

Gender and Indigenous Law

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1. Introduction

Internal oppression and power imbalances are another reality that all Indigenous people—like anyone else—have to consciously guard against. Sexism is a reality. Homophobia is a reality. Ageism (despite the rhetoric) is a reality. Many of our communities are not safe places for our children and other vulnerable individuals. Law is one way to deal with questions of oppression and the abuse of power. If we understand law as an intellectual process that all citizens engage in, then we can use that process to enable people to tackle the uncomfortable issues in our communities. In order to remain alive, Indigenous legal orders and law must be able withstand internal challenges and change. It is this ongoing challenge to norms that keeps a culture alive and vital—and ensures continued relevance for younger people. Otherwise, Indigenous law will fail to be useful in today’s world, and if it is not useful, there is no point in teaching or practicing it. Our young people will continue to turn away in spite of our rhetoric.¹

Many different approaches to Indigenous law exist, and as Val Napoleon describes in the quote above, questions should be asked about how people can think about, and use, Indigenous law.² There need to be many perspectives about Indigenous law and ongoing discussions that allow for different voices to be heard. Recently, I had the pleasure of being an attendee at one such discussion, at the “Revitalizing Indigenous Laws: Accessing Justice and Reconciliation” conference [hereinafter, the conference] in Winnipeg, Manitoba.³ This event highlighted the findings of student researchers, who were each working with different Indigenous legal traditions.⁴ This research was part of a collaborative project between the University of Victoria Indigenous Law Research Unit, the Indigenous Bar Association, and the Truth and Reconciliation Commission of Canada. The focus in this report is to offer a review of only the conference, however it is

¹ Val Napoleon, “Thinking About Indigenous Legal Orders” in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Global Pluralism* (Dordrecht: Springer, 2013) 229 at 243.

² When I use the term ‘Indigenous law,’ I am referring to Indigenous peoples’ own legal orders. This is different from my use of ‘aboriginal law,’ which I understand to describe state or Canadian laws that are unjustly imposed on Indigenous peoples. Although I am using the broad language of ‘Indigenous’ here, to ensure that all Indigenous peoples’ laws are included, it should be noted that ongoing discussions should be much more specific (for example, discussions about Cree law or Métis law). Indigenous legal orders vary and the discussion that I present in this report is meant to only be an initial conversation.

³ “Revitalizing Indigenous Laws: Accessing Justice and Reconciliation,” collaborative project between the University of Victoria Indigenous Law Research Unit, the Indigenous Bar Association, and the Truth and Reconciliation Commission of Canada, Winnipeg, Manitoba, 17-18 October 2012 [“Revitalizing Indigenous Laws”].

⁴ The majority of the researchers for the project were law students. I will refer to the researchers throughout as student researchers.

important to remember that the dialogue that took place in Winnipeg is part of a larger project, as well as a larger conversation on revitalizing Indigenous laws.⁵

With the idea of ongoing discussion in mind, this paper reflects on where we might go next in the conversation and considers what still needs to be talked about since the conference ended. For me, the answers to those questions center on how to think about, and account for, gender in work on Indigenous law.⁶ Gender was seldom addressed at the conference. This tendency to not focus on gender commonly occurs at conferences and in research on Indigenous law.⁷ Although discussion about gender was generally absent at the conference, it can still be brought into the dialogue about the conference. A gendered analysis is consistent with the spirit and work of the project.

Throughout this paper, I consider the following question: how is gender a necessary part of the ongoing work on Indigenous law? The position that I take is that gender needs to be purposefully and explicitly included in future work on Indigenous law. As I discuss below, Indigenous women and men can experience social and legal issues in different ways. Indigenous women in particular face high levels of marginalization within and outside of their communities.⁸ It is necessary to talk about

⁵ For further information, visit the University of Victoria, Faculty of Law website: <<http://law.uvic.ca/>>.

⁶ In talking about gender, I draw here on work that I have developed elsewhere. See Emily Snyder, “Indigenous Feminist Legal Theory” (2013) [unpublished paper] [“Indigenous Feminist Legal Theory”]; Emily Snyder, *Representations of Women in Cree Legal Educational Materials: An Indigenous Feminist Legal Theoretical Analysis* (PhD Dissertation, University of Alberta, Department of Sociology, 2013 in progress) [unpublished] [“Representations”]. Gender is just one answer to the question about the need for ongoing discussion. For example, Lindsay Borrows and Aaron Mills noted in their presentations that there is a need for additional work on the relationship between language and Indigenous laws (Lindsay Borrows and Aaron Mills, “Some of the Critical Questions Moving Forward” session [“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012]). Further, Val Napoleon and Hadley Friedland have talked about the need for further work on Indigenous legal methodologies (“Revitalizing Indigenous Laws,” *supra* note 3; Val Napoleon and Hadley Friedland, “An Inside Job: Developing Scholarship from an Internal Perspective of Indigenous Legal Traditions,” [2011] [unpublished paper] online: <<https://sites.google.com/site/Indigenouslawconference/resources>> [“An Inside Job”]; Hadley Friedland “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” [2012] 11:1 *Indigenous Law Journal* 1 [“Reflective Frameworks”]).

