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To Be Is to Be Entangled

Indigenous Treaty-Making, Relational Legalities and the Ecological Grounds of Law

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3.1 Introduction

How are we entangled? I invite you to breathe in. Can you feel the air enter your nostrils and lungs, and then be expelled? Try it again. With some practice you may no longer feel 'you' and 'the air', but simply a sensation that appears in consciousness. From this and a multitude of other metabolic processes, your body is literally constructed and deconstructed daily through exchanges – the activities of breathing, eating, shedding – with your environment. At an atomic level, it is not even easy to tell where the boundary between the self and the environment lies. Between the electrons and the nucleus that make up the apparent solidity of your skin is a distance the equivalent of something like that between the Sun and Jupiter. Electrons that are 'part of' your skin can be discharged in a current, and, indeed, have no distinct location (or other definite properties) but exist as a set of probable states expressed as a wave function (indeed, as energy).[1]

The human minds that find these aspects of quantum mechanics counterintuitive have evolved, slowly and over millennia, a form of intuition matched to the mechanics of what is visible and touchable,[2] a musculoskeletal system adapted to gravity on earth, and a nervous system capable of responding to prevalent threats and resources in furtherance of survival. Generalized throughout ecosystems, this

[1] M. Humphrey, P. Pancella and N. Berrah, *Quantum Physics* (Alpha Books, 2015), chapter 9.

[2] This may correspond to Newtownian physics or even earlier theories: see B. Sherrin, 'Common Sense Clarified: The Role of Intuitive Knowledge in Physics Problem Solving' (2006) 43 *Journal of Research in Science Teaching* 535–55.

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physical, chemical and biological interconnectivity entangles everything from whales to weather patterns.[3] The way things appear to us is a product of an interaction of the properties of matter and motion with our sensory-motor system (although we can play around with those perceptions, as in the breathing meditation above). This 'life of the body' then proves integral to the development of even the most abstract of conceptual schemas, whether because reasoning relies metaphorically on basic physical properties like shape, size, distance, motion, up/down, now/later, inside/outside and containment, or because, as a neuroscientist might put it, 'imagining and doing use a shared neural substrate'.[4] That is, we learn to think together with human and non-human others; through them, we humans co-constitute our 'selves'. Forms – selves, types, categories, concepts – are neither mind nor thing, say ecologists of mind, but a process of pattern production and propagation in which we participate with the rest of the world, both present and absent.[5]

Following the first order of physical interdependence, this second order of semantic emergence from the material is also related to the inseparability of observer and observed. For example, were we to measure or observe the location of those electrons above, we would find that our choice of apparatus affects the phenomenon that is observed, such as in the famous wave–particle experiment for light.[6] Interaction with laboratory equipment causes the wave function to collapse into a definite state.[7] Further, to understand what an electron is, we would first need to examine the material conditions that provide it with meaning and some definite sense of existence; doing so, we would inevitably find a network of humans and non-humans – scientists and lab technicians, microscopes and particle accelerators, but also funding agencies,

[3] K. Balaramen, 'Whales Keep Carbon Out of the Atmosphere', Scientific American, 11 April 2017, www.scientificamerican.com/article/whales-keep-carbon-out-of-the-atmosphere/.

[4] V. Gallese and G. Lakoff, 'The Brain's Concepts: The Role of the Sensory-Motor System in Conceptual Knowledge' (2005) 22 *Cognitive Neuropsychology* 455–79, at 456.

[5] E. Kohn, *How Forests Think: Towards an Anthropology beyond the Human* (University of California Press, 2013), pp. 20, 37. On constitutive absences, see T. W. Deacon, *Incomplete Nature: How Mind Emerged from Matter* (Norton, 2006), p. 3.

[6] See R. Feynman, R. Leighton and M. Sands, *The Feynman Lectures on Physics* (Addison-Wesley, 1965), Vol. 3, §1-4–§1-6, www.feynmanlectures.caltech.edu.

[7] And once one aspect of that state is measured – its location, for instance – other of its properties can no longer be determined, as per Heisenberg's uncertainty principle: see ibid., §1-8.

manufacturers and policy-makers, as well as a shared system of signs and representations.[8]

I have begun with the lessons of (to take them in rough order) mindfulness, dialectics, quantum mechanics, ecology, phenomenology, cognitive psychology, evolutionary semiotics, anthropological post-humanism and actor-network theory to make the point that you and I have multiple ways of grasping entanglement. However, my purpose in this chapter is not to then notice that law is yet another 'thing' that becomes entangled or is made by entanglement, although I hold this to be sometimes a useful way of seeing the world. Socio-legal theory, for example, has embraced the dialectic idea that 'law' and 'society' are co-constituted through processes of argumentation, proof, naming and claiming, record-keeping, monitoring and all forms of performance, discipline, enactment, representation and discourse. Intersecting legal orders may produce particular formulations of one another through processes of 'recognition', on which social actors act, so that those actors then become in some measure part of the changing reality of each of those orders.[9] Rather than entangled legalities, though, in this text I am interested in legalities of entanglement – forms of legality adapted to the ontological entanglement in which we find ourselves. It has been noted that one reason for the various ecological crises we face is that dominant forms of law have become dysfunctionally oblivious to human interdependence with the living world.[10] Seeking to understand or develop legalities of entanglement engages with the normative project of developing what has been labelled 'Earth jurisprudence' or law imagined in ecological terms.[11]

In this chapter, I would like to suggest ways in which many Indigenous legalities provide examples of law borne out of entangled ways of being. From where I am writing, in Canada, invoking Indigenous legalities also engages with the normative project of settler-colonial reconciliation and

[8] K. Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007), p. 22.

