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Editor’s Note:

I am very pleased to introduce Volume 2, Number 2 of The Forensic Social Scientist, the Official Newsletter of the Forensic Social Sciences Association (FSSA). As an international and interdisciplinary organization, the Association is dedicated to advancing training at the undergraduate, graduate, and postdoctoral levels, practice issues such as the development of certification in forensic social sciences, policy initiatives, and research in the forensic social sciences. The FSSA is currently planning to launch undergraduate, graduate, and post-doctoral courses, certification programs in the forensic social sciences, the first ever Journal of the Forensic Social Sciences, and other publications.

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In this issue, The Forensic Social Scientist highlights the work and accomplishments of forensic social scientists.

Stephen J. Morewitz, Ph.D.
Analysis by Dr. J. Barry Gurdin:

Social Science, The Law, The Environment, and First Peoples

by J. Barry Gurdin, Ph.D.

On January 28-29, 2016, at the University of California, Berkeley School of Law, the Canadian Studies Program sponsored a conference, “Fossil Fuels and Radical Sovereignties: Boardrooms, Blockades, and Jurisdictional Struggles over Oil and Gas Development in ‘North America,’” that dealt with major current issues relating to the law and the environment with a particular emphasis on the rights of First Peoples, frequently described by the terms, Aboriginal or Indigenous. Due to work, I missed several of the presentations, but I was able to hear many of the papers and engage in conversations, observations, and raise questions with several of the presenters and attendees. While the conference presenters showed real concern for justice toward the environment and First Peoples and several of the papers offered excellent summaries of recent relevant social action and legal cases, they lacked references to the social sciences of the law relevant to these events and cases. Instead of using this extensive literature to interpret their material, the presenters frequently substituted an analytical concept more derivative of identity politics than the social sciences. Thus I shall critically review several issues of interest to social scientists, by focusing on perhaps the least ideological of the papers with a more in-depth reference to concepts of major researchers in the areas of social sciences, the law, the environment, and First Peoples.

Sociology of the law as applied to the environment and First Peoples has been interpreted through various theoretical perspectives. For example, Janna Promislow (2016) described her work as pragmatic in that it emphasized the difficult strategic choices indigenous peoples face regarding forums. She noted that questions arise regarding jurisdiction with respect both to Indigenous peoples and “the Crown” (i.e. the Canadian government) as to how it meets its obligations. Using the term, “settler state”—which was used in many other papers—to refer to the Canadian government, Dr. Promislow stressed that these obligations are defined how the Canadian government defines them. Yet, she underscored that there was room for Indigenous peoples’ assertions and arguments to impact regulatory systems.

Professor Promislow cites the case of the Haida Nation v British Columbia 2004 SCC73 at paragraph 27, and in so doing, she appears to appeal to an implicit ethical code which would stir the consciences of contemporary Canadian citizens:

The answer, once again, lies in the honour of the Crown. The Crown, acting honourably cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.
In Dahlberg-Larsen’s (2002) understanding of Habermas,

from about 1600 on, a characteristic feature of human society has been a split into two sectors, systems and the life world, which have developed on their own. Thus, parts of the system—economics and politics—became disconnected to their previous close connection to morality and religion and became primarily interested in getting as much profit and power for themselves as possible. As a consequence, law became to be seen as a tool in the hands of the powerful and disconnected from morality.

Dr. Promislow’s paper appears to implicitly reject the Frankfurt School’s neo-Marxian reasoning of Habermas in that she cites “the honour of the Crown” which is based on an evolving ethical sense of fairness that the Canadian government recognizes in its legal code vis-à-vis First Peoples.

An immigrant to the USA from Hungary who became an American sociologist of law, Steven Vago, observed that organizations such as Common Cause, the Sierra Club and the Public Interest Research Groups have provided “the impetus for a series of laws dealing with the protection of the environment including the Air Pollution Control Act of 1967, the Clear Air Act of 1970, the Clean Water Act of 1972, in addition to the formation of a number of new federal agencies to both monitor compliance with the numerous existing pollution and environmental protection laws and to help establish new polities” (1981, 148). With reference to such legislation, the Danish legal and sociological scholar’s interpretation of Habermas stresses that “the positive effects of the new statutory rules” have the negative effect of “colonizing the life world” of other social groups’ norms and values which makes these citizens “objects controlled from the outside ... lead[ing] to social/cultural impoverishment, a pacification which destroys their possibilities for creating their own life” and “thus getting out of the role [of] ... a social client controlled by the norms of the social legislation” (Dalberg-Larsen, 2002, 12).

Professor Janna Promislow underscores that Canadian law defines who has the responsibility for consultation and accommodation in regards to particular parts of the obligation. Additionally, Canadian law details which activities are permitted and who has access to designated territory or resources. She reminds us:

E. Do Third Parties Owe a Duty to Consult and Accommodate?

The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree. It is suggested (per Lambert J.A.) that a third party’s obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown’s assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with “aboriginal people claiming an aboriginal interest in or to the area” (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.
It is also suggested (per Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of “knowing receipt”. However, as discussed above, while the Crown’s fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown’s honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. (McLachlin, Beverley; Major, John C.; Bastarache, Michel; Binnie, William Ian Cornell; LeBel, Louis; Deschamps, Marie; Fish, Morris J. 2004. S.C.R. 74 at paragraph 32)

Another case cited by Janna Promislow can be used to illustrate how social science can be applied to problems of the environment in society. By the time he published Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy, Habermas (1992b; 1996b) became more sympathetic toward applying legal solutions to real world problems like that of the environment in contemporary societies. For instance, he pointed out “the only legitimate kind of law is the one rooted in popular debates in society and reflecting people’s own values and experience” (Dalberg-Larsen, 2002). Avoiding the “colonizing effects” which he outlined in The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society (1981; 1984), Habermas identified popular experience which aimed at improving the form and contents of the law would could make it capable of solving “actual problems in a reasonable way,” even though “many factors can prevent such favorable development” particularly “the modern mass media” (Dalberg-Larsen, 2002). Professor Promislow’s and others’ (Mehta, 2016) discuss Chippewas of the Thames Deshkaan Ziibing Anishinaabeg versus Enbridge Inc., the National Energy Board, and the Attorney General of Canada. However, the role of the media appears to go in a different direction from that typically predicted by Habermas in that articles in the press, on television and online seem to support the Chippewas of the Thames argument that they were not properly consulted as required by Canadian law.

This case presents us with a clear example in which a First Nation is engaging in a debate with a powerful company and powerful agents of the Canadian state whose agents strongly disagree about whether the Chippewas of the Thames were consulted in a proper manner as determined by Canadian law.

In another case regarding Seismic testing off the Clyde River on Baffin Island, Professor Promislow’s paper focuses on the question of the Crown’s jurisdiction. In this case three Norwegian companies, TS-NOPEC Geophysical Company ASA, Petroleum GeoServices, and MultiKlient Invest AS plan “to do seismic testing in the Davis Straits, up and down the entire length of Baffin Island. The testing uses loud, high-intensity sounds to help map the sea floor and the geology underneath” (CBC News, May 27, 2015). The Inuit inhabitants of the area argued before the National Energy Board against this project because “it would disturb or harm seals, whales, walrus and other marine mammals locals depend on for food” and many “NGOs such as Greenpeace, the Sierra Club and Amnesty International” supported the position of the Inuit (CBC News, May 27, 2015). While the legal questions involved who could represent (sue on behalf of) the Inuit rights holders, I suggest that it is also a good illustration of Habermas’s evolution of thought towards being more favorable toward regulation in environmental questions. While a Federal Court rejected the Clyde River bid to block the seismic tests on the grounds that its duty to consult with the Clyde River hamlet on Eastern Nunavut Project was fulfilled (Nunatsiaq News, 2015), the Norwegian energy consortium “cancelled its plans to conduct seismic testing off of Baffin Island” in the summer of 2015 (CBC News, May 27, 2015).
Janna Promislow’s paper stresses the legal issues involved the Crown’s jurisdiction. She points out that two legal cases about Clyde River resulted in two different answers. Dr. Promislow summarizes that one case found that the NEB, the National Energy Board, does not have the jurisdiction to carry out the duty to consult, while the other case found that the NEB has the jurisdiction to do so, but it was not met. She also underscores that who can represent or sue on behalf of the Inuit rights holders became a disputed issue in these cases. The lawyer representing Clyde River, Nadar Hasan, argued “that the companies proposing the testing did not consult with Inuit in a meaningful way, in part by holding community information sessions rather than consultation hearings” while “a lawyer for one of the companies involved in the seismic testing project rebutted that argument, saying they did many consultations with Baffin communities” and the lawyers for the companies “argued that the Qikiqitani Inuit Association and Nunavut Tunngavik, Inc. were consulted as representatives of Inuit, under the Nunavut Land Claims Agreement. They said those organizations are the only ones who can legally speak for Inuit in this case. The hamlet of Clyde River, they argued, cannot” (CBC, April 20, 2015).

Dalberg-Larsen (2002) interprets Habermas’s theories as containing two dissimilar components, a traditional Age of Enlightenment view that citizens in democratic states can shape their development based on their own desires and values, and a skeptical and critical framework embodying concepts like, systems, life world, legislation and colonization. Janna Promislow’s paper lucidly illustrates through real legal cases that in our era of globalization powerful international companies may employ the law in any individual state, as in the example of Clyde River, by claiming to have fulfilled a national law by having some kind of informational process among differing subgroups of a First People while not others who judge the corporations’ information not to have been presented in a manner conforming to law. On the other hand, the indigenous population may gather famous writers and organizations who agree that their livelihoods are threatened and may go public through various media, such as television, radio, and the internet that help influence public opinion. The skepticism of Habermas’s earlier work was based on empirical referents to other social groups which may have been harmed when, for example, bureaucratic decision makers neglected to fairly consider how their legislation may affect the traditional livelihood of important segments of the population.3

