandatory stand-alone course is that the Indigenous law may become divorced from its ontology, epistemology, ethic, and logic.<sup>91</sup> This scenario would reproduce the obstacles encountered by Chief Justice McEachern and Justice Vickers. When Indigenous laws are treated as a mere laundry list of rules or principles, removed from their ontological, epistemological, ethical, and logical foundations, they can appear simplistic—lacking in normative force, “disconnected and bizarre” or “completely and hopelessly stuck in the past.”<sup>92</sup> As a result, Indigenous laws can be misconstrued, especially when subjected to foreign analytical categories.<sup>93</sup> For example, as Larry Chartrand recognizes, many Indigenous legal traditions do not compartmentalize their laws “into discrete subject matters like tort law or criminal law.”<sup>94</sup> Although John Borrows allows for the possibility of organizing some Indigenous laws according to common law or civil law categories,<sup>95</sup> he also argues that it is preferable to use the categories inherent to the tradition in question,<sup>96</sup> and thus suggests organizing a course in Anishinaabe law according to the following categories: Heroes,

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<sup>90</sup> I envision this two-pronged approach as an instance of what Damien Lee refers to as the “Balloon Approach to Decolonization”, according to which one simultaneously pushes back against colonialism (for example, by articulating the differences between western and Anishinaabe ontologies, epistemologies, ethics, and logics in a stand-alone course) and fills up the space created by the push-back with Indigenous legal orders (for example, by teaching Indigenous laws throughout the legal curriculum): Damien Lee, “*Because Our Law is Our Law*”: *Considering Anishinaabe Citizenship Orders through Adoption Narratives at Fort William First Nation* (PhD Thesis, University of Manitoba Department of Native Studies, 2017) [unpublished] at 80–81.

<sup>91</sup> See Mills, *supra* note 60 at 851, 857, 883.

<sup>92</sup> Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished], cited in Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 *Indigenous LJ* 1 at 14.

<sup>93</sup> See Eva Marie Garrouette & Kathleen Delores Westcott, “The Story Is a Living Being: Companionship with Stories in Anishinaabeg Studies” in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) 61 at 61–62.

<sup>94</sup> Chartrand, *supra* note 12 at 22. Similarly, John Borrows explains that noun-based categories in general are not the norm for nations whose language is verb-based, as Anishinaabemowin is: John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education” (2016) 61:4 *McGill LJ* 795 at 808 [Borrows, “Heroes”].

<sup>95</sup> Borrows, “Heroes”, *supra* note 94 at 813.

<sup>96</sup> *Ibid* at 814–15.

Tricksters, Monsters, and Caretakers.<sup>97</sup> Of course, Indigenous ontologies, epistemologies, ethics, and logics could potentially be taught in a torts law or criminal law course, for example. But given that these ontologies, epistemologies, ethics, and logics underlie all aspects of Indigenous law, and given the substantial attention they merit so as to avoid painting a simplistic picture of an Indigenous worldview, a stand-alone course may be worthwhile.

### 3.3 Pedagogies

The fundamental differences between a western epistemology and an Anishinaabe epistemology also illustrate the reason for employing Anishinaabe pedagogies when teaching Anishinaabe laws.<sup>98</sup> As Rauna Kuokkanen notes, attempting to understand Indigenous traditions through a western epistemology or pedagogy “yields only epistemic violence and biased, stereotypical (mis)interpretations.”<sup>99</sup> Two of the principles that emerged from the story of “Nanaboozhoo and the Maple Trees” were the importance of learning through active personal engagement and learning collectively.<sup>100</sup> I aim to implement these principles in my Indigenous Legal Traditions course in the following ways.

I use lectures sparingly—usually only when discussing history—given the western epistemological assumptions implicit within the lecture format, namely that the lecturer is an authority, that knowledge can be transmitted by simply communicating true facts, and that students are empty vessels to be filled up.<sup>101</sup> Instead, my classes are most often structured around talking circles.<sup>102</sup> There are thirty students in each section of the course. We usually have two talking circles per class. First, a group of approximately eight to fifteen students discusses a handful of Anishinaabe stories in a talking circle, while the other students serve as witnesses to the circle. Then the groups switch, and approximately eight to fifteen of those who were witnesses

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<sup>97</sup> *Ibid* at 801, 820–27.

<sup>98</sup> Ray & Cormier, *supra* note 77 at 165–66, 172.

<sup>99</sup> Kuokkanen, *supra* note 6; see also Ray & Cormier, *supra* note 77 at 173.

<sup>100</sup> For further discussion of the significance of collective learning within community embeddedness, see Friedland, *The Wetiko*, *supra* note 85 at 130–32; Doris Pratt et al, *Untuwe Pi Kin He—Who We Are: Treaty Elders’ Teachings*, vol 1 (Winnipeg: Treaty Relations Commission of Manitoba, 2014) at 101 (quoting Anishinaabe Elder Enil Keeper) [Pratt et al]; Simpson, *supra* note 86 at 7.

<sup>101</sup> See Settee, *supra* note 89 at 36 (describing Maria Campbell’s 2003 keynote address in which Campbell explained that each of these features of the lecture format are “not conducive to [learning] Indigenous [k]nowledge”).

<sup>102</sup> As mentioned above at note 68, I am indebted to Mills for many aspects of the structure of my course, including the talking circle format that I employ.

discuss a handful of different stories in a circle and the others take their turn as witnesses.

Both the use of stories and the circle format promote students' active learning and personal engagement. Anishinaabe stories reflect Anishinaabe law.<sup>103</sup> But unlike expository writing, stories rarely contain a positivistic statement of legal principles. Instead, principles are often implicit within the action of the story and listeners (or readers)<sup>104</sup> are responsible for finding the principles and using them to generate meaning within their own lives.<sup>105</sup> The circle format also promotes active engagement and learning.<sup>106</sup> No one is in a privileged position, at the front of the room, raised above others. I sit in the circle with the students; we are all on the same level, in the same position.<sup>107</sup> As the stick makes its way around the circle, each person has as much or as little time as he or she needs to draw out principles from the stories. Given that I am only one voice in the circle, students cannot passively rely solely on my thoughts. That being said, I do modify the circle format for the classroom: once the stick has gone around once, we put it down and open up the circle for discussion. This provides an opportunity for synthesis—to answer questions that came up during the circle and for students to ask further questions. The open discussion, though, does not eclipse the circle portion in either time or importance.<sup>108</sup>

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<sup>103</sup> See Pratt et al, *supra* note 100 (“Laws in First Nations lands were passed down from the Elders to the younger generations through their stories, language, and sacred teachings” at 27); Borrows, *Indigenous Constitution*, *supra* note 22 at 57; Napoleon & Friedland, “Inside Job”, *supra* note 26 at 738 (“Our starting place is that some Indigenous stories embed law, legal principles, and legal processes. Stories can be or contain a deliberate form of precedent or shared memory”); on the role of Anishinaabe stories in teaching Anishinaabe laws to children, see Thomas Peacock, “Teaching as Story” in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiiik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) 103; for an account of the power of Anishinaabe stories to reclaim Anishinaabe laws from the laws excreted by Canadian courts, see John Borrows, “*Maajitaadaa*: Nanaboozhoo and the Flood, Part 2” in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiiik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) ix.