[9] See K. Anker, *Declarations of Interdependence: A Pluralist Approach to Indigenous Rights* (Ashgate, 2014).

[10] F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publications, 2015); K. Bosselman, *The Principle of Sustainability: Transforming Law and Governance,* 2nd ed. (Routledge, 2016); F. Ost, *La Nature Hors la Loi, l'Ecologie à l'Épreuve du Droit* (La Découverte, 1995).

[11] P. Burdon (ed.), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011).

the call for the recognition of Indigenous law *as law*.[12] Indeed, political philosopher James Tully's recent work on sustainable constitutionalism would have us see that the 'ecological problem' and the 'reconciliation problem' are intricately connected.[13] The disembedding of European peoples from their environments – produced by phenomena like the enclosure of the commons and industrialization – and the colonizing dispossession of Indigenous peoples were driven by similar forces and ideologies.[14] Indeed, some would go further and describe plantation colonies as the historical engine for industrial capitalism and its ecological fallout.[15] In the present, efforts towards Indigenous reconciliation are continually thwarted by the pressures of extractive economics, as well as the assumption of state dominion over land through its monopoly over sovereignty and the rule of law.[16] So, on the one hand, reconciliation cannot occur without a reckoning with the ecological pathologies of the reigning legal, economic and political systems. On the other hand, solutions to ecological crises that do not address the colonial suppression of Indigenous law and knowledge, Tully argues, will 'fail to discern and realize a good, sustainable relationship [with the Earth] because such a relationship is discovered and learned through practice. [. . .] Indigenous peoples and their practical knowledge systems have co-evolved with the ecosystems in which they have co-inhabited, learned from, shaped and been shaped.'[17]

As state institutions and citizens grapple with the issue of how to 'make space for' and recognize Indigenous legal orders, a reverse formulation of the question of coexistence appears that is much more deeply challenging both to state sovereignty and its form of legality: how can

[12] V. Napoleon and H. Friedland, 'Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions' (2015–16) 1 *Lakehead Law Journal* 16–44, at 20.

[13] J. Tully, 'Reconciliation Here on Earth', in J. Tully, J. Borrows and M. Asch (eds), *Resurgence and Reconciliation: Indigenous–Settler Relations and Earth Teachings* (University of Toronto Press, 2018).

[14] See K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times* (Beacon Press, 2001) on the market society or V. Plumwood on a form of gendered rationality in *Feminism and the Mastery of Nature* (Routledge, 1993) and *Environmental Culture: The Ecological Crisis of Reason* (Routledge, 2002).

[15] D. Haraway, 'Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin' (2015) 6 *Environmental Humanities* 159–65.

[16] See H. King and S. Pasternak, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis* (Special Report of the Yellowhead Institute, 2018), https://yellowheadinstitute.org/rightsframework/.

[17] Tully, 'Reconciliation Here on Earth', p. 84.

newcomers find a place for themselves in Indigenous legal orders?[18] It is my argument that attempting to find such a place leads us to a different take on both the reconciliation and the Earth jurisprudence project. First, tentative answers to the question of coexistence require not simply trying to understand the competitive overlap of Indigenous and non-Indigenous legal orders, for example, as they vie for jurisdiction over forestry or child protection matters, nor the mutual normative or ideological influences that may historically have created 'intersocietal law'[19] or now lead to entanglement in the nature of mutual impacts, transplants and borrowings between legal traditions.[20] Rather, these questions require looking to the way Indigenous law speaks to the deeper ontological entanglement in which all things – including Indigenous peoples, newcomers and their legal orders – are implicated in each other. For the Earth jurisprudence project, this engagement with Indigenous legalities leads us away from mere intellectual recognition of symbiosis and planetary limits and towards embodied practices of entanglement.

Beginning with a brief overview of Canadian history through the lens of pluralist legal encounters, the centrepiece of which is the conclusion of treaties between European colonial (and, post-1867, Canadian federal) authorities and Indigenous peoples, I argue, borrowing a framework developed by Anishinaabe legal scholar Aaron Mills, that such a view largely relies on a contractual, and thus liberal, understanding of legality.[21] I then shift to exploring the legalities out of which Indigenous practices of treaty-making emerged. As Robert Williams Jr. puts it, treaties are 'a way of imagining a world of human solidarity

[18] See for instance, L. S. G. Finch, 'The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice', paper presented at the 'Indigenous Legal Orders and the Common Law' British Columbia Continuing Legal Education Conference (Vancouver, November 2012), www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf, 20.

[19] B. Slattery, 'The Generative Structure of Aboriginal Rights' (2007) 38 *Supreme Court Law Review* 595–628; J. Webber, 'Relations of Force, Relations of Justice' (1995) 33 *Osgoode Hall Law Journal* 623–60.

[20] B. Miller, 'An Ethnographic View of Legal Entanglements on the Salish Sea Borderlands' (2014) 47 *UBC Law Review* 991–1023.