Janna Promislow also addresses the consultation process involving regulation of the Athabasca Oil Sands, which reports from The Proceedings of the National Academy of Sciences by a group of University of Alberta researchers “revealed the prevalence of carcinogens in areas around and downstream from the tar sands” (Kwon, 2012). The Chief of the Athabasca Chipewyan First Nation (ACFN), Allan Adams, stated, “We live a very traditional life; we live off the land and the water. We have been told again and again that contaminants are naturally occurring, yet in the last 40 years we have seen the health of our community decline due to cancers and illness that we didn’t see before” (Kwon, 2012). Like Professor Promislow, other Canadian lawyers have observed a deterioration of the right to consultation in recent years in Canada (McIvor, 2016). It has been reported that a long list of First Nation law suits is before the Canadian courts, and aboriginal groups such as “the Mikisew Cree and Frog Lake First Nation are before the courts arguing that Ottawa’s recent amendments to the Fisheries and Navigable Waters Acts run afoul of their rights” (Weber, 2014). Nigel Banks, professor of resource law at the University of Calgary, is quoted as stating, “In the oil sands area, it’s really the intensity of the development…The treaties give the province the power to take up lands and the argument is there must be a limit to that. That can’t be an entitlement to take away all lands (to) which First Nations have historically exercised hunting rights” (Weber, 2014). Even after the New Democratic Party with its call for more consultation over oil sands development, “Seven First Nation and Métis communities pulled out of an October 16, 2015, meeting on the province’s sustainable development plan for the region when they said they weren’t being heard” (Giovannetti and Cryderman, 2015). “A key issue for the aboriginal communities is the fate of an agency that monitors and makes recommendations to government on oil sands development policy. The Fort McMurray-based Cumulative Environmental Management Association (CEMA) is on the verge of shutting down unless industry or government steps in with funding” (Giovannetti and Cryderman, 2015). While industry wants CEMA “folded into initiatives such as the Joint Oil Sands Monitoring Program, a federal-provincial partnership launched in 2012, and, more recently, Canada’s Oil Sands Innovation Alliance,” many First Nations recognize it as the “only independent outlet for their concerns” and it needs “$5-million annual budget” to keep it going (Giovannetti and Cryderman, 2015).
How has social science understood such developments involving First Peoples, the environment, and the law? Here we can recall the debate between Jürgen Habermas (1981, 1984, 1992b, 1996b) and Niklas Luhmann (1970, 1972, 1985, 1986, 1993, 1997, 2004) to which Professor Jørgen Dalberg-Larsen refers. Although Luhmann’s point of departure is Talcott Parsons’ social systems theory, Parsons used systems theory as a tool to analyze the components of the system such as law. For Parsons, “the primary function of a legal system is integrity. It serves to mitigate potential elements of conflict and to oil the machinery of social intercourse” (1962, 58, cited in Vago, 1981). During the 1960s and 1970s, Luhmann continued to elaborate the functions of law and remained optimistic about how to apply the law in a social technical way. However, by the “end of the 1970s and early 1980s,” his “concept of social systems and law changed.” While before Niklas Luhman found that there were “obstacles to applying law in State regulation,” now such obstacles became “the crucial principal rule” (Dalberg-Larsen, 2002, 15). At this period he borrowed the Chilean Humberto Maturana and Francisco Varela’s biologically-based notion of autopoietic systems theory. To survive social systems “have to be maintained through a number of internal processes which … consist of communication … if they are well-defined in relation to the surrounding world consisting of other systems” (Dalberg-Larsen, 2002, 15). Each individual system has its own code, which for the legal system is legal/illegal, and for science … is true/false” (Dalberg-Larsen, 2002, 15). In Luhmann’s theory, the entire society cannot be maintained unless each social subsystem makes its “single system contribution with regard to the surrounding world” (Dalberg-Larsen, 2002, 15). Law’s contribution “is to secure the maintenance of contrafactual expectations, which might be paraphrased to securing calculation beforehand, being a central function of the rule-of-law principle” (Dalberg-Larsen, 2002, 15).

Professor Dalberg-Larsen (2002, 15) is quite critical of Luhmann in that he characterizes Niklas Luhmann’s social system theory as being highly “speculative,” despite being based on some “empirical observations.” He also thinks Luhmann’s theory leads to some “radical consequences about the social functions of law, particularly environmental law” (2002, 15). For example, Luhmann’s framework identifies action outside the natural function of one system towards another system as “disadvantageous” and “menacing” its own system. Moreover, if a social subsystem acts on another it may “smuggle new foreign codes … into the system from outside” (2002, 15). Thus Luhmann thinks that “the legal system” should “concentrate on its self-maintenance,” meaning preserving “its own specific code” which means renewing “its content through small modifications in natural continuation of its contents and principles” (Dalberg-Larsen, 2002, 15-16). In Luhmann’s view, principles or rules which are foreign to a system, such as attempting to solve environmental problems, lie outside law’s “one and only function” of securing “the possibility of calculating beforehand and not contributing to the solution of … non-legal problems” (Dalberg-Larsen, 2002, 16).

Forensic social scientists could argue against Luhmann that if a court were to introduce a statutory rule based on an evaluation of the real effects of whether or not the Athabasca Chipewyan First Nation (ACFN) members’ health had been negatively affected by the Athabasca Oil Sands, this court’s ruling would not represent a replacement of the law’s code, legal/illegal, by a scientific code, true/false. Rather, social scientists might argue that Luhmann is wrong in suggesting that legal judgments are made without using the most exact determination available as to whether empirical harm has been caused to individuals, community members, or their property by other individuals or corporate agents. Furthermore, they would object to Luhmann’s simple dichotomy as accurately reflecting a legal code or his claim that the political, economic and knowledge subsystems of society have not exerted influence on one another throughout the development of the law. Indeed, the history of English law which greatly influenced both Canadian and American law illustrate constant interaction in their empirically operating in one another’s spheres or “subsystems” (Vago, 1981, 279-315). These objections are not to dismiss totally Luhmann’s concerns about the imbalance of “subsystems” which may have contributed to varying extents to “a crisis in the welfare state” as many on-going debates in North America and Europe illustrate. Luhmann’s call for the “classical form of law, the conditional norms and precise definition of legal facts and consequences” (Dalberg-Larsen, 2002, 16) certainly have an appeal for citizens and legal scholars concerned with correct interpretation of the law. Yet, to reject alternative dispute resolution and other legal responses to changing societal needs seems to contradict what is known about the history of the development of law in relation to other subsystems of society like the economy, the natural world, and evolving norms. Moreover, Luhmann’s thought has been criticized as creating an ontological view of the social system, and, in my opinion, it is this aspect of his thought that has attracted a considerable following in societies of an historically-recent totalitarian past, for Luhmann elevates his analytical tool to an almost existing force.
Post-Modernism, the Law, the Environment, Pluralism, and First Peoples

In Professor Jørgen Dalberg-Larsen’s understanding, since the 1980s, the social sciences have moved beyond the view of Marxism and functionalism to a post-modern view that society today “cannot be understood as being governed by certain general social regularities which social sciences have to discover” (2002, 17). For post-modernists, “society is not characterized...[by] some factors or structures concealed from individuals” which “determine” their acts without their “knowing it” (Dalberg-Larsen, 2002, 17). In this view, people remain “subject to power” and “are not free to act as they want depending on who they are and what they are doing” even though “predictions” cannot be made regarding “the result of large and small power struggles taking place all the time” (Dalberg-Larsen, 2002, 17). In a post-modernist perspective, “no form of power is any more important than any other” which prompts him to inquire what implications follow from this assumption for “legal sociology and environmental law” (Dalberg-Larsen, 2002, 17). For the sociology of law, postmodern thought encompasses “a great variety of conceptions,” for which “a general legal strategy or policy to solve environmental problems” will give way to “law and legal arguments being used as weapons by both parties ...in a variety of small fights” (Dalberg-Larsen, 2002, 18). The greatest influence postmodernism has had within legal sociology is by relativizing “the very concept of law and problematizing the traditional view of law as a unity” (Dalberg-Larsen, 2000 & 2002, 18). Jørgen Dalberg-Larsen credits Portuguese Boaventura de Sousa Santos (1987; 1995; 2002; 2015) as being the most outstanding representative of a postmodern legal-pluralistic conception of the law (2002, 18).

Professor Dalberg-Larsen contrasts the traditional view of law as a unity—held by both legal dogmatics and legal sociology to Boaventura de Sousa Santos’s notion which describes this unity as only being “apparent” in that “the contents of the law can be viewed from many angles, none of which is more correct than the others” (2002, 18). Whereas the traditional perspective describes the law “as an instrument” which politicians elaborate in coherent national legal systems “to solve problems in society or “the environment,” Santos (1987; 1995) likens the law to “the art of drawing up a map representing the physical reality of a round globe on a piece of paper” when the cartographer must choose which “symbols, dimensions, and center” represent “the specific parts of reality” (Dalberg-Larsen, 2002, 18). “When illustrating law” one can look at three options: its global dimension finding “rough outlines” which become “identical with international law” (Dalberg-Larsen, 2002, 18). The second scale produces a more detailed description of a smaller field with which “the national legal systems can be described” (Dalberg-Larsen, 2002, 18). Santos’s third scale allows “a very detailed description of a concrete place,” which he calls “local law” (Dalberg-Larsen, 2002, 18). Professor Dalberg-Larsen praises Santos’s conception of law because he thinks that in any “concrete situation the international, national, and local laws all must be considered; that they will interact”; and that “it is impossible to predict the result of such interaction for the individual or the environment” (2002, 18). While Professor Dalberg-Larsen observed that globalization, the European Union, and the international human rights movement had led to “national legal systems”—formerly “considered to be the natural or even inevitable basis for determining current law”—as being driven back “especially by international law” while “local law” gained “increasing importance as authorities had delegated to regional and municipal units tasks and expertise in areas such as environmental law” (2002, 19). For this Danish professor, “a pluralistic view of law means” that one “must search for law in various places,” even though “state law which ... can be regarded as pluralistic, does not have the regulatory power normally assumed” (Dalberg-Larsen, 2002, 19). From this assumption, it follows that “the environment can be regulated at various levels” and that people intervening with the law “might sometimes be able to choose the regulatory level which is most positive towards protecting the environment” (Dalberg-Larsen, 2002, 19). Jørgen Dalberg-Larsen would “expect the best result when efforts on one level are combined with efforts on other levels too” (Dalberg-Larsen, 2002, 19).

Dr. Dalberg-Larsen thinks that Santos’ pluralistic concepts resemble those of Luhmann and Habermas with regard to their skepticism that legislators can use the law as an instrument to solve problems (2002, 19). Yet he contrasts Santos’s notions that the law can have many forms and functions with Luhmann’s view that law has one function. Among postmodernists, Santos emphasizes the reality of “a plurality of legal systems, all of which influence...the environment and often have distinct contents or effects pulling in different directions” (Dalberg-Larsen, 2002, 20). In contrast to Habermas’s notion of “legal regulation of society as lacking reference to the morality and mentality of a population,” (Dalberg-Larsen, 2002, 20), he identifies Santos’s legal-sociological analyses as having a moral dimension in that they “contribute to reducing the use of law to oppress people” and instead “help liberate oppressed people” by analyzing “concrete type[s] of situations in different places in the world” (Dalberg-Larsen, 2002, 19). Santos’s theory is interesting “because it points out so vividly specific features in the present situation that
obstruct a mere continuation of the classical traditions within sociology and legal science,” for “the world has changed and has become more complex and confused, and so have legal matters” (Dalberg-Larsen, 2002, 19).