<sup>104</sup> Anishinaabe stories are often told orally, but some stories have also been recorded in writing: see Borrows, *Indigenous Constitution*, *supra* note 22 at 56.

<sup>105</sup> See Simpson, *supra* note 86 at 8.

<sup>106</sup> See Ray & Cormier, *supra* note 77 at 169.

<sup>107</sup> See Pratt et al, *supra* note 100 (quoting Anishinaabe Elder Ken Courchene: “The seventh law, look at how we sat in a circle. All differently. We got to sit in this way. Everyone is different and yet equal. And we always had that belief, that difference is not to segregate someone as higher or lower” at 31).

<sup>108</sup> As mentioned above at note 68, I am indebted to Mills for this talking circle format.

The talking circle and the protocols we use in the circle also promote collective learning. Students are encouraged to build upon what others say in the circle. They can do this by incorporating the discussion of others into their own discussion while adding further thoughts. They can also offer answers to questions raised in the circle. In addition, those who want to disagree with something that has been said in the circle are encouraged to do so indirectly to avoid directly contradicting each other.

The second rationale, identified above, for making Indigenous law mandatory is the need to teach future lawyers and judges how to treat Indigenous law as law; or in other words, how to comprehend Indigenous stories as containing not merely factual information but also normative principles that are useful in solving legal problems. The modes of evaluation within my Indigenous Legal Traditions course are structured to accomplish this goal. The two main modes of evaluation are a talking circle assignment and a final exam. Both are designed to let students practice applying the law in the same way that students practice applying the common law, namely, through the use of hypothetical fact scenarios. The talking circle assignment is essentially an in-class, group-based, oral exam. A group of fifteen students is assigned to complete the talking circle assignment during a specific class. At the beginning of that class, those students are given a fact scenario describing an Anishinaabe community dealing with a number of interrelated legal problems. The students are required to analyze the scenario using Anishinaabe law, not Canadian law. They must do so as a group, using the talking circle protocols that we employed during class when discussing stories. The final exam is also a hypothetical fact scenario where students are required to apply either Anishinaabe or Métis law, not Canadian law, but it is in the format of a conventional law school exam—each student writes out his or her own answer individually.

### 3.4 Room for Improvement

Although the foregoing description illustrates, I hope, some potential means of implementing Anishinaabe pedagogies into a law program, I also acknowledge the many shortcomings of my course. One pertains to language. The Anishinaabe language, Anishinaabemowin, reflects Anishinaabe law.<sup>109</sup> Anishinaabe Elder Harry Bone (Giizis-Inini) explains: “That is what the Elders said long ago. If someday you cannot speak the Anishinaabe language, then you will lose your Anishinaabe way of thinking.”<sup>110</sup> My proficiency in Anishinaabemowin is insufficient, at this time, to properly teach the ways in

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<sup>109</sup> See Johnston, *supra* note 83 at 55–56.

<sup>110</sup> Pratt et al, *supra* note 100 (“Our languages are sacred gifts, given to us by the Creator. They carry our way of life, our views of the world, our history, our laws and they bind us to each other” at 69).

which it embodies Anishinaabe law. Thus, a satisfactory analysis of this topic is beyond the scope of this paper as such an analysis is beyond my abilities at this time. The best I can do is highlight Basil Johnston's "One Generation from Extinction", where Johnston explains that within Anishinaabemowin, "the wolf, the bear and the caribou" are our elder brothers, not beasts, objects, or resources.<sup>111</sup> In other words, animals are our relations, and as such, we have an obligation to fulfill certain responsibilities to them. Animals are not chattels or potential chattels. In this way, Anishinaabemowin reflects certain Anishinaabe ontological principles, which in turn give rise to normative principles, or in other words, laws. One of my goals going forward is to rectify my shortcoming in this regard by learning Anishinaabemowin.

Another shortcoming of my course is that it is not sufficiently land-based.<sup>112</sup> Land, including rocks, plants, trees, animals, and water, is a significant source of Anishinaabe law.<sup>113</sup> As Anishinaabe Elder Francis Nepinak (Giiwedinanang) explains: "That is where the Anishinaabe person gets his knowledge, from the environment; this is what it is called in English—'education,' 'school.' The earth, Mother Earth, has been teaching. The Creator gave her what to teach us."<sup>114</sup> John Borrows uses the Anishinaabemowin term *aki-noomaagewin*,<sup>115</sup> or the English phrase "natural law", to describe this phenomenon,<sup>116</sup> but is quick to distinguish natural law in this sense from western natural law theories,<sup>117</sup> according to which some necessary

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<sup>111</sup> Basil H Johnston, "One Generation from Extinction" in WH New, ed, *Native Writers and Canadian Writing* (Vancouver: UBC Press, 1990) 10 at 10.

<sup>112</sup> For a discussion of the importance of land-based pedagogy when teaching Indigenous law, as well as an account of such initiatives in Canadian law schools, see John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2016) 33:1 *Windsor YB Access Just 1* [Borrows, "Outsider Education"]. See also Hannah Askew, "[Indigenous Legal Traditions and the Challenge of Intercultural Legal Education in Canadian Law Schools](#)" (2014) [unpublished] at 16–20, online: <[www.oba.org/CBAMediaLibrary/cba\\_on/pdf/Foundation/StudiesFellowshipHannaAskew.pdf](http://www.oba.org/CBAMediaLibrary/cba_on/pdf/Foundation/StudiesFellowshipHannaAskew.pdf)>.

<sup>113</sup> See Ray & Cormier, *supra* note 77 at 172; Hannah Askew, "[Accessing Justice and Reconciliation: Anishinabek Legal Summary](#)" at 35, 38, online: <[indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/anishinabek\\_summary.pdf](http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/anishinabek_summary.pdf)>. For an example of how to derive principles regarding research methodologies by drawing analogies from engagement with the land, specifically berry picking, see Kathleen E Absolon (Minogizhigokwe), *Kaandossiwin: How We Come to Know* (Winnipeg: Fernwood Publishing, 2011) at 25–26.

