

Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws

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There is increasing academic, professional and community interest in the greater recognition and revitalization of Indigenous legal traditions in Canada. While there are compelling arguments for why this is important, there has not been much academic attention to the practical question of how to go about doing so. This article takes up the practical question of

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method, examining the question: How might legal scholarship assist with the practical tasks of finding, understanding and applying Indigenous laws today? Through a close analysis of the work of three leading Indigenous legal scholars, it first addresses current issues related to the identification and availability of existing resources. It further goes on to discuss identified challenges to a greater engagement with Indigenous laws. It then examines how each of the three legal scholars have addressed these challenges, identifying four analytical frameworks from their respective works, including (1) the linguistic method; (2) the sources of law method; (3) the single-case analysis method; and (4) the multi-case analysis and legal theory method. Finally, it proposes a fifth possible methodological framework for finding, understanding and applying Indigenous laws: an adapted method of legal analysis and synthesis, as currently taught in common-law law schools. This method is illustrated through a case study of the author's own research project employing this method to identify and articulate Cree legal principles regarding the wetiko (windigo). The article concludes that serious and sustained legal scholarship, scholarship that takes Indigenous laws seriously as laws, is both possible and important. Such legal scholarship is best seen as contributing to Indigenous communities' own ongoing internal political projects of learning, researching, debating and applying Indigenous laws today.

I Introduction: The First Stream

On October 16, 2010, at the close of the conference entitled “Indigenous Law in Coast Salish Traditions,”¹ Professor John Borrows told a story about an experience he had in the summer on Cape Croker reserve, as he stood by a lake in the early morning. When he looked up, soaking in the beauty of the morning, he realized that he was seeing a reflection of the lake in the sky. As he gazed upon this reflection, he suddenly noticed in it a small stream connected to the lake that he had never noticed before. Sure enough, looking down, he saw the stream, which had always been part of the landscape. That morning, a confluence of events allowed him to view a familiar vista in a new way, making it possible for him to see clearly what had been there all along.

1 This conference was held October 14-16. It was hosted by Cowichan Tribes on Cowichan Territory, and sponsored by the Cowichan Tribes and the Research Group on Indigenous Peoples and Governance (IPG), with funding from the Social Sciences and Humanities Research Council of Canada, the Pierre Trudeau Foundation, the Faculty of Law at University of Victoria, and the Consortium of Democratic Constitutionalism.

Like the stream in the above story, Indigenous legal traditions continue to exist in Canada, despite a lack of recognition by the state or by the general public. Indigenous legal traditions may be deeply meaningful and have great impact on the lives of people within Indigenous communities.² Yet I have come to accept that, outside those communities, these traditions are largely invisible or even incomprehensible. Borrows captures this familiar perception when he relates a personal conversation with an unnamed Chief Justice of a provincial appellate court who bluntly stated, “You say Indigenous law exists; I don’t believe it for a minute.”³ Yet even people who want to engage more deeply with Indigenous legal traditions struggle to understand how to do so. Professor Val Napoleon relates her experience of having a well-known lawyer for Aboriginal groups say to her: “We all know there is *something* there—but we don’t know how to *access* it.”⁴ Even if we agree that Indigenous legal traditions *should* be given more respect and recognition within Canada, and drawn upon in more explicit and public ways, we are still left with the very real question of *how* to do this.

There has been increasing scholarship in recent years, by both Indigenous and non-Indigenous scholars, arguing for the importance of a revitalization and recognition of Indigenous law in Canada at a philosophical or political level and discussing legal and theoretical frameworks for imagining that possibility.⁵ Interest about this goes beyond the academy as well, to the judiciary, legal professionals, governance organizations, the federal Department of Justice and Indigenous communities.⁶ Yet very little scholarship or discussion has

2 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23.

3 *Ibid* at 46.

4 Val Napoleon, personal conversation, April, 2010.

5 See, for example, Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009); Lisa Chartrand, “Accommodating Indigenous Legal Traditions” (Discussion Paper prepared for the Indigenous Bar Association, 2005), online: <<http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>>; Sakej Henderson, “Empowering Treaty Federalism” (1994) 58 Sask L Rev 241; Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin, 1996); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 211; Jeremy Webber, “Relations of Force, Relations of Justice: The Emergence of Normative Community between Colonies and Aboriginal Peoples” (1995) 33 Osgoode Hall LJ 623 at 657; and Jeremy Webber, “The Grammar of Customary Law” (2009) 54:4 McGill LJ 580.

6 Some examples of this professional and community interest include the Law Commission of Canada, *Justice Within: Indigenous Legal Traditions*, DVD (Ottawa: Minister of Supply and Services Canada, 2006). In February 2006, the Institute on Governance, a non-profit think tank dedicated to issues of Aboriginal governance, held a “Roundtable on Indigenous Legal Traditions.” For a summary, see online: <http://iog.ca/sites/iog/files/2005_tanaga6summary.pdf>. The Indigenous Bar Association’s annual conference held October 25-27, 2007, was called “Indigenous Laws: Practice, Conflict and Harmonization: Indigenous Laws and Territorial Dispute

focused on the critical and imminently practical question of how academics, lawyers, judges and members of Indigenous communities can “locate methods of finding, analyzing, and applying [Indigenous] law.”⁷

The need to address this question of methods is highlighted by the fact that, in the U.S. context, several Indigenous scholars who are also tribal court judges, including Mathew Fletcher, Pat Sekaquaptewa and Christine Zuni Cruz, have recently raised and explored variations of the above question.⁸ This is significant because, unlike Canada, the United States has a tribal court system. The existence and ongoing operations of tribal courts mean that many of the vexing institutional and intellectual questions often posed as barriers to the greater recognition and integration of Indigenous legal traditions within Canada’s legal system, such as jurisdiction and harmonization,⁹ have been answered satisfactorily enough in the American context.¹⁰ In addition, many

Resolution,” online: <<http://www.indigenousbar.ca/pdf/Conference%20Agenda%20FINAL.pdf>>. Val Napoleon gave a talk entitled “Indigenous Legal Traditions Today: How Might Trans-Systemic Legal Pedagogy Inform Current Legal Processes?” at the Canadian Association of Provincial Court Judges’ Annual Meeting in Halifax, 2010. On March 9, 2011, Justice Canada–Aboriginal Affairs Portfolio hosted the “Symposium on Indigenous Legal Traditions” in Ottawa. The Splotsin-Sek’emaws Tribal Council hosted an “Indigenous Legal Traditions Workshop at Neskolith” in the community of Neskolith, British Columbia, on July 28-29, 2011, online: <<http://www.splotsin.ca/indigenous-legal-traditions>>.

- 7 Mathew Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (Occasional Paper delivered at Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series, 2006) at 17, online: <<http://www.law.msu.edu/indigenous/papers/2006-04.pdf>>. Fletcher uses the term “customary law” interchangeably with “traditional law” or “custom”. I prefer the term “Indigenous law”, of which custom is one of several sources, following Borrows on this point. See Borrows, *supra* note 2 at 24, where he explicitly makes the point that “not all Indigenous laws are customary at their root or in their expression, as people often assume.”
- 8 See generally Fletcher, *supra* note 7; Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking” (2007-2008) 32 *Am Indian L Rev* 319; and Christine Zuni Cruz, “Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law” (2001) 1 *Tribal LJ*, online: <http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/index.php>.
- 9 For a discussion of some of the institutional challenges, see Borrows, *supra* note 2 at 155-165 (discussion of applicability), 177-218 (ch. 7), 219-238 (ch. 8).
- 10 I use the term “satisfactorily” on purpose, as these questions are, no doubt, not answered perfectly. Several American Indigenous legal scholars raise current issues related to federal encroachment on jurisdiction as one of the top concerns for tribal courts today. See, for example, Justin B. Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008) at 13-15; Piestewa (Robert H. Ames), “Contemporary Hopi Courts and the Law” in Edna Glenn *et al.*, eds, *Hopi Nation: Essays on Indigenous Art, Culture, History and Law* (2008) 135 at 137, online: <<http://digitalcommons.unl.edu/hopinaton/15>>; Robert A. Williams Jr., “Foreword: The Tribal Law Revolution in Indian Country Today” in Raymond D. Austin, *Navaho Courts and Navaho Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009) i at x. For a discussion of some of the impact of jurisdictional limitations on the problem of gendered violence, see Sarah Deer, “Toward an Indigenous Jurisprudence of Rape” (2004) 14 *Kan JL & Pub Pol’y* 121 at 127-128. However, for

of these courts have requirements—through “tribal constitutions, tribal court codes and ordinances, and tribal court rules”—to use “customary law” in tribal court decision-making.¹¹

Yet American legal scholars and tribal court judges are clear that a disjuncture exists between the written laws adopted and applied in tribal courts, which remain largely Anglo-American in origin, and “traditional” or Indigenous laws within Indigenous communities.¹² Justin Richland asserts:

Whatever the perspective on the place of customs and traditions in their tribal law, even a cursory review of the contemporary literature on tribal courts reveals that, for today’s tribal jurists, the question concerning the relationship between norms of Anglo-American legal procedure and their unique tribal legal heritage is their fundamental jurisprudential concern.¹³

Even with tribal court jurisdiction, incorporating Indigenous laws makes for a challenging endeavour that often requires further work.¹⁴ The methodological question of how to find, analyze and apply Indigenous laws still remains.¹⁵

It is this question of method I take up in this paper. To be clear from the outset, I will not be addressing the question of whether or not Indigenous laws

the purposes of this paper, my point is that these questions do not exist as barriers to the existence of tribal courts in the United States, while in Canada, in part due to the very different histories of the two countries’ legal relationships with Indigenous nations, these questions are posed as barriers to similar processes.

- 11 Fletcher, *supra* note 7 at 10 (for a complete discussion, see 10-17). See also Zuni Cruz, *supra* note 8 at 5-6.
- 12 See, for example, Zuni Cruz, *supra* note 8 at 1 (“even recently enacted law continues to look very much like the western law of states”), 5. See also Ames, *supra* note 10 at 135: “The Hopi Courts are in much the same situation that I am—halfway [about recognizing custom and tradition in rendering decisions].” Even in the Navaho courts, Austin is blunt that “there is an obvious imbalance in all Navajo Nation Law”; Austin, *supra* note 10 at 37. See also Richland, *supra* note 10 at 15-16.
- 13 Richland, *supra* note 10 at 16.
- 14 See, for example, Sekaquaptewa, *supra* note 8 at 320; Williams’s discussion in Austin, *supra* note 10 at xx; and Zuni Cruz, *supra* note 8 at 5-6, 10.
- 15 As mentioned above, this is not to suggest that there are not Indigenous people in Canada who already access, understand and apply Indigenous laws. In the U.S. context, the Navaho courts are renowned for the extent to which they have incorporated and applied Navaho legal principles to develop a truly Navaho common law. See generally, Austin, *supra* note 10. This may be due to the extensive publically available case law applying these principles, as well as to the cultural knowledge of tribal court judges themselves. However, Sekaquaptewa stresses that, although it may surprise outsiders, “tribal leaders and judges find themselves looking for the law as well,” for good reasons, including the existence of multiple legal levels within any group (Sekaquaptewa, *supra* note 8 at 330, n 31). This inquiry may also be useful for considering how to articulate or reinterpret these laws more explicitly in order to increase general understanding outside communities; see Borrows, *supra* note 2 at 139. Importantly, this inquiry may be used to increase the accessibility of Indigenous laws for the great number of Indigenous individuals who may be alienated from their own communities or legal traditions due to the colonial “socio-economic dislocation amongst Indigenous people in Canada” (at 143).