⁷ Regarding the statement that this omission of gender occurs at conferences on Indigenous law, I base this assertion on my own experiences of conferences that I have attended over the past several years. One exception to this is: “An Exploratory Workshop: Thinking About and Practicing With Indigenous Legal Traditions” (Fort St. John, BC, Indigenous Peoples and Governance [IPG] Project [SSHRC/MCRI] in collaboration with the Treaty 8 Tribal Association, 30 September to 2 October, 2011). The second day of this conference focused explicitly on gender. Concerning the statement that gender is overlooked in research on Indigenous law, I base this on my work on Indigenous feminist legal theory and Cree law (Snyder, “Indigenous Feminist Legal Theory,” *supra* note 6; Snyder, “Representations,” *supra* note 6).

⁸ For discussion on this, see: Joanne Barker, “Gender, Sovereignty, Rights: Native Women’s Activism against Social Inequality and Violence in Canada” (2008) 60:2 *American Quarterly* 259; Val Napoleon,

gender, when talking about Indigenous law, to ensure that women’s experiences are recognized, that their knowledge is included, and that Indigenous laws are not taken up in ways that end up contributing to Indigenous women’s marginalization. Including gender in discussions about Indigenous law will mean embracing difficult questions, facing challenging realities, and thinking critically about how Indigenous women and men are talked about. Difficult discussions such as these are meant to empower Indigenous law – to ensure that Indigenous laws are relevant, useful, and can maintain their vibrancy.⁹

In the first section of the paper, I describe the conference in more detail, including some of the main ideas that emerged. I then turn to a conversation about gendered contexts in the second section to show that gendered realities exist and that power dynamics and conflict need to be paid attention to. In the third section, I discuss what it could look like to make gender a central part of work on Indigenous law. This discussion includes: describing what I mean when I use the term ‘gendered analysis’; explaining how a gendered analysis is consistent with the work presented at the conference; presenting some of the possibilities and benefits of a gendered approach; and raising, and responding to, some of the challenges. Finally, the paper is concluded with a short summary and reflection.

2. The Conference

The conference was a two-day event, with the first day featuring presentations by the student researchers. The focus of the research was on examining conflicts within, and between Indigenous groups,¹⁰ and the researchers looked at legal responses to conflict, within various Indigenous legal orders.¹¹ A goal of the project, and of the discussions at the conference, was to move beyond general and descriptive accounts of Indigenous law, to engage in specific thinking about how Indigenous laws are (and could be) accessed and

“Aboriginal Discourse: Gender, Identity, and Community,” in Benjamin J. Richardson, Shin Imai and Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 233; Emma LaRocque, “The Colonization of a Native Woman Scholar,” in Christine Miller and Patricia Chuchryk, eds, *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 11.

⁹ Napoleon, *supra* note 1 at 243.

¹⁰ Val Napoleon & Hadley Friedland, “Beyond the Whys: Methods of Engagement with Indigenous Legal Traditions” session (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

¹¹ Each student worked with one legal order. The project included: Coast Salish; Tsilhqot’in; Cree; Anishinaabe; Mi’kmaq; Secwepemc; Métis; and Inuit legal orders.

used.¹² Too often discussions on Indigenous law overlook the complexity of legal principles, reasoning, and responses.¹³ A serious engagement with Indigenous law moves beyond generalities, or discussions about following rules, to thinking critically about what Indigenous laws can do, where they might need to be improved, and how they can be accessed and applied to conflicts.¹⁴ At the conference (as with this paper), the importance of theory and methods were embraced.¹⁵ Napoleon emphasizes the importance of recognizing “law as an intellectual process” and activity.¹⁶ Theory can help to understand and explain Indigenous laws, and provides a way in to discussion, disagreement, and critical thinking.¹⁷ Methods for researching and accessing Indigenous laws are also crucial. The student researchers analyzed publicly available materials (stories),¹⁸ and also interviewed community members as part of their methods.¹⁹

In their presentations, the students discussed legal principles, for example, Hanna Askew described principles of proportionality, education, community safety, and respect of autonomy (until it harms others), in her discussion on Anishinaabe legal traditions.²⁰ Estella Charleson commented on the importance of understanding the legal processes that aim to uphold legal principles.²¹ The students examined legal steps and procedures that exist for responding to conflicts. For instance, Kris Statnyk described that evidence gathering and observation are examples of legal steps for investigating harm in Cree legal

¹² Hadley Friedland, “Beyond the Whys: Methods of Engagement with Indigenous Legal Traditions” session (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

¹³ *Ibid*; Friedland, *supra* note 6 [“Reflective Frameworks”]; Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (DPhil Law Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished].

