LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600-1800, Robert A. Williams, Jr., (New York: Oxford University Press, 1997)

Vine Deloria has written that the problem with U.S. federal Indian law is that "there are no Indians in the story."[1] Deloria recently directed this complaint at the standard reference work in the area, Felix Cohen's influential *Handbook of Federal Indian Law*.[2] That book continues to undergo revision in order not only to update the text but, Deloria hopes, to write the Indian side of the story into it. This is one of the objects of Rob Williams, Jr.'s new book *Linking Arms Together* — to write the Indian story into the legal discourse of American Indian law — but this is not the author's sole object. The book also importantly retrieves resources of both language and practice rooted in our shared past, on the "first multicultural frontier" on the North American continent, with which to shape our shared future together.

The use of law and legal discourse in the West's will-to-empire over the indigenous peoples of the Americas was the object of Williams' first book, *The American Indian in Western Legal Thought*.[3] That was the story as told by colonizers; not the history of the country which the colonizer plunders, but "the history of his own nation in regard to all she skims off, all that she violates and starves" (these words of Fanon's formed the epigraph to this first book). In *Linking Arms Together*, Williams writes back to the empire from within the settler-derived states of the Americas to tell a different story: the "history of the legal ideas that American Indian peoples sought to apply in their relations with the West during the North American Encounter era,"[4] roughly from the time of the early sixteenth to the late eighteenth century.[5]

As *The American Indian in Western Legal Thought* reveals, the West's legal discourse is inadequate to the task of justifying the "underlying legitimacy and moral foundation of the West's colonial hegemony over indigenous tribal peoples."[6] This failure is typical of most historiography of colonialism and empire, resulting in calls to reinscribe into historical studies the social agency of the "subaltern."[7] Williams

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1 R.A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law & Peace, 1600-1800* (New York: Oxford University Press, 1997) at 6. See V. Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law" (1989) 31 Ariz. L. Rev. 203 at 205.

2 See V. Deloria, Jr., "Reserving to Themselves: Treaties and the Powers of Indian Tribes" (1996) 38 Ariz. L. Rev. 963 referring to F. Cohen, *Handbook of Federal Indian Law* (Washington: U.S. Government Printing Office, 1941).

3 R.A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

4 *Supra* note 1 at 3.

5 *Ibid.* at 139 note 3.

6 *Ibid.* at 5.

7 The overdetermined concept of the "subaltern," Gayatri Spivak argues, should be confined to "everything that has limited or no access to the [West's] cultural imperialism." See L. De Kock, "An Interview With Gayatri Chakravorty Spivak" (1992) 23 *Ariel* 29 at 45-46. On the subaltern studies group see G.C. Spivak, "Subaltern Studies: Deconstructing Historiography" in R. Guha, ed., *Subaltern Studies IV: Writings on South Asian History and Society* (Delhi: Oxford University

accomplishes this task by invoking "tribal visions law" revealed in accounts of Encounter-era treaty making. He is able, thereby, to reconstruct original understandings of Indian peoples in their legal relations with the European settlers. The recovery of this "shared legal world" reveals that certain recurring tribal "paradigms of behaviour" governed visions of law and peace on North America's first multicultural frontier. These paradigms of behaviour, taken together, suggest a powerful "countermythology" to the West's morally inadequate statist discourse. It is this countermythology which has helped to sustain the Indigenous peoples and, as sources of law, have precedential value in contemporary decolonization struggles.[8] *Linking Arms Together* provides the outline of this countermythology, one in which peoples collaborate for the purpose of creating a new heterogeneous society in which no one society is ascendant.

By describing these paradigms of behaviour as "sources of law with precedential validity" in contemporary Indian law, Williams offers a daring counterhegemonic move. Aboriginal understandings of treaty making, according to Western conceptual conceits, did not constitute law. Indeed, according to this mythology, Indians were viewed as obstacles to the development of civilization of which law was an integral organizing component.[9] As Upendra Baxi has argued, this disinclination to recognize Occidental systems of law "has distinctly colonial origins," making possible the "churlish, Eurocentric British boast ... that colonized nations had a notion of authority but not legality."[10] It has its contemporary manifestations in judicial pronouncements that First Nations on the Northwest Coast had no organized society or system of government sufficient to establish cognizable common law interest in Aboriginal lands.[11]

Williams' narrative reveals that the Indigenous peoples of North America had been negotiating treaties and alliances with each other for some time prior to the arrival of the Europeans. It was these paradigms of negotiating behaviour that were engrafted onto relations with the Europeans, and that became resources for the practice of Indian diplomacy through treaty making.[12] The use of kinship terms, such as those of father, younger/elder brother, and cousin, appear repeatedly in the Encounter-era treaty literature and had specific meanings in Indigenous tribal traditions. They described relationships of "connection" — relations of reciprocity and shared commitment that were essential to survival — derived from tribal life and used in treaty making to

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Press, 1985) 330.