exist here. It seems to me illogical to assume otherwise,¹⁶ and I hope we will one day shudder at the collective colonial ignorance and arrogance that once submerged the resources of Indigenous legal thought from the broader Canadian political and legal imagination.¹⁷ However, we now must address one of the intellectual consequences of this: that the current state of invisibility and incoherence raises issues related to the accessibility and intelligibility of Indigenous laws.¹⁸ I will also *not* be addressing the question of whether legal scholars *should* work towards increasing the accessibility and intelligibility of Indigenous laws. Although I am conscious there are those who might caution against such a thing,¹⁹ I begin from the assumption that there is value in such an endeavour, and I leave debate about this value for others to take up and examine. I also step aside from the broader questions of the political and legal justifications and frameworks for greater formal recognition of Indigenous legal traditions in Canada that other scholars have already grappled with so ably.²⁰

The narrow question this paper contemplates is: How might legal scholarship assist with the practical tasks of finding, understanding and applying Indigenous laws today? In the American tribal court context, there is a recognized need and a use for increased serious and sustained scholarship engaging with Indigenous legal traditions. Sekaquaptewa argues that legal treatises, accounts, studies, compilations and reviews “provide a big picture backdrop for the making and application of written laws. They also generate debate about

16 See the discussion of groups and law in Sekaquaptewa, *supra* note 8 at 346. The concept of Indigenous peoples as the ‘lawless other’ is an illogical myth that historically served to justify denials of Indigenous sovereignty over desired land by imperial cultures. See, for example, Tully, *supra* note 5 at 65; and Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 Alta L Rev 498 at 507. Prior to European contact or ‘effective control’, Indigenous peoples lived here, in this place, in groups, for thousands of years. We know that when groups of human beings live together, they must have ways to manage themselves and all their affairs. Therefore, as a matter of logic alone, our starting point for any inquiry has to be that, *at some point*, and for a very long time, all Indigenous peoples had self-complete systems of social order. While not every form of social order is legal in nature, the self-completeness means that these systems had to include some normative mechanisms that legal theorists like to call law.

17 Austin, *supra* note 10 at xv, points out that a goal for establishing a solid foundation for the Navaho courts is so they may “eventually assume their rightful place among the world’s dispute resolution systems.”

18 For a discussion of these challenges, see Borrows, *supra* note 2 at 138-148.

19 Borrows himself points out some cautions around greater accessibility to Indigenous legal traditions that stem from a lack of trust due to a historical and present disregard for Indigenous peoples’ intellectual property. See *ibid* at 148-149.

20 See, for example, *ibid* ch. 4-5, 7-8, in which Borrows thoroughly examines and suggests solutions for numerous theoretical, legal and institutional barriers to the greater recognition of Indigenous legal traditions in Canada. See also Tully, *supra* note 5, for a compelling political argument.

the deeper meaning of legal principles important to historical and contemporary issues and spur innovation to solve current problems.”²¹ Specifically, this paper argues that a certain *kind* of legal scholarship could be particularly useful for the critical development and application of written laws in American tribal courts,²² as well as for revitalizing Indigenous legal traditions in Canada: scholarship from an internal viewpoint of a legal tradition.²³ Even more specifically, I conclude that adapting and applying the core method of current legal scholarship from an internal viewpoint—legal analysis and synthesis—is a promising framework to build on the current work of Indigenous legal scholars in this regard.

In this article, I will first discuss the question of what legal resources are available for engaging with Indigenous legal traditions. Next, I outline some of the issues raised by three leading Indigenous legal scholars regarding the current identification and understanding of Indigenous legal traditions, and then I describe the frameworks they propose or use to address these issues in their work. I turn to a discussion of the fundamental similarities in their work, focusing on the questions they ask and on the way they answer these questions—from an internal viewpoint. I then discuss the general recognized benefits of scholarship from an internal viewpoint of a legal tradition, and highlight legal analysis and synthesis as the central method for this scholarship in law schools today. Finally, drawing on my own work applying these adapted tools to Cree laws as a case study, I will argue that this method is the next logical step building on the work of these scholars, as it effectively addresses many of the challenges they raise for finding, understanding and applying Indigenous laws. I conclude that this method is worth pursuing but must be approached responsibly. Legal scholars engaging with Indigenous legal traditions should do so reflexively, conscious of the limits and contributions possible in their role and of their work within the broader communities of practice they engage with.

21 Sekaquaptewa, *supra* note 8 at 379.

22 Zuni Cruz advocates for studies of traditional laws and “the critical development of written law that is based on the principals and precepts of traditional law, thus requiring an inquiry into how any proposed written law relates to principles of traditional law, and whether it is consistent or inconsistent” (Zuni Cruz, *supra* note 8 at 9).

23 “Scholarship from an internal viewpoint” refers to legal scholarship that addresses the way one negotiates successfully and argues within the parameters of legal practice itself. I will discuss the concept at greater length below. See Jeremy Webber, “The Past and Foreign Countries” (2006) 10 *Legal Hist Rev* 1 at 2. Webber contrasts this with legal scholarship from an external viewpoint, which focuses on “historical and sociological accounts of the very same body of law” (*ibid* at 2).

II Approaches to Engaging with Indigenous Legal Traditions: Resources, Challenges and Analytical Frameworks

Some recent scholarship by leading Indigenous legal scholars in North America effectively adapts existing theoretical and analytical tools developed within the legal academy to provide analytical frameworks through which other legal scholars and legal practitioners can begin to engage with Indigenous legal traditions in a realistic and useful manner. I focus specifically on the work of three leading Indigenous scholars mentioned already in this paper, John Borrows, Mathew Fletcher, and Val Napoleon.²⁴ All of their work, in different ways, identifies possible legal resources, directly addresses challenges around the practical engagement with Indigenous legal traditions and provides analytical frameworks for accessing, analyzing and applying Indigenous laws to contemporary issues.

Identification of Legal Resources

A natural consequence of the dearth of publically accessible and written materials explaining, analyzing and using Indigenous laws are the questions: What and where are the resources for engaging with these laws? Where would legal scholars or practitioners start? The Law Commission of Canada's report, *Justice Within*, found that some Indigenous people suggest law can be found in dreams, dances, art, the land and nature, and in how people live their lives. Some people described Indigenous laws as being "written on our hearts."²⁵ These are not the kind of legal resources your average Canadian law student (or professor) would be familiar with! Borrows, Napoleon and Fletcher have all turned their minds to this issue, and all offer some useful starting points. Fletcher also raises some critical questions about the challenges and limitations posed by accessing many of these resources. A further question, addressed later in this paper, is how to begin understanding and interpreting Indigenous laws, even if one finds resources for identifying them.

Borrows explains that Indigenous laws can be recorded and shared in different forms, and in more broadly dispersed and decentralized ways than in the published statutes and court cases that legal scholars are accustomed to.²⁶ He argues that part of the strength and resiliency of Indigenous laws derives from them having been practiced and passed down through "[e]lders,

24 For representative work, see Borrows, *supra* note 2; Fletcher, *supra* note 7; and Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished]. I will focus on these three scholars for clarity but will continue to refer to others as they overlap with or expand on certain aspects of the discussion.

25 Law Commission of Canada, *supra* note 6.

26 Borrows, *supra* note 2 at 139.

families, clans, and bodies within Indigenous societies.”²⁷ He agrees that Indigenous laws can be recorded and promulgated in various forms, including in stories, songs, practices and customs.²⁸ Although Borrows does not discuss this, he also demonstrates that it is possible to identify and interpret law from a variety of different resources through his own identifying and interpreting of legal principles from published collections of ancient origin stories,²⁹ from family and elders’ teachings regarding laws in nature,³⁰ from pots, petroglyphs and scrolls found in an ancient ceremonial lodge,³¹ from terms within an Indigenous language,³² and even from descriptive historical accounts recorded by outsiders.³³

Napoleon appears to agree with Borrows when she explains that law “setting out the legal capacities, relationships, and obligations” can be embedded and recorded in “narrative, practices, rituals and conventions.”³⁴ In her in-depth treatment of the Gitksan legal traditions, Napoleon draws on the cases she analyzes from witness testimony in the *Delgamuukw* trial transcripts regarding oral history (the *adaawk*), from collectively owned stories (*antamahlaswx*), from personal memories and direct experiences, and from information gained through interviews and other published research, both by community members and by outsiders.³⁵

In his broad study, Fletcher identifies several sources that tribal court judges in the United States use as a means for discovering Indigenous laws, and he also adds his critical evaluation of the advantages and limitations of each source. His criticisms are worth discussing in some detail, as they may equally apply to some of the sources Borrows and Napoleon explain and use, and thus may be considered when developing frameworks for interpretation. Fletcher states that, in a tribal court setting, the parties to the litigation should be the first source.³⁶ However, he notes that this is “almost never the

27 *Ibid* at 179.

28 *Ibid* at 139.

29 See, for example, *ibid* at 93-95 (a Carrier story about a wife who changes into a beaver), and at 119-121 (a Cree story about a meeting between the animal people and the Creator before humans were created). See also John Borrows, “With or Without You: First Nations Law in Canada” (1996) 41 McGill LJ 629 (about a treaty between the deer people and humans).

30 See, for example, Borrows, *supra* note 2 at 29-30 (his mother’s legal reasoning related to the observation of butterflies and milkweeds), and at 31-32 (a community meeting discussing a negotiation for control over fishing, where two respected elders tell stories and recollections of fish management).

31 John Borrows, *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) at 38-47.

32 Borrows, *supra* note 2 at 84-86 (using examples from the Cree language).

33 *Ibid* at 81-82 (a case regarding an Anishinabek group’s collective response to an individual becoming increasingly dangerous, recorded by the Superintendent of Indian Affairs in 1838).

34 Napoleon, *supra* note 24 at 71.

35 *Ibid* at 30-31.

36 Fletcher, *supra* note 7 at 36.

case,” with lawyers or advocates rarely contributing any arguments or materials based on Indigenous laws, even when the judge directly asks for these.³⁷ Further, he points out that where litigants make representations regarding Indigenous law without citing authority, this guidance may not prove helpful at all—or may even become dangerous if a judge creates precedent based on faulty guesswork.³⁸

A second possible source, one that Fletcher describes as “having the potential of being the finest source available,” is the use of knowledge of the language. He explains that in many Indigenous communities, “the law is encoded right into the language—and the stories generated from the language.”³⁹ Yet this source often remains unavailable, as “realities dictate” few judges sitting who are actually fluent in the Indigenous language of the tribal court community, and Fletcher believes that translations to English may miss “fundamental fine distinctions, subtle nuances, and even correct meaning.”⁴⁰ Another source is “people of the community—often elders—who are cognizant of the community’s customs and traditions.” Fletcher describes these community members as the “next best ideal source” after a tribal judge who might fit into this category.⁴¹ Yet he goes on to describe several difficulties with this resource, including finding people “willing and qualified to participate in tribal court litigation,” and, more sensitively, “the legitimacy of the representations made by ... community ‘experts.’” Not only might “reasonable minds differ” but there also might exist “fundamental differences on family or political lines” of what constitutes Indigenous laws and what they require of people.⁴² Realistically, tribal judges might “not have the institutional capacity” to choose between competing understandings of Indigenous laws.⁴³

37 *Ibid.*

38 *Ibid.* at 36-37.

39 *Ibid.* at 37.

40 *Ibid.* A notable exception to this concern is perhaps the Navaho courts. See Austin, *supra* note 10 at 40-44 for an example of Navaho fundamental doctrines rooted in Navaho language.