Yet, Professor Dalberg Larsen is critical of postmodernists, like Santos, for “completely giving up the ambitions of understanding the regularities of modern society,” and wished for “attempts at evolving new theories about which forms of law exert an influence on other forms of law; and which have a special influence on given conditions in society or on the physical surroundings” (2002, 19). He also sees in Santos’s and other versions of a theory of legal pluralism “a vagueness and width in the concept of law” such as labeling “almost all norms as legal norms,” as being as reductionist and problematic as Luhmann’s (Dalberg-Larsen, 2002, 20). Yet, “even with a legal concept resembling ordinary usage,” Jørgen Dalberg-Larsen thinks that “it is possible to operate with a considerable measure of legal pluralism” (2002, 20).

In his conclusion, Dalberg-Larsen (2002) thinks that other sociological theorists “like Bourdieu or Giddens” may shed light on “barriers for an efficient regulation of the environment,” but he does not delve into these sources. Rather he thinks that Gunther Teubner’s (1993; 2012) notion of reflexive law offers a “positive solution to the problems which Habermas and Luhmann identified in regards to using law to solve environmental problems … because it permits a continuous application of a form of law for active solutions to problems outside the law itself without” leading “to an increased legalization and colonization of the life world and without destroying the autopoiesis of the social subsystems” (Dalberg-Larsen, 2002, 20). Professor Dalberg-Larsen characterizes this “type of law [as] furthering a controlled form of self-administration (2002, 20). Professor Teubner wrote, “Reflexive law is characterized by a new kind of legal constraint. Instead of taking over regulatory responsibility for the outcome of social processes, reflexive law restricts itself to the installation, correction, and redefinition of democratic self-regulatory mechanisms” (1983, 239). While Professor Dalberg-Larsen concludes that “sociological theory might be worth studying … in order to understand some problems about using law to solve environmental problems,” it does not provide “definitive answers because both society and environmental problems are constantly changing” which necessitates “a constant need to develop a theoretical understanding of the functions of law … and the prospects of environmental law” along with “an urgent need for more empirical investigations showing how things actually happen” which require “constantly adjusting former theories or elaborating new ones to fit these observations” (2002, 20). He also stresses the “vital importance of being acquainted with the relevant forms of natural sciences” because “successful environmental regulations have to result in modifications of the physical surroundings lying outside social conduct and social systems” (Dalberg-Larsen, 2002, 20).

Recent Developments in Social Scientific Theory, the Law, and the Environment

I chose to structure the theoretical part of this essay around Professor Dalberg-Larsen’s article because it provides a succinct review of major social theories relevant to the laws discussed in the papers at the conference. However, these theories were reviewed in a particular historical context in 2002 which is much different from 2016. The economic context of the last quarter century was much more favorable toward legal and political responses to “economies of scale” and globalization than today in 2016. Some commentators describe a “Requiem” for the “European Dream” (Guez, 2016; Stiglitz, 2016; Stokes, 2016), with its centralized decision-making in Brussels. In Europe and the United States of America in 2016, strong political forces oppose open borders, and appeals to national sovereignty suggest that the lifeworld of the working-classes in the USA and Europe has been disadvantaged by centralized decision-making and the laws that underlie these changes (Bartlett and Steele, 1992; 2012; Foroohar, 2016). Describing differences among social groups that led to the British vote in favor of the Brexit, journalists recorded “... massive victory margins for "remain" in thriving metropolitan centers such as London and equally resounding victories for "leave" in small towns, rural areas and struggling, post-industrial cities” (Witte, Adam, and Balz, 2016). On the other side of the political spectrum, conservatives attack Gunther Teubner’s notion of “reflexive law” as being a main source of undermining “hard law” in international decision-making regarding environmental regulation (Wood, 2014), and a major sociologist believes the discipline has decomposed (Horowitz, 1994).
In recent years, film, television, and the internet have played a vigorous role in reflecting on the relationship between the environment, the law, and social issues including First Peoples. Here I would cite the Danish television series, *Borgen*, which has an episode entitled, “100 Days,” in which the fictive Danish woman Prime Minister visits Greenland only to realize that Denmark has played a role in the suffering of its largely Inuit population and commits to improving the situation (see also Petersen, 2008). Similarly, the Norwegian television series, Occupied/ *Okkupert*, is a political thriller, in which upheaval in the Middle East lessens oil production just as the United States has become independent in its energy sources and withdraws from NATO. Meanwhile climate change causes a terrible hurricane which ravages Norway and leads to the election of the Green Party which ends Norway’s oil production and replaces it with a new non-polluting fuel. In response, Russia—supported by the European Union which is experiencing an energy crisis—invades Norway to restore its oil production. Closer to reality, “thirty years after the 1986 Chernobyl, Ukrainian nuclear disaster, the reindeer of the Sami people had readings of 8,200 becquerel per kilo, much greater than the already-high 3,000 becquerel permitted in reindeer meat by the Norwegian government. This fact is a real threat to the Sami herders way of life” (Lewis, Kayleigh, 2016). Moreover, First People both in Greenland (Hersher, 2016) and Canada have experienced tragically high rates of suicide (Lewis, Jason Edward and Skawennati, 2016), although Canadian Prime Minister Justin Trudeau has announced that sixty-nine million Canadian dollars of new funding over the next three years will be devoted to improving indigenous mental health services (Kirkup, 2016).

The Social Evolution of the Law, the Environment, and First Peoples

An introductory paper can only cover a few of the major legal and social issues which the “Fossil Fuels and Radical Sovereignties...” conference covered. Even though the evolution of the law framed in a social scientific framework in recent literature was in part a result of the cross-fertilization of a German professor interacting with Americans at the University of California, Berkeley’s Center for the Study of Law and Society (Teubner, 1983, 239), I could not discern references to this vast literature at the conference. Rather, I did note the importance of the concept of the “Honour of the Crown” which is based in the following legal cases: “Haida Nation v. British Columbia, 2004 SCC 73; Little Salmon/Carmacks First Nation v. Yukon, 200 YKCA 13, see ¶63, ¶67, and ¶90; Mikisew Cree Nation v. Canada, 2005 SCC at ¶54 and ¶57 (Justice Binnie); and R.V. Lefthand, 2007 ABCA 206” (*Duhaime’s Law Dictionary*) (see also McIvor, 2016). In addition, many of the papers relied implicitly or explicitly on the concept of “white settler colonialism” (Coombes, 2006; Lovell, 2007; Barker, 2009) rather than the literature of the social sciences of the law to explain various points they addressed.

Here I must stress that the Canadian Charter of Rights and Freedoms/La Charte canadienne des droits et libertés, which is a bill of rights and the first part of Canada’s Constitution Act of 1982, contains Section 25 which shields old rights in the following terms:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.” In 1983 Section 25 was amended to include land claims to read, “the current version refers to rights that “now exist by way of land claims agreements or may be so acquired.” Section 35 of the Charter elaborates, (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons” (Asch, 1984; Aki-Kwe and Turpel, 1991; Bulbulian, 1987; Walkem and Bruce, 2003).

These basic formal laws just touch the surface of the relevant literature pertaining to this area.
The Limitations of Ideological Concepts in Maximizing the Wellbeing of the Environment, First Peoples, and the Law

- In response to one of the presenters’ implying that there is a dearth of social scientific theory relevant to the subjects dealt with at the conference, I obliquely challenged his declaration by referring to Max Weber’s definition of the state (2015[1919], 136), “The state is seen as the sole grantor of the 'right' to physical force. Therefore, ‘politics’ in our case would mean the pursuit for a portion of power or for influencing the division of power whether it is between states, or between groups of people which the state encompasses.” Weber identifies “traditional authority, charismatic authority, and legal authority as the three principles which justify the legitimacy of political domination of the state” (2015[1919], 137-138). Weber’s definition of the state is relevant to the history of the evolution of the Canadian state and its laws, and has been one, if not the most, frequently cited definitions of the state in the social sciences. In a social scientific interpretation, the localized Canadian state and its provinces definition of “Honour of the Crown,” historically evolved from the conquest of the territory of what is today Canada initially by the European countries of France and England. Under the Treaty of Paris of 1763 France ceded its former colonies to Britain, which remained separate British colonies until Confederation in 1867. The Dominion of Canada remained under the control of the British Empire until the enactment of the State of Westminster in 1931 at which time the Dominion obtained legislative authority except regarding constitutional laws which remained under the jurisdiction of the United Kingdom. In 1982 the Canada Act transferred legal control to Canada. Yet at the conference, an interpretative concept derivative of multicultural ideology (Horowitz, 1994, 118-129; BBC News, 2011)–white settler colonialism (Barker, 2009; Coombes, 2006; Lovell, 2007)–was perhaps the most frequent interpretive framework. In my conclusion, I shall focus on a few points to criticize the notion of the “white colonial settler state” that detracts from rather than promotes the well-being of the environment, First Peoples, the law, and social scientific concepts that throw light on them.

- The Canadian Charter of Rights and Freedoms/Le Charte canadienne des droits et libertés contains Section Twenty-seven which stipulates, “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” While in 1988 the Canadian Multiculturalism Act, particularly its section 3 (1) spelled out Canadian governmental policy in respect to multiculturalism, minority opinion voiced strong objections to it, and the Province of Quebec rejected multiculturalism in favor of interculturalism. The pros and cons of multiculturalism are too voluminous to review here, although a synopsis pinpoints some of the main arguments (Song, 2014; see also Prato, 2009).

- Canada’s policy of multiculturalism developed in reaction to a notion that Canada had two founding peoples, the English and French, which excluded the indigenous/aboriginal/native groups and all subsequent immigrant groups to Canada. Even though this switch from the notion of “the two founding peoples” to multiculturalism theoretically had the advantage of including all Canadians, many writers and scholars have outlined a host of downsides to multiculturalism, particularly the tendency of Canadians not to feel a strong sense of belonging to Canada (Bissoondath, (1994) 2001; Garcea, Kirova, and Wong, 2008, 1-10; Hasmath, 2012; Stoffman, 2002).