¹⁴ *Supra* note 13.

¹⁵ Val Napoleon, “Closing Remarks” (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

¹⁶ Napoleon, *supra* note 1 at 243.

¹⁷ Napoleon, *supra* note 15.

¹⁸ More specifically, the students used the case method and legal synthesis to analyze the stories. The case method is used in law schools, and involves making a ‘brief’ of the case, which draws out: the main facts of the story, the human problem that the story deals with, what was decided for how to address the problem, and the reason behind the decision. Legal synthesis can include taking the information from many case briefs, to address questions about legal reasoning, decision-making processes, and principles (Napoleon and Friedland, day two of “Revitalizing Indigenous Laws” *supra* note 3, 18 October 2012). For further discussion on this see: Napoleon and Friedland, *supra* note 6 [“An Inside Job”].

¹⁹ This is just one approach, and there are other methods that can be taken up and imagined. See Friedland, *supra* note 6 [“Reflective Frameworks”].

²⁰ Hanna Askew, “The Research Experience and Outcomes: Anishinaabe Legal Traditions” (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

²¹ Estella Charleson, “The Research Experience and Outcomes: Coast Salish Legal Traditions” (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

traditions.²² The students talked about who recognized decision-makers are in the legal orders that they researched,²³ and discussed legal responses to various conflicts. Additionally, the presentations showed that there are different sources of law that can be examined.²⁴ Analyses of Indigenous laws can continue to be deepened when certain areas of law (e.g. family law),²⁵ specific principles,²⁶ or specific social issues (e.g. violence against women),²⁷ are focused on.

The second day of the event included an intensive workshop on Indigenous methodologies, which was led by Dr. Val Napoleon and Hadley Friedland (the project coordinators), with the help from the student researchers. Conference participants worked hands-on, to analyze publically available Dene stories, using the same method that the students used.²⁸ This provided an opportunity for attendees to begin to understand the detailed work that the students engaged in, in their research. Attendees were also presented with a legal framework, and we worked to bring our stories together to continue with a conversation about legal processes, reasoning, and principles. An informal discussion was held afterwards, which created space for asking questions about the methodology that we tried out, and for asking the students about their experiences with researching Indigenous laws.

The student research (and the work of the project) does not speak to the full complexities of the Indigenous legal orders that were included, and could not realistically speak to more than one area of Indigenous law. Instead, the methods used at the

²² Kris Statnyk, “The Research Experience and Outcomes: Cree Legal Traditions” (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

²³ For example, Estella Charleson, *supra* note 21; Lindsay Borrows, “The Research Experience and Outcomes: Mi’kmaq Legal Traditions” (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

²⁴ For example, in her work on Anishinaabe legal traditions, Askew talked about interpretation of the land as a source of law (Askew, *supra* note 20). John Borrows describes that there are several different sources of law in Indigenous law (and in other legal orders), including natural law, sacred law, customary law, positivistic law, and deliberative law. For discussion on this, see Chapter 2 of John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

²⁵ Napoleon, *supra* note 15.

²⁶ See for example, Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Sauleaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, Faculty of Law, 2009) [unpublished].

²⁷ The topic of drawing on Indigenous laws as a resource for challenging violence against Indigenous women is further discussed in Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” [draft 3 January 2013, unpublished].

²⁸ For a short explanation of this method, see footnote 18.

conference provide a way in to the beginning of detailed conversations about law, and show that Indigenous laws can be accessed and engaged. Gordon Christie noted in his reflections at the conference that the detailed work that the student researchers did, and the conversation that we were all a part of, were also themselves the ‘doing of law.’²⁹

When thinking about the specifics of Indigenous law, questions about gender can provide further insight and deliberation. For example, how do the gender dynamics in a society shape law? Do legal processes impact Indigenous women and men differently? Do legal responses include women’s experiences and knowledge? There are many more questions that can be asked about gender that I include below. Overall, gender was not the focus of the conference, though it did come up occasionally. For instance, Napoleon encouraged us, at the workshop on stories, to consider that our understandings of the stories and legal processes might change if we focused more centrally on the female characters, and re-told the stories from the perspectives of the women and girls in the stories.³⁰ In her presentation on researching Mi’kmaq legal traditions, Lindsay Borrows briefly addressed gender when she noted that the role of women within Mi’kmaq governance has shifted, in part because of colonial influence. She explained that women used to be valued decision-makers, but now men primarily occupy leadership and decision-making positions in Mi’kmaq communities.³¹