<sup>114</sup> D'Arcy Linklater et al, *Kaësi Wahkotumahk Aski—Our Relations With The Land: Treaty Elders' Teachings*, vol 2 (Winnipeg: Treaty Relations Commission of Manitoba, 2014) at 23–24 [Linklater et al].

<sup>115</sup> See Dalhousie University, "['Aki-noomaagewin \(Earth's Teachings\): Stories of the Fall, Indigenous Law and Reconciliation' – Dr. John Borrows](#)" (2014), online: Vimeo <[vimeo.com/88384840](https://vimeo.com/88384840)>.

<sup>116</sup> Borrows, *Indigenous Constitution*, *supra* note 22 at 28.

<sup>117</sup> *Ibid* at 29.

connection exists between law and morality.<sup>118</sup> The natural law described by Borrows involves observing the natural world, such as the actions of plants and animals, and reasoning by analogy to draw legal principles from those observations.<sup>119</sup> Ray and Cormier's interpretation of "Nanaboozhoo and the Maple Trees" illustrates a natural law approach. They draw an analogy between the process of making maple syrup and the process of acquiring knowledge, and then derive principles from that analogy about the nature of knowledge. I strive to incorporate land-based learning into my course by bringing my students to the sugar bush at Fort William First Nation, which is located beside Thunder Bay.<sup>120</sup> Instead of simply reading about the normative principles that can be derived from maple trees, students have the opportunity to engage directly with the land and to learn from members of Fort William First Nation about how they understand and uphold their responsibilities to the maple trees at the sugar bush.<sup>121</sup>

While I believe this opportunity has immense value for our law students, I recognize that it also falls far short of the ideal described by Leanne Simpson in "Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation".<sup>122</sup> Simpson eschews attempts to indigenize the academy that try to incorporate Nishnaabeg intelligence into the existing structure of western universities, which rests on "coercion and authority."<sup>123</sup> Instead, she advocates for a truly Nishnaabeg conception of learning, free from settler-colonial institutions and premised on fostering intimate relationships with all elements of creation.<sup>124</sup> As Simpson puts it, "we shouldn't be just striving for land-based pedagogies. The land must once again *become* the pedagogy."<sup>125</sup>

I acknowledge that one visit to the sugar bush, even combined with the use of talking circles in the classroom, comes nowhere close to actualizing the kind of Nishnaabeg learning that Simpson describes. Throughout

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<sup>118</sup> See Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, 3rd ed (Oxford: Oxford University Press, 2012) at 10.

<sup>119</sup> Borrows, *Indigenous Constitution*, *supra* note 22 at 28. See also Linklater et al, *supra* note 114 ("The stories ... show us how revered and sacred plants and animals are to our Nations. ... By observing them, we learn good behaviours. They show us the natural laws we are to live by" at 39).

<sup>120</sup> For an account of this initiative, see Borrows, "Outsider Education", *supra* note 112 at 15–16.

<sup>121</sup> See Damien Lee & Stephanie MacLaurin, "[Maple Syrup and Anishinaabe Governance in a \(Climate\) Changing World](#)", *The Walleye* (4 April 2016), online: <[www.thewalleye.ca](http://www.thewalleye.ca)>.

<sup>122</sup> Simpson, *supra* note 86.

<sup>123</sup> *Ibid* at 7.

<sup>124</sup> *Ibid* at 9–10.

<sup>125</sup> *Ibid* at 14 [emphasis in original].



the course, I strive to instill in students a sense of humility about their relationship with Anishinaabe law, and my hope is that their experience will encourage them to continue to pursue, even after completing their formal western education, the type of community-embedded, self-led learning for which Simpson advocates.<sup>126</sup>

#### 4. Academic Freedom

Another potential hurdle in the way of mandatory Indigenous content is the claim that such a requirement would violate academic freedom. This section evaluates this claim and argues that it rests on a mischaracterization of academic freedom.

At the heart of the academic freedom complaint is the claim that certain universities have become beholden to a political agenda, and that this agenda is the driving force behind the push for required Indigenous content.<sup>127</sup> Brent Venton, for example, argues that the motivation for mandatory Indigenous courses is the indoctrination of university students into a particular viewpoint.<sup>128</sup> He describes universities as being concerned that society has the “wrong” opinion on Indigenous issues, and as trying to “correct” this opinion with an Indigenous content requirement.<sup>129</sup> His conclusion is that mandatory Indigenous content “undermines academic freedom.”<sup>130</sup>

Venton’s critique presumes that universities who adopt mandatory Indigenous content requirements are prescribing certain doctrines, views, or opinions. I submit that this presumption, at least with respect to legal education, is unfounded. Teaching Anishinaabe law and Métis law is not a matter of convincing students to espouse any particular viewpoint. Rather, the goal is to teach content and skills to students. As discussed earlier in Section 2, lawyers and judges in Canada need to know the content of Indigenous laws so that they can properly interpret and apply section 35 rights. Section 2 also illustrated the problems judges (and lawyers) encounter when they have not received training regarding Indigenous ontology and epistemology, and hence do not have the skills to identify and then apply Indigenous legal principles.

This prompts the question of whether prescribing particular content and skills, as opposed to viewpoints, violates academic freedom. If so,

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<sup>126</sup> *Ibid* at 7.

<sup>127</sup> See Venton, *supra* note 7.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

advocates for mandatory Indigenous content face a serious problem because academic freedom, as Michiel Horn puts it, is widely regarded as being a Good Thing.<sup>131</sup> The defence of academic freedom within academia is so ardent that the concept is considered to be almost sacred.<sup>132</sup> Given its clout, it may be tempting to try to stretch the concept to include ever more facets of academic life under its aegis. And yet, academic freedom is not unlimited.<sup>133</sup> To answer this question, then, it is necessary to examine the concept of academic freedom.

Michiel Horn explains that academic freedom generally has two meanings: “the freedom of universities from external control, and the freedom of teachers and researchers to do their work.”<sup>134</sup> The former refers to the autonomy of universities *qua* institutions, and the latter refers to the autonomy of individual professors to pursue truth regardless of the unpopularity of their conclusions. It is not clear which meaning critics such as Venton have in mind, and so the next two sections consider each in turn.

#### 4.1 University Autonomy

Academic freedom in the sense of university autonomy can be further subdivided into concerns with universities’ independence from the influence of governments or other funding institutions on the one hand, and political neutrality on the other. The former was at issue in *McKinney v University of Guelph*, where a majority of the Supreme Court of Canada held that in the context of that case, the universities at issue were not part of government

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<sup>131</sup> Michiel Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999) at 6 [Horn]; see also *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 69, 76 DLR (4th) 545 [McKinney].