41 Fletcher, *supra* note 7 at 37. See Austin, *supra* note 10 at 45-46. See also Zuni Cruz, *supra* note 8 at 8, who draws on an approach taken in Saddle Lake to advocate for a “process of utilizing meetings and interviews with elders to determine traditional law” and the “use of the information to then articulate basic, foundational principles and precepts of traditional law and the use of those foundational precepts to build the law.”

42 See some of the questions around this in Zuni Cruz, *supra* note 8 at 9. One way of addressing some of these challenges is the Navaho case law developed around the qualifications of expert witnesses on Navaho culture (Austin, *supra* note 10 at 48-49).

43 Fletcher, *supra* note 7 at 39. See also Sekaquaptewa, *supra* note 8 at 320, where she describes her surprise “to find a common practice whereby elder community members are randomly consulted ‘on the spot’ to provide information regarding custom where the context, relevance, and application of such information is reserved to the sole discretion of (often non-Native) drafting attorneys or judges. In the case of judges, there is an expectation that a tribal judge will use his or her knowledge and experience of tribal custom.” She argues, “In all such cases, drafting attorneys and judges are de facto policymakers in great need of useful theories or at least guidelines for working with custom.”

Finally, Fletcher identifies published works as possible sources for locating and identifying Indigenous laws. Fletcher sees “secondary literature about tribal customs and traditions” as having “considerable possibility” as a resource. There is an ample supply of this academic literature, and a good researcher could locate and deliver it to judges.⁴⁴ Fletcher points out that, for many communities, this work may be the only source of histories, legends and laws available.⁴⁵ However, “there is a very significant bias” among Indigenous people against this academic work, which could present a “formidable obstacle” for any tribal court judge using it as a basis for finding and understanding Indigenous laws. Fletcher states frankly, “the legitimacy of a tribal court opinion declaring customary law based on the findings of an academic would be in serious doubt much of the time.”⁴⁶ Another source that might arguably be considered more legitimate is the written work of community members, including “academic research, translation, by others of the oral stories and histories of Indian people and Indian tribes, and even fiction, poetry, stories, and legends told and written by ... community members.”⁴⁷ Although Fletcher does not discuss this, relying on these kinds of sources would likely raise some of the same challenges as would the work of community ‘experts’ or of academics, depending on the author’s proximity to and affiliations with the home community.

The resources identified above can be separated roughly into three categories based on their general availability: (1) resources that require deep knowledge and full cultural immersion; (2) resources that require some community connection; and (3) resources that are publically available.

- 1) Resources that require deep knowledge and full cultural immersion:** The first category of resources would appear to require something close to full immersion in a specific culture to access. This category would include resources such as specific terms in a language, dreams, dances, art, beadwork, pots, petroglyphs, scrolls, songs, natural landscapes, ceremonies, feasts, formal customs and protocols.
- 2) Resources that require some community connection:** The second category of resources would likely require some familiarity with or

44 Fletcher, *supra* note 7 at 37.

45 *Ibid* at 38. See Austin’s point that some Indigenous nations “will have to dig deep into the past to uncover fundamental philosophies, values, and customs to apply to their governments and communities and various aspects of nation-building” (Austin, *supra* note 10 at xx).

46 Fletcher, *supra* note 7 at 38. See also Sekaquaptewa, *supra* note 8 at 382, citing some challenges for judges using outside experts. But see Austin, *supra* note 10 at 48, stating that this may not always be the case anymore in the context of a Navaho court, as there are “now non-Navaho authors who have interpreted, analyzed and discussed Navaho culture and philosophy very well in their books.”

47 Fletcher, *supra* note 7 at 37-38.

connection to a particular cultural community to access. These resources include stories, communally owned oral traditions, information from knowledgeable community and family members, including elders, as well as personal knowledge and memories.

- 3) Resources that are publically available:** The third category of resources requires the least amount of connection to a particular culture or community to access, as it involves publically available, published resources. This category would include written work, including academic work, and works of fiction by community members, descriptive academic work by outsiders to the community, published court cases, trial transcripts involving Indigenous issues and litigant arguments in tribal court settings.

In identifying these categories, I note that in actual practice, no bright lines differentiate these resources, and there is much overlap between them. However, these three categories do roughly map onto the advantages and challenges identified by Fletcher.

Generalizing from Fletcher's insights, it seems fair to say that resources of the first category, such as language or deep knowledge of ceremony, may be perceived as 'ideal' sources for accessing, analyzing and applying Indigenous laws. Yet, realistically, many legally trained scholars, judges and professionals, or even community members, will not have the deep knowledge or cultural immersion they require. While it is worthwhile pursuing such knowledge, the time required to gain it is immense. The next best resources may be those that require some community connection, such as conversations with and teachings by community experts, elders and certain oral traditions. However, it may be challenging to find people willing and able to share their knowledge for particular purposes. Further, it may be difficult to navigate internal conflicts of interpretation within communities. Finally, publically available published resources may raise serious questions of bias and legitimacy. However, they may be the amplest or even the only source of historical legal knowledge available for some Indigenous communities and legal scholars. It thus appears that, generally, the most ideal resources are likely the least available at this time, while the least ideal resources are the most available.

In summary, then, there are many and varied potential resources for accessing Indigenous laws. While the ones identified here are not intended to represent an exhaustive summary of those opportunities, it is none the less possible to sort resources into three categories, each one of them requiring a different depth of cultural knowledge. Real challenges and limitations exist for all categories, and at this point in time, we are faced with a disconcerting inverse correlation between the idealness of resources and their availability. This means that legal scholars must consider the specific challenges of par-

ticular resources, but must also find legitimate ways to work with the non-ideal to advance an important practical task in the present. Let me now turn to further challenges identified for such work.

More Challenges for Increased Practical Engagement with Indigenous Legal Traditions

Borrows addresses institutional and intellectual challenges that interfere with the greater recognition and integration of Indigenous legal traditions within Canada's legal system.⁴⁸ For the purposes of this paper, I focus on the intellectual challenges. Borrows argues that one barrier to the enhanced recognition of Indigenous legal traditions are negative stereotypes derived from the overgeneralization and oversimplification of these traditions.⁴⁹ He identifies as another intellectual barrier "pressing concerns" regarding the intelligibility, accessibility, equality, applicability and legitimacy of Indigenous legal traditions.⁵⁰ As this paper focuses on methods of engagement with Indigenous laws, I will not discuss issues of equality and applicability, which primarily relate to the interaction of Indigenous laws with the Canadian legal system.⁵¹

Borrows begins by explaining that some people may see Indigenous laws as too vague or imprecise to constitute intelligible legal prescriptions for conduct. He points out that there is "nothing inherently unintelligible within Indigenous laws" but acknowledges that "there may be a need to articulate, translate or reinterpret some of them in particular instances."⁵² Closely related to intelligibility is the issue of accessibility, the concern that Indigenous laws are "not readily available" and are difficult to understand.⁵³ The current conundrum regarding resources for accessing Indigenous laws has already shown us that accessibility is indeed a pressing issue.⁵⁴ Borrows also discusses the problem of legitimacy, which he describes as a "catch-all category" that addresses "broader sociopolitical difficulties," including "psychological and emotional objections" that both non-Indigenous and Indigenous people might have regarding a broader acceptance of Indigenous laws in Canada.

Another perspective on legitimacy comes from a common-law scholar, Peter Birk. A contemporary aspect of any law's legitimacy today, he points out, is that the authority of law has been "deeply challenged by changes in

48 For a discussion of some of the institutional challenges, see Borrows, *supra* note 2 at 177-218 (ch. 7), 219-238 (ch. 8).

49 *Ibid* at 23.

50 *Ibid* at 138.

51 But if the reader is interested, see *ibid* at 150-165.

52 *Ibid* at 138-139.

53 *Ibid* at 142.

54 See Zuni Cruz, *supra* note 8 at 4; and Sekaquaptewa, *supra* note 8 at 378, and suggesting structural solutions to accessibility concerns at 379.

the structure of society itself”: “A democracy the members of which are well educated, ambitious and articulate will not take the authority of law for granted. Authority has now to be earned as legitimacy, and legitimacy must be grounded in reason.”⁵⁵ This contemporary demand for explicit reasoning behind laws is another important consideration alongside the psychological and emotional aspects of legitimacy.

Napoleon identifies at least three problems that arise from the typical descriptive accounts of Indigenous legal traditions. First, oversimplified descriptions can “serve to perpetuate the stereotypical myth [that] [I]ndigenous peoples had little or no intellectual life, but just followed rules and stoically upheld unchanging morals.”⁵⁶ Second, it can be hard to imagine the relevance and current usefulness of “fundamentalist versions” of Indigenous legal traditions because they tend to erase the “messy stuff of life,” such as “conflicts and contradictions,” and appear to assume a “naturally harmonious people” rather than real people dealing with real life.⁵⁷ A third issue is the distortion that occurs when state legal systems consider isolated elements of ‘customary law’ as “disconnected and bizarre practices” rather than as parts of “a comprehensive whole.” This makes Indigenous laws appear “completely and hopelessly stuck in the past” and leads to the assumption that they cannot change or adapt internally to deal with today’s issues “according to current social and legal norms, and politics.”⁵⁸

Napoleon voices particular concern about the issues of relevance and utility, arguing that if “legal traditions are determined to be incapable of change or are pinioned in the past, their theoretical and intellectual resources will no longer be available.”⁵⁹ She argues that if legal principles, processes and obligations are to be seen by both insiders and outsiders as part of living legal traditions, rather than as cultural remnants, they must be seen as relevant in today’s world, stating succinctly, “law is something people *do*... [so] if it is not practical and useful to life ... why bother?”⁶⁰

Significantly, Fletcher points out a dearth of the actual use of Indigenous laws in recorded tribal court decisions in the United States. The reasons he gives resonate with the concerns cited by Borrows and Napoleon in the Canadian context. Fletcher identifies eight practical reasons why judges may not rely on Indigenous laws in tribal courts. First, he points out that Indigenous laws are “difficult to discover.” Second, experts may disagree or “be unreliable

55 P.B.H. Birks, “Editor’s Preface” in P.B.H. Birks, ed, *Pressing Problems in Law: What Are Law Schools For?*, vol 2 (Oxford: Oxford University Press, 1996) at vii.

56 Napoleon, *supra* note 24 at 29.

57 *Ibid* at 30.

58 *Ibid* at 47. Napoleon uses an example of a treatment of African customary law regarding a modern-day ‘witchcraft’ killing in a South African murder case.

59 *Ibid* at 91.

60 *Ibid* at 312. See also Zuni Cruz, *supra* note 8 at 4.

relaters” of the relevant law. Third, judges who are part of the community may not give written reasons to expound the law (and they may not use English when doing so), while the majority of judges are not part of the community, raising the concern that their written reasons may not necessarily be reliable or legitimate indicators of Indigenous laws.⁶¹ A fourth practical reason is a question of relevance. Fletcher states that Indigenous laws “may have limited utility in modern disputes,” as they may be too broad and vague to apply to specific fact disputes, or, conversely, may be too specific, and so apply “only to limited fact patterns that tend not to arise in the modern world.”⁶² Fifth, Indigenous law from the past “may not carry enough moral weight to legitimate its use.” Because cultures are not static, new rules adopted by an Indigenous community may be inconsistent with past laws.⁶³

Another, sixth, reason Fletcher believes tribal courts do not often use Indigenous laws is that litigants often do not cite them, either in oral or written arguments, and tend instead to “rely on Anglo-American law or intertribal common law.”⁶⁴ Seventh, in some cases, statutes might preclude the use of Indigenous laws, even for interpretation purposes. The final reason Fletcher lists is the one he sees as perhaps the most important one: that “many tribal court judges do not feel competent to announce or apply customary law” and may not even see it as appropriate to their institutional role, seeing this as better left to the political leadership of the community.⁶⁵ Fletcher also brings up some related concerns about tribal courts applying Indigenous laws, including the “sensitive” subject of whether judges who are not members of a community can or should announce those community’s laws.⁶⁶ Additionally, there is the risk of tribal courts carelessly invoking vague, superficial “pan-tribal values” as Indigenous law.⁶⁷

These practical and theoretical issues can be roughly sorted into five categories of challenges to finding, understanding and applying Indigenous laws: (1) challenges of accessibility; (2) challenges of intelligibility; (3) challenges of legitimacy; (4) challenges of distorting stereotypes; and (5) challenges of relevance and utility.