8 *Supra* note 1 at 7-8.

9 *Ibid.* at 21.

10 U. Baxi, "'The State's Emissary': The Place of Law in Subaltern Studies" in P. Chatterjee & G. Pandey, eds., *Subaltern Studies VII: Writings on South Asian History and Society* (Delhi: Oxford University Press, 1993) 247 at 252.

11 McEachern C.J. in *Delgamuukw* v. *B.C. (A.G.)* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), rev'd. (1993), 104 D.L.R. (4th) 470 (B.C.C.A.). I say this with the knowledge that McEachern C.J. might regard such a characterization as coming from "some biased source posing as an expert, usually from a university." See the Hon. Chief Justice McEachern, "Judicial Independence" [unpublished].

12 *Supra* note 1 at 71. Also see D.K. Richter & J.H. Merrell, eds., *Beyond the Covenant Chain: The Iroquois and their Neighbours in Indian North America, 1600-1800* (Syracuse: Syracuse University Press, 1987); and F. Jennings, W.N. Fenton, M.A. Druke & D.R. Miller, eds., *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and their League* (Syracuse: Syracuse University Press, 1985).

identify and deepen relations with European officials. The peace pipe tradition and the exchange of eagle feathers are recurring features in the treaty literature and served a number of vital functions in Indian diplomacy prior to the arrival of the Europeans: for initiating peace negotiations, forging strategic alliances, commercial trade, the exchange of prisoners, and securing rights of passage through alien territory. These "sacred" acts also helped to seal relations of connection with the Europeans that were established through the treaty system. Storytelling, another inter-tribal practice, emerges in the treaty literature. Indian diplomats would sing, gesture, dance and weave stories in order to explain their vision of the treaty relationship.[13] Stories would be used to set examples, lodge official grievances, and generally served to educate treaty partners about the "expected norms of behaviour between peoples in a treaty relationship."[14]

By recounting the educative role of storytelling in the Encounter era, Williams takes sides with those who value narrative in contributing to the establishment and maintenance of legal relations.[15] Williams takes up philosopher Richard Rorty's contention that narrative evokes "solidarity" by generating the "imaginative ability to see strange people as fellow sufferers."[16] Storytelling, according to this account, has an important role to play not only in tribal visions of law but in the contemporary practice of intercultural communication.

Treaty making in the Encounter era, then, displayed a number of recurrent practices that also featured in inter-tribal diplomacy. Treaties were presented as "sacred texts" that enabled "different peoples to attain 'one mind' according to a divine plan for humankind."[17] Treaties also established "connnections" that made survival more certain on the multicultural frontier. Treaties were recounted as "stories" that "enabled treaty partners to imagine a world of human solidarity."[18] Williams devotes three chapters in the book to each of these portraits: treaties as sacred texts; treaties as connections; and treaties as stories. In the last chapter, Williams asks that we consider treaties as constitutions. Taken as an ensemble of practices and customs these paradigms of behaviour amount, argues Williams, to a body of "indigenous constitutional principles."[19] Williams asks that we think of these principles as constitutional in the same way that the British think of their unwritten constitution as a body and values of customs having evolved since time immemorial.[20]

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13 Williams, *supra* note 1 at 84.

14 *Ibid.* at 89-91.

15 See, for instance, R. Delgado, "Legal Storytelling: Storytelling for Oppositionists and Others" (1989) 87 Mich. L. Rev. 2411. For a nuanced critique, see M. Tushnet, "The Degradation of Constitutional Discourse" (1992) 81 Geo. L.J. 251.

16 *Ibid.* at 92. See R. Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), c. 4.

17 *Ibid.* at 98.

18 *Ibid.*

19 *Ibid.* at 99.

20 It may be more accurate to analogize Indigenous constitutional law to what is formally understood as the body of Canadian consitutional law — a mix of British and American constitutional traditions comprised of both written foundational documents and unwritten common law principles.