<sup>132</sup> See Cannie Stark, “Academic Freedom, “Political Correctness”, and Ethics” (1997) 38:4 Can Psychology 232 at 232 [Stark].

<sup>133</sup> *Ibid* at 232 (explaining that academic freedom “does *not* mean that we can *do* whatever we want and *say* whatever we want and *write* whatever we want *whenever* we want”) [emphasis in original].

<sup>134</sup> Horn, *supra* note 131 at 4. See also Charles T Gillin, “The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada” (2002) 39:3 Can Rev Sociology & Anthropology 301 at 304 (explaining that “academic freedom may be about the protection of individual rights and/or institutional independence”) [Gillin]; Universities Canada, “[Statement on Academic Freedom](#)” (25 October 2011), *Universities Canada*, online: <[www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/](http://www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/)> (stating that academic freedom is based on “institutional autonomy”) [Universities Canada]. Contra Canadian Association of University Teachers, “[Academic Freedom](#)” (approved by CAUT Council, November 2011), *CAUT / ACPPU*, s 6, online: <[www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom](http://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom)> (drawing a sharp distinction between academic freedom and institutional autonomy and denying that institutional autonomy is an element of academic freedom) [CAUT, “Academic Freedom”].

for the purposes of section 32 of the *Charter*.<sup>135</sup> One of the reasons relied on by the majority in support of this conclusion was the academic freedom of universities, understood as the entitlement of universities to be free from government influence.<sup>136</sup>

Government control, however, is not the issue in the present debate. Critics are not suggesting that governments are forcing or even persuading universities to adopt an Indigenous content requirement. Rather, by complaining that universities are being influenced by “social and political” concerns, Venton is appealing to the second sense of university autonomy, namely, the notion that academic institutions must be politically neutral. According to the traditional view, institutional neutrality is a condition precedent for the exercise of academic freedom by individual professors.<sup>137</sup> This raises the question: Does institutional neutrality mean that universities must be free of all social and political influences, as Venton implies?

Venton’s claim that such influence is unacceptable suggests that at least some universities are able to avoid it, presumably those which do not have an Indigenous content requirement. The assumption, then, is that at least some universities are neutral, unbiased, and impartial insofar as they are not beholden to a social and political agenda. But of course, content requirements still exist within these universities: to graduate with any given degree, a student must successfully complete the required courses for that degree. The difference is merely that the content of these required courses is non-Indigenous. The implication is that non-Indigenous content requirements are neutral, unbiased, and impartial, while Indigenous content requirements are the result of pandering to social and political agendas.

The problem with this line of thought is that non-Indigenous content requirements are not neutral; they reflect a privileging of non-Indigenous worldviews, non-Indigenous epistemologies, non-Indigenous ontologies, and non-Indigenous normative principles. To paraphrase Thomas Nagel, there is no view from nowhere.<sup>138</sup> The choice of any given content is a privileging of that content over whatever is excluded. For this reason, academic freedom in the sense of institutional neutrality cannot mean that universities must be free from all social and political influences. Such a state of affairs is impossible. Every program that a university approves, every

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<sup>135</sup> *McKinney*, *supra* note 131 at para 45.

<sup>136</sup> *Ibid* at para 42.

<sup>137</sup> See J Peter Byrne, “Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education” (1993) 43:3 *J Leg Educ* 315 at 316, 318 [Byrne]; David M Rabban, “Does Professional Education Constrain Academic Freedom?” (1993) 43:3 *J Leg Educ* 358 at 358–59 [Rabban].

<sup>138</sup> Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986).

degree that a university decides to offer, and essentially every substantive decision that a university makes, reflects some social and political value. Institutional neutrality merely means that a university's administration cannot endorse social and political views in a way that impedes the academic freedom of individual professors.<sup>139</sup> To determine whether Indigenous content requirements cross this line, it is necessary to consider academic freedom in the second sense, namely, the autonomy of individual professors to pursue truth free of institutional interference.

## 4.2 Freedom to Pursue Truth

Discussions of academic freedom most often focus on the concept's second meaning: the freedom of professors to determine their research agenda and articulate the findings of their research free from the threat of reprisal. No definition of academic freedom in this second sense has gained universal, or even Canada-wide, acceptance.<sup>140</sup> Horn provides the most comprehensive history of academic freedom in Canada.<sup>141</sup> Barry Hogan and Lane Trotter summarize Horn's description into five elements:

- (a) the freedom to pursue truth wherever that may lead, (b) tenure so that the truth-seeker is not subject to loss of job when the research is controversial, (c) the ability of the scholar to be critical of the university, (d) the ability of the scholar to participate in public life, and (e) co-governance within the university.<sup>142</sup>

The model clause approved in 1977 by the Canadian Association of University Teachers ("CAUT") has also enjoyed a certain measure of approval.<sup>143</sup> In 1990, Donald Savage described it as "the most authoritative statement in Canada on the subject of academic freedom"<sup>144</sup> and it was applied in at least

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<sup>139</sup> Cf Byrne, *supra* note 137 (explaining that complaints about political correctness refer to "administrative sponsorship of certain social ideals in a manner that restricts criticism or debate" at 316).

<sup>140</sup> See *Re University of Manitoba*, 21 CLAS 438, [1991] MGAD No 19 (QL) (grievance arbitration) ("The phrase 'academic freedom' means different things to different people" at para 31) [*Manitoba*]; *University of Calgary Faculty Assn v University of Calgary*, 60 CLAS 13, [1999] AGAA No 104 (QL) (grievance arbitration) ("Academic freedom is not a term with a precise definition" at para 8) [*University of Calgary*].

<sup>141</sup> Horn, *supra* note 131.

<sup>142</sup> Barry E Hogan & Lane D Trotter, "Academic Freedom in Canadian Higher Education: Universities, Colleges, and Institutes were Not Created Equal" (2013) 43:2 Can J Higher Education 68 at 70 [Hogan & Trotter].

<sup>143</sup> But see *Manitoba*, *supra* note 140 (identifying deficiencies in the CAUT model clause at para 92).