Further, when explaining processes of banishment and reintegration in Tsihlot’ in legal traditions, Al Hanna commented that “[s]ome interviewees characterized the possibility of return and reintegration into the community as having a gendered dimension.”³² Hanna noted that while further research is needed on gender, it was not the focus of the conference.³³ I show in this paper that ongoing discussion about gender is fully compatible with the work and insights that can be taken away from the conference. Thinking beyond the conference, this paper suggests that much work still needs to be done on how experiences and expectations about gender shape, and are shaped by,

²⁹ Gordon Christie, “Research Presentations” session (speaking about Inuit legal traditions) (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

³⁰ Val Napoleon, “Mini-Intensive: Drawing Law From Stories” (“Revitalizing Indigenous Laws,” *supra* note 3, 18 October 2012).

³¹ Borrows, *supra* note 23.

³² Al Hanna, “The Research Experience and Outcomes: Tsihlot’ in Legal Traditions” (“Revitalizing Indigenous Laws,” *supra* note 3, 17 October 2012).

³³ *Ibid.*

Indigenous law. Rather than thinking of gender as a special topic or a sub-topic that one could focus on in the future, I suggest here that gender should always be on our minds when talking about Indigenous law, given the gendered contexts within which Indigenous laws are practiced.³⁴

3. Gendered Context

It is imperative when talking about law, and when talking about gender, to think about power. Thinking about power means trying to understand why some groups are continuously marginalized and treated badly, while others seem to succeed and benefit a great deal from social structures (e.g. legal structures, family structures) and norms (commonplace ideas about what is ‘normal’). When focusing on Indigenous and non-Indigenous relations, white settlers have a great deal of (unearned) privileges compared to Indigenous peoples. Power dynamics also exist in Indigenous communities and this includes gendered power dynamics.³⁵ Indigenous women face marginalization in many different ways, both within and outside of Indigenous communities.³⁶ It is crucial, when talking about Indigenous law (as with state law), to understand the gendered context within which law exists. Law responds to and is shaped by the society within which it operates.³⁷ Gender shapes experience and while Indigenous women and men face similar social and legal issues, Indigenous women can experience them differently and face additional challenges, compared to Indigenous men.³⁸

³⁴ I contend that gender dynamics also shaped legal practices (though not in the exact same ways as today) in the past. Gendered dynamics not only shape our interpretations in the present, but as Napoleon has suggested, also shape our interpretations of the past (personal communication with Napoleon).

³⁵ When I use the word ‘community,’ I do not only mean a bounded geographic location (such as a reserve). I imagine ‘community’ to have much more flexible boundaries than that.

³⁶ Napoleon, *supra* note 8; Barker, *supra* note 8.

³⁷ For a discussion on gender norms and the law see Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989). For a discussion on race and colonial norms and the law, see Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2:1 *Indigenous Law Journal* 67.

³⁸ While gender analysis tends to be ignored in discussions on colonization and Indigenous social and political contexts, many scholars have written about the gendered impacts of colonization. For a short discussion on this, see LaRocque, *supra* note 8. Unfortunately this scholarship on gender is often not taken up in discussions and the privileging of male experiences, knowledge, and methodologies remain ‘invisibly’ central in both scholarship and politics outside of the university.

For instance, Indigenous women have access to fewer resources. On average, Indigenous women make less money than Indigenous men.³⁹ Further, Indigenous women are less likely to be elected into leadership positions in communities and face political marginalization.⁴⁰ Not only can this mean that the risk exists that Indigenous women's concerns will not make it to, or be heard by predominantly male decision-makers, but the problem arises that Indigenous men are more likely to be in positions in which they can exercise control over resources within a community.⁴¹ Sexism is a major problem in Indigenous communities (as it also is in Canadian society more generally) and there needs to be increased awareness about the impacts that this can have on women.⁴²

Violence against women is also a significant problem in Indigenous communities. For example, Indigenous women face high rates of sexual violence.⁴³ In addition to being vulnerable to this violence as adults, Indigenous women report higher rates of having experienced some form of sexual violence as a child (61 per cent of Indigenous women reporting this compared to 35 per cent of Indigenous men).⁴⁴ Rates for domestic violence are also high.⁴⁵ Domestic violence can include physical, sexual, psychological (or emotional), spiritual, and economic violence (controlling or manipulating someone through resources). While violence can be understood as occurring between individuals,

³⁹ Aboriginal Affairs and Northern Development Canada, "Aboriginal Women in the Canadian Economy: The Links Between Education, Employment and Income" (fact sheet, 2012, online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ai_res_aborig_econ_pdf_1331068532699_eng.pdf>) at 1 ["Aboriginal Women"].