For Williams, the the Law of the Great Peace is exemplary not only because it exhibits each of the characteristics of treaty making (as sacred text, connection, and story) but also because it has served as the constitution of the Five Nations (now six) that make up the Iroquois Confederacy or, as they call themselves, the Haudenosaunee.[21] The Great Law established an intergovernmental federal system of mutual respect and conciliation — decisions of consequence, for instance, required complete unanimity among three brotherhoods.[22] The epic story recounted in the Great Law "envisioned a multicultural community of all peoples on earth, linked together in solidarity under the sheltering branches of the Tree of Great Peace."[23] It was under this great tree that the Five Nations assembled and under which the Iroquois extended the peace in treaties with the French and English.[24] It is a story of "linking arms together" from which Williams draws the title of his book and it is the basic model from which Williams wishes us to draw lessons for contemporary life: "as human beings in a world of diversity and conflict," he writes, "we are under an obligation to link arms together."[25]

We arrive here at one of the guiding themes of *Linking Arms Together*. The book is an exercise in the reconstruction of Aboriginal rights not for the purpose simply of retrieving the agency of the subaltern who is erased from standard narrative historical accounts. It also is for the purpose of building bridges of understanding between communities divided by history in order to recover that "shared legal world" that was constructed on contact. Williams' objective perhaps is better understood in light of recent critiques of an unreconstructed politics of recognition. Wendy Brown has trenchantly observed that contemporary idenitity politics resubordinates historically subjugated subjects by reenacting the conditions which give rise to claims to recognition.[26] Politicized identity becomes a "political practice of revenge," premised on exclusion "for its very existence as identity":[27]

> Politicized identity thus enunciates itself, makes claims for itself, only by entrenching, restating, dramatizing, and inscribing its pain in politics; it can hold out no future — for itself or others — that triumphs over this pain.[28]

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21 See A.C. Parker, *The Constitution of the Five Nations or the Iroquois Book of the Great Law* (Albany: University of the State of New York, 1916) (Museum Bull. No. 184, 1 April 1916); and Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol.1 (Ottawa: Supply and Services Canada, 1996) at 50-61.

22 Parker, *ibid.* at 11.

23 *Supra* note 1 at 60.

24 *Ibid.* at 116.

25 *Ibid.* at 123.

26 She writes that the politics of identity that aspire to the universal ideal of middle-class America become marginalized as "special interest" or disciplined and normalized via juridical power. See W. Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), c. 3 at 55, 59. For a similar reconstructive critique of identity politics see H. Bhabha, "Editor's Introduction: Minority Maneuvers and Unsettled Negotiations" (1997) 23 *Critical Inquiry* 431 at 450-53; and M. Minow, *Not Only for Myself: Identity, Politics and the Law* (New York: The New Press, 1997) at 55.

27 Brown, *ibid.* at 73.

28 *Ibid.* at 74.

Brown instead calls for a "slight shift" in the character of the political discourse of identity, supplanting the language of "I am" with language of "I want this for us."[29] This shift in political language, Brown argues, reopens the possibility of a shared political future, rather than an injured past, across politically constructed identities. It is this "idiom of futurity" that Williams paradoxically employs in his reconstruction of Indian diplomacy on the multicultural frontier. The paradigms of behaviour which characterize treaty making in the Encounter era are offered, not as some unreconstructed past, but as resources for repairing damaged Indian/settler-state relations of the present day.

Williams closes the book with a discussion of the centrality of trust as an organizing theme in Encounter-era treaty literature.[30] Treaties were, at bottom, relationships of trust and successful treaty relations were based upon "confident example setting"[31] — the granting of land settlement rights to Europeans, eating out of the common bowl, and behaving as relatives towards each other engendered the confidence necessary to sustain relationships of trust. Understanding some of the ways Indians sought to build relationships of trust "can teach us important lessons about how we might achieve law and peace between different groups of peoples in a multicultural world," writes Williams.[32] One way in which treaty partners maintained trust was to engage in continual constitutional renewal as a means of forgiveness for breaches of treaty agreements or for acts of bad faith. Forgiveness, in the Encounter era, "was an expected customary practice between treaty partners."[33] Here is an important lesson to be drawn from Encounter-era treaty diplomacy: the notion of constitutional renewal as a means of restoring relationships of political trust.

According to Williams, the "customary terms used to describe the connections maintained by a treaty, the frequent conferences, the binding of future generations, and the forgiveness of past transgressions were seen as acts of renewal between treaty partners."[34] Constitutional renewal provides, then, an opportunity for forgiveness and for restoring relations of trust between political parties — a model of behaviour not only for Aboriginal and Canadian state relations but also for damaged intercultural relations elsewhere in the world. This is the kind of future "for us" that Williams proposes we talk about. By beginning to understand the language and behaviour of Indian forest diplomacy, Williams hopes that we might begin the process of "learning how to nurture the trust that is necessary for Indian tribalism and dominant white

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29 *Ibid.* at 75.

30 *Supra* note 1 at 125-26.

31 *Ibid.* at 125 quoting A.C. Baier, *A Progress of Sentiments: Reflections on Hume's Treatise* (Cambridge: Harvard University Press, 1991) at 232.

32 *Supra* note 1 at 125.

33 *Ibid.* at 112.

34 *Ibid.* at 113.

society to survive and flourish, forging the solidarity for our multicultural future together."[35]

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[35] *Ibid.* at 135.