In the following paragraphs, I shall focus on the Weberian notion of legitimization as it pertains to Canadian society, culture, and law with respect to indigenous peoples. In his essay Politics as a Vocation, Max Weber (1919 (2015)) depicted the state as being based on three types of authority, traditional, charismatic, and legal. For Weber, legal rational authority rests on valid statutes developed by means of rational competence and obedience by servants of the state. Historically, Weber emphasizes the role of the ruler’s administrative staff in both earlier and modern states. Just considering Weber’s idea of the modern state, he observes that administrators do not own the physical tools of their administration but essentially expropriate for the monarch or elite ruling classes. Such actions permit those with the greatest power to invest in a way they choose to do so.
Gunther Teubner (1983, 240) observed that post-modern society seems to be “reassessing its commitment to purposive law and to the bureaucratic and legal structures associated with it” derivative of “formal rationality” (Rheinstein, 1954, 61, 39). In Teubner’s assessment, “A formal legal system creates and applies a body of universal rules and formal rational law relies on a body of legal professionals who employ particularly legal reasoning to solve specific conflicts. With the coming of the welfare and regulatory state, greater stress has been placed on substantively rational law, i.e. on law used as an instrument for purposive, goal-oriented intervention (Rheinstein, 1954, 63, 303). Moreover, Teubner notes that “Since substantively rational law is designed to achieve specific goals in concrete situations, it tends to be more general and open-ended, yet at the same time more particularistic than classical formal law” which “European scholars have called the ‘rematerialization’ of the law” (1983, 240).

Canadian scholars more concrete characterization of the evolution of Canadian law with respect to First Peoples and the environment demonstrates the continuing relevance of Max Weber’s concepts. For example, Professor Douglas L. Bland (2013)—who served as a senior officer in the Canadian Armed Forces for thirty years and who held the Chair of Defence [Canadian spelling] Studies at Queen’s University—examines the possibility for “disruptive confrontation between Canada’s Aboriginal and non-Aboriginal communities based on five determinants central to the feasibility hypothesis: 1) Social fractionalization; 2) The ‘Warrior Cohort’; 3) Economic and resource factors; 4) The Security Determinant; and 5) Typography” (2013, 1-2). Similar to Dr. Bland’s concerns to avoid such potential violent conflict, Simon Fraser University’s Professor Ted S. Palys’s many publications emphasize concrete policies that have improved outcomes for Aboriginal Canadians while lessening the chances for violent conflict in the relationships with non-Aboriginal Canadians and Canadian agents of social control (2014).

With these and other authors’ documentation of the evolution of the law in Canada from formal rationality toward goal-oriented, intervention of the welfare and regulatory state, most reasonable observers would nonetheless acknowledge that Weber’s notion—that the state, in this case, Canada, as the sole grantor of physical force—underlies these relationships, as was demonstrated historically during the Rebellions of 1837 in Lower and Upper Canada and in 1885 during the Northwest Rebellion or Resistance, Saskatchewan Rebellion, Northwest Uprising or Second Riel Rebellion of the Métis people under Louis Riel and the related uprisings by First Nations Cree and Assiniboine of the District of Saskatchewan against the government of Canada. In their grievances against King George III of Great Britain and Ireland, the Representatives of the United States of America, in language expressing the Zeitgeist of July 4, 1776, alleged that the King had “endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions” (Jefferson, 1776, p. 3, lines 91-94). In our own times we have witnessed Weber’s observation of a state’s being the sole grantor of physical force when this force is challenged by subunits of a state such as Chechnya which attempted to succeed from Russia or Kosovo from Serbia. As in these and other cases, when a nation state’s domination of legitimate force is put to the test, open warfare leading to many deaths, is predictably the outcome. When a Russian neo-fascist suggested that the United States of America would break-up along racial and ethnic lines, similar to the dissolution of the Soviet Union, and when he advocated and practiced physical violence against his opponents, I published an op-ed advocating that he not be granted a visa to the USA (Gurdin, 1994).

Many of ethnic and racial groups which immigrated to Canada after the English and the French argue that they had not been accepted at earlier stages of Canadian history or faced discrimination when they were finally permitted to enter Canada. They would argue that their rights and obligations towards First Peoples would be what had been established in Canadian law at the time they became citizens and that they did not participate in the expropriation of native lands or physical harm to indigenous peoples. Indeed, they would argue that they might have been active in changing policies that had taken children from their aboriginal cultures and languages, either as open-minded citizens engaged in efforts to revive the native cultures and languages or protect or improve the environment in which indigenous people live. Some of these groups would object to being classified as “white” and/or “settlers.” If some “marginal Canadian men” among them had indeed done harm to indigenous peoples, they would point out that these were the acts of “marginal” or “deviant” individuals from their ethnic and racial groups and by no means were representative of their whole group. Indeed, when I carried out a large survey of ethnic identity in Canada,
I found a highly complex response set (Gurdin, 1983). People of many Canadian ethnic groups value policies that enable all Canadians to enjoy a sustainable environment while preserving the languages, foods, and customs of all Canada’s ethnic groups, including the indigenous peoples of Canada. Such policies have been labeled as “boutique multiculturalism” by an American legal scholar (Fish, 1997, 378) who contrasts it to “strong multiculturalism” in which another culture’s beliefs and practices such as a religiously-decreed injunction against or death threats for writing a book; rape; stoning; or beheading offend the values of the boutique multiculturalist (Fish, 1997, 378-378; see also Egginton, 2016).

While I could review many more objections to the notion of a “white colonial settler state,” I shall conclude by underscoring how the notion undermines support for improving many real social problems that the First Nations of North America face, as have been reviewed in publications and the media (Bland, 2013; Cook, 2016; Hudetz, 2016; The General Assembly, 2008; Martin and Bennett, 2016; Patterson, 2016). The notion of “the white colonial settler state” delegitimizes the state it attacks, yet acknowledges its authority by attempting to reform the injustices, inequalities, the lack of respect for human rights and good faith that The Truth and Reconciliation Commission (TRC) has illuminated in respect to “Canadian policies and practices toward indigenous peoples that remain in urgent need of redress, as the recent suicide epidemics underscore” (Coon Come, 2016). The government of Prime Minister Justin Trudeau has been reported to be committed to “fully adopting implementing the UN’s sixteen-point action plan outlined by the TRC” which would be monitored by the Indigenous Affairs minister who would report annually to Parliament (Coon Come, 2016). Such a legislative framework “would also highlight the importance of ensuring that federal laws are consistent with the declaration, which among other things recognizes indigenous peoples’ right to freely determine their political status and freely pursue their economic, social and cultural development” and obligates states to co-operate with and consult indigenous peoples “to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Coon Come, 2016). Despite the goodwill expressed in these official events, it is clear from Prime Minister Justin Trudeau’s recent statements, that the ability of the federal government of Canada to meet all these goals is limited and that at best Canada will attempt to develop its resources sustainably and enact its responsibilities to First Peoples in regard to the pipeline and other matters (Trudeau, Justin, 2016), although reporters have cast doubt over the extent to which the American and Canadian declarations will “carry a wallop” (Gillis and Davenport, 2016). Yet, most reasonable, external observers would objectively note that despite these recent Canadian developments, Max Weber’s insight that the state continues to dominate power remains true, even if it is modulated towards goals in line with John Rawls’ writings (1971; 1999).

During the Cold War, Columbia University sociologist, Robert Merton, developed the idea of “theory of the middle range” by which he encouraged sociologists to “develop special theories from which to derive hypotheses that can be empirically investigated and to evolve a progressively more general conceptual scheme that is adequate to consolidate groups of special theories” (1968). With reference to indigenous Canadians, records of disappearances and deaths of aboriginal girls and young women could be re-opened and re-investigated along British Columbia’s “Highway of Tears” and within RCMP records (Levin, 2016) by a variety of contemporary forensic and social scientific techniques. In the area of education, social scientists could use qualitative and quantitative techniques to evaluate such initiatives as that of the Martin Aboriginal Education Initiative’s use of Skype and other modern technologies that will link 860 schools and 166,000 indigenous school children in “the north” to non-aboriginal school children in “the south” to talk to one another about their lives and cultures (Curtis, 2016). A related study might investigate the effectiveness of the $2.6 billion Canadian dollars devoted to improving on-reserve education in the 2016 Liberal government’s budget. In the realm of the arts, in the opinion of the Institute for Indigenous Futures “encouraging their incorporation into science fiction art and other forms of inclusion could counter their “highest dropout rate, highest incarceration rate, and … suicide rate” (Lewis and Skawennati, 2016). Similarly, social scientists could investigate changes in attitudes of non-indigenous school children to their school’s inviting aboriginal dancers, artists, musicians, and authors, as the We Stand Together Campaign is currently doing in Quebec (Curtis, 2016). Regarding economic development, the Canadian Government provided a grant of $57,000.00 (Canadian) to support the Indigenous Leadership Development Institute to host the 2016 World Indigenous Business Forum in Saskatoon, Saskatchewan as part of Canada’s Western Economic Diversification. Social scientists could evaluate to which extent the connections among the 1,000 delegates attain the conference’s goals of economic, employment, and training opportunities as well as learning about the regional and national Indigenous Canadian cultures and
international talents (Anonymous, 2016).

I could take another concrete example from my earlier work on a medical anthropological investigation of a Canadian indigenous community. Though not expected during this investigation, I observed children ten years of age and older buying tobacco cigarettes from the store on the reservation and smoking them, as did the indigenous children in the neighboring town that had been the former half of the reservation that had assimilated. Statistics Canada’s investigations continue to find that indigenous people smoke at twice the rate as compared to other groups in Canada’s population, and in the USA “Although adolescent daily cigarette use has declined in the past decade from 32% in 2002 to 19% in 2013 (Substance Abuse and Mental Health Services Administration, 2014), American Indian or Alaska Native (AI/AN) adolescents have higher rates of cigarette smoking than other ethnic/racial groups. According to a national report, AI/AN youths aged 12–17 years had the highest rate of 30-day cigarette smoking (18.9%), followed by White (10.6%), Hispanic (7.9%), Black (5.0%) and Asian (3.8%) adolescents (SAMHSA, 2009). Such high rates of cigarette smoking increase the risk for the two leading causes of death—heart disease (18.4%) and cancer (18.2%)—among American Indians (CDC, 2015).” (Yu and Whitbeck, 2016). While Section 87 of Canada’s Indian Act exempts First Nations’ individuals from paying tax on allocation cigarettes on a reserve, studies suggest that it contributes to major health issues and crime (Marsden, 2009 (2014)). A social scientist could develop middle range hypotheses and test them with culturally-appropriate interventions to lower smoking rates and other major health issues among the aboriginal population.