61 Fletcher, *supra* note 7 at 28-29. But see Austin, *supra* note 10 at 45-51, discussing ways the Navajo courts deal with these challenges.

62 Fletcher, *supra* note 7 at 29.

63 *Ibid.*

64 *Ibid.* One reason for this may be a structural one. Sekaquaptewa argues that “tribal governments, by default have put the financial burden on our elders [those most likely to need or want] to find and plead custom.” She argues that tribal leaders and legislatures “need to give serious attention to shifting the burden off our more traditional and elder parties and onto the government where it belongs” (Sekaquaptewa, *supra* note 8 at 383).

65 Fletcher, *supra* note 7 at 30. See Sekaquaptewa, *supra* note 8 at 320, describing this as a “policymaking role” and calling for guidelines for judges interpreting custom.

66 Fletcher, *supra* note 7 at 40.

67 *Ibid.* at 33. See Sekaquaptewa, *supra* note 8 at 328, calling this “essentialism.”

- 1) **Challenges of accessibility:** This category speaks to the reality that Indigenous laws are typically not readily available, as Borrows points out and as we have already seen when we looked at the legal resources available. It is captured in Fletcher's practical concerns about the difficulty of discovering what Indigenous laws are, the lack of written reasons citing Indigenous laws, and the reality that the majority of people with legal training may not have deep enough knowledge of the language and culture to recognize and understand Indigenous laws embedded within these resources.
- 2) **Challenges of intelligibility:** Some Indigenous laws may appear too vague or too imprecise to serve as standards for conduct. Borrows acknowledges this as a barrier, and Fletcher refers to the issue of specific laws being too broad or vague to be usefully applied to modern issues. There must be a way to understand what laws require of people subject to them. Some laws that are embedded in resources which require deep knowledge or cultural immersion to be understood may necessitate a more conscious and explicit articulation, translation or reinterpretation to be comprehensible to a greater number of people today.
- 3) **Challenges of legitimacy:** Borrows's insight that historical, emotional and sociopolitical issues can impact people's perceptions of legitimacy is a crucial one for understanding some of the concerns raised by Fletcher about tribal judges from outside the community, whose decisions, and decision-making capacity regarding Indigenous laws, may not be viewed as legitimate simply because of who they are (or who they are not). Deeply engrained feelings about who should and should not speak about Indigenous laws reflect a reasonable distrust rooted in a long and painful history.⁶⁸ Such emotions clearly impact legal scholarship as well. However, authority and legitimacy are also grounded in people's ability to reason through law. This may be an increasing challenge *within* communities.⁶⁹ Fletcher's point that specific laws from the past simply may not have enough moral weight today speaks to this aspect of legitimacy. Laws that might have been legitimate in the past may not be so in the present, in large part due to reasoning processes within traditions that respond to sociopolitical changes. This process of change is legitimate, and ignoring the results may lead to the fundamentalism and atrophy both Borrows and Napoleon caution us against.

68 For a discussion of part of this history in the context of academic research and Indigenous peoples, see Shaun Wilson, *Research Is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood Publishing, 2008) at 45-51.

69 See, for example, Zuni Cruz's point that issues regarding the use of 'traditional' laws are raised "by those within the tribe and without the tribe," and pointing out that some tribal members "may feel that traditional law is subject to manipulation" (Zuni Cruz, *supra* note 8 at 4).

- 4) Challenges of distorting stereotypes:** All three scholars point out that there are negative, static, utopian or superficial pan-Indigenous stereotypes that must be contended with if the continued dismissal or distortion of Indigenous laws is to be avoided. Borrows sees overcoming negative stereotypes as one of the most crucial tasks to achieve greater recognition and respect for Indigenous laws in Canada. Napoleon's concerns regarding distortions and the perpetuation of ugly stereotypes of unthinking Indigenous people and Fletcher's concerns about superficial pan-Indian values masquerading as Indigenous laws represent serious concerns about the potential negative impact of stereotypical portrayals of Indigenous laws.
- 5) Challenges of relevance and utility:** Both Napoleon and Fletcher talk directly about the challenge of Indigenous laws' current relevance and utility. Napoleon is particularly concerned that, on a general level, resources from within Indigenous legal traditions will no longer be available to Indigenous people if they are seen as mere remnants of the past, without any capacity to change. Fletcher's observation that most litigants in tribal courts do not use Indigenous laws in their written or oral arguments raises questions in this regard. This is surely an inevitable issue that must be considered, as is his point that some Indigenous laws simply may not apply, for various reasons, to certain modern issues. Issues of relevance and utility will have to be faced at both broad and particular levels.

These challenges are formidable, and they exist both in Canada and in the United States. In Canada, they arise more at the theoretical or philosophical level, sometimes being cited as reasons against the more formal recognition and integration of Indigenous legal traditions. In the United States, where tribal courts exist and are often specifically mandated to consider and apply Indigenous laws, they arise at an intensely practical level.⁷⁰ This suggests that challenges of accessibility, intelligibility, legitimacy, stereotyping and utility are likely to be long-term ones, even if changes occur at the political and institutional levels in Canada. We cannot wish these difficulties away. Once again, we face the question of how to proceed productively in the non-ideal present.

70 Fletcher, *supra* note 7 at 10-16, discusses the varied sources of these mandates in a number of tribal courts. The widespread persistence of these challenges to finding, understanding and applying Indigenous laws does not mean that tribal courts in the United States are not doing so. The institutional space of tribal courts, particularly when staffed by culturally embedded judges and legal professionals, creates the interactional space for the ongoing development of unique jurisprudence that considers and incorporates Indigenous laws in various ways. Two excellent examples of this can be found in the extended discussion of the Hopi courts in Richland, *supra* note 10, and of Navaho case law in Austin, *supra* note 10.

Indigenous Scholars' Analytical Frameworks for Accessing, Analyzing and Applying Indigenous Laws

It seems fair to say that any legal scholarship robust enough to provide some useful frameworks or guidelines for finding, understanding and applying Indigenous laws will likely require methodologies that consciously consider and adequately address these challenges. I turn now to examine how different methods of engaging with Indigenous legal traditions create a variety of analytical frameworks for addressing them. Fletcher, Borrows and Napoleon have all developed such analytical frameworks; I will call the different ones (1) the linguistic method, (2) the source of law method, (3) the single-case analysis method and (4) the multi-case analysis and legal theory method. Each of these methods addresses several of the above challenges.

The Linguistic Method

I will begin with Fletcher's proposed method because I find it the least useful for legal scholarship if used in isolation, although it may have much merit in the context of U.S. tribal courts. Fletcher argues that if tribal courts are going to require or encourage the use of Indigenous laws, they should also provide "a roadmap for finding, understanding, and applying" these laws.⁷¹ He then advocates for a specific method of accessing, understanding and applying Indigenous laws in tribal courts, which he relates back to H.L.A. Hart's legal theory involving primary and secondary rules. For those readers in need of a Hart refresher, Fletcher explains that primary rules are rules that "impose obligation to conform behavior of members of the community," such as prohibitions or requirements,⁷² and that secondary rules are rules of recognition, including "rules of adjudication" and "rules of change," which comprise procedures for determining "where the rules are" and "authoritative determinations of the fact the rule has been broken."⁷³ Based on this discussion, Fletcher proposes what he calls the "linguistic method," which involves the following process: First, the tribal court judge must "identify an important and fundamental value identified by a word or phrase in the tribal language" (a primary rule).⁷⁴ Next, that primary rule is applied by the judge to the Anglo-American or intertribal secondary rule "as necessary to harmonize these outside rules to the tribe's customs and traditions."⁷⁵

71 Fletcher, *supra* note 7 at 36.

72 *Ibid* at 8.

73 *Ibid* at 10.

74 *Ibid* at 41.

75 *Ibid*.

Fletcher gives an example of a tribal court having actually done this, one where a Navaho court applied the tribal principle of *hazho'ogo* (a fundamental tenet about treating other humans with patience and respect)⁷⁶ to expand the procedural prohibitions around self-incrimination in criminal cases.⁷⁷ Fletcher sees this method as transferable and capable of providing “interpretative parameters” to tribal judges.⁷⁸ He believes it provides the “critical advantage” of allowing tribal courts “to bring customary law into the modern era without creating much additional confusion as to the application of the law,” adhering to a form of “judicial minimalism” in tribal court jurisprudence.⁷⁹

When considering the challenges listed in the previous section, as well as the current quandary regarding legal resources, I have trouble picturing how far legal scholarship could move using Fletcher’s method. In the context of a tribal court, I agree that relying on the inherent knowledge of language as a legal resource, and applying broad concepts as interpretative aids to Anglo-American procedural law, is likely to do the least harm: it risks little in terms of distortions relating to superficial pan-Indigenous values, and it at least gives tribal court judges a concrete way to begin considering and using Indigenous principles in a relatively safe and transparent way. This is perhaps the method’s greatest strength. In addition, by relying on language, which fits into the most ideal category of legal resources, it will have the ring of legitimacy for many people. However, Fletcher himself establishes that the most ideal legal resources are actually the least available, and he does not provide a satisfactory way of addressing this issue.⁸⁰

The other glaring problem that Fletcher does not consider is his own earlier point that reasonable minds can differ regarding the interpretation of any law. His method appears to ignore the reality that serious interpretative conflicts can emerge concerning a single word, particularly one that signifies a fundamental legal principle in a society. For example, Austin describes *hazho'ogo* itself as “a polysemous term.” Although he states that it “generally means respectful and considerate behavior in the presence of others,” the term’s specific meaning “usually depends on the context in which it is used.”⁸¹ Consider also that troublesome gem of the English language so central to con-

76 My own rough interpretation from the “statement of tribal common-law” by the Navaho Court, as reproduced in Fletcher, *ibid* at 19.

77 *Ibid* at 41, referring to the case, *Navaho Nation v. Rodriguez*, discussed in detail at 17-21. See also Austin, *supra* note 10, for extended case law applying fundamental Navaho principles to various cases in a similar way.

78 Fletcher, *supra* note 7 at 42.

79 *Ibid*.

80 Fletcher does suggest that tribal court judges who do not speak the language could still apply the values in a specific term, but this seems to fly in the face of, or at least dodge, his own earlier comments about the problems of translation.

81 Austin, *supra* note 10 at 110.

stitutional jurisprudence both in the United States and in Canada, “equality”.⁸² Fletcher suggests no real way of grappling with conflicting interpretations of the principle in question. Also troubling, applying single linguistic terms as legal values, without anything more, seems to raise the risks of oversimplification that Napoleon cautions against, as the terms are presented as isolated values, rather than as one principle to consider, one that must be balanced against others in a comprehensive whole. While the competing interests before tribal courts may provide this balancing, in scholarship *per se* there is no obvious way to deal with the attendant risks of rigidity, essentialism and fundamentalism using this method.