⁴⁰ See Barker, *supra* note 8; Kim Anderson, "Affirmations of an Indigenous Feminist," in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* ["Indigenous Women"] (Vancouver: University of British Columbia Press, 2010), 81 at 84-85.

⁴¹ Joyce Green, "Taking Account of Aboriginal Feminism," in Joyce Green, ed, *Making Space for Indigenous Feminism* ["Making Space"] (Winnipeg: Fernwood Publishing, 2007) 20 at 24.

⁴² *Ibid*; Napoleon, *supra* note 8; LaRocque, *supra* note 8; Kiera Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13 *Australian Indigenous Law Review* 62; Verna St. Denis, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Green, ed, ["Making Space"], *supra* note 41, 33; Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization," in Green, ed, ["Making Space"], *supra* note 41, 53.

⁴³ An Amnesty International report indicates that Indigenous women in Canada "reported rates of violence, including domestic violence and sexual assault, 3.5 times higher than non-Indigenous women" (Amnesty International, "No More Stolen Sisters: The Need For A Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada" [London, 2009, online: <<http://www.amnesty.ca/sites/default/files/amr200122009enstolensistersupdate.pdf>>) at 1 ["Stolen Sisters"].

⁴⁴ Ontario Federation of Indian Friendship Centres, "Aboriginal Sexual Violence Action Plan" (in partnership with the Métis Nation of Ontario and the Ontario Native Women's Association, Toronto, Ontario, 2011, online: <http://www.ofifc.org/pdf/20120202_Aboriginal_sexual_violence_action_plan_final_report.pdf>) at 1 ["Aboriginal Sexual Violence Action Plan"].

⁴⁵ See *supra* note 43.

it is important to also recognize it as connected to larger social problems, and to understand that violence against women is perpetuated through social structures and circumstances. For example, it might be difficult for an Indigenous woman to leave an abusive relationship because of a lack of resources and/or housing shortages.⁴⁶ Further, the pervasiveness of violence against women is perpetuated by social norms in which the degradation of Indigenous women is treated as normal and is supported by denigrating stereotypes that devalue Indigenous women's worth and right to their own bodily and mental safety.

Not only do Indigenous women face violence within their communities, they also face a great deal of external violence as well, in ways that are different from how Indigenous men experience colonial and settler violence.⁴⁷ Indigenous laws need to consider that both internal and external oppression shapes today's gendered contexts. Colonial violence has been, and still is, reliant on violence against women.⁴⁸ Gendered violence, such as sexual assault, is a common 'tool' of colonial oppression and degradation.⁴⁹ Rates of sexual assault are 3.5 times higher for Indigenous women, compared to non-Indigenous women in Canada.⁵⁰ There is an epidemic of missing and murdered Indigenous women in Canada that continues to be poorly understood and responded to by settlers (individuals and institutions).⁵¹ Further, research indicates the brutality of the violence done unto Indigenous women is often more severe.⁵² An Amnesty International report noted a government survey that indicated that "young First Nations women are five times more likely than other women to die as a result of violence."⁵³ The report clarifies that the statistics on violence against Indigenous women

⁴⁶ "Aboriginal Sexual Violence Action Plan," *supra* note 44 at 1.

⁴⁷ Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ "Stolen Sisters," *supra* note 43 at 1. This statistic is based on a government survey that was conducted in 2004.

⁵¹ A fact sheet produced by the Native Women's Association of Canada indicates 582 cases of missing and murdered Indigenous women in Canada (as of 2010) ("Fact Sheet: Violence Against Aboriginal Women," Native Women's Association of Canada, online: <http://www.nwac.ca/sites/default/files/imce/NWAC_3E_Toolkit_e.pdf> at 3) ["Fact Sheet"].

⁵² "Stolen Sisters," *supra* note 43 at 1.

⁵³ *Ibid* at 1.