The last limitation of ideological concepts in maximizing the well-being of First Peoples and the environment upon which I shall comment is the subtle anti-Zionism as anti-Semitism that I witnessed at the conference at UC Berkeley’s School of Law, on January 28-29, 2016. One of the presenters showed a video-clip of an indigenous group of protesters rightfully defending themselves from an oil company attempting to enter and drill upon their ancestral lands without their permission. In the accompanying sound-clip, one of the protesters shouted at the company team that they were not in Gaza. It seems a reasonable interpretation that the indigenous protester felt that Palestinians whose missile attacks had killed Israeli citizens and disrupted their ability to carry out daily activities had been disproportionately responded to by the Israelis; yet, is it also not an unreasonable interpretation to assume that the presenter had either consciously or unconsciously selected this video-clip out of many possible other ones with an exclusively North American content to convey solidarity with the BDS (Boycott, Divestment, and Sanctions) movement, which the Canadian Parliament has recently condemned by a vote of 229 to 51 on Monday, February 22, 2016 (The Canadian Press, 2016). Despite that vote, the Green Party of Canada voted in favor of BDS (Silcoff, 2016), as has its counterpart in the USA (Sales, 2016). Several of the presenters had York University affiliations, which is an institution where it is reported, “Jewish students told the newspaper they do not feel safe on campus due to relentless criticism of Israel” and where a major donor has withdrawn his support due to a mural which he sees as extremely biased against Israel (JTA, 2016). While it is true that the elected council for the Native American and Indigenous Studies Association became the third U.S.-based scholarly association to support the academic boycott of Israel, reading reported comments regarding that vote documents that there was dissent against it among scholars of indigenous people (Anonymous, 2013). Moreover, there are individuals of indigenous North American backgrounds who are Jewish by religion (Naasi, 2016), of whom at least one fell in love with Israel and joined the Israel Defense Forces (Dvir, 2016). Of the American Anthropological Association (AAA)’s 9,359 members eligible to vote, a total of 2,423 AAA members voted to oppose a boycott of Israeli academic institutions, while 2,384 members voted to support it (Redden, 2016 (a & b)) and recent statements by non-academic indigenous North Americans reveal pro-Israeli views (Bellerose, Ryan, 2016). This issue is relevant to this article because some of the major social scientists who have worked in favor of the improvement of the well-being of North American indigenous peoples have been North American Jews who were and are pro-Zionist. According to the Pew 2013 survey of U.S. Jews, “overall about seven-in-ten- Jews surveyed say they feel very attached (30%) or somewhat attached (39%) to Israel, essentially unchanged since 2000-2001…” (Lugo, Luis et al., 2013). Behind this sentiment lies the recognition by large numbers of North American Jews that both Canada and the United States of America admitted very few Jewish refugees during the period before and during the Holocaust (Abella and Troper, 1983; Wyman, 1984). The current Vice President of the United States was reported to make this widely-held sentiment explicit to American Jewish leaders when he said, “Folks, there is no place else to go, and you understand that in your bones that no matter how hospitable, no matter how inconsequential, no matter how engaged, no matter how deeply involved you are in the United States … there is only one guarantee. There is really only one absolute
guarantee, and that’s the state of Israel…” (Biden, 2014, quoted in Goldberg, 2015). Certainly, the major work of law that summarizes US law in regards to native populations which I saw still recommended as a resource in the spring of 2016 on a Native American television program is the work of Felix S. Cohen and his wife, Lucy Kramer Cohen, a student of Franz Boas and an anthropologist. Indeed, a recent book (Kehoe, 2014) and article (Washburn, 2009, 1 & 14) maintain that 1930s anti-Semitism in the USA is an important factor in comprehending why Assistant Solicitor Felix S. Cohen in the Department of the Interior (DOI) who wrote the Indian Reorganization Act in 1934 and the Indian Claims Commission Act in 1946 received so little recognition for his work and was fired from the Department of Justice (DOJ), even though he returned to the DOI after being required to do clerical duties instead of the law for his remaining time at the DOJ. Moreover, his wife, Lucy Kramer Cohen’s being a woman was a major reason she was not properly publicly accredited for her great contribution to the Handbook of Indian Law until her obituary appeared (Sullivan, 2007).

In Canada, it is significant that Angelique EagleWoman was appointed “as dean of Lakehead University’s Bora Laskin Faculty of Law, in Thunder Bay, Ontario” (Loriggio, 2016). Bora Laskin was the first Canadian Jew appointed to Canada’s Supreme Court in 1970 and Chief Justice of Canada in 1973. He authored six books, seven commission reports, and many articles, of which his Canadian Constitutional Law (1951) was the standard textbook for a generation in Canadian law schools, and influenced Canadian jurisprudence in labor, constitutional, and civil rights law (Girard, 2013 (2005)) (see also Laskin, 1969). After obtaining his B.A. and M.A. from the University of Toronto, his LL.B. from Osgood Hall, and then an L.L.M. from Harvard University, Bora Laskin was unable to find a job in teaching or practicing law which has been attributed to prevailing anti-Semitic attitudes. He finally located a position summarizing legal cases for the Canadian Abridgment (Anonymous, 2014).

In one of his influential books, Irving Louis Horowitz (1994) described a diminishing influence of sociology in democratic countries as being historically-related to and following intellectual trends in the decomposition of Soviet Communism. In Horowitz’s interpretation, part of this decomposition is due to anti-Zionism which began to assert itself on the left as it had earlier on the right in the discipline (1994, 92), and that part of its source was “aided and abetted by sophisticated scholars of Jewish origin who still feel that placating the virulent poison of anti-Semitism will somehow mitigate its consequences” (1994, 91). Since Professor Horowitz’s book, scholars have documented that a well-known writer still admired among contemporary progressives, Gertrude Stein, of Jewish ethnic origin, collaborated with the Fascist Vichy Regime, and recent exhibitions on her and her family’s art in San Francisco dissimulated this fact while critics of this cover-up mention similar recent acts by fringe groups today (Melnikova-Raich, 2011; Will, 2011; Greenhouse, 2012). For different motives, heads of Hollywood studios who were of Jewish ethnic origin also collaborated with the Nazis before and during the Second World War (Urwand, 2013). Among current Christian public figures, Prime Minister Justin Trudeau’s failure to note the Nazis’ particular targeting of Jews on Holocaust Memorial Day in Canada has been criticized (Marmur, 2016), and, in a gesture of reconciliation, Prime Minister Trudeau, accompanied by a survivor, paid an emotional visit to Auschwitz (Brewster, 2016). In contrast to the Canadian Prime Minister’s initial omission, California Concurrent Resolution No. 152 relative to California Holocaust Memorial Day—passed unanimously on May 16, 2016—explicitly states, “… the dictatorship of Nazi Germany murdered six million Jews as part of a systematic program of genocide known as ‘The Final Solution of the Jewish Question’; … Jews were the primary victims, but they were not alone. Five million other people were murdered in Nazi concentration camps as part of a carefully orchestrated, state-sponsored program of cultural, social, and political annihilation under the Nazi tyranny; …” (Assembly Concurrent Resolution No., 152, 2016). In addition, the California Senate joined other states and passed an anti-BDS (Boycott, Divestment, and Sanctions) Bill, AB 2844 (Block, 2016).

Melissa Lovell’s (2007, 11) crediting Edward Said’s book, Orientalism (1978), as shaping the field of postcolonial studies is significant.13 While her paper does not mention an earlier, influential book by Karl August Wittfogel, Oriental Despotism: A Comparative Study of Total Power, 1967 (1957), Edward Said’s characterization of such a work as “racist, imperialist, and almost totally ethnocentric” (1978, 203-204) has been disputed by other scholars who identify Said’s inaccuracies while underscoring that he neglects a great variance among European scholars’ views of “the Orient,” and omits non-Western empires.
Lovell did not delve into Wittfogel’s notion of the “hydraulic-bureaucratic-state” which argued that vast bureaucracies needed to develop large irrigation projects resulted in forcing their populations to provide labor and in so doing crushed civil society, which, in turn, is able to organize against the central authority. Interpreters of Wittfogel have interpreted his work as a major critique of Stalinism and Maoism which contrasts with Edward Said’s masked defense of authoritarian cultures and societies (Irwin, 2006 and 2008; Hourani, 1991; Gellner, 1993; Muravchik, 2013; Warraq, 2007; Washbrook, 1999 (2007)). Relevant to the environmental focus of this article, it should be noted that Wittfogel was an influence on Marvin Harris’s ecological anthropology (1979, 104-105, 162-163, 314).

Conclusion

In Jørgen Dalberg-Larsen’s conclusion, he draws upon Gunther Teubner (1983, 239-285) who wrote, “Reflexive law needs to utilize and develop only knowledge necessary to the control of self-regulatory processes in different contexts. Thus, encompassing social policy models may be replaced by models of how to combine the insights of social-legal analysis and the dynamics of interaction for social problem solving” (1983, 281). Recently, Teubner (2015) has clarified that the “law’s binary code of right and wrong gets into a tangle when it inevitably is applied to itself in the paradox of self-reference.” Thus, Teubner (2015) asserts that “it exposes the law to the suspicion of being arbitrary; undermines its quest for legitimacy; and paralyzes decisions.” In the thirty-three years that have elapsed since he published his 1983 article, his recent thinking incorporates the varied types of law that have developed in response to globalization (Teubner, 1993; 2011; 2012; and especially 2015). From a Weberian perspective, Martin Albrow (2013) related similar concerns. However, the participants whom I heard at the conference discussed in this article appeared to neglect the vast literature in the social sciences of the law in favor of an interpretive framework, “the white colonial settler state,” that delegitimizes a legal concept, the “honour of the Crown,” to which they frequently appealed as a source of legal good.

Teubner (2015) often addressed “constitutionalism” in a broader sense of “…a set of norms (rules, principles, or values) creating structuring possibly defining the limits of government power or authority…” (Waluchow, 2014) that could be applied to a wide range of social agents from NGOs to multinational companies’ secret contracts. While wondering why different social subsystems have such different constitutional subsystems, Teubner (2015) observes four trends “that link constitutional paradoxes together. These are the exponential expansion of judge-made law; a return to natural law; a change in the direction of protest movements; and the greatly different statuses of various types of constitutions.” Here his use of paradox seems close to meaning of “something … that is made up of two opposite things and that seems impossible but is actually true or possible” (Paradox, 2016). For Teubner (2015), “the law externalizes its paradox with the aid of the state constitution…and in this way seeks its ultimate legitimation in democratic politics,” while “politics has to struggle with an internal unsolvable paradox: the binding of unbindable authority.” Teubner asks, “How could one bind the sovereign to rational rule and [his or her] own promises?” Some commentators pinpoint to changes in the law as having led to negative outcomes in the economic subsystem in America (Bartlett and Steele, 1992); others narrow their focus more specifically on “financialization” (Foroohar, 2016) within the economic subsystem; while still others argue for a decentralization from the centralizing policies that were inherent in Teubner’s observations in 2015 (Evans-Pritchard, 2016).