The Sources of Law Method

Borrows suggests that the intellectual barrier posed by negative stereotypes about Indigenous legal traditions can be overcome if “Indigenous laws are understood in greater detail, free from misleading characterizations.”⁸³ He argues that a better understanding of the details of Indigenous laws and of “communities’ legal foundations” could “lead to a better appreciation of their contemporary potential, including how they might be recognized, interpreted, enforced, and implemented.”⁸⁴ Towards this end, he identifies varied sources of Indigenous laws, including (1) sacred, (2) natural, (3) deliberative, (4) positivistic and (5) customary law.⁸⁵ This offers a particularly important discussion for two main reasons. First, by identifying multiple sources of law, Borrows demonstrates that Indigenous legal traditions reflect a much richer and more complex social organization than their typical characterization as “customary law” suggests.⁸⁶ Second, Borrows argues convincingly that “the proximate source of most Indigenous law” is deliberation.⁸⁷ This emphasizes the intellectual and inherently social character of all law, including the centrality of questions of interpretation and persuasion. He explains: “When Indigenous people have to persuade one another within their traditions, they must do so by reference to the entire body of knowledge to which they have access, which includes ancient and modern understandings of human rights, due process, gender equality, and economic considerations.”⁸⁸ Borrows stresses that the deliberative character of Indigenous laws is “key to resisting fundamentalist

82 Although examples of this abound, a clear illustration of competing interpretations of equality is found in Borrows’s discussion of equality arguments for and against the greater formal recognition of Indigenous legal traditions in Canada. See Borrows, *supra* note 2 at 150-155.

83 *Ibid* at 23.

84 *Ibid*.

85 *Ibid* at 23-58 (ch. 2).

86 *Ibid* at 51.

87 *Ibid* at 35.

88 *Ibid*.

and dogmatic legal practices and ideas.”⁸⁹ It also “means they can be continuously updated and remain relevant in the contemporary world.”⁹⁰

Borrows’s discussion of different sources of Indigenous laws provides an analytical framework for thinking through them in a more complex and complete way than do typical descriptive accounts. This attention to complexity and a focus on deliberation appear to effectively challenge and avoid stereotypes, as well as increase intelligibility by making the origins of laws more explicit. Identifying and questioning the sources of any particular Indigenous law also provides a way to reinforce the legitimacy of a statement of law or to respectfully argue interpretative differences.⁹¹ Yet this method does not necessarily address the issue of accessibility to laws in the first place.

The Single-Case Analysis Method

Yet another striking and groundbreaking method Borrows often uses, but rarely, if ever, discusses in detail as a methodology, goes quite far in increasing accessibility to Indigenous laws by closely analyzing individual Anishinabek stories to draw out legal principles, much as law students do with court cases. I call this the “single-case analysis method” and believe it is the single biggest step towards accessibility and intelligibility that has ever been taken in legal scholarship engaging with Indigenous legal traditions.

In some places in *Canada’s Indigenous Constitution*, but more so in its companion book, *Drawing Out Law*, and in previous work,⁹² Borrows interprets legal principles from a particular story and uses these principles to explore or explain current issues. In doing so, he explains, he is acting on his mother’s teachings about the need to consider and share the current relevance and utility of these stories.⁹³ While the single-case analysis method undeniably renders principles within stories much more accessible and intelligible, Fletcher criticizes and actually rejects this method, which he views as a variation of the case method, because he sees the interpretation of principles from specific stories as an essentially boundless endeavour, raising the issue of in-

89 *Ibid* at 36.

90 *Ibid* at 35.

91 For example, see Borrows’s discussion regarding the appeals to authority of positivist proclamations where they are practically entangled with a “powerful group’s claims to authority from laws flowing from the Creator [sacred], nature [natural law], or from the functioning of a deliberative council [deliberative]” (*ibid* at 50).

92 Borrows, *supra* note 29.

93 In *Drawing Out Law*, Borrows, *supra* note 31 at 87, explains, “his mother always encouraged him to see the wider world through older Anishinabek eyes. She encouraged him to share how their ancient ways still swirled around them. It was obvious to her that the events and stories surrounding them were still very much connected to their living, enduring culture. She always expected her son to make these connections more explicit, no matter where he lived.”

determinacy. He states bluntly: “Some limitation in meaning must be present or else there will be no meaning at all.”⁹⁴

To be fair, Borrows never claims his interpretations as authoritative; he merely states that ancient stories have useful lessons to give, and that these can be applied to current issues. However, if deliberation, interpretation and persuasion are at the heart of a legal tradition, and if these principles are to be applied with concrete consequences, there must be ways for others to legitimately confirm or challenge his interpretations and their relevance. The single-case analysis method may thus raise similar challenges as I discussed regarding the current availability of ideal legal resources.

Borrows may be operating within implicit interpretative limits when identifying principles from individual stories due to his particular deep cultural knowledge, or to his access to family and community connections, even though he often uses publically available sources in his work. Other people without deep knowledge or comparable family connections may not have similar implicit interpretative limits at their disposal. Borrows himself points out that “law is a cultural phenomenon,” and so “those who evaluate meaning, relevance, and weight of Aboriginal legal traditions must therefore appreciate the potential cultural differences in the implicit meanings behind the explicit messages if they are going to draw appropriate inferences and conclusions.”⁹⁵ This could pose a particular interpretative challenge for legal scholars who are attempting to engage with and articulate internal dimensions of Indigenous legal traditions but who were not, in fact, raised or trained within that particular Indigenous society.⁹⁶ Both Borrows and Napoleon emphasize the importance for legal scholars to be reflexive about their position in power dynamics and structures,⁹⁷ to recognize the cultural foundations of knowledge and to acknowledge their own biases when engaging with Indigenous legal traditions.⁹⁸ Yet while recognition and reflexivity may allow scholars to question their assumptions, they do not, in and of themselves, support the development of interpretative limits. There must be some way to recognize legitimate boundaries for interpretative arguments to take place within. Interpretative

94 Fletcher, *supra* note 7 at 43-44.

95 Borrows, *supra* note 2 at 140.

96 Napoleon acknowledges that this constitutes a limitation for her analysis, despite her having spent more than 20 years working with the Gitksan and being an adopted member of the Hours of Luuxhon of the Frog Clan. She none the less proceeds to “explore and interpret Gitksan legal traditions from an internal philosophical basis, rather than focus on external descriptions” (Napoleon, *supra* note 24 at 17). While legal scholars of non-Indigenous descent most obviously face this limitation, there are also Indigenous scholars who may be working in a different legal tradition (like Napoleon, who is Cree, but engages with the Gitksan legal order) or who were not raised within Indigenous communities for a variety of reasons.

97 *Ibid.*

98 Borrows, *supra* note 2 at 141.

boundaries would also provide an important safeguard against distortions deriving from stereotypes or simply from profound misunderstandings as people reason through the law.

The Multi-Case Analysis and Legal Theory Method

Napoleon's work with the Gitksan legal tradition stands out as by far the most thorough analysis of a particular Indigenous legal tradition to date. She combines two major approaches to avoid replicating the problems in many descriptive accounts that she criticizes in her own treatment of Gitksan law, as well as to build interpretative limits. First, she deliberately adopts a "law case method" for exploring Gitksan law in a substantive way.⁹⁹ She explains that she has chosen this method, despite extant criticisms, because "the law case method reveals the intellectual aspects of Gitksan law—forms of legal reasoning (*i.e.*, analogy, metaphors, problem-solving, collectively owned outcomes, etc.), use of precedent, interpretation, applications, decision-making and agreements that are often missed or ignored completely in descriptions of [I]ndigenous law."¹⁰⁰ Second, she draws from Western legal scholars to theorize about the broader "structures, processes, and expressions of law" that enabled the Gitksan "to effectively manage themselves as a decentralized, non-state people."¹⁰¹ She consciously adapts and applies work from classic Western legal theorists (specifically from H.L.A. Hart's positivist theory of primary and secondary rules, Lon Fuller's interactional law theory, and William Twining's legal theory framework) as critical tools to explore and analyze the substantive Gitksan law she identifies through the case method.¹⁰² By combining these two approaches, Napoleon locates principles from specific cases in a comprehensive whole, while also ensuring that her articulation of that comprehensive whole avoids "romanticism and rhetoric"¹⁰³ by remaining "grounded in a substantive on-the-ground treatment of Gitksan law."¹⁰⁴

In her two-pronged approach, Napoleon first groups cases into rough categories to identify principles within each category. She then applies Twining's theoretical framework to the principles and practices within these categories to identify a tentative Gitksan legal theory, which she proposes can be "tested

99 Napoleon, *supra* note 24 at 24 -29, explicitly refers to the influence on her own thinking of Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

100 Napoleon, *supra* note 24 at 29.

101 *Ibid* at 38.

102 *Ibid* at 38, nn 106-107, citing H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); Lon L. Fuller, "Human Interaction and the Law" in Kenneth I. Winston, ed, *The Principles of Social Order: Selected Essays of Lon Fuller* (Portland, OR: Hart Publishing, 2001) 232; and William Twining, *Globalisation and Legal Theory* (New York: Cambridge University Press, 2000).

103 Napoleon, *supra* note 24 at 39.

104 *Ibid* at 15.

and extrapolated for broader application to other areas of law within the Gitksan legal order” and, “with care,” may have potential as a “basic framework model for other non-state and decentralized indigenous peoples.”¹⁰⁵

To give a sense of the complexity and comprehensiveness of Napoleon’s work here, I set out an outline of her articulation of a tentative Gitksan legal theory. Her findings include

- 1) *A coherent total picture* of the Gitksan legal tradition, including
 - a) a non-state, decentralized governance system¹⁰⁶
 - b) relevant legal actors and relationships (including kinship)
 - c) stabilizing tensions¹⁰⁷
 - d) sources of law¹⁰⁸
 - e) geographic space or jurisdiction¹⁰⁹
- 2) *General concepts*, including that
 - a) Gitksan law comprises implicit and explicit rules *and* the intellectual processes of legal reasoning, interpretation and application¹¹⁰
 - b) there are different types of Gitksan laws, including primary, secondary and strict¹¹¹
- 3) *General normative principles*, including
 - a) the “paramount importance of maintaining ... the overall legitimacy of the legal order”¹¹²
 - b) the importance of kinship relations
 - c) individual and collective accountability
 - d) resistance to hierarchy and centralization
 - e) the importance of relationships to the land and to non-human life forms
 - f) agency and independence
 - g) cooperation¹¹³
- 4) *General working theories* for participants, including
 - a) “a focus on compensation rather than a determination of guilt”

105 *Ibid* at 294.

106 *Ibid* at 296.

107 *Ibid* at 297-299.

108 *Ibid* at 299-300.

109 *Ibid* at 300-301.

110 *Ibid* at 301-303.

111 *Ibid* at 303-305.

112 *Ibid* at 307.

113 *Ibid* at 307.

- b) “public witnessing and accountability”
- c) “collectivity versus individuality insofar as responsibility and compensation are concerned”
- d) the importance of precedent
- e) “the critical importance of knowledge of lineage, history, and kinship relationships”¹¹⁴

It is hard to imagine someone walking away from legal scholarship so robust imagining that Gitksan legal principles are isolated anachronisms or viewing the Gitksan of the past (or the present) as simple, unthinking people. It is also an accessible and intelligible treatise, even for people who are not Gitksan, or for those who may not even know who the Gitksan are.