[21] A. Mills, 'What Is a Treaty? On Contract and Mutual Aid', in J. Borrows and M. Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017). My objective is to bring that work to bear on the theme of this volume, so that the difference between 'entangled legalities' and 'legalities of entanglement' comes more sharply into focus.

where we regard others as our relatives'.[22] Following the lead of Williams and a number of other Indigenous scholars, I understand treaty jurisprudence as growing out of a deep appreciation for entanglement as constitutive of our being. Human treaties, if you like, are the reiteration of similar patterns of interdependence beyond the human. Further, I have learned that treaties were – and are – extended as invitations to newcomers to enter into relations with the peoples of Turtle Island[23] and the broader webs of their connections with local ecologies. Responding to an invitation confounds the colonial dynamics of recognition, in which Indigenous law is rendered legible to state institutions or individuals;[24] it is also different to simply stepping back or carving out a space for Indigenous law so as to avoid appropriating what is not mine, because it is about law as the practice of relationships rather than as an object of knowledge or appropriation. Finally, the invitation to invigorate ontological interdependence also has critical consequences not just for rethinking the liberal monad of the contractual conception of treaties, but for several other separations foundational to modern legal theory, such as the division between culture and nature, mind and matter, and subject and object. It gives me a way of drawing the lessons of entanglement from above into a relational mode for law generally.

3.2 Colonial Encounters and Normative Pluralism

Colonial encounters in North America produced a range of plural legal phenomena when the 'visitors who never left' – European fishers, fur traders, religious orders, soldiers, farmers, entrepreneurs and others – were variably integrated into local kinship networks, trade alliances and treaties, and when the original peoples – Mi'kmaq, Innu, Eeyou, Anishinaabe and Haudenosaunee fishers, hunters, agriculturalists, warriors, medicine people and others – were variably integrated into imported forms of education, economics and law. Historical accounts demonstrate different degrees and kinds of entanglement. In the terminology used in Chapter 1 by Nico Krisch, one can see the adoption, from

[22] R. Williams, *Linking Arms Together: Indian Treaty Visions of Law and Peace 1600–1800* (Routledge, 1999), p. 113.

[23] A common name for North America deriving from widespread creation stories that recount the emergence of the land from the back of a turtle.

[24] See G. Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) and A. Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Duke University Press, 2014).

early times, of Indigenous protocols by colonists as a *strategic pathway to mutual benefit*. In conducting trade and diplomatic business, colonial officials would give gifts, exchange wampum belts and perform abbreviated parts of the Haudenosaunee condolence ceremony for greeting allies:[25] these norms were likely adopted to 'create space to come to a preferred conclusion'.[26] Conciliatory approaches led in some places to ad hoc forms of criminal and civil justice that represented compromises between differing conceptions of crime and punishment. For instance, in New France, the individual responsibility for French *habitants* confronted the Innu practice of compensating crimes like murder with goods or human substitution.[27] The emergent norm for intercultural murder in New France for 150 years – that Aboriginal culprits would be delivered to French authorities, who would then pardon them with the exchange of ceremonial gifts – could be a *connecting norm*, 'weaving together different bodies of norms in order to come to a solution in a given case'.[28] Again, in Krisch's terms, we can see *interface norms* providing for varying degrees of engagement. The Treaty of Albany from 1701 describes complimentary, but distinct, areas of jurisdiction in which wrongs or injuries committed by the English or Dutch against Indians would be punished by the governor at New York, and, conversely, wrongs committed by 'Indians belonging to the Sachims' against the English or Dutch would be punished by the Sachims.[29] American law similarly recognized limited tribal sovereignty and treated it as foreign law subject to private international law rules.[30] Elsewhere, the common law 'doctrine of continuity' promoted the recognition of local Indigenous 'customs' within colonial legal categories and incorporated them as

[25] M. Pomedli, 'Eighteenth-Century Treaties: Amended Iroquois Condolence Rituals' (1995) 19 *American Indian Quarterly* 319–39; A. Wallace and T. Powell, 'How to Buy a Continent: The Protocol of Indian Treaties as Developed by Benjamin Franklin and Other Members of the American Philosophical Society' (2015) 159 *Proceedings of the American Philosophical Society* 251–81; J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009), pp. 11–32.

[26] See Chapter 1.

[27] Webber, 'Relations of Force and Relations of Justice'; R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (Cambridge University Press, 1991).

[28] See Chapter 1.

[29] J. Borrows and L. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 4th ed. (LexisNexis, 2012), pp. 14–16.

[30] M. Walters, 'The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*' (1999) 44 *McGill Law Journal* 711–52.

British law.[31] The longstanding practice of making trade and diplomatic agreements formalized into an official British treaty-making policy with the Royal Proclamation of 1763, which provided for an 'interface norm' of consent for the settlement of lands occupied by Indigenous 'nations' – such lands would only be settled if 'ceded to or purchased by' the Crown at 'some public Meeting or Assembly of the said Indians'.[32] These so-called 'cession' treaties extended from Ontario in the east to parts of British Columbia in the west from the 1780s to 1921; their written texts read as a transaction in which Indigenous parties promise to 'cede, release and surrender' their lands to the Crown in exchange for small reserves, contingent hunting and fishing rights over the remainder of their territories, payments and other promises like the provision of education or medicine. An earlier era of treaties secured 'friendship' between the British and their Indigenous allies.[33] The undertakings of the Royal Proclamation itself were the subject of the Treaty of Niagara in 1764, at which 2,000 representatives of twenty-four Indigenous Nations from the eastern regions of North America gathered to 'join hands' in the Covenant Chain of friendship and alliance, in continuity of such treaties with European colonists dating back to the 1600s.[34]

Treaty-making thus constituted the central 'interface norm' for Indigenous and colonial polities for an extended period. Later, the balance of power shifted in favour of the Europeans. Following confederation in 1867 the Canadian state assumed jurisdiction over Indigenous peoples as subjects, and instigated a policy of assimilation.[35] After a century or more of official state denial of the existence or relevance of Indigenous law, the constitutional recognition of 'Aboriginal and treaty rights' with the promulgation of s. 35 of the Canadian Constitution Act in 1982 opened the door to wider consideration of the place of Indigenous legal orders, jurisdiction and sovereignty in modern Canada. For historic treaties, constitutional recognition has meant

[31] J. Borrows, 'With or Without You: First Nations Law (in Canada)' (1996) 41 *McGill Law Journal* 629–65.