<sup>144</sup> *Ibid* at para 43; but see critique of Savage's view of the limits of academic freedom as being too narrow (*ibid* at para 92).

one arbitration decision.<sup>145</sup> In 2011, however, CAUT adopted an updated policy on academic freedom, which differs in some important respects from the 1977 model clause.<sup>146</sup> The 2011 policy is too long to quote in its entirety here, but the key passage states:

Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service to the institution and the community; freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.<sup>147</sup>

Universities Canada, an organization that advocates for Canadian universities, has issued its own "Statement on Academic Freedom" that puts greater emphasis on the limitations of academic freedom as opposed to its substantive content.<sup>148</sup> The differences between the CAUT statement and that of Universities Canada are not surprising, given the different

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<sup>145</sup> *In the Matter of the University of British Columbia and Dr Julius Kane*, unreported, Innis Christie, March 23, 1983 [*Kane*], cited in *Manitoba*, *supra* note 140 at para 43. But see *Manitoba*, *ibid* at para 92 (holding that the decision in *Kane* does not establish "that the CAUT statement is an all encompassing description of academic freedom").

<sup>146</sup> One key difference is that the 2011 policy draws a sharp distinction between institutional autonomy and academic freedom, and denies that institutional autonomy is an element of academic freedom: CAUT "Academic Freedom", *supra* note 134, s 6. This distinction and denial does not appear in the 1977 model clause, which states:

The common good of society depends upon the search for knowledge and its free exposition. Academic freedom in universities is essential to both these purposes in the teaching function of the university as well as in its scholarship and research. Academic staff shall not be hindered or impeded in any way by the university or the faculty association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticize the university and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge (Cited in *Manitoba*, *supra* note 140 at para 42).

<sup>147</sup> CAUT, "Academic Freedom", *supra* note 134, s 2.

<sup>148</sup> Universities Canada, *supra* note 134.

constituencies these organizations represent: faculty associations and universities respectively.

In the light of this lack of unanimity, a lawyer's natural inclination is to look to courts and tribunals, whose definitions normally possess a degree of authority. However, the concept of academic freedom may be an exception to this rule. J Peter Byrne, writing about the legal application of academic freedom to law schools, states: "Legal regulation lies lightly upon law schools."<sup>149</sup> Charles Gillin argues that the meaning of academic freedom is not consistent across Canadian arbitration decisions.<sup>150</sup> As he puts it, "[t]he arbitral grounding of academic freedom is soft and shifting—bog-like."<sup>151</sup> One reason cited by Gillin for this phenomenon is the role of arbitrators as private adjudicators who have an incentive to issue "balanced" decisions or risk jeopardizing their career prospects, given that both the administration and the union must agree to hire any given arbitrator.<sup>152</sup> The incentive to give some benefit to each party can result in different arbitrators applying the concept in different and, according to Gillin, muddled ways.<sup>153</sup> Another explanation may be that arbitrators are bound to interpret and apply the collective agreement at issue, and different collective agreements define academic freedom differently.<sup>154</sup> Perhaps more importantly, grievances rarely turn on a collective agreement's academic freedom provision alone.<sup>155</sup> When other provisions are engaged, their application can be conflated with the notion of academic freedom.<sup>156</sup>

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<sup>149</sup> Byrne, *supra* note 137 at 316.

<sup>150</sup> Gillin, *supra* note 134 at 319.

<sup>151</sup> *Ibid* at 319.

<sup>152</sup> *Ibid* at 316.

<sup>153</sup> *Ibid* at 316, 317.

<sup>154</sup> See *Manitoba*, *supra* note 140 (recognizing that the history of academic freedom "in Canada is one largely of contract as a mutual expression of understanding and agreement by faculty and university" at para 31).

<sup>155</sup> Gillin may be alluding to this point when he states that arbitration decisions that employ "a 'legalistic' approach" fail to provide an insightful analysis of academic freedom: Gillin, *supra* note 134 at 317.

<sup>156</sup> See e.g. *Memorial University of Newfoundland v Memorial University of Newfoundland Faculty Association*, 2007 CanLII 13499 (grievance arbitration) (where the university administration changed some students' final grades without the instructor's knowledge or input: at 14, 56). The arbitration panel concluded that the university was entitled to change the grades and that the professor did not have the "final say", based on the university's regulations (*ibid* at 55). However, the panel held that the university violated the professor's academic freedom by not consulting her about the change in the grades, as required by principles of procedural fairness and due process (*ibid* at 55, 56). The panel held that academic freedom includes such procedural rights. However, it is not clear whether the panel would have reached the same conclusion on the basis of the concept of academic freedom alone, if not for the management rights clause in the collective agreement, which

Despite the lack of consensus, it is possible to identify some core elements within the concept of academic freedom, such as those features that are consistent across the various definitions, as well as the purpose underlying the concept. With respect to the first of these, it is uncontroversial that the protections afforded by academic freedom apply not only to research, but also to teaching.<sup>157</sup> This raises the question: Does a requirement to teach Indigenous content violate the academic freedom of course instructors? In other words, does the application of academic freedom to teaching mean that instructors have free reign over what they teach such that they are entitled to refuse to teach Indigenous content, if they so choose?

To answer this question, it is necessary to consider the second core element of academic freedom, namely, the purpose underlying the concept. Taking a purposive approach to the concept of academic freedom is warranted because, as David Barnhizer explains, “[a]cademic freedom is not an end in itself; it exists only so that higher ends may be achieved.”<sup>158</sup> What, then, is the higher end or purpose of academic freedom? It is to facilitate the search for truth.<sup>159</sup> If truth is to be identified, those who search for it cannot be constrained by prescribed dogma. They must be permitted to conduct their search without fear of reprisal in case it turns out that the truth is unpopular.<sup>160</sup> Tenure is a necessary concomitant to academic freedom because it protects faculty from discipline for reaching unorthodox

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imposed a procedural duty on the university to exercise its governance functions in a “fair, equitable and reasonable manner” (*ibid* at 41, 42).

<sup>157</sup> See CAUT, “Academic Freedom,” *supra* note 134, s 2; Universities Canada, *supra* note 134. Although the summary of Horn’s account provided by Hogan & Trotter does not explicitly refer to teaching, Horn clearly recognizes that teaching is covered by academic freedom: see Horn, *supra* note 131 at 4, 6. See also Keith S Dobson, “The Other Side of Academic Freedom is Academic Responsibility” 38:4 *Can Psychology* 244 (acknowledging that much of “the debate about limits to academic freedom actually deal more with the classroom and curriculum—and what is legitimate and not in that context—than research, per se” at 245).

<sup>158</sup> David Barnhizer, “Freedom to Do What? Institutional Neutrality, Academic Freedom, and Academic Responsibility” (1993) 43:3 *J Leg Educ* 346 at 348, 349 [Barnhizer].