Napoleon’s work appears to answer Fletcher’s criticism of boundlessness, as well as his concern about the case method more generally,¹¹⁵ partially because she develops a larger theoretical framework, which arguably sets up interpretative limits, but also because she analyzes a *number* of Gitksan stories and cases (24 in all) as a “small slice” of a larger Gitksan legal tradition.¹¹⁶ By taking Borrows’s method of single-case analysis one step further and “unpacking” several cases at the same time, Napoleon is able to identify differing themes, or categories of legal decision-making, as well as common legal principles.¹¹⁷ Although she does not explicitly identify her methodology beyond that of the case method, she clearly reaches and supports her conclusions by analyzing and synthesizing several cases, from different times and with different fact scenarios. Arguably, such an identification of general principles can serve to set the outer limits of the normative and interpretative debates within the broader Gitksan legal tradition, or at least suggest certain factors that would likely influence the “relative success of various normative assertions” within it.¹¹⁸

114 *Ibid* at 309.

115 Fletcher, *supra* note 7 at 43.

116 Napoleon, *supra* note 24 at 95. Napoleon stresses the importance of remembering “that the whole of the Gitksan legal traditions is infinitely more extensive than anything I am able to capture here.”

117 For example, Napoleon identifies as a general legal principle a focus on punishment, compensation and remedies, rather than on findings of guilt or responsibility. See the discussion and analysis *ibid* at 156-160. Other general principles she identifies in this manner include a heavy reliance on reciprocal relationships in kinship systems and an emphasis on public witnessing and accountability. See *ibid* at 148-156, 160-164.

118 Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 Osgoode Hall LJ 167, as cited in Borrows, *supra* note 2 at 137-138. Webber’s essential insight is that law’s content is always more provisional and open-ended than “singular or predetermined,” and that it is more useful to look at the range of arguments and terms of the debate itself, rather than focusing on one particular outcome at any given point in time.

Relying on case analysis and synthesis using many legal resources, and building a tentative legal theory based on these findings, may also offer one way to effectively address some of the challenges of legitimacy. Napoleon relies mainly on publically available materials from court transcripts, but her synthesis considers and incorporates interviews with community connections and even published accounts from outside academics. By synthesizing legal principles from all of these resources, and by bringing this synthesis back to sketch a tentative legal theory, her final result becomes more than the sum of its parts. It is both grounded enough to withstand challenge and criticism and flexible and complex enough to acknowledge interpretative debates, as tensions between legal principles are a vital part of a living Gitksan legal tradition.

Each of the four methods described and discussed in this section has significant strengths. None provides a complete answer to every challenge or represents *the* definitive road map for how to find, understand and apply Indigenous laws. For instance, generally, it would appear that while the strength of Fletcher's framework lies in the immediacy and efficiency with which it may allow tribal court judges to *apply* Indigenous laws in an institutional setting, the strengths of the frameworks provided by Borrows and Napoleon are the extent to which they may allow legal scholars to *access* and *understand* these laws. This arguably creates a more robust foundation for ongoing application,¹¹⁹ but in the end, the question of whether these methods can address the challenge of relevance and utility is still an open one.¹²⁰

III Next Steps for Legal Scholars

Thus far, I have examined some of the opportunities and challenges facing those interested in engaging more deeply with Indigenous legal traditions. By looking closely at the work of three leading Indigenous legal scholars, I have identified several legal resources which can be roughly grouped into resources that require deep knowledge or cultural immersion, resources that require some family or community connection and resources that are publically

119 See Sekaquaptewa, *supra* note 8 at 320.

120 This is not necessarily a bad thing, if a sustained, serious engagement means that relevance and utility are able to be considered, debated and decided upon openly within Indigenous communities. See, for example, the finding by the Navaho Supreme Court in an individual case that "[t]he danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place; Old customs and practices may be followed by the individuals involved in the case or not; there may be a dispute as to what the custom is and how it is applied; or, a tradition of the Navajo may have so fallen out of use it cannot any longer be considered a 'custom'" (*Lente v. Notah*, as cited in Austin, *supra* note 10 at 173). On a political community level, see also Zuni Cruz, *supra* note 8 at 9; and Sekaquaptewa, *supra* note 8 at 373).

available. I have also outlined the present resource quandary that the most ideal resources are the least available and the least ideal are the most available in many instances. Further, I have identified five additional challenges, ones of (1) accessibility, (2) intelligibility, (3) legitimacy, (4) stereotyping and (5) relevance and utility. Last, I have examined four methods for finding, understanding and applying Indigenous laws, including (1) the linguistic method, (2) the sources of law method, (3) the single-case analysis method, and (4) the multi-case analysis and legal theory method. I have also critically considered whether and how these methods address the identified challenges, establishing the strengths and gaps in each one. Stepping back to look at this work more generally, I now turn to ask what might be potential next steps in this work for interested legal scholars.

Learning from and Building on the Frameworks

The legal scholarship I have examined in this paper has effectively adapted and applied existing tools from the legal academy to develop analytical frameworks for engaging more productively with Indigenous legal traditions. Despite differences between the methods, all these frameworks constitute significant steps forward because so little legal scholarship has engaged substantively with Indigenous legal traditions thus far, and these traditions are not currently taught in university law schools.¹²¹ This absence implicitly perpetuates colonial legacies that ignore, dismiss or diminish the importance of Indigenous laws. It also means that legal scholarship—which is one way for us to recognize and consciously explore aspects of legal traditions and legal practice that practitioners might otherwise not consciously notice, or which they simply take for granted—is unavailable as a resource to Indigenous communities for Indigenous laws.¹²² Sekaquaptewa highlights this structural absence when she demands of Indigenous leaders and governments, “Where are our institutionally mandated self-studies? Where are our custom law treatises and archives? Where are our tribal bar study materials and exams requiring attorneys and advocates to have some basic knowledge of our custom law?”¹²³

121 There have, however, been exceptions to this, and currently efforts are under way for the creation of a degree program in Indigenous Law at the University of Victoria. See Borrows, *supra* note 2 at 228-237.

122 For a discussion of this complementary role of legal scholarship and legal practice in the U.S. legal system, see, for example, Fred C. Zacharias, “Why the Bar Needs Academics—and Vice Versa” (2003) 40 *San Diego L Rev* 701; and Andrew Halpin, “Ideology and Law” (2006) 11 *Journal of Political Ideologies* 153. Of course, as Halpin writes, “Just as theoretical reflection may bring illumination to practice, so too the wider observation of practice may cause us to refine our theory—where, in particular, a theoretical construct is seen to be artificially restricting our view of what we find is actually going on in that practice” (at 153).

123 Sekaquaptewa, *supra* note 8 at 383.

It is worth noting that the role of legal scholarship and law schools in the common law legal tradition is itself a relatively recent phenomenon.¹²⁴ The common law did not always incorporate legal scholarship, and even now scholarship is not always accepted or used in practice.¹²⁵ None the less, it is currently acknowledged as playing a useful role in that legal tradition.

The existing work by the Indigenous legal scholars mentioned above clearly demonstrates that legal scholarship engaging with Indigenous legal traditions can also be useful. It may provide a way into Indigenous legal traditions, offering a concrete step towards the greater accessibility and intelligibility of Indigenous laws. It can dispel negative or pan-Indigenous stereotypes and may help identify the current relevance and utility of these legal traditions. If done carefully and explicitly, it might also provide interpretative limits and transparency, so that the legitimacy of statements about Indigenous laws can be challenged, confirmed or questioned, reinvigorating deliberative traditions. This kind of legal scholarship does appear to increase the possibility of Indigenous laws being accessed, understood and applied to contemporary issues. Therefore, such work can contribute to the continued health and vitality of Indigenous legal traditions,¹²⁶ as well as to increasing respect for and recognition of them within the broader Canadian legal and political framework.¹²⁷

It is worth asking what Fletcher, Borrows and Napoleon have all done differently than other legal scholars who have written about Indigenous legal traditions. I would suggest two main differences. First, they are asking different questions of Indigenous legal traditions than are typically or were historically asked. Rather than focusing on broad generalities, or on using Indigenous laws as rhetorical tools to critique state legal systems, these scholars focus on the specifics of Indigenous laws themselves. This focus leads to the following intellectual shifts vis-à-vis typical research questions:

124 Birks notes that, at the beginning of the 20th century, “the common law had barely begun to acknowledge the existence, much less the importance, of jurists, and the notion that university law schools might be essential to the education of lawyers was still novel.” See Birks, *supra* note 55 at v.

125 Obviously, Indigenous legal traditions continue to be practiced without the benefits of legal scholarship. However, in regard to the common law tradition, Birks points out that the role of legal scholars in “shaping raw case law” went largely unrecognized for “the best part of a century after it might first have been observed” and that even now, “neither the image of the common law nor formal accounts of its operation has fully adjusted to the necessity of law schools and the law-making and law-shaping role of the juristic literature that flows from them” (*ibid*).

126 Napoleon, *supra* note 24 at 295. Napoleon argues that the health of law in a society means, at minimum, the legal order “(1) is considered legitimate by the people of that society, (2) is an effective tool by which citizens manage themselves as a society, and (3) provides a constructive way for people to manage internal and external conflict” (at 294-295).

127 Borrows, *supra* note 2 at 139, 143.

FROM

TO

What is Aboriginal justice?

What are the legal concepts and categories within this Indigenous legal tradition?

What are the cultural values?

What are the legal principles?

What are the “culturally appropriate” or “traditional” dispute resolution forms?

What are the legitimate procedures for collective decision-making?

OVERALL SHIFT:

What are the rules?
What are the answers?

What are the legal principles and legal processes for reasoning through issues?

These shifts in questions are demanding ones, particularly given the current challenges of available and ideal legal resources for engaging with Indigenous legal traditions. However, asking these questions is worth the effort, because they force legal scholars to think beyond stereotypes and pan-Indigenous generalities, and they treat Indigenous legal traditions as seriously as other legal traditions.¹²⁸ This is particularly important because it encourages legal scholarship that grapples with Indigenous laws as *laws*, in all their complexity. Legal scholarship that asks the right questions may be able to play a vital role in reasoning through the “questions, contradictions and conflicts” that arise from the substantive practice of law on the ground.¹²⁹

The second, and closely related, unique aspect of these Indigenous legal scholars’ work is how they have answered these questions. Fletcher, Borrows and Napoleon are among a handful of North American scholars who are writing about Indigenous legal traditions from an internal viewpoint.¹³⁰ To be clear, legal scholarship from an internal viewpoint does *not* refer to the legal scholar’s Indigenous descent or membership in a specific Indigenous community prior to engaging with an Indigenous legal tradition. Rather, it refers to a specific *type* of legal scholarship. Law schools across Canada train law students to learn and write about the common law or the civil law tradition

128 Zuni Cruz stresses the value of an approach that “represents a serious respect for traditional law and its place not only in resolving specific disputes on a case-by-case basis, but in serving as a foundation for all law of the tribe, including the law of governance, ethics, and substantive and procedural law” (Zuni Cruz, *supra* note 8 at 9).

129 *Ibid.*

130 Of course, American tribal court judges such as Zuni Cruz, Sekaquaptewa and Austin are also doing this substantive scholarship.

from an internal viewpoint. In law school I had classmates from all over the world, from China to Ukraine, but we all learned the Canadian common law legal tradition from an internal viewpoint, because it was this internal viewpoint that would enable us to access, understand and apply laws—in class, in our exams, and eventually in legal practice. Fletcher, Borrows and Napoleon all demonstrate that legal scholars can productively adapt and apply the tools they have learned in law school, such as legal theory, to similarly engage with Indigenous legal traditions from an internal viewpoint.