[32] King George III of England, Royal Proclamation issued 7 October 1763, https://exhibits.library.utoronto.ca/items/show/2470.

[33] Such as the 'Covenant Chain' treaties in the seventeenth century, and the 'Peace and Friendship' treaties in the eighteenth century: see Miller, *Compact, Contract, Covenant*, chapter 2.

[34] Ibid., pp. 70–3.

[35] For a comprehensive history, see J. R. Miller, *Skyscrapers Hide the Heavens: A History of Native-Newcomer Relations in Canada*, 4th ed. (University of Toronto Press, 2018).

reversing the prevailing judicial stance that they were unenforceable either because First Nations lacked the capacity of an 'independent power', or because treaties were understood simply as gestures of political good will and not as binding legal obligations.[36] Further, courts now undertake to interpret the written treaties as manifesting the parties' common intention in light of their distinct motivations and understandings, and the cultural and linguistic differences between the parties.[37] While the written text remains the core of treaty interpretation for the courts, research on the transcripts of treaty negotiations, as well as oral histories passed through generations, has led to an academic consensus that the Indigenous signatory parties to the 'cession' treaties could not have intended to surrender their land; that an understanding of their relationships to land – and of their constitutional orders more generally – supports only that the treaty parties were agreeing to share the land and enter into ongoing relationships with the newcomers.[38]

3.3 Indigenous Treaty Jurisprudence

It is my contention that to see these interpretive differences with respect to treaties in terms of different things that are consented to misses the forest for the trees. For the whole structure of a contractual-style agreement as the interface between normative orders – the means by which individual norms might become entangled – treats contract as a neutral meta-norm. However, an attentive turn to Indigenous treaty jurisprudence shows up the ways in which the contractual paradigm is deeply implicated in the common (and civil) law traditions imported into Canada but is inimical to the territory's Indigenous forms of law. This has dramatic implications for treaty interpretation; it also has significance for legal pluralist scholarship and our focus in this volume on the

[36] *R.* v. *Syliboy* [1929] 1 DLR 30.

[37] *R.* v. *Sioui* [1990] 1 SCR 1025, pp. 1068–9; *R.* v. *Badger* [1996] 1 SCR 771, pp. 52–4.

[38] See, for example, M. Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014); A. Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Purich Publishing, 2013); J. S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario* (McGill-Queen's University Press, 2010); R. T. Price (ed.), *The Spirit of the Alberta Indian Treaties*, 3rd ed. (University of Alberta Press, 1999); Treaty 7 Elders and Tribal Council with W. Hildebrandt, D. First Rider and S. Carter, *The True Spirit and Original Intent of Treaty 7* (McGill-Queen's University Press, 1996).

ways in which norms become entangled. Indeed, it is significant for what we see as being entangled.

One of the 'strategic pathways' taken up by the French, Dutch and British was the adoption of the metaphors and tropes of Indigenous diplomatic language. Kinship terms in treaty formalities abounded: the Haudenosaunee were addressed as 'brethren' in the eighteenth-century treaties collected by Benjamin Franklin, and the British were invited, through rituals of care and concern between parties ('wiping tears' and 'clearing the ground'), to eschew purely mercantile concerns in favour of human solidarity.[39] These treaties invoked the bodily gesture of 'linking arms' or the linkage metaphor of the Covenant Chain that had to be polished regularly, lest it tarnish.[40] In treaty negotiations following the Royal Proclamation, Kings George III and George IV were referred to as 'our Great Father', Queen Victoria the 'Great Mother',[41] while the newcomers were greeted as *Kiciwamanawak* or cousin by the Cree: elder Harold Johnson writes of the treaty his forebears signed as an adoption ceremony under Cree law.[42]

These kinship tropes are not mere flourish, but speak to an underlying 'worldview' or, as I have been taught, a legality. Kinship extended beyond the human, to animals, plants, water, rocks and spirits, which are often linguistically marked as 'animate' and attributed agency in North American Indigenous languages.[43] For Anishinaabe peoples, *Nindoodem* (totem) animals – representations of which were placed as signatures on the Great Peace of Montreal in 1701 – were not only symbolic ways to organize human groups and to structure identity but, as explained by Anishinaabe of the period, were taken as their apical ancestors in the Creation period.[44] Harold Johnson puts the connection of humans to non-humans in prosaic terms:

[39] Pomedli, 'Eighteenth-Century Treaties', 319.
[40] Williams Jr, 'Linking Arms Together'.
[41] M. Walters, '"Your Sovereign and Our Father": The Imperial Crown and the Idea of Legal-Ethnohistory', in S. Dorsett and I. Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010).
[42] H. Johnson, *Two Families: Treaties and Government* (Purich Publishing, 2007), p. 82.
[43] R. W. Kimmerer, 'Learning the Grammar of Animacy' (2017) 28 *Anthropology of Consciousness* 128–34; J. Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, and Social Imagination* (University of British Columbia Press, 2005).
[44] H. Bohaker, '"Nindoodemag": The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600–1701' (2006) 63 *The William and Mary Quarterly* 23–52.