In Canada Liberal Prime Minister Justin Trudeau signed the Paris Agreement which was tabled before the House of Commons on May 6, 2016, and which he will discuss with the Prime Ministers of Canada’s provinces in October as to how Canada can meet the treaty’s goals, although legally in Canada the executive signs treaties and submits them for approval to the governor in council and the federal cabinet can provide the real ratification (McDiarmid, 2016). Likewise, the United States of America joined 170 other nations and signed the treaty that commits it “to take steps to prevent global temperatures from rising by no more than 2 degrees Celsius — 3.6 degrees Fahrenheit — by the end of the century” (Fears, 2016), even though the USA’s Supreme Court in February 2016 “issued a stay on the Environmental Protection Agency’s Clean Power Program, considered to be the Obama administration’s most ambitious effort to control greenhouse gas emissions under the Clean Air Act. The stay means the EPA cannot take
industry cleanup actions at least until challenges are resolved in lower courts. Oral arguments in one case are expected to start in the U.S. Court of Appeals for the D.C. Circuit on June 2,” (Fears, 2016). In addition, “invoking the Antiquities Act,” President Obama designated as a national monument “eighty-seven thousand acres in Maine” and added “almost three hundred million acres” to the Papahānaumokuākea Marine National Monument northwest of Hawaii (Kolbert, 2016). He also “… announced the designation of the Northeast Canyons and Seamounts Marine National Monument at an ocean conservation meeting in Washington, shortly after issuing a proclamation protecting an area roughly the size of Connecticut that sits 130 miles off the coast of Cape Cod” (Davis, Julie Hirschfeld. 2016).

Related to these environmental actions, the “seventh Clean Energy Ministerial (CEM) whose members represent seventy-five percent of global greenhouse gas emissions and ninety percent of clean energy investment” met in San Francisco, California, on June 1-2, 2016, to “engage ministers so that they want to push forward clean energy initiative in the world.”

If various social sectors are constantly in flux as Teubner postulates, real environmental events like forest fires resulting in the evacuation of 88,000 people in Fort McMurray, Alberta, or the deaths of forty-seven inhabitants of Lac-Mégantic, Quebec, due the derailment of a train transporting oil (Mackrael, 2014) lead to ferocious debates resulting in legal cases between powerful social forces as to the extent to which these events are caused by human beings, natural forces such as El Niño, or some combination thereof (Borenstein, 2016; McGrath, 2016; Yardley, 2016). Recent scientific studies such as those of Professor Mike Flannigan of the University of Alberta and his colleagues and The U.S. National Academy of Sciences conclude that the warming of the planet has led to increased forest fires, not only in Canada and the United States, but in in many other countries in the boreal regions (Gillis and Fountain, 2016), as well as forests in the southern hemisphere such as Brazil and Indonesia. “Since 1970 about 20 percent of the Amazon basin”—the “tropical forests of which store large amounts of carbon which slows global warming”—“has been deforested” (Phillips and Miroff, 2016). Amazon Watch is concerned that with Brazil’s economic crisis, the policies of the new government of Michel Temer are “easing licensing requirements for projects in protected areas, weakening mining regulations and allowing ‘productive activities’ in Brazil’s indigenous reserves” (Phillips and Miroff, 2016) (see also Anderson, 2016). Similarly, climate change has been reported to desiccate Lake Poopó in Bolivia upon which the Uru-Morato indigenous people’s livelihood of fishing and fowl economy was based, thereby undermining their way of life (Casey and Haner, 2016).

Moreover, the recent leak of an estimated 16,800 gallons from the Keystone Pipeline south of Freeman, South Dakota, has led to a legal dispute between the South Dakota Public Utility Commission which recertified the Keystone XL Pipeline—after President Obama had blocked its construction earlier in the year—and several groups. These plaintiffs include Dakota Rural Action, the Cheyenne River Sioux Tribe, the Yankton Sioux Tribe, an inter-tribal organization, and several individual interveners, who filed an appeal against the PUC’s decision, which will be compiled into one suit against constructing the Keystone XL Pipeline, particularly in light of the recent spill” (KFSYabc, 2016). On the other hand, “South Dakota Public Utilities chairman Chris Nelson said ‘it doesn't hinge upon what may or may not have happened on some other pipeline, it hinges upon the criteria that are laid out in state law. That's what we evaluated, and how we made our decision’.” (KFSYabc, 2016). Between “five to six hundred individuals representing twenty to thirty tribes are protesting out of concern that the Dakota Access Bakken Pipeline will pollute their own and downstream water and disrupt their historic and sacred sites” (Donovan, 2016; Dalrymple, 2016; Upadhye and Zalcman, 2016; and Smith, 2016). While the leader of the Standing Rock Sioux Tribe, Dave Archambault’s (Schlecht, 2016), and the Morton County Sheriff Kyle Kirchmeier’s accounts (Grueskin, 2016) of the peacefulness of the demonstrations differed, so do the interpretations of the law surrounding this pipeline which will go under the Missouri River. In June 2016, “U. S. District Judge Scott Skavdahl ruled that the U. S. Bureau of Land Management (BLM) lacks the authority to ban fracking. However, Judge Skavdahl’s ruling was based on Florida State University Law Professor Hannah Wiseman’s article, and she and thirty-five other law professors from around the country filed an appeal with the appeals court on June 17, 2016, disagreeing with Judge Skavdahl’s ruling and stating that he fundamentally misinterpreted her article” (Neray, 2016). On September 9, 2016, “The
North Americans, both Americans and Canadians, tend to frame their choices in much more concrete terms than the highly-abstract categories of Teubner’s reflexive law. In both countries, the issue of earning a living that provides citizens productive employment at an acceptable standard is balanced against sustaining the environment. In the current American election, some Native Americans, such as Gene McCowan, the human resources director for the Trenton Indian Service area governing six counties in North Dakota and Montana where 2,600 Turtle Mountain Chippewa live, was quoted stating, “We would like to see more drilling,” even though he acknowledges being in a bind because “people are concerned about fracking and how it will affect the earth and water” (Reuters Media, 2016). In contrast, members of the Standing Rock Tribe have formed a human wall of prayer directly in the pathway of the 1,150 mile Dakota Access Pipeline that is designed to carry oil through Tribal lands, even though the Army Corps of Engineers has not issued all the required permits such as those considering environmental and cultural damages. This tribe’s action is in response to their lawmakers’ refusal to stop this pipeline.

The cases reviewed in this article are evidence that Teubner’s notion of reflexive law in relation to the environment and First Peoples generally describes an evolution of law that has combined the insights of social and legal analysis with the dynamics of interaction between first the French, English, Spanish, Dutch, and Swedish settlers and their governments in North America with many different First Peoples, and over the course of several centuries subsequent immigrants of European, African, and Asian origins, many of whom had been excluded by law at earlier periods of North American history. Recent attempts by ideological notions, such as the “white colonialist state,” to ascribe the same torts to the latter immigrant groups as those of the earliest European settlers distorts their own histories of interactions with the First Peoples and assumes collective legal obligations for themselves and their descendants which they did not assume at the time they became citizens of the United States of America or Canada. Furthermore, it obscures the changes of religious beliefs that led to subsequent changes in attitudes and behavior of latter immigrants toward First Peoples and the environment. The more pluralist orientation of the Weberian framework inherent in the social sciences of the law in recognizing real power differentials among historically-different ethnically, racially, genderly, and sexual-orientationally stratified groups in contemporary North America allows for a greater sense of unified nations based on evolving religious and ethical obligations toward First Peoples and the environment.

Examples of these changes include: the inquiry of Canada’s Minister of Indigenous and Northern Affairs, Carolyn Bennett, who, after several months of consulting with indigenous communities, concluded “What’s clear is the uneven application of justice” (Levin, 2016, A8). Recognizing “disproportionately high rates of poverty, incarceration, alcoholism, substance abuse and often lack of basic necessities like safe drinking water, the Canadian government has allocated 8.4 billion Canadian ($6.4 billion US) dollars over five years to aid indigenous communities” (Levin, 2016, A8). Ms. Bennett attributed the social problems of aboriginal communities to “generations of socioeconomic marginalization and trauma tied to government policies. Particularly damaging was a state-financed, church-run boarding school system for aboriginal children who were forcibly taken from their families by officers of the Royal Canadian Mounted Police. Many of the 150,000 children who were sent to residential schools over a century became victims of physical and sexual abuse. The program was fully shut down in the mid-1990s” (Levin, 2016, A8). Here again social scientists might investigate the disbursement of these new funds; which new programs they make possible; and how the lives of indigenous communities are affected by these changes.

Social scientists are noted for contrasting what public figures state with what they actually do. Thus they weigh the coherence between stated policies and their social scientific, empirical observations. In this light, Premier Justin Trudeau’s signing the Paris Climate Agreement with his strong support for the Keystone XL Pipeline has been cited as a contradiction by some journalists (Shedletzky, 2014; Harris, 2015; Trudeau (a) & (b), 2016), and one journalist reports that PM Trudeau has acted in a similar manner to former PM Harper in muzzling climate scientists and cutting their numbers at Environment Canada (Akin (a) & (b), 2016). Even though the North American heads of state have “committed to a continent-wide goal of having 50 per cent of all electricity come from clean-energy sources by 2025, an increase
from the current 37 per cent; a reduction in methane emissions from the oil and gas industry of 40 per cent to 45 per cent; and cuts in two other potent greenhouse gases” and “agreed to work together on research and development projects aimed at commercializing clean technology, including demonstration projects in areas such as energy storage, and the capture of carbon dioxide for use as an industrial feedstock or for sequestration underground,” (McCarthy, 2016) social scientists will be interested in monitoring the extent to which these goals are actually enacted. In a similar vein, New Democratic Party (NDP)—Canada’s social democratic political party—Alberta Premier Rachel Notley’s meeting with her province’s oil executives to restore drilling as soon as possible after the Fort McMurray wildfire (Reuters, 2016) has been observed as being inconsistent with her party’s stated goal of environmental sustainability. These examples point to national leaders in both Canada and the United States of America having to weigh their larger world views in terms of real impacts in their respective countries on different groups and the outcomes of their decisions on the quality of the environment in that all of these factors are constrained by laws and particular national and international conjunctures.