The work of both Borrows and Napoleon demonstrates that it is both possible and productive to analyze Indigenous legal resources. This leads me to take a closer look at the analytical tools of legal analysis and legal synthesis, although neither scholar explicitly identifies these tools in his or her respective methods. Most people who have attended a North American law school in the past century are familiar with the tool of legal analysis, first developed by Christopher Langdell, the dean of Harvard Law School in 1870.¹³¹ While there is a rich, ongoing debate about the need for and use of other methods and interdisciplinary influences in the study of law, Langdell's "original program of analyzing legal materials and cases (albeit now suitably leavened by a sprinkling of non-legal sources)" continues as a central methodology within legal scholarship and legal education.¹³² Minimally, contemporary legal scholarship from an internal viewpoint continues to consist of *legal analysis*, whereby cases are summarized and interpreted (much like Borrows's single-case analysis),¹³³ and *legal synthesis*, whereby disparate elements of cases and statutes are fused to develop coherent and useful general legal standards that explain, justify or are consistent with a group of particular legal decisions (much like Napoleon's multi-case analysis).¹³⁴

Legal analysis and synthesis are methods of legal scholarship that start from an "internal" view of a particular legal system,¹³⁵ thus producing "embedded" legal scholarship: extended discussions based on "the authoritative artifacts of law."¹³⁶ The knowledge gained through legal analysis is no longer seriously considered "scientific,"¹³⁷ nor is it necessarily about a broad under-

131 Jack M. Balkin and Sanford Levinson, "Law and the Humanities: An Uneasy Relationship" (2006) 18 *Yale JL & Human* 155 at 159-160.

132 *Ibid* at 160.

133 Philip C. Kissam, "The Evaluation of Legal Scholarship" (1988) 63 *Wash L Rev* 221 at 231.

134 *Ibid* at 232. For a particularly good article on teaching the skill of legal synthesis in law school, see Paul Figley, "Teaching Rule Synthesis with Real Cases" (2011) 61 *J Legal Educ* 245.

135 Balkin and Levinson, *supra* note 131 at 162.

136 Todd D. Rakoff, "Introduction" (2001-2002) 115 *Harv L Rev* 1278 at 1279.

137 Balkin and Levinson, *supra* note 131 at 162. Balkin and Levinson point out that while Langdell originally touted legal analysis as a "scientific method" of studying law, "only the most foolhardy academic today would describe doctrinal analysis as 'scientific'. The preferred term today is 'craft'" (at 162).

standing or critique of the legal order.¹³⁸ Rather, it is considered knowledge of the “language of law”:¹³⁹ of the practical nuts and bolts of “how arguments are fashioned and deployed within legal practices.”¹⁴⁰ In other words, legal analysis and legal synthesis are methods that assist scholars and practitioners in learning the law from an internal viewpoint—learning in a way that enables them to access, understand and apply that law.

In addition to offering this kind of assistance, Birks points out that traditional legal research and scholarship within the common law tradition “criticizes, explains, corrects, and directs legal doctrine.”¹⁴¹ It can also be used to resolve doctrinal issues, such as inconsistent or conflicting decisions of different courts,¹⁴² and to produce teaching materials for law students.¹⁴³ My hypothesis is that employing the methods of legal analysis and synthesis to engage with Indigenous legal traditions could, with some adaptation, likewise allow legal scholars to summarize and interpret legal resources, articulate coherent legal principles and standards, reconcile seemingly disparate resolutions and develop teaching materials from an internal viewpoint of Indigenous legal traditions. This type of detailed and robust scholarship could contribute to increasing potential resources and to addressing the challenges facing those wishing to access, understand and apply Indigenous laws to contemporary issues. I believe that legal scholarship which explicitly adapts and applies legal analysis and synthesis to Indigenous legal materials constitutes the next logical step in building on the current legal scholarship from an internal viewpoint of Indigenous legal traditions. In the following section, I give an example of one way this might be done.

A Case Study: Applying Legal Analysis and Synthesis to a ‘Deep Slice’ of Cree Law for the *Wetiko* (Windigo) Legal Principles Project

To illustrate the possibilities in adapting and applying the tools of legal analysis and synthesis to Indigenous legal resources, I discuss my own research as a case study for how this method could potentially build on Borrows’s and Napoleon’s methods to move forward through challenges in future legal scholarship.

138 Kissam, *supra* note 133 at 236-239.

139 James Boyd White, “Legal Knowledge” (2001-2002) 115 Harv L Rev 1396 at 1397. White argues, “Knowledge of the law is like knowledge of a language: you never know all of it, you never know it perfectly, you cannot reduce your knowledge of it to a set of directions or descriptions or rules; rather, your competence consists of being able to use it more or less well, in one set of situations or another.”

140 Webber, *supra* note 23 at 2.

141 Birks, *supra* note 55 at ix.

142 Kissam, *supra* note 133 at 234.

143 *Ibid* at 236.

The Project: Wetiko (Windigo) Legal Principles

In *Canada's Indigenous Constitution*, Borrows applied his single-case analysis method to identify principles and processes in a historical account, recorded in 1838 by the Superintendent of Indian Affairs, William Jarvis, of an Anishinabek group who had to urgently respond to, and ultimately execute, a member of their group who had become increasingly dangerous to himself and to others.¹⁴⁴ Borrows points out that “a vast literature shows this pattern of dealing, over long periods of time, and in different geographic regions where the Anishinabek lived.”¹⁴⁵ He also suggests that these principles and processes, if not the specific outcome, would be familiar to Anishinabek people today.¹⁴⁶

In fact, although I am not Anishinabek, the principles did sound familiar to me, from similar stories I have heard from Cree elders in northern Alberta. These were stories about people who had become a *wetiko* (also known as a windigo). The word “*wetiko*” was sometimes translated to me as a “cannibal,” but on a closer examination, it appears to be a concept or categorization of people who are harmful to themselves or to others. While there are ‘supernatural’ aspects to stories about *wetikos* that might make them difficult to believe for many people,¹⁴⁷ I was immediately struck by the fact that Cree elders living in northern Alberta today related principled responses to a person becoming a *wetiko* that were strikingly similar to the responses of a group of Anishinabek people in Ontario in 1838. In the excerpt analyzed by Borrows, the Anishinabek group leader explained how they responded to the man, after observing him becoming increasingly dangerous:

We then formed a council to determine how to act as we feared he would eat our children.

It was unanimously agreed that he must die. His most intimate friend undertook to shoot him not wishing any other hand to do it.

After his death we burned the body, and all was consumed but the chest which we examined and found to contain an immense lump of ice which completely filled the cavity.

The [young man], who carried into effect the determination of the council, has given himself to the father of him who is no more: to hunt for him, plant and fill all the duties of a son. We also have all made the old man presents and he is now perfectly satisfied.

This deed was not done under the influence of whiskey. There was none there, it was the deliberate act of this tribe in council.¹⁴⁸

144 Borrows, *supra* note 2 at 81-83.

145 *Ibid* at 83.

146 *Ibid*.

147 Borrows, *supra* note 31 at 227.

148 Borrows, *supra* note 2 at 82.

For many reasons grounded in Western legal theory, including the subject matter,¹⁴⁹ the identifiable collective reasoning and problem-solving processes,¹⁵⁰ and the demonstrated felt obligations in most accounts,¹⁵¹ I concluded that the *wetiko* was best understood as a legal concept or category in at least Cree and Anishinabek legal traditions.¹⁵²

For this research project, I decided to pursue what I believe to be the next logical step from Borrows's and Napoleon's internal scholarship within Indigenous legal traditions. If Napoleon could identify general legal principles from a "slice" of Gitksan legal cases, and Borrows could identify legal principles from individual stories, or even from an outsider's historical account regarding a *wetiko*, what legal principles might emerge from a legal analysis and synthesis of one deep slice of law within Cree and Anishinabek legal traditions? I decided to gather as many legal resources on the subject of the *wetiko* as I could, and then to apply legal analysis and synthesis to those materials in order to identify legal principles that might be evident, just as I had in law school and in legal practice.

Legal Resources: Sifting through the Stereotypes

Earlier in this paper I identified the current conundrum regarding legal resources. While many and diverse resources for accessing Indigenous laws exist, at the current time, those most ideal are least available, and those most available are the least ideal. I had to face this issue squarely when I began my research into the *wetiko* legal category. I do not have any deep knowledge of Cree language or culture to bring to the subject, so the most ideal resource was not available to me at all. I did have access to the next best resource—community connections. I was able to interview knowledgeable elders, as well as younger community members in the Cree community where I had first heard stories of the *wetiko*. Yet I quickly realized that I needed to go beyond

149 No one seriously argues against H.L.A. Hart's assertion that our human vulnerability means that one of "the most characteristic provision[s]" of any system of law or morals must include the prohibition or restriction of "violence in killing or inflicting bodily harm." See H.L.A. Hart, *The Concept of Law*, 2d ed (New York: Oxford University Press, 1994) at 194-196.

150 Gerald Postema argues that legal reasoning requires "a distinctive deliberative and discursive capacity ... an ability to articulate and defend judgments publicly." Because legal judgments are public and collectively owned, they must be made in a way that elicits "recognition and acceptance as appropriate in one's community." See Gerald Postema, "Classical Common Law Jurisprudence, Part II" (2003) 3 OJLJ 1 at 10.

151 In their recent treatise on international law, Jutta Brunnée and Stephen Toope argue that "the distinctiveness of law lies not in form or in enforcement but in the creation and effects of legal obligation." See Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 7. A more in-depth discussion of the concept of legal obligation follows at 92-97.

152 For a more in-depth analysis of this, see Hadley Friedland, *The Wetiko (Windigo) Legal Principles* (LLM Thesis, University of Alberta, 2009) [unpublished] at 35-40.

personal community connections if I wanted a breadth of perspective on the issue, in terms both of time and of geographic space. To gain this perspective I had to look beyond what connections to one Cree community could provide. The only resource realistically available for these purposes was publically available literature, written mostly by outsiders. I gathered stories from a wide array of sources, including published folk-tale collections, academic publications in anthropology, history and psychology, and Canadian case law.

One thing that became immediately apparent was that if I was to be indiscriminate about resources, I needed a strategy for approaching them which allowed me to access the information they provided without adopting their culturally bounded interpretations, interpretations that often led to illogical, incomplete, distorting or demeaning conclusions. I returned to Borrow's brief work on the *wetiko* to find a way to navigate this issue. Borrow's approach has three interrelated aspects that I adopted as starting assumptions for analyzing the literature about the *wetiko*:

- 1) Borrow begins by assuming that Indigenous people in historical accounts are reasoning people within reasonable legal traditions. This allows him to access the historical rationality of their actions, regardless of any bias the recorder of events may have had.
- 2) His focus lies on the contemporary application of legal principles as present-tense intellectual resources within living legal traditions. This means that his analysis is more concerned with applicability than with some elusive 'authenticity'. This keeps him from being distracted by distorted details.
- 3) He also focuses on the social responses to the universal human problem the concept of the *wetiko* represents and brackets off the big questions about supernatural aspects. This bracketing increases the accessibility of these intellectual resources.¹⁵³

Adopting these assumptions allowed me to analyze the literature for legal principles, rather than getting distracted by certain aspects of the stories themselves or by the author's biased conclusions. The sheer number of 'cases' I was able to gather also helped with this. Fortuitously for my purposes, the *wetiko* had been a salacious topic for anthropologists and psychologists for many years. I found that by gathering a larger amount of resources on a single topic, patterns did begin to emerge, and this made it easier to sort out what was likely a biased distortion by an outsider and what elements appeared to have greater consistency through time and space. Borrow's assumptions and the

153 For a more in-depth discussion of these three assumptions, see *ibid* at 45-53.

public availability of many and diverse resources together helped me manage the bias contained in these materials and to access their potential as a resource.