> This is where my ancestors are buried, where their atoms are carried up by insects to become part of the forest, where the animals eat the plants of the forest, and where my ancestors' atoms are in the animals that I eat, in my turn. I am part of this place.[45]

The term 'worldview' undersells these connections, though, in that it suggests simply a way of seeing rather than an actual world in which people are engaged (similar to the difference between culture and ontology that worries Paul Nadasdy).[46]

These entanglements at the ontological level give rise to specific kinds of law. In her examination of documented accounts of Treaty 1 negotiations, Aimée Craft notes how identification with the land gave rise to an ethos of responsibility, in contrast to the British concept of property:

> Chief Ayee-ta-pe-pe-tung [. . .] spoke to the Queen's negotiators about his 'ownership' and his view that rather than owning it, he was *made of the land*. Other Chiefs relayed their view that they had a sacred responsibility towards the land and that the future of the land was intimately linked to the future of Anishinaabe children: 'The land cannot speak for itself. We have to speak for it.'[47]

Indeed, the treaties I have mentioned can be understood as modelled after more pervasive forms of interdependence in the 'natural' world. Heidi Stark argues that Anishinaabe stories demonstrate a continuity between human–human treaties and human–animal relationships, both of which are characterized by mutual respect and gift circulation – such as when the beaver agree to offer themselves as food and the Anishinaabe commit to returning their bones to the water and offering tobacco in thanksgiving.[48] Aaron Mills characterizes this as a form of 'rooted' constitutionalism which he calls 'mutual aid', rooted because the practices of gifting and interdependence are learned from, and continuous with, earthly relations. Earthly somethings – plants, animals, bacteria, fungus, rocks, air and light – provide natural constraints to human law, but more importantly, sustain it through a web of relations.[49]

[45] Johnson, *Two Families: Treaties and Government*, p. 13.

[46] P. Nadasdy, 'The Gift in the Animal: The Ontology of Hunting and Human–Animal Sociality' (2007) 34 *American Ethnologist* 25–43.

[47] Craft, *Breathing Life into the Stone Fort Treaty*, p. 94.

[48] H. Stark, 'Respect, Responsibility and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada' (2010) 34 *American Indian Culture and Research Journal* 145–64, at 146. See also Borrows, 'With or Without You'.

[49] Mills, 'What Is a Treaty?' and Mills, 'Miinigowiziwin: All That Has Been Given for Living Well Together – One Vision of Anishinaabe Constitutionalism', PhD thesis, University of Victoria (2019), http://dspace.library.uvic.ca/handle/1828/10985.

Further, the somethings are not just in the material realm: Sákéj Henderson stresses that Indigenous law also emerges out of experiences with the spiritual realm – that is, with the affective forces of the ecosystem for which he borrows quantum physicist David Peat's term, the 'implicate order'.[50]

3.4 Logics of Contract, Logics of Kinship

If interdependence is a way of being in the world, this brings a particular inflection to our study of legalities. It is not so much that ecological relatedness creates a norm of responsibility or obligations of gift-giving. It is, as Mills so carefully lays out in his work, that kinship, interdependence and 'mutual aid' are logics that structure the way we think and act, including the specific laws we come up with in service of them;[51] they are law as a mode of being alive.[52] For this, the choice of the term 'legalities' rather than law or norm as the focus of this volume is inspired. Legality is the most adjectival or adverbial of nouns; it speaks to the *qualities* of being legal or acting in accordance with the law; it is modal rather than categorical or concrete. A focus on legality allows us to ask not only 'why such and such a normative proposition is or isn't good law, but also and more foundationally [. . .] how a community comes to have a concept of what law is and a view of its purposes',[53] to notice the ways in which 'law [is] so deeply embedded in the world that one can look anywhere and see its reflection'.[54]

Here I will return to a view of treaties as transactional contracts that is likely more familiar to most readers, in order to now shed light on the legality that informs *that* understanding. Agreements with Indigenous peoples were referred to in the language of contract in contemporary colonial communications;[55] the written documents themselves record quid pro quo agreements in which the 'Indians' promise collaboration

[50] J. Y. Henderson, '*Ayukpachi:* Empowering Aboriginal Thought', in M. Battiste, *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000), p. 262. See also G. Cajete, *Native Science: Natural Laws of Interdependence* (Clear Light Publishers, 2000).

[51] Mills, 'Miinigowiziwin', p. 24.

[52] R. Macdonald, 'Everyday Lessons of Law Teaching – Le quotidien de l'enseignement juridique' (2012) 3 *Canadian Legal Education Annual Review* 3–37, at 12.

[53] Mills, 'Miinigowiziwin', p. 24.

[54] B. Mann, 'Afterward: The Death and Transfiguration of Early American Legal History', in C. Tomlins and B. Mann (eds), *The Many Legalities of Early America* (University of North Carolina Press, 2001), p. 447.

[55] See examples in Miller, *Compact, Contract, Covenant*, p. 13.

with the British,[56] grant that the King may 'hold, occupy, possess and enjoy' the land in question 'irrevocably' for 'consideration' or in light of 'presents',[57] or 'cede, release, surrender and yield up' territories in exchange for cash annuities and other benefits, for example.[58] We have already looked fleetingly at two ways in which these texts have come into question as being representative of the nature of the agreements reached between the parties. First, the wealth of research in the past few decades on the oral negotiations shows that Indigenous parties did not cede title to land (much less sovereignty) but were negotiating on the basis of consensual coexistence and the sharing of land and resources.[59] Second, images like the Covenant Chain emphasize that, from the perspective of Indigenous parties, treaties were relational – and thus involving a need for 'polishing' or renewal as parties revisit their commitments to one another and attend to evolving situations – rather than transactional, constituted by a discrete moment in time that fixed parties' rights with respect to one another.[60] These two points capture something of the contrast between Indigenous treaty jurisprudence and contract. However, the legality of interdependence that I introduced above allows us to see that the transactional character of contract is just the tip of the iceberg.