While the Canadian laws addressed at this conference frequently appealed to the “honour of the Crown,” American scholars would note that lines 28 through 108 of the U.S. Declaration of Independence (Jefferson, 1776) detail conduct by King George III of Great Britain and Ireland which American representatives deemed to be most dishonorable. Yet, recent scholarship documents that King George III sent agents to stir sentiment opposing the uprising among Aboriginal tribes and African slaves who were not given equal rights in the American Declaration of Independence, even though both Native Americans and African slaves fought on the side of the American revolutionaries (Parkinson, 2016; Reséndez, 2016). While anthropology has relied on the notion of cultural relativism to understand cultures, it cannot claim to judge whether a culture is good or bad, right or wrong. Historically, anthropology and sociology have been used by regimes of the far right (Schafft, 2004) and far left (Geertz, 1964; Horowitz, 1994), as well as liberal democracies. Yet, implicit in the title of Margaret Mead’s book, And Keep Your Powder Dry, is that democracy with all its flaws, is worth fighting for against Nazism and Fascism. As the cultures and societies of Canada and the United States of America have evolved by incorporating more diverse ethnic and racial groups, their laws regarding Aboriginal/Indigenous/First Peoples have evolved as well. Soon after the Second World War, the Cold War quickly followed between democratic and totalitarian governments. During this same period this struggle was enacted between colonies and new or emerging states, in which democracies sometimes sided with authoritarian regimes to prevent the emergence of new Communist states. Not infrequently, intellectuals opposing colonial rule published intellectual works such as Frantz Omar Fanon’s The Wretched of the Earth (1961(1965)) that castigated The Third World’s attempt to mimic the spiritual and other thought of Europe and its offshoot, the United States of America, which he characterized as murderous, domineering, and rapacious. Yet, in the newly independent states influenced by European socialism and communism, authoritarian rule in the Third World—frequently accompanied by civil and external wars impacting negatively millions of people—led to questioning the moral legitimacy of these ideologies, particularly after the fall of Soviet Communism and the aftermath of the Cultural Revolution in the Peoples Republic of China. During this same period, the United Nations’ reputation itself became subject to moral and philosophical criticism which observers in democracies have related to a high percentage of its member states being ranked undemocratic by Freedom House (Puddington et al., 2016). Given the failures of the UN to prevent genocide among other major grievous misdeeds, readers of its declaration of rights of indigenous peoples (2007) might doubt to which extent the idealism of its enumeration of rights will be respected globally, particularly because many of these rights are framed in relativistic terms that counter historical claims by powerful groups within nation states. Perhaps as a guideline, they will inspire concrete action to ameliorate conditions that are now viewed as historical wrongs, particularly in democratic nations, in which this author has been fortunate to spend his life, and to which social scientists can participate in understanding and aiding change with their respective skills.
Notes

1. One illustration is Professor Jørgen Dalberg-Larsen’s article, “A Sociological Perspective on Environmental Law,” which draws on the writings of Jürgen Habermas, Niklas Luhmann, and Boaventura de Sousa Santos. Doctor of Law Dalberg-Larsen’s article is based on a lecture he gave at Roros, Norway, in August 1999 at the Nordic Research Course, “Law and the Environmental Challenge.”


3. Donald L. Bartlett and James B. Steele’s books, such as America: What Went Wrong? (Kansas City, Missouri: Andrews and McMeel Publishing, 1992) connect changes in the law to their negative impact on the lives of the middle class for more than three decades.

4. Although Niklas Luhmann (December 8, 1927 – November 6, 1998) obtained his degree in law from the University of Freiberg in 1949, and began a career in public administration, on a sabbatical in 1961, he went to Harvard and studied under Talcott Parsons. In considering Luhmann’s sociology, it is not irrelevant to note he was conscripted as “a Luftwaffenhelfer during World War II and served two years at the age of 17” in the army of Nazi Germany before “he was taken prisoner by American troops in 1945” (Horster, 1997). While his seventy books and nearly four hundred articles have attracted a following worldwide, it is significant that they have been influential in countries with a historically recent right- and left- wing totalitarian past such as Germany, Japan, Russia, and the Eastern European countries.

5. Boaventura de Sousa Santos is Professor in the School of Economics at the University of Coimbra; Distinguished Legal Scholar at the University of Wisconsin-Madison Law School; Global Legal Scholar at the University of Warwick; and Director of the Center of Social Studies (CES) at the University of Coimbra, Portugal.

6. Both Borgen and Occupied/Okkupert are available on Netflix. There are many movies that address these topics. Consider, for example, Dir. Maurice Bulbulian’s Dancing Around the Table, Part One and Part Two. National Film Board of Canada (1987); Be the Change (2008), Call of the Hummingbird (2007), Hoot (2006), Lithium Springs (2006), The Yes Men Fix the World (2009), and Gasland 1 & 2 (2010; 2013) among many others.


8. The Canadian Multiculturalism Act R.S.C. 1985, c. 24 (4th Supp.) declared it to be the policy of the Government of Canada to (a) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage; (b) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada’s future; (c) promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation; (d) recognize the existence of communities whose members share a common origin and their historic contribution to Canadian society, and enhance their development; (e) ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity; (f) encourage and assist the social, cultural, economic and political institutions of Canada to be both respectful and inclusive of Canada’s multicultural character; (g) promote the understanding and creativity that arise from the interaction between individuals and communities of different origins; (h) foster the recognition and appreciation of the diverse cultures of Canadian society and promote the reflection and the evolving expressions of those cultures; (i) preserve and enhance the use of languages other than English and French, while strengthening the status and use of the official languages of Canada; and (j) advance multiculturalism throughout Canada in harmony with the national commitment to the official languages of Canada.
9. Even though most Canadians view multiculturalism favorably, many residents of Quebec think that multiculturalism makes French-speaking Canadians just one ethnic group among others and instead encourage interculturalism which they view as accepting people of all backgrounds who are willing to integrate into the French-speaking majority. In 2008 a Consultation Commission of Accommodation Practices Related to Cultural Differences depicted Quebec as a pluralist society for which Canadian multiculturalism “does not appear well suited to conditions in Quebec” (CBC News, 2008, see also Bouchard, 2011, see also Nussbaum, 1997, see also Rattansi, 2011).

10. An influential philosopher explained interculturalism as “the recognition of common human needs across cultures and of dissonance and critical dialogue within cultures” and she underscores that interculturalists “reject the claim of identity politics that only members of a particular group have the ability to understand the perspective of that group” (Nussbaum, 1997; see also Bouchard et al. (a) and Bouchard (b), 2011).

11. See: Gionet and Roshanafshar. In short, “In 2007–2010, … Smoking rates were over two times higher among the three Aboriginal groups than the non-Aboriginal population. Aboriginal people were also twice as likely to be exposed to second-hand smoke in the home.” In several other health indicators in this report First Peoples’ health was poorer than that of the non-Aboriginal population. See also Kaplan, 2012 and Marsden (2009, Updated 2014.

12. Here I need to disclose that in the mid-1980s I was asked to moderate a discussion on the possibilities for peace between Israelis and Palestinians filmed at Ida Noyes Hall at The University of Chicago between the then Palestinian Mayor of Hallul, Mohammed Milhem, and the then Israeli Member of the Knesset, Mordechai Bar-On, segments of which appeared on national television in the USA. See also: Gurdin, J. Barry, review of Negotiating Jerusalem, by Jerome M. Segal, Shlomit Levy, Nadar Izzat Sa‘id, and Elihu Katz, Journal of Peace Research 39(2), March 2002. While in graduate school, my thesis adviser, Professor Robert Sévigny (1973) acknowledged my fellow graduate student, Mahmoud Dhaouadi (from Tunisia) and my collaboration on his article on “The Psychosocial Causes of Violence.”

13. Columbia University Professor of English and Comparative Literature, Edward Said, was a member of the Palestinian National Council from 1977 to his resignation in 1991. When Yassar Arafat was the Chairman of the Palestine Liberation Organization, President of the Palestinian National Authority, and Leader of the Fatah political party, Dr. Said was a close associate of Yassar Arafat whom he aided writing his speech delivered at the United Nations in 1974. He also helped communicate between the Carter Administration and the PLO from 1977 to 1991. However, he broke with Arafat over his signing the 1993 Oslo Accords, and instead advocated a one state solution in which Palestinians and Jews would live together in a nonsectarian state.


15. U.S.A.’s fire statistics are available at: https://www.nifc.gov/fireInfo/fireInfo_statsistics.html and many of Professor Mike Flannigan and his colleagues’ articles may be downloaded on Research Gate, https://www.researchgate.net/

16. In an article that beautifully illustrates the complex ethical and policy decisions about whether a national state should intervene or not with preliterate peoples some of whom lived in bands within its boundaries, a writer records, “For much of the twentieth century, Brazil defined the region’s approach to the aislados: its National Indian Foundation sent scouts to contact them, with the goal of assimilation. These efforts were mostly calamitous for the contacted people, who tended to die out from disease, or to wind up living in frontier shantytowns, where the men often succumbed to alcoholism and the women to prostitution. In barely fifty years, eighty-seven of Brazil’s two hundred and thirty known native groups died off, and the ones that remained lost as much as four-fifths of their population. In the nineteen-eighties, officials at the National Indian Foundation, horrified by the decline, began to enforce a ‘no contact’ policy: when its agents spotted aislados, they designated their land Terras Indígenas—areas forbidden to outsiders” (Anderson, 2016, 44).

17. Here I must disclose that I have participated in demonstrations and signed petitions against the Keystone XL Pipeline and fracking.

18. It has been reported that coal produces “roughly 45 percent of the emissions that contribute to climate change” while more than a quarter of the electricity used globally [is] still coming from coal plants,” and even a major Obama Administration project attempting to produce “clean coal” has resulted in enormous cost overruns, problems managers tried to conceal, and as of July 2016 few, if any, attained goals” (Urbina, 2016). However, business leaders, officials, and environmentalists are setting aside differences to build a new economy to replace jobs lost to mining coal (Stolberg, 2016).
ACKNOWLEDGMENTS

The excellent undergraduate courses in anthropology by my late Professor Evalyn Jacobson Kunkel Michaelson, who sparked my interest in First Peoples, the environment, and the social science of the law, inspired the subject of this article. Besides her excellent academic teaching, she and her former husband and father of her two sons, the late Professor Peter Hapke Kunkel, kindled my awareness of how social action could help meet vital needs in a minority community through their Project Tincup in which I served as a tutor to a young African American male pupil the year before the public schools of Fayetteville, Arkansas, were integrated.