Method: Applying Legal Analysis and Synthesis to Learn about the Wetiko Legal Category

As indicated earlier, my method was simple: to adapt and apply legal analysis and legal synthesis to the available resources about the *wetiko*. In the spirit of first-year law school, I began my legal analysis by briefing all resources that gave enough information to identify a problem and a decision or resolution to that problem (23 in all). Assuming descriptive accounts were of reasoning people in reasonable legal orders, I identified either an explicit or implicit ratio for the resolution. Many resources, including written stories and oral accounts, just gave the background or descriptions of certain aspects of the *wetiko* legal category. Where information was insufficient to complete a case brief, I began to record that information under various headings referring to the different aspects identified. Once I had completed a review of all the literature and conducted my interviews within the community, I undertook a legal synthesis, bringing together all of my legal analysis. How did I do this? I actually worked to prepare an outline of everything I had learned, just as I had done in law school to prepare for exams.

Quite simply, this worked. The results of this research were beyond anything I could have imagined. By applying the analytical tools of legal analysis and synthesis to a ‘deep slice’, or a single legal area in Cree and Anishinabek legal traditions, I was able to identify many rich legal principles that, together, helped me understand this area of law in a much more detailed and comprehensive way.

Research Results

The focus of this paper is method, rather than a discussion of my substantive research results. Yet in order to illustrate the depth and complexity that emerged for me in this single area of law, which, of course, is only one area of law within larger legal traditions, I provide here a very brief summary of my findings. In the *wetiko* legal category I found:

- 1) There were principles about *legal processes*, including the principles that
 - a) legitimate decisions are collective and open
 - b) authoritative decision-makers are leaders, medicine people and close family members

- c) legitimate responses require three procedural steps:
 - i) recognizing warning signs
 - ii) observation, questioning and evidence gathering to determine whether someone fits in the *wetiko* category
 - iii) determining the response.
- 2) There were principles about *legal responses*. The overall principle is ensuring group safety and protection of the vulnerable. Responses usually go from least intrusive to most intrusive, as needed, and available resources and larger political realities affect decisions. There are four response principles that are blended and balanced depending on the facts in a particular case. These are
 - a) healing
 - b) supervision
 - c) separation
 - d) incapacitation
 - e) retribution (considered to a lesser extent).
- 3) There were legal principles about *obligations*, including
 - a) a responsibility to help and protect
 - b) a responsibility to warn
 - c) a responsibility to seek help
 - d) a responsibility to support.
- 4) There were legal principles about both *procedural and substantive rights*.

Procedural rights include

 - a) the right to be heard
 - b) the right to decide.

Substantive rights include

 - a) the right to life and safety
 - b) the right to be helped
 - c) the right to ongoing support.
- 5) There were two *underlying, general principles*:
 - a) the principle of reciprocity: helping the helpers
 - b) the principle of efficacy: being aware and open to all effective tools and allies.¹⁵⁴

154 For a more in-depth discussion of these principles, see *ibid* at 82-122 (ch. 4).

How This Method Addresses Challenges

As is obvious from the detail and complexity of the principles listed above, the greatest strength of this method is how it addresses the challenges of accessibility and intelligibility. Working through the resources with the process of legal analysis and synthesis was hard work, and it took time. It was intense, but it was possible, even for me, a legal scholar without deep cultural knowledge. I was able to access and understand the principled reasoning behind a wide range of decisions responding to a person causing harm to others in Cree and Anishinabek societies, even from largely descriptive or incomplete accounts. It was possible to articulate these principles, so that others could access them in an understandable and convenient form. This method also proved an effective way to navigate bias and to effectively challenge distorting stereotypes. Crucially, my claim is not that such research gives me, as a legal scholar, the authority to pronounce or apply Cree or Anishinabek laws. Absolutely not. Rather, this kind of legal research could provide a starting point for the ongoing learning, research and debate Sekaquaptewa advocates for regarding Indigenous legal traditions, just as scholarly articles and legal texts do within the common law tradition.

This method does little to address the challenge of legitimacy linked to sociopolitical and emotional reactions to *who* articulates legal principles. At least, however, it may go some small way in addressing Fletcher's insights that the legitimacy of a decision based solely on information found in published resources would be seriously questioned, and that there can be interpretative differences within communities. Importantly, any increased understanding of *wetiko* legal principles in this case study was not dependent on my identity, the authority of biased resources or even solely on the authority of the community members interviewed. Rather, the legitimacy of my research results is rooted in the *process of reasoning through* both community interviews and non-ideal resources using the adapted method of legal analysis and synthesis.¹⁵⁵

This process proves particularly useful in that it contains its own interpretative limits. The legal synthesis provides the bounds within which reasonable interpretations can occur, and statements of law within it can be tracked back to a specific legal analysis of one or several legal resources. This provides a reasoned avenue for challenging a particular interpretation as well. For example, if someone finds fault with my interpretations of the *wetiko* legal principles, he or she can track any one of them to its source and challenge me accordingly. This method thus also appears to have real potential for addressing the challenge of legitimacy as it relates to the extent people can reason

155 I thank Val Napoleon for this insight. Val Napoleon, personal conversation, October, 2011.

through law, providing a possible transparent process for revitalizing respectful deliberation within and between communities.

In addition, by developing additional legal resources for those interested in understanding and applying Indigenous laws, increased scholarship using this method may develop resources that could potentially reduce the time and uncertainty currently correlated with many peoples' challenges to accessing Indigenous legal principles. A good legal synthesis organizes information on a specific legal subject in an accessible and understandable way, so that it can be readily analyzed and applied. To the extent that efficacy matters to people facing immediate issues they want to resolve, this may assist in addressing the challenge of utility. Ultimately, however, it is people on the ground, not legal scholars, who will really determine whether they see utility in specific Indigenous legal principles, and what principles, under which circumstances, they consider relevant to reasoning through and resolving their particular issues.

This brief evaluation of how my case study of adapting and applying legal analysis and synthesis to Indigenous legal resources addressed the identified challenges to accessing and understanding Indigenous laws shows clearly that this method does not address every challenge facing the revitalization of Indigenous legal traditions today. Yet it does have significant strengths. It is a simple, bounded and transparent way for legal scholars to access non-ideal resources productively, and to contribute to the greater accessibility and understanding of Indigenous laws. *How* legal scholars approach Indigenous laws matters. At the very least, I contend that legal scholars need to approach Indigenous laws seriously as *laws*, and should expect to work at least as hard to access and understand them as we do the state laws we learned in law school. This method reminds us of that. It builds on the work of the Indigenous legal scholars engaging with Indigenous legal traditions from an internal viewpoint, and it builds on skills that are already being taught and used in law school. This case study of my own research experience suggests that the method of adapting and applying legal analysis and synthesis to 'deep slices' of Indigenous legal traditions is worth pursuing further. For these reasons, I conclude that it constitutes a useful fifth analytical framework for legal scholars to consider using when engaging with Indigenous laws from an internal viewpoint.

IV Conclusion: Another Stream

Shortly before the Cowichan conference mentioned in the introduction to this paper, my Cree partner pointed out a rather tiny stream beside the road as we drove by.¹⁵⁶ I remarked that I had never noticed it before, and he told me that

156 He has given me permission to tell this story in this paper. All interpretations, and the analogy I am using it for, are mine alone.

that was because *this* stream had *not* been there. He had noticed it a short time before and observed that it was growing wider. He interpreted the fact that the stream had appeared and was growing as a sign of a beaver dam or of another obstruction closer to the water source. If the stream continued to grow, the creek running through the community, a few kilometres away, might dry up.

Until very recently the local community relied completely on this creek for all its water, and some community members and elders still use it as their primary water source. The elders work on hides and drink tea down by the creek, and it is a peaceful and familiar gathering spot. My partner noted, matter-of-factly, that he was continuing to watch the stream and would, if needed, eventually go look for the obstruction and break it up. Sure enough, a few weeks later, on his days off from work, he and his mother followed the stream upwards until they discovered the obstruction—a pile of rocks that had fallen into the water. His brother came to join them on his lunch break to assist with the laborious project of moving all the stones.

I tell this second story, about this observation of another stream, to illustrate that while legal scholarship does have contributions to make, the ‘heavy lifting’ of law will still remain in the hands of practitioners on the ground, acting on their responsibilities. In addition, if legal scholars’ understanding of Indigenous legal traditions increases through our research, this increased access and understanding may come with increased responsibilities. A vital aspect of these responsibilities is, as Napoleon has stressed in her work, the need to go beyond aspiration and rhetoric to consider law “on the ground.”¹⁵⁷ The hard, and often messy and mundane work of law in practice is precisely how each generation makes and remakes law, and there is never a guarantee that any legal tradition will continue without our conscious effort.¹⁵⁸ Indeed, “the hard work of ... law is never done.”¹⁵⁹

Gordon Christie argues that Indigenous legal theorists must “maintain their groundings in their communities.”¹⁶⁰ I would suggest that a broader grounding is necessary, one that requires all legal scholars to reflexively consider and act on their ongoing responsibilities, including the limits of their scholarly role, within the communities of interpretation and practice they are engaging with. In an Indigenous context, the work of consciously revitalizing and developing laws rooted in Indigenous legal principles can be seen as an act of self-determination.¹⁶¹ The process itself can be seen as the accountability of Indigenous leaders to their community members, requiring questions to

157 Napoleon, *supra* note 24 at 15.

158 Anthony Kronman, “Precedent and Tradition” (1990) 99:5 Yale LJ 1029 at 1052-1054.

159 Brunnée and Toope, *supra* note 151 at 8.

160 Christie, *supra* note 5 at 231. Christie discusses the importance of both experiential and cultural grounding (at 204-206).

161 Zuni Cruz, *supra* note 8 at 11.

be “debated internally on an ongoing basis,” allowing that “at different points in time consensus or compromise will happen.”¹⁶² As Austin puts it regarding the U.S. tribal context: “Whatever the process of revitalization, simply drafting customs and traditions into tribal codes and tribal court decisions will not suffice. The people and their leaders must supplement text with meaningful discourse and action to ensure full comprehension and employment of the traditional principles in the native context.”¹⁶³ The work, then, is about strengthening today’s governance structures and functions. Ultimately, Napoleon argues, it is “fundamentally about rebuilding citizenship.”¹⁶⁴

Legal scholarship from an internal viewpoint may contribute to this work through serious and sustained engagement with Indigenous legal traditions. This scholarship may prove useful in broadening, clarifying, legitimating or critically examining the work of practitioners if legal scholars remain connected to the practices, problems, conversations and questions of the day-to-day practice of law.¹⁶⁵ Ultimately, just as occurs with legal scholarship within the common law tradition, (Indigenous) people themselves will determine if legal academics’ insights contribute to the ongoing work of law within Indigenous legal traditions. Legal scholars would do well to keep this at the forefront of our minds as we move forward.

162 Sekaquaptewa, *supra* note 8 at 386.

163 Austin, *supra* note 10 at xx.

164 Val Napoleon, “Thinking About Indigenous Legal Orders” (Research Paper for the National Centre for First Nations Governance, June 2007), online: <http://fngovernance.org/ncfng_research/val_napoleon.pdf> at 20.

165 Birks argues that if legal scholarship “is ever useless to [practitioners] we have come adrift from our foundations,” and that if a law school “bore no relation” to the activities of law in practice, it “would have defined itself out of existence as a law school” (Birks, *supra* note 55 at vi).