In exploring the broader ways of being that lie underneath contractarian logic, I am indebted to Mills' comparative analysis of constitutional logics in Canada/Turtle Island, one of the most thorough and clearheaded that I have yet seen.[61] Contracts, as we know, create obligations when two parties exercise their free will to make and accept binding promises, in a 'meeting of the minds'. Aside from these privately created bonds, we are subject to other obligations created by legitimate political authority – again, justified by the consent of the governed through the putative 'social contract'. The autonomous selves at the heart of this story

[56] Such as the Peace and Friendship Treaties from 1752 and 1760–1, www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522.

[57] The language typical of the Upper Canada Land Surrenders from the 1780s to 1862, ibid.

[58] The formula frequently used in the 'numbered' treaties of 1871–1921, ibid.

[59] See references cited at n. 38.

[60] J. Y. Henderson, 'Empowering Treaty Federalism' (1994) 58 *Saskatchewan Law Review* 241–329; M. Walters, 'Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall' (2001) 24 *Dalhousie Law Journal* 75–138.

[61] Mills, 'What Is a Treaty?' and Mills, 'Miinigowiziwin'; A. Mills, 'The Lifeworlds of Law: On Revitilizing Indigenous Legal Orders Today' (2016) 61 *McGill Law Journal* 847–84; A. Mills, 'Driving the Gift Home' (2016) 33 *Windsor Yearbook of Access to Justice* 167–86.

of obligations are of course deeply liberal ones, with capacities for self-direction and rational choice. The relationship between humans set up by the pattern of offer and acceptance is one of direct and strictly defined reciprocity. Without contract, in the liberal story, we are disconnected, even antagonistic, individuals;[62] only the social contract and its appointment of a sovereign stop us from descending into Hobbes' 'war of all against all'. Rights underwritten by the sovereign are also oppositional, a power over things or others because their compliance is compelled;[63] they secure negative liberty and freedom *from* our fellow humans; rights and obligations, and the autonomy and self-interest they protect, square up bilaterally in a zero-sum game.[64] The disconnection extends to humans' ecological contexts as liberal legality collaborates with the extractive 'mastery' of nature, and in turn underwrites the physical alienation of peoples from land through commodification of the commons and colonization.

In the logics of gift and mutual aid, Mills writes, treaty is not the means to bring into relation atomistic persons in order to secure their liberty, that is, their capacity to exercise their autonomy. Instead, persons are always and already interdependent – the sum of their relations – and treaties deepen their intentional participation in a complex circulation of gifts through specific kinship forms.[65] In place of the contractual structure offer/acceptance/consideration, where what is offered in response corresponds directly to the initial offer, the response to gift is gratitude that then moves us to reciprocate, although likely not directly, to the gift giver.[66] Alternatively, and this is a formulation seen often in treaty records, Mills explains that mutual aid might be initiated through the presentation of a need to one's relatives that then inculcates a sense of responsibility and initiates beneficent action: hence the language of petitioning the King for 'pity' or protection in treaties.[67] In this way, and whether they are initiated as gifts or petitions, treaties are offered not as a way for Indigenous peoples and non-Indigenous peoples to bind

[62] Mills notes that even communitarian theorists hold that our social embeddedness is simply a factor in how we are able to exercise individual autonomy rather than see it as grounding a different understanding of the self: see Mills, 'Miinigowiziwin', p. 52.
[63] Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (William B. Eerdmans, 2001), p. 16.
[64] Mills, 'Miinigowiziwin', p. 101.
[65] Mills, 'What Is a Treaty?'
[66] Mills, 'Miinigowiziwin', p. 102.
[67] Ibid., p. 104.

themselves to their promises, but as an invitation to specific forms of kinship, a relationship governed by Indigenous legality.

This understanding of treaty has implications for Canada's reconciliation project. If, as the aphorism now goes, 'we are all treaty people' here in Canada, the possibility of reconciliation and respect for Indigenous law is undermined if contract – and the baggage of its legality – is taken as the framing device. It would constitute what Mills calls 'constitutional capture', that is, that Indigenous claims are worked out through common and civil law categories, and within the presumptive structure of Canada's liberal constitution.[68] Further, the logic of gifts and mutual aid does not presume, as does liberal legality, that human political and legal relational structures can be severed from those of the Earth. In the logic of mutual aid, the reconciliation question is not about securing space for Indigenous legal traditions and the exercise of autonomy for different legal orders, but about sustaining healthy relationships in our ecosystems.[69] The treaty invitation to non-Indigenous peoples is to root themselves in Canadian soil, quite literally.

Learning, as an outsider, about the legal traditions specific to particular places in Canada, and the life-worlds that inform them, is part of

[68] Mills, 'Miinigowiziwin', pp. 35–7, 212. This is a particular instance of a larger problem with political 'recognition': see P. Markell, *Bound by Recognition* (Princeton University Press, 2003); D. Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (University of Toronto Press, 2006); Coulthard, *Red Skin, White Masks*.