<sup>159</sup> See Sidney Hook, “The Principles and Problems of Academic Freedom” (1986) 58:1 *Contemporary Education* 6 (“why should the community which ... underwrites the great costs of university education support the institution of academic freedom? ... It believes that the discovery of new truths and the extension of the frontiers of knowledge are more effectively furthered by the presence of academic freedom than by its absence” at 8) [Hook]. See Dobson, *supra* note 157 (noting that some have “argued that academic freedom has been the major vehicle for advancing knowledge” at 244).

<sup>160</sup> See Hook, *supra* note 159 (“the professionally qualified person in pursuit of the truth, and abiding by the Canons of professional ethics ... [has] the right to heresy in the field of his competence” at 7).

conclusions.<sup>161</sup> On the traditional view, academic freedom requires political neutrality not only on the part of the institution, but also on the part of individual professors, whose inquiries must be disinterested so as to avoid distortion in their search for truth.<sup>162</sup> Underlying this view is the claim that the scientific model serves as the basis for academic scholarship.<sup>163</sup> In the legal context, however, this assumption is unfounded. No one methodology, not even the supposedly scientific Langdellian method,<sup>164</sup> enjoys universal acceptance within legal scholarship,<sup>165</sup> and the various methodologies employed—legal positivism, natural law theory, law and economics, critical legal studies—often presuppose certain political values.<sup>166</sup> Regardless of which methodology is employed, the typical project of most legal scholarship is to identify shortcomings in the law and advocate for change. Such a project is inherently normative insofar as the selection of both shortcomings and alterations is underpinned by social and political values.<sup>167</sup> Accordingly, social and political neutrality is not the ideal in legal scholarship.<sup>168</sup> It is questionable whether neutrality is still the ideal in any other discipline, given CAUT's rejection of it, as articulated in its 2011 policy statement, which provides: "Academic freedom does not require neutrality on the part of the individual. Academic freedom makes intellectual discourse, critique, and commitment possible."<sup>169</sup> The purpose underlying academic freedom in the legal context, then, is to protect faculty from being forced to espouse a position they do not endorse, and to ensure they are not prevented from espousing a position they do endorse, but political neutrality on the part of the individual is not a prerequisite to academic freedom.

A purposive analysis reveals that an Indigenous content requirement does not violate academic freedom. Such a requirement prescribes the

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<sup>161</sup> See *McKinney*, *supra* note 131 ("Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas" at para 62); *Hogan & Trotter*, *supra* note 142 at 70; *Gillin*, *supra* note 134 at 302.

<sup>162</sup> See *Byrne*, *supra* note 137 at 318; *Rabban*, *supra* note 137 at 359.

<sup>163</sup> See *Byrne*, *supra* note 137 at 327.

<sup>164</sup> See *Barnhizer*, *supra* note 158 (explaining that the approach of legal scholars in the Langdellian era, who believed "law to be a science, value-neutral and apolitical", and questioning the characterization of the Langdellian approach as scientific at 353, 348).

<sup>165</sup> See *Byrne*, *supra* note 137 (arguing that as legal scholars, "we lack essential methodologies around which we can build consensus about what constitutes outstanding legal scholarship" at 320, 328).

<sup>166</sup> *Ibid* at 321.

<sup>167</sup> *Ibid* at 320.

<sup>168</sup> See *Barnhizer*, *supra* note 158 (explaining that in the context of legal scholarship, "political and institutional neutrality is a mirage. We cannot do it" at 356); *Bakht et al*, *supra* note 8 ("The view that law is objective and neutral has long been the subject of devastating critique and today finds almost no serious scholarly support" at 683–84 [footnotes omitted]).

<sup>169</sup> CAUT, "Academic Freedom", *supra* note 134, s 3. See also *Gillin*, *supra* note 134 at 303.



subject matter of a course, not any particular position the instructor must take on the subject. Academic freedom, though, prohibits prescribing positions, not the subject to be taught. Being assigned to teach a certain subject does not prohibit a professor from articulating the findings of his or her research or require a professor to espouse positions that she or he does not endorse. Compelling reasons may exist for not assigning some courses to some professors, including lack of expertise or the need to balance teaching load, but these reasons appeal to principles of quality and fairness, not academic freedom.<sup>170</sup> As scholars have consistently recognized, being assigned to teach any given course—whether it is family law or Indigenous law—is a legitimate limitation of one’s academic freedom, not a violation of it.<sup>171</sup>

Nothing about the underlying purpose of academic freedom allows faculty members to dictate the courses they teach, as opposed to the positions they take when teaching those courses. For example, when an instructor is assigned to teach property law, academic freedom does not entitle him or her to teach criminal law instead. And when an instructor is assigned to teach property law and the properly approved course description establishes

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<sup>170</sup> Admittedly, a course assignment could potentially be allocated in such a way that it constitutes a violation of academic freedom, for example, if a faculty member is assigned to teach a course for which he or she lacks expertise as a punishment for articulating or not articulating particular views: see *Re Vandervort*, [2003] SLRBD No 14 (QL) at para 238 (holding that “there are ways that a university could bring pressure on a professor to alter his views short of discipline; for example, by assignment of duties”). The key, though, is the element of retribution against a faculty member for taking some action protected by academic freedom; without this element, such a teaching assignment may be unfair or injudicious, but it is not a violation of academic freedom. This is illustrated by the decision in *University of Calgary*, *supra* note 140. A dean withheld desirable teaching assignments from faculty members who had refused to include an essay as a mode of evaluation in their other courses. The panel held that based on the specific provisions of the collective agreement and the university’s particular governance structure, the dean’s attempt to implement the essay requirement was not a clear breach of academic freedom, although it did fall within a “grey area”: at para 370. Thus, the dean’s withholding of the desirable courses amounted to a breach of the harassment provision in the collective agreement, but not necessarily a breach of the academic freedom provision: at paras 372–73.