“almost certainly underestimate the scale and severity of the violence faced by Indigenous women.”⁵⁴

The marginalization of Indigenous women has been institutionalized through settler policies and laws,⁵⁵ and it is important to recognize the high rates of violence that occurred/occur through, and in, settler institutions (for example, in foster care, prisons, and historically in residential schools).⁵⁶ Human trafficking and sexual exploitation are major social problems and Indigenous women and girls are particularly vulnerable, in part, due to poverty.⁵⁷ What is complex is that Indigenous women are not only disproportionately victims of violence; they are also disproportionately imprisoned compared to non-Indigenous women.⁵⁸

Economically, when looking at the differences between Indigenous and non-Indigenous women, Indigenous women typically have lower incomes, earning only 77 per cent of what non-Indigenous women in Canada make.⁵⁹ Indigenous women are more likely to be living below the poverty line than other women.⁶⁰ Further, Indigenous women are overrepresented in manual labour jobs and clerical work, and are underrepresented in management jobs, compared to non-Indigenous women.⁶¹

The above statistics reveal nothing new – these findings have been reported elsewhere and patterns of violence against Indigenous women have been written about many times before.⁶² It is discouraging to re-write these statistics here because of the

⁵⁴ *Ibid* at 1. While there are many complex reasons why Indigenous women may not disclose incidents of violence, it certainly must be considered that much of the data comes from government surveys. Given the violent history and contemporary practices of the state, many Indigenous women are unlikely to see government surveys as trustworthy or safe outlets for disclosing violence. In a fact sheet by the Native Women’s Association of Canada, it is indicated that “[c]ommunity-based research has found levels of violence against Aboriginal women to be even higher than those reported by government surveys” (“Fact Sheet,” *supra* note 51 at 5).

⁵⁵ Barker, *supra* note 8.

⁵⁶ “Aboriginal Sexual Violence Action Plan,” *supra* note 44 at 1.

⁵⁷ *Ibid* at 1.

⁵⁸ “Stolen Sisters,” *supra* note 43 at 4. For a discussion on how racist and colonial policies and ‘justice’ practices impact Indigenous women, as well as how Indigenous women’s social circumstances impact experiences with imprisonment, see the “Lost to the Prison System” section of *supra* note 43 at 18-19.

⁵⁹ “Aboriginal Women,” *supra* note 39 at 2-3.

⁶⁰ *Ibid* at 3.

⁶¹ *Ibid* at 2.

⁶² See for example Emma LaRocque, “Policy Paper on Violence Against Métis Women,” (prepared for the Women of the Métis Nation, online: <<http://www.laa.gov.nl.ca/laa/naws/pdf/WMNViolencePaper.pdf>>);

harsh realities that they speak to, and also because of the general lack of response to seriously addressing the marginalization of Indigenous women. I do not mean to suggest that there have been no responses – many organizations, groups, and individuals work hard to challenge this marginalization.⁶³ Further I do not mean to suggest that Indigenous women are powerless (or that all Indigenous women have the exact same experiences). It is useful to think of power as something that is used against others, but also as something that people take up to resist and challenge oppression.⁶⁴ This does not mean that everyone has the same ‘amount’ of power though, those who face oppression certainly exercise their power in constraining circumstances and are subjected to limitations.⁶⁵ The marginalization of Indigenous women in settler society and in Indigenous communities is an ongoing social problem that continues to be perpetuated by systemic racism, sexism, and dehumanizing social perceptions about the value of Indigenous women.

When thinking about and practicing Indigenous laws, gendered context is essential. Not talking about gender or acknowledging that Indigenous women and men have different experiences as legal subjects erases the above-mentioned realities.⁶⁶ To act as though everyone is the same is not only false, it actually adds to the problem of oppressing Indigenous women in that it denies that sexism exists and offers nothing to address the problem. At its core, law is about citizenship and conflict.⁶⁷ All citizens should be included in legal processes with the social complexities (gender, sexuality, class, race, ability) that shape their lives in mind.

To reiterate, gender should be an explicit part of all discussions on Indigenous law. Gender should not only be talked about in relation to ‘women’s issues’ (violence,

Emma LaRocque, “Violence in Aboriginal Communities” (1994, *The Path to Healing*, Ottawa, Health Canada 72, online: <<http://publications.gc.ca/collections/Collection/H72-21-100-1994E.pdf>>); Smith, *supra* note 47.

⁶³ See also the work of organizations such as the Native Women’s Association of Canada, the Aboriginal Women’s Action Network, Femmes Autochtones Du Québec Inc./Quebec Native Women Inc., the Institute for the Advancement of Aboriginal Women, the Métis National Council of Women, and Pauktuutit Inuit Women of Canada.

⁶⁴ I am drawing here on a discussion about gender and Michel Foucault’s ideas on power – see Smart, *supra* note 37 at 6-9 (and see Chapter 1 more generally).

⁶⁵ *Ibid.*

⁶⁶ Discussions about Indigenous feminism, as well as discussions about intersectionality, are especially helpful for understanding the importance of being explicit about gender when talking about Indigenous social and political issues. See for example Green, *supra* note 41; Napoleon, *supra* note 8; Ladner, *supra* note 42; St. Denis, *supra* note 42; LaRocque, *supra* note 42; Andrea Smith, “Native American Feminism: Sovereignty and Social Change” in Green, ed, [“Making Space”], *supra* note 41, 93.