[69] The Two-Row Wampum (*Kaswenta*), a beaded belt with two parallel purple lines on a white background and closely associated with colonial-era treaty-making, is often said to represent a principle of non-interference – the European ship and the Haudenosaunee canoe sail separately in the shared river. It thus looks at first glance like an Indigenous (or intercultural) endorsement of something akin to negative liberty. This wampum may well have emerged in an era during which the original covenant had been forgotten by British authorities (see D. Bonaparte, 'The Disputed Myth, Metaphor and Reality of Two Row Wampum' (8 September 2013), http://indiancountrytodaymedianetwork.com/2013/08/09/disputed-myth-metaphor-and-reality-two-row-wampum; and K. Muller, 'The Two "Mystery" Belts of Grand River: A Biography of the Two Row Wampum and the Friendship Belt' (2007) 31 *American Indian Quarterly* 129–64). Stepping back from efforts to quash and undermine Indigenous legal orders is a necessary redress of imperial relations. However, it is only an initial remedial step, and it would be a mistake to assume that non-interference as a liberal value of negative liberty is an end goal of treaty. A more fulsome reading of the Two-Row, which includes the three alternating white lines representing peace, friendship and respect (J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002), p. 149), is consistent with the ethos of relationality found throughout Haudenosaunee thinking (see generally K. P. Williams, *Kayenerenkó:wa: The Great Law of Peace* (University of Manitoba Press, 2018)).

a process of decolonization. Supreme Court jurisprudence has underlined that the goal of reconciliation in s. 35 of the Canadian Constitution requires the inclusion of the 'Aboriginal perspective' on rights under s. 35,[70] and the Indian Residential School Truth and Reconciliation Commission report of 2015 calls on law schools to include courses on Indigenous legal traditions so that future judges and lawyers may be equipped to go beyond paying lip service to 'the Aboriginal perspective'.[71] Such cross-cultural projects inevitably raise issues of translation – who can do it and how, the problems of rendering living and highly contextualized traditions legible to outsiders and their institutions, and the risk of appropriating what little remains after centuries of destructive colonial policies. These dynamics are reconfigured by the framing of Mills and others of the issue as one of relatedness rather than recognition. Mills writes that Anishinaabe constitutionalism is not about ethnic identity but about a way of being in political community on Earth: 'Though your stories may be different and you and I may not read the earth the same way, this is a constitutional framework available to all.'[72] This is why my approach here and elsewhere is to explore ways in which the messages of Anishinaabe and Haudenosaunee jurisprudence (the two rooted traditions growing out of the place where I live) resonate with the knowledge from my own inherited traditions.[73]

This understanding of treaties also has consequences for expanding our consideration of the heuristic of entangled legalities itself. Conceiving of entangled legalities in terms of normative pluralism – borrowing or transplanting rules and principles, developing hybrids, instituting structures that deal with conflicting norms – presupposes the form that law takes and constitutes its own kind of capture. If an actor – like a judge or other decision-maker – can select from a range of norms, we would have to think about law as dismembered pieces, as abstract propositions to be

[70] *R* v. *Van Der Peet* [1996] 2 SCR 507, [49].

[71] Call to Action 28 in Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission of Canada, 2015), www.trc.ca/res-trc-finding.html. See K. Drake, 'Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom' (2017) 95 *Canadian Bar Review* 9–46.

[72] Mills, 'What Is a Treaty?', p. 245.

[73] See K. Anker, 'Law as Forest: Eco-Logics, Stories and Spirits in Indigenous Jurisprudence' (2017) 21 *Law Text Culture* 191–213.

'applied' rather than an integral part of the way we live.[74] In the case of Indigenous law, such a floating rule or principle would, as Gordon Christie argues, be disembedded from the landscape.[75] Sákéj Henderson's vivid metaphor is that understanding Indigenous law as rules would be trying to appreciate an opera by reading the flute score.[76] In fact, Mills argues that rooted legalities do not find their usual or ultimate expression as rules at all.[77] This is partly because rules require abstraction – the disembedding from relationships – and partly because the agency of beings is suppressed if they are subject to (even provisionally) determinate rules.[78] Our entanglements, our giving and receiving of gifts, are continually co-constituting the world and, if I have understood well, the law is learned as a way of being in those relationships, producing not generalizable rules but rather a capacity to exercise judgement in situ to foster those relationships.[79]

Many scholars working on law in the Anthropocene have noticed the dysfunctionality of the conventional notion of law as rules faced with the dynamic and integrated nature of ecological crises, largely because the rule of law is based on predictability and resistance to change.[80] Law needs, consequently, to mirror ecological systems, to become dynamic and adaptive.[81] It may be that models of adaptive management, in which decisions and regulations are provisional and adjustable in light of environmental feedback, have something in common with the indeterminacy of law-as-judgement of rooted legalities. This short foray into the

[74] See M. Constable's retelling of the Norman conquest as the origin of positive law in the move from implicit knowledge about how to act to the articulation of rules in propositional language: *The Law of the Other: The Mixed Jury and Changing Perceptions of Citizenship, Law, and Knowledge* (University of Chicago Press, 1994), chapter 4.

[75] G. Christie, 'Indigenous Legal Orders, Canadian Law and UNDRIP', in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Centre for International Governance Innovation, 2017), p. 49.

[76] J. S. Henderson, 'Comprehending First Nations Jurisprudence', unpublished paper, Indigenous Law and Legal Systems Conference (University of Toronto Faculty of Law, 27 January 2007).

[77] Mills, 'Miinigowiziwin', p. 135.

[78] See the story of Wiisakejak and the ducks discussed by Mills, 'Miinigowiziwin', p. 137.

[79] Ibid., t pp. 137–45.