In addition, I would like to express my appreciation to Professor Robert Sévigny and Professor Marcel Rioux who brought to my attention to the importance of Max Weber’s definition of the state on my doctoral comprehensive examination at l’Université de Montréal. My response to their inquiry is central to the topic of this article. Professor Robert Sévigny was my Ph.D. thesis advisor, and his insights into the individual and society and the importance of viewing mental health within a social and cultural context have contributed to my writings, as have his and Professor Marcel Rioux’s understandings of Québec and Canadian society and culture.

I wish to thank particularly Irene Bloemraad, Professor of Sociology and then the Thomas Garden Barnes Chair of Canadian Studies of the University of California, Berkeley, and Mr. Elliott Smith, Co-Organizer, for their invitation to attend the conference as well as the former Co-Chair of Canadian Studies, Professor Emeritus Nelson Graburn, Dr. Rita Ross, Emerita Academic Coordinator of the IAS Canadian Studies Program, and the late Professors Thomas Barnes and Victor Jones for their welcome over the years since I first participated in the Canadian Studies Group as Visiting Scholar in the Department of Sociology in 1984/85 and Research Associate in the Department of Anthropology in 1987.
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**Author’s Note**

I submitted my article, "Social Science, The Law, The Environment, and First Peoples," on August 30, 2016, and continued to submit a few corrections and additions to it until October 6, 2016. Several major events relevant to the topics in it occurred after its completion and are not addressed, although hopefully my article remains a relevant summary of major intellectual currents that are pertinent to its discussion.
Social Scientists Testimony and Governmental Agencies

Social scientists testify about many social sciences-related issues before a variety of governmental bodies. In the U.S., social scientists have testified before the U.S. Congress about the effects of recessions on families (https://psidonline.isr.umich.edu/Publications/PSIDCongressionalTestimony.pdf). In other testimony before the U.S. Congress, social scientists have offered testimony about the role of social sciences in public health. Social scientists also have presented testimony about the effects of hunger on the elderly.

Tips for Testifying before Governmental Agencies

Dr. Chad English, director of science policy outreach for COMPASS, has posted some observations and tips for social scientists who testify before governmental agencies such the U.S. Congress (http://www.socialsciencespace.com/2014/02/two-myths-and-one-truth-about-congressional-testimony/).

Dr. English suggests that the social scientists know why the governmental hearing is taking place. They should also be aware of why they have been asked to testify. The social scientists should also consider requesting assistance from the governmental staff and governmental affairs offices in preparing their social sciences testimony.

He notes that the social scientists generally will be expected to make specific recommendations for action on the part of the agency. The social scientists may have only a limited amount of time to offer testimony before a governmental body, and they should be prepared to concisely present their testimony in a non-technical fashion. The social scientists may be asked to pay their travel expenses.

Curricular Innovations in the Forensic Social Sciences

Employment opportunities are available for social scientists involved in the application of social sciences to such fields as civil, criminal, immigration, and military law. Faculty and administrators involved in curriculum development should consider developing forensic social sciences courses and programs at the undergraduate, graduate and post-doctoral levels. Below is an outline of a semester course dealing with the application of forensic sciences to criminal law.

Outline of a Semester Course: Forensic Social Sciences in Criminal Law

Week 1: Laws Related to Expert Witnesses and Consultants in Criminal Law Cases
Week 2: Criminal Law Court Procedures
Week 3: Ethical Issues for Expert Witnesses and Consultants
Week 4: Crime Scene Analysis in Criminal Law Cases
Week 5: Social and Psychological Factors in Determining Foul Play in Criminal Law Cases
Week 6: DNA Analysis and Methods in Criminal Law Cases
Week 7: Forensic Archaeological Principles and Methods in Criminal Law Cases
Week 8: Forensic Anthropology Principles and Methods in Criminal Law Cases
Week 9: Use of Forensic Sociology and Psychology in Missing Persons Cases
Week 10: Premises Liability
Week 11: Use of Gang Research and Theory in Criminal Law Cases
Week 12: Role of Recidivism Theory in Criminal Law Cases
Week 13: Domestic Violence Expert Witnesses and Consultants
Week 14: Stalking and Death Threats Expert Witnesses and Consultants
Week 15: Homicide and the Insanity Defense
Week 16: The Role of Mitigation Expert in Death Penalty Cases

Developing a Forensic Sociology Graduate Degree Concentration Program
SJ Morewitz - 2013 - works.bepress.com

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Forensic Innovations

DNA Profiling
Investigators at Flinders University have developed Micro-Swab, which employs fibers that are soaked in a surfactant to bind to the DNA in fingerprints. This technique is designed to extract more DNA than conventional techniques. Investigators hope that this new method will reduce the likelihood of inadmissible evidence.


New Law Enforcement Strategy to Fight Spike in Violent Crime
In response to a very large increase in the rate of violence crime in San Antonio, Texas, the San Antonio Police Department (SAPD) has developed an intelligence-based approach to fighting crime in 2017. The strategy includes building collaboration among the SAPD’s covert units to focus on violent crime throughout the city. The SAPD plans to target individuals with a history of violent crime rather than focus on community areas.

Awards and Publications

**Dr. Stephen J. Morewitz and Dr. Caroline Sturdy Colls** were awarded a San Jose State University Faculty Author Award for their new book: *Handbook of Missing Persons* (New York: Springer 2016). Dr. Stephen J. Morewitz was also awarded a San Jose State University Faculty Author Award for his new book: *Runaway and Homeless Youth. New Research and Clinical Perspectives* (New York: Springer, 2016).

New Books


Articles and Edited Book Chapters


Other Member Achievements

Promotion

2016 Dr. Eric Bartelink; Promoted to Full Professor, California State University, Chico.

Research Grants


Presentation

Dr. Mark L Goldstein is presenting a seminar in July 2017 in Prague at the International Law and Mental Health conference. He also had an article published in the American Journal of Forensic Psychology.

Presentations by Dr. Richard Leo:


“Writing (Academic and Popular) Books.” University of San Francisco School of Law, Faculty Colloquium. September, 2016.


“The Problem of Confessions.” Simon Fraser University, School of Criminology. Vancouver, Canada. April, 2016

“Miranda: 50 Years Later.” University of San Diego School of Law. San Diego, CA. April, 2016.


Work in Progress by Demosthenes Lorandos, Ph.D., J.D.

Dr. Demosthenes Lorandos and his Editor at Thomson Reuters WEST have worked closely together for a decade and a half on Dr. Lorandos’ two-volume set: Cross Examining Experts in the Behavioral Sciences. For two and a half years, they have been working closely on THE LITIGATOR’S HANDBOOK OF FORENSIC MEDICINE, PSYCHIATRY AND PSYCHOLOGY.
In a first for WEST, this three-volume set is specifically targeted to the United States, the UK, Canadian, and Australian markets . . . after all, the science is the same. This is why we have worked hard to find and include experts from science and law in all of these countries. Dr. Lorandos has about forty contributors from four countries.

This will be a legacy publication in that it will be updated annually for many years. Dr. Lorandos and his staff have been in close communication with stakeholders in numerous areas of science and law. They have solicited and received input from prosecutors, defense counsel, plaintiff and defense counsel, family law specialists and various legal and scientific professional groups.

Some specifics about the set: Each section will be devoted to supporting and attacking proposed expert input to the courts. This is a set for both plaintiff and defense. The chapters and sections will be:

**Section One: The Bases of Scientific Assessment and Expert Testimony**
- Chapter One: The Bases of Expertise
- Chapter Two: The Admissibility, Direct and Cross Examination of Expertise
- Chapter Three: Scientific Assessment & The Process of Differential Diagnosis
- Chapter Four: Probability and Statistic for Lawyers

**Section Two: Forensic Medicine**
- Chapter Five: The Independent Medical Examination
- Chapter Six: The Medicolegal Autopsy
- Chapter Seven: The Sexual Abuse Forensic Examination
- Chapter Eight: Forensic Use of DNA

**Section Three: Forensic Psychiatry and Forensic Psychology - Pre-trial Assessments**
- Chapter Nine: The Assessment of Eyewitness Memory for People and Events
- Chapter Ten: False Memory and Suggestibility
- Chapter Eleven: Assessment of Repressed and Recovered Memories
- Chapter Twelve: Interrogative Suggestibility
- Chapter Thirteen: Capacity to Waive Miranda Rights
- Chapter Fourteen: Assessment of Competence and Criminal Responsibility

**Section Four: Specialized Assessments in Civil Law**
- Chapter Fifteen: Psychiatric Disability Determinations and Personal Injury Litigation
- Chapter Sixteen: Assessments of Malingering
- Chapter Seventeen: Voluntary and Involuntary Psychiatric Hospitalization
- Chapter Eighteen: Assessment of Civil Competencies: Contractual, Testamentary Capacity & Informed Consent
- Chapter Nineteen: Psychological Evaluation of Emotional Damages in Tort Cases
- Chapter Twenty: Professional Liability and Standards of Care in Clinical Psychiatry and Psychology
- Chapter Twenty One: Assessment in a Child Protection Context
- Chapter Twenty Two: Child Custody Evaluation

**Section Five: Specialized Assessments**
- Chapter Twenty Three: Forensic Evaluation in Delinquency Cases
- Chapter Twenty Four: Child Sexual Abuse Evaluations
- Chapter Twenty Five: The Forensic Assessment Of Harassment And Stalking
- Chapter Twenty Six: Assessment of Domestic Violence
- Chapter Twenty Seven: “Syndrome” Evidence: CSAAS & RTS
- Chapter Twenty Eight: “Syndrome” Evidence: Munchausen by Proxy
Chapter Twenty Nine: Risk and Dangerous in Adults and Violence Risk Assessment
Chapter Thirty: Neurological Evaluation of Violence

Section Seven: - Sample Direct and Cross Examination Questions

Section Eight: - Sample Motions

The material will be delivered in several ways:
A. Print - a three-ring bound, three-volume set updated annually
B. Searchable via online subscription
C. In bi-monthly “webinars” for continuing education credits in medicine, psychiatry, psychology & social work. WEST Legal Education will coordinate and I will work with each chapter contributor to create a one hour, live presentation of chapter content and Q & A.

Dr. Lorandos expects that it will be completed by December, 2017.

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A Member of the Bar of the United States Supreme Court - Second, Sixth, Ninth, Eleventh Federal Circuits - - Active in Michigan State Bar and Emeritus/retired status in New York, California, Washington, DC, & Tennessee state bars.cted

Additional Works by FSSA Members

Dr. Daniel B. Kennedy and Dr. Dennis M. Savard, "Delayed In-Custody Death Involving Excited Delirium," Journal of Correctional Health Care (in press).