⁶⁷ Napoleon, *supra* note 13.

family, reproduction).⁶⁸ The notion of ‘women’s issues’ is terribly misguided – the specific problems that women face exist in relation to the privileges that men experience and need to be especially addressed by those who benefit from and can change oppressive social situations. The tendency to only talk about gender when discussing ‘women’s issues’ creates several problems. First, it limits the complexity of women’s lives. Second, and connectedly, by relegating women and gender to the topic of ‘women’s issues,’ boundaries are created that state that women’s knowledge, insights, and abilities are confined to only certain issues. Third, in talking about gender only in relation to ‘women’s issues,’ male experience and privilege remains normal, and sometimes even invisible. Gender shapes all of our lives in deeply complex ways that play out in social structures and everyday experiences and interactions. It is therefore crucial to talk about gender – to understand the contexts of legal subjects, but also that the contexts themselves shape law.⁶⁹

While law (especially state law) is often talked about as ‘neutral’ or ‘objective,’ many legal scholars have shown that power dynamics exist in legal processes, which reflect the broader power dynamics in a given society.⁷⁰ Indigenous and non-Indigenous scholars describe how state laws perpetuate racist and colonial ideologies: through legal processes that rely on stereotypes about racialized ‘others’ and overlook their lived realities; through legal decisions that are made primarily by white men; and through interpretations of principles which almost always leave white privilege and the colonial state intact.⁷¹ Feminist scholars have also shown how state law relies on sexist stereotypes and assumptions, and perpetuates the marginalization of women and the privileging of men’s experience, knowledge and interpretations.⁷² Furthermore, scholars have taken up intersectional lenses to show, for example, how state law takes up sexist, racist, and colonial ideologies and stereotypes together.⁷³ The dominant norms in a

⁶⁸ See also Napoleon, *supra* note 8 at 235.

⁶⁹ See Snyder, *supra* note 6 [“Indigenous Feminist Legal Theory”].

⁷⁰ See Smart, *supra* note 37; Christie, *supra* note 37.

⁷¹ See Christie, *supra* note 37.

⁷² See Smart, *supra* note 37; Margaret Davies and Kathy Mack, “Legal Feminism – Now and Then” (2004) 20 Australian Feminist Law Journal 1.

⁷³ See Sherene H. Razack “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” (2000) 15 Canadian Journal of Law and Society 91; Patricia Monture, “The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women,” in Kerry Wilkins, ed, *Advancing Aboriginal Claims* (Saskatoon: Purich, 2004) 39.

society shape practices of law.⁷⁴ I suggest here that how the sexism that exists in Indigenous communities shapes Indigenous legal processes, decision-making, and interpretations, also needs to be considered. Some Indigenous scholars have shown how self-governance strategies and decolonization politics, for example are gendered.⁷⁵ So too must Indigenous law be explicitly talked about as gendered⁷⁶ and be understood as a site of gender struggle.⁷⁷ Those who engage with, and apply Indigenous laws need to be able to understand the gendered realities that exist and need to be able to recognize how Indigenous law is tied up in, and can reinforce, gendered power dynamics in ways that uphold sexism. Indigenous law (like other legal orders) has great potential for challenging sexism but this work can only be seriously taken up in the future if gender and power are explicitly and critically talked about.

4. Bringing Gendered Analysis into The Work of Indigenous Law

4.1 What Does A ‘Gendered Analysis’ Involve?

A gendered analysis first and foremost involves acknowledging that gender is a powerful social category in all of our lives and that gendered power dynamics exist. A gendered analysis should be intersectional – meaning that it should consider how ideas about gender are connected to ideas about race, class, ability, etc. Indigenous women, for example, are not just women/gendered – and not just racialized. Looking at gender and sexism thus also means looking at how various systems of oppression rely on one another. As noted above, colonial violence, for instance, relies on and perpetuates sexism and violence against Indigenous women.⁷⁸ Andrea Smith notes that “the notion that we can separate gender justice from sovereignty struggles does not take into consideration the fact that it is precisely through gender violence that colonialism and white supremacy

⁷⁴ Smart, *supra* note 37; Borrows, *supra* note 24.

⁷⁵ See Ladner, *supra* note 42; Green, *supra* note 41.

⁷⁶ Snyder, *supra* note 6 [“Indigenous Feminist Legal Theory”].

⁷⁷ Smart, *supra* note 37.