<sup>171</sup> See A Malloch, “Academic Freedom and Its Limits”, in Michiel Horn, ed, *Proceedings, Academic Freedom Conference Harry Crowe Memorial Lecture Series 1986* (Toronto: York University, 1987) 6 at 10–11 [Malloch], quoted in Stark, *supra* note 132 (explaining that “the professor is not free to offer a course of instruction within the university which has not been approved by the appropriate academic bodies” at 232); Stark, *supra* note 132 (explaining that “our freedom is conditioned by the nature of our teaching assignments: the subject matter of our courses” at 232); Hogan & Trotter, *supra* note 142 (“While academic freedom protects the right of the scholar to pursue truth through their research and teaching, institutions have the right to determine who can teach which courses, what may be taught in those courses, and who should be admitted into the university” at 71).

that property law includes common law property law, that is not a violation of academic freedom.<sup>172</sup> Likewise, being assigned to teach an Indigenous law course, or being assigned to teach property law when the properly approved course description establishes that the course covers, say, both common law and Anishinaabe law of property, is not a violation of academic freedom. As Horn explains, academic freedom does not “confer the liberty to teach whatever catches one’s fancy. Course content may depend on the choices made by individual professors, but the subjects to be taught must be authorized by academic bodies.”<sup>173</sup>

Horn’s passage recognizes two points. The first is that instructors may be entitled to determine the specific topics they cover in their courses, even if they are not entitled to dictate their teaching assignments.<sup>174</sup> An

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<sup>172</sup> In such a case, requiring the instructor assigned to the course to teach common law property law, and imposing discipline if he or she refuses to do so, is not a violation of that person’s academic freedom. However, depending on the precise wording of the properly approved course description, the instructor may be entitled to teach more than just common law property law, as long as common law property law is also adequately covered. This is illustrated by *University of Ottawa v Assn of Professors of the University of Ottawa (Rancourt Grievance)*, [2008] OLAA No 356 (QL) (grievance arbitration) [*University of Ottawa*]: where the instructor of a physics course described the course online as being about social and political activism, and the university argued that that description was unacceptable insofar as it “effectively removed the scientific content from the description of the course to in effect convert a course on science into a course on social activism (*ibid* at paras 48, 76). The arbitration decision concerned only this description and not the actual content of the course, as the university and the instructor reached a settlement when the university was assured that sufficient science content was still being covered in the course (*ibid* at paras 65, 67). The arbitrator held that the instructor’s description adequately conveyed the scientific content of the course and that the statements describing the course as being about social and political activism “fell legitimately within the scope of his academic freedom in pursuing a different pedagogical approach to draw students into the learning of science” (*ibid* at paras 76, 82).

<sup>173</sup> Horn, *supra* note 131 at 6. See also Hogan & Trotter, *supra* note 142 at 71.

<sup>174</sup> This principle is also subject to limitations imposed by the properly authorized academic body, as illustrated by the decision in *Assoc des professeures et professeurs à temps partiel de l’Université Concordia c Université Concordia (grief de Dracopoulos)*, 2014 CanLII 22795 (QC SAT), 2014 LNSARTQ 137. Mr. Dracopoulos, a contract lecturer, was directed to use a particular textbook in a course he was assigned to teach. Mr. Dracopoulos refused, as he had been planning to use a different textbook, and as a result his contract was cancelled (*ibid* at para 25). The academic freedom provision in the relevant collective agreement stated that academic freedom “protects each part-time faculty member’s freedom to . . . express and disseminate the results of their scholarly activities in a reasonable manner, (and) to select, acquire and disseminate their chosen documents and materials in the exercise of their professional responsibilities, without interference from the Employer or its agents” (*ibid*). Despite this provision, the arbitrator upheld the decision to cancel the contract given that the specified textbook as well as the outline for the course, had been approved by the institution’s senate (*ibid* at paras 40, 52). See also *University of Ottawa*, *supra* note 172 (holding that instructors must be given “some latitude for flexibility both as to the teaching methods and

Indigenous content requirement, then, should be articulated at the same level of generality as the course descriptions for non-Indigenous courses. This requirement is unproblematic; there is no *a priori* reason why a course description for an Indigenous law course would be articulated with more specificity than course descriptions for non-Indigenous courses.

Horn's second point refers to the academic bodies that have oversight over a university's course offerings. He is alluding to a principle closely associated with academic freedom, namely, collegial governance, according to which academic bodies such as committees, faculty councils, and senates, as opposed to the administration, are responsible for academic decisions, such as approving courses and course descriptions.<sup>175</sup> Most, if not all, law schools in Canada operate within universities governed by such a bicameral system. An Indigenous content requirement must emerge from the proper application of these procedures.<sup>176</sup> Again, this requirement is unproblematic; to my knowledge, no concerns have been raised about Indigenous content requirements being imposed without being approved by the appropriate academic body. Likewise, many of the collective agreements and employee handbooks pertaining to law schools in Canada set out guidelines for allocating the teaching assignments of faculty members each year. Naturally, courses with an institutionally-approved Indigenous content requirement must be assigned in accordance with any such guidelines. Again, this should be unproblematic. There is no *a priori* reason why such guidelines would be violated in the case of Indigenous law courses.

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specific content of a course” but “academic freedom does not extend to allowing a professor to introduce changes which effectively contradict or radically depart from the fundamental concept of the course as originally established” at para 80).

<sup>175</sup> *Contra* John Lachs, “Shared Governance Is a Myth” (2011) 57:23 *Chronicle High Education* (arguing that collegial governance is a myth). Collegial governance is sometimes described as a component of academic freedom, although, like the concept of academic freedom, no universally recognized formulation or definition of collegial governance exists: see *University of Calgary*, *supra* note 140 at paras 354, 355. Collegial governance can also operate as a legitimate limitation on an individual's academic freedom, as illustrated in *University of Ottawa*, *supra* note 172, where an arbitrator held that a university was justified in disciplining an instructor who described his course as being a bilingual graduate course when the senate-approved course description established that the course was an undergraduate course offered in French (*ibid* para 83). According to the arbitrator, no principle of academic freedom permits an instructor to publicly misrepresent the description of a course as approved by the senate (*ibid* para 74).

<sup>176</sup> That being said, academic bodies are not entitled to refuse to approve courses, including mandatory Indigenous courses, merely because they disagree with the content: see Malloch, *supra* note 171 at 11, cited in Stark, *supra* note 132 (arguing that the “fact that courses of instruction must be approved before they can be offered does not authorize departments or faculty councils to reject course proposals as a means of excluding methodologies or orientations which they find uncongenial” at 233).