[80] J. Stacey, *The Constitution of the Environmental Emergency* (Hart, 2018); C. Voigt, *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press, 2013); J. Ebbesson, 'The Rule of Law in Governance of Complex Socio-ecological Changes' (2010) 20 *Global Environmental Change* 414–22.

[81] J. Ellis, 'Crisis, Resilience, and the Time of Law' (2019) 32 *Canadian Journal of Law and Jurisprudence* 305–20.

legalities of entanglement that inform treaty-making in North America gives insight into the ways in which the premises of ecological law – a rule of law grounded in the Earth, in which each of us has an 'ecological citizenship' calling on us to 'respect the workings of the Earth's life systems'[82] – can be more than just the means to the end of sustainability; those workings are more than simply a model to copy or calculate with, they are a set of relationships to live in.

3.5 Conclusion

But wait. How are we separate? This can also be enumerated. Being an individual and distinct organism is a dominant and recurring part of my existence. When I touch a boiling kettle, it is only my hand that recoils. My body mostly feels like a bounded unit with my 'self' located somewhere in my head. Although individualism is often decried as a mythological foundation for liberalism, it has a phenomenological and pragmatic reality – alongside entanglement, it is *also* part of the way the world thinks. Human symbolic thought has the property of permitting the experience of an interior or virtual world that can seem separate from the domain of the concrete, material world. This separation between mind and matter, and between culture and nature, has in part been actualized – and amplified – through agricultural practices, the construction of cities and states, and empirical science. As anthropologist Eduardo Kohn comments, the phenomenon we are calling the Anthropocene seems to be the apotheosis of the mind–matter dualism inherent in symbolic thinking.[83]

There is now a multitude of disciplines seeking to critique or find solutions to the ways in which the current legal and political paradigm ignores our ontology of entanglement, among them ecological jurisprudence, ecology of mind,[84] new materialisms[85] and

[82] UN GA, 'Sustainable Development: Harmony with Nature – Report of the Secretary General' (17 August 2012) UN Doc A/67/.

[83] E. Kohn, 'Anthropology as Cosmic Diplomacy: Toward an Ecological Ethic for the Anthropocene', unpublished paper, Yale Ethnography and Social Theory Colloquium Series (Yale University, 5 February 2018), https://fore.yale.edu/files/Kohn.pdf, p. 6.

[84] G. Bateson, *Mind and Nature: A Necessary Unity* (E. P. Dutton, 1979).

[85] J. Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press, 2010); A. Grear, 'Toward New Legal Futures? In Search of Renewing Foundations', in A. Grear and E. Grant (eds), *Thought, Law, Rights and Action in an Age of Environmental Crisis* (Edward Elgar, 2015).

cosmopolitics.[86] Many of their insights, like those I related in Section 3.1, may be useful, in the reconciliation project, for taking Indigenous law seriously, particularly in engaging elements – like spirits or animals as persons – that can sound fanciful because the idiom used to express them has become denigrated within a modern disenchanted approach to knowledge.[87]

But these disciplines addressing the ecological project also have much to learn from engaging with Indigenous perspectives. Zoe Todd, Kyle Powys Whyte and others have pointed out that discourses of the Anthropocene have tended to both overstate the extent to which the problem is a merely recent or impending dystopia, instead of the continuity of an apocalypse that for Indigenous peoples began with colonization, and ignore or erase the contributions of Indigenous activists and thinkers to our framing.[88] Many factors in anthropogenic climate change and ecocide relate to the genocides, land transformations, migrations and global trade wrought by colonialism, but the Anthropocene as a discursive trope also 'continues a logic of the universal which is structured to sever the relations between mind, body and land'.[89] What this study of treaty shows is that the exchange on entanglement cannot be simply an intellectual one, as Indigenous ontologies are part of legal orders through which those who share their territories are, like it or not, related.[90] And as we have seen, that legality – manifest in treaty – is centred on grounded practices of creating and sustaining kin.

Given that entanglement and separation are both 'in' the world, we desperately need to choose to amplify those aspects of the way the world thinks that foster connection and care. As philosopher of science Donna Haraway puts it in her book for these troubled times, *Staying with the*

[86] B. Latour, 'Whose Cosmos? Which Cosmopolitics? A Comment on Ulrich Beck's Peace Proposal' (2004) 10 *Common Knowledge* 450–62; I. Stengers, *Cosmopolitics I* (University of Minnesota Press, 2011).

[87] M. Berman, *The Reenchantment of the World* (Cornell University Press, 1981).

[88] Z. Todd, 'An Indigenous Feminist's Take on the Ontological Turn: "Ontology" Is Just Another Word for Colonialism' (2016) 24 *Journal of Historical Sociology* 4–22; K. P. White, 'Our Ancestors' Dystopia Now: Indigenous Conservation and the Anthropocene', in U. Heise, J. Christensen and M. Niemann (eds), *The Routledge Companion to the Environmental Humanities* (Routledge, 2017).

[89] H. Davis and Z. Todd, 'On the Importance of a Date, or Decolonizing the Anthropocene' (2017) 16 *ACME: An International Journal for Critical Geographies* 761–80, at 761.

[90] Todd, 'An Indigenous Feminist's Take on the Ontological Turn'.

Trouble, given the irreversible losses that we are facing, any renewed generative flourishing will need the kind of refuge spaces that are made by a mesh of symbiotic, sym*poetic*, collaborators.[91] The answer that both she and Indigenous treaty jurisprudence give to the question 'how are we related, how are we entangled'? Let us multiply the ways.

[91] D. Haraway, *Staying with the Trouble: Making Kin in the Cthulucene* (Duke University Press, 2016).