⁷⁸ Smith, *supra* note 47; Andrea Smith, “Against the Law: Indigenous Feminism and the Nation-State” (2011) 5:1 *Affinities: A Journal of Radical Theory, Culture, and Action* 56 [“Against the Law”].

work.”⁷⁹ Colonial violence also relies on heterosexist violence (the assumption that everyone is, and ought to be, heterosexual).⁸⁰

A gendered analysis requires going much deeper though, than just acknowledging gender and its relationship to other social categories. There are many different ways to then work with and think about gender. The approach that I discuss here, for how to work with gender, is a critical approach that is informed by various feminist theories, including Indigenous feminist theories, and Indigenous feminist legal theory. ‘Feminism’ is often met with negative responses, in both settler society and Indigenous communities. Notions that feminism promotes man-hating, divides communities, and prioritizes women over men are common misconceptions in both settler and Indigenous contexts.⁸¹ I say that they are misconceptions because there are *many* feminist theories and practices, and the extreme depictions of feminism are oversimplified and most often inaccurate.⁸² The entire discussion in this paper thus far has been informed by Indigenous feminist legal analysis, and I hope to have shown that critical analyses of gender purposefully engage an entire citizenry.

Additional concerns about feminism, specific to Indigenous contexts, also exist. Notions that feminism is something that white women do, that it is inappropriate for Indigenous contexts, that it is not traditional, and that it is a colonial tool are common arguments against feminism.⁸³ That debate about whether feminism is an appropriate analytic tool for Indigenous peoples has already been written about extensively elsewhere.⁸⁴ White women have dominated the mainstream women’s movement in Canada (and in other settler nations).⁸⁵ Racism and colonialism have been, and still are, a

⁷⁹ Smith [“Against the Law”], *supra* note 78 at 65.

⁸⁰ Ladner, *supra* note 42; Val Napoleon, “Raven’s Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues” (2002) 17 *Canadian Journal of Law and Society* 149; Andrea Smith, “Indigenous Feminism Without Apology” (2006) 58 *New Socialist* 16.

⁸¹ See Smith, “Against the Law,” *supra* note 78; Green, *supra* note 41.

⁸² Smith, “Against the Law,” *supra* note 78; Green, *supra* note 41.

⁸³ For discussion of these debates, see Smith [“Against the Law”], *supra* note 78; Green, *supra* note 41; St. Denis, *supra* note 42; LaRocque, *supra* note 42; Tracey Lindberg, “Not My Sister: What Feminists Can Learn about Sisterhood from Indigenous Women” (2004) 16 *Canadian Journal of Women and the Law* 342.

⁸⁴ *Supra* note 83.

⁸⁵ Twila L. Perry explains that while there is much talk about intersectionality (recognizing how gender, sexuality, race, class, etc. are interconnected), this has yet to have a significant impact on the white privilege that still dominates in women’s activism (Twila L. Perry, “Family Law, Feminist Legal Theory, and The Problem of Racial Hierarchy,” in Martha Albertson Fineman, ed, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* [New York: Routledge, 2011] 243).

problem within mainstream feminist activism, in which the state and its institutions are taken for granted, and issues such as land claims, treaty relations, and decolonization are overlooked.⁸⁶ There are multiple feminisms and feminists though that aim to challenge this marginalization and violence, and it is this work that I draw on here.⁸⁷

While there are different approaches to Indigenous feminism, it can generally be described as a tool that examines how gender, sexuality, race, and colonialism are connected and impact Indigenous people's lives.⁸⁸ Indigenous feminists maintain that sexism is a problem in settler and Indigenous societies, and advocate that decolonization and self-determination practices must purposefully include critical discussions about gender so as to not reproduce male privilege, female oppression, and sexism in Indigenous politics.⁸⁹ 'Indigenous feminist legal theory' takes up this important insight, alongside Indigenous legal and feminist legal ideas, to talk more specifically about how Indigenous laws need to be understood as gendered, and how gender needs to be explicitly included in conversations on Indigenous law.⁹⁰

Both approaches encourage taking up gendered analysis in a way that does not take the idea of 'gender' for granted. Doing a thorough gendered analysis involves asking after the concept of gender itself. It is commonly assumed that gender exists in a binary (man/woman), and that gender stems from 'sexed' bodies (male/female). In other words, it is assumed for example, that a body with a penis is a 'male' body and that those with that body should then take up 'appropriate' gender roles and behaviour for boys and eventually men. In the approach to gender analysis taken in this paper, both 'gender' and 'sex' are treated as social constructs. What this means is that ideas about gender are human interpretations that exist in relation to culture and society. To talk about 'sex' as a social construct does not mean that we should deny the actual existence of our bodies, rather it means that how we interpret, define, and understand our bodies are consistent

⁸⁶ For discussion on gender, racism, activism, and the state see