Some may argue that an Indigenous content requirement also threatens academic freedom insofar as instructors may feel pressure to teach in a particular way or to espouse a particular view in these courses.<sup>177</sup> It may be tempting to label this pressure as “political correctness”, which has long been pejoratively characterized as a threat to academic freedom.<sup>178</sup> To evaluate this claim, it is necessary to understand what it is about political correctness that is thought to be so pernicious. It cannot be the mere fact of being subjected to critique, as critique is the lifeblood of the academic enterprise and is essential to the underlying purpose of academic freedom, namely, engaging in the search for truth. It is through continually subjecting our current theories to critique that we can hope to move ever closer to the truth. Scholars consistently explain that having one’s argument subjected to criticism based on the standards of the discipline is a legitimate limitation of one’s academic freedom, not a violation of it.<sup>179</sup>

What is thought to be so problematic about political correctness, then, is its supposed appeal to standards other than rigorous academic standards. When an argument is characterized as being about “political correctness”, the implication is that the argument is based on the desires of “special interest groups” and not on merit.<sup>180</sup> Whether this is accurate depends on the particular argument at issue. There is no reason to assume the arguments of Indigenous communities, Indigenous scholars, and allies advocating for particular positions within a mandatory Indigenous law course would be based on anything other than merit. On the contrary, we may use as an example some of the most prominent critiques of Canada’s assertion of sovereignty over Indigenous peoples and Indigenous lands that appeal to legal and normative principles—such as equality,<sup>181</sup> the rule of law,<sup>182</sup> and the right to self-determination<sup>183</sup>—each of which constitutes accepted standards within academic and legal discourse. In the light of this scholarship, those who want to teach that Canada’s assertion of sovereignty

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<sup>177</sup> See Venton, *supra* note 7.

<sup>178</sup> See Horn, *supra* note 131 at 328; Dobson, *supra* note 157 at 244; Stark, *supra* note 132 at 232–33. *Contra* Dobson, *supra* note 157 at 244 (arguing “that there is a legitimate role for political correctness in many aspects of the academy’s functioning”); Stark, *supra* note 132 (arguing that “academics are not harmed by what some label ‘politically correct’ behaviour” at 232).

<sup>179</sup> See Hook, *supra* note 159 at 6; Dobson, *supra* note 157 at 244; Byrne, *supra* note 137 at 315–16.

<sup>180</sup> Stark, *supra* note 132 at 232, 233.

<sup>181</sup> See e.g. Michael Asch & Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*” (1991) 29:2 *Alta L Rev* 498 at 501, 510–12.

<sup>182</sup> See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto, 2002) at 116–19.

<sup>183</sup> See Mark Bennett, “‘Indigeneity’ as Self-Determination” (2005) 4 *Indigenous LJ* 71.

is legitimate have a scholarly obligation to respond to the substance of these critiques.<sup>184</sup> Dismissing arguments as appeals to political correctness without engaging with their substance is a way to trivialize those arguments and forestall debate on the merits of the issue.<sup>185</sup> In this context, accusations of political correctness pose the real threat to academic freedom; it is the academic freedom of those accused of political correctness that is under attack, not the academic freedom of those who brandish the barb.

## 5. Conclusion

Many law schools are embracing the call to include Indigenous law as a mandatory component within their curricula. Not all reactions, though, have been positive. Articulating a clear rationale for an Indigenous content requirement is essential to formulating a persuasive response to critics. Without such a rationale, critics may assume that mandatory Indigenous content is a waste of time for students who do not plan to practise in the area of Indigenous issues, or that a particular viewpoint will be mandated in violation of the principle of academic freedom. The rationale sketched by the Truth and Reconciliation Commission and by the Canadian Bar Association points toward the potential of section 35 of the *Constitution Act, 1982*, to foster reconciliation. Thus far, most courts have failed to comply with the Supreme Court of Canada's exhortation to inform the interpretation of section 35 rights with Indigenous laws. This failure is not necessarily due to any lack of enthusiasm or good will on the part of judges, as illustrated by Justice Vickers' attempts to engage meaningfully with Tsilhqot'in law. It is due to a lack of substantive knowledge about Indigenous ontologies, epistemologies, logics, and ethics, and a lack of skill in identifying legal principles within sources such as Indigenous stories, Indigenous languages, and the land. Many judges lack these skills because they were never trained in them. A student may know during law school that she or he has no interest in Indigenous legal issues, but a law student cannot know with any certainty whether she or he will one day become a judge. Indigenous law must be mandatory so that our future judges receive the training they need to contribute to reconciliation. An Indigenous law requirement ensures that

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<sup>184</sup> See Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research Council of Canada, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (Ottawa: December 2014), online: <[www.pre.ethics.gc.ca/pdf/eng/tcps2-2014/TCPS\\_2\\_FINAL\\_Web.pdf](http://www.pre.ethics.gc.ca/pdf/eng/tcps2-2014/TCPS_2_FINAL_Web.pdf)> [TCPS 2 2014] (explaining that "[w]ith academic freedom comes responsibility ... including ... duties of ... rigorous analysis ... and adherence to the use of professional standards" at 5).

<sup>185</sup> See Stark, *supra* note 132 at 233, 235. See e.g. Horn, *supra* note 131 (noting that the phrase "political correctness" was initially applied to feminists, at 327, but also characterizes those to whom the phrase is applied as attempting "to limit debate and confine teaching, research, and publication to nonthreatening topics" at 328).

those who need the training most—those with no interest in Indigenous issues—will get it.

A number of implications flow from this rationale. One is the answer to the question of whether Indigenous law should be taught in a stand-alone course or whether it should be incorporated throughout the curriculum: The two options are not mutually exclusive. The latter option is valuable as a means of avoiding the marginalization of Indigenous law. The former option is valuable as a means of teaching the epistemologies, ontologies, logics, and ethics that underlie Indigenous laws. The differences between an Anishinaabe epistemology, for example, and a western epistemology illustrate the importance of employing Anishinaabe pedagogies such as talking circles and land-based learning in a course on Anishinaabe law. Another aspect of the rationale for a mandatory Indigenous law course is the need to teach future judges how to apply Indigenous law to novel situations in order to resolve legal issues in the same way that the common law is used to resolve legal issues. One way to accomplish this goal is to have students apply Indigenous law to hypothetical fact scenarios. In my Indigenous Legal Traditions course, I combine these techniques by having students apply Anishinaabe law to a hypothetical fact scenario in a talking circle, using talking circle protocols.

The concern that an Indigenous content requirement violates academic freedom is unwarranted. Academic freedom in neither sense—neither university autonomy nor the freedom of individual professors—is harmed by an Indigenous content requirement. University autonomy in the sense of institutional neutrality does not mean that the institution's courses, programs, and degrees must be utterly free of political influences. Such a state of affairs is inconceivable. Institutional neutrality merely prohibits the university from impeding the academic freedom of individual professors. The purpose of academic freedom, in this second sense, is to facilitate the search for truth, which is why professors cannot be forced to endorse views with which they disagree. A mandatory Indigenous law course does not impede this purpose because the instructor of an Indigenous law course is not mandated to espouse any particular position in the course. The instructor may feel pressure, which some might be tempted to label “political correctness”, to endorse a particular position. This pressure is not a violation of academic freedom when it is rooted in arguments that engage legitimate debate. A mandatory Indigenous law course poses no greater threat to academic freedom than does a mandatory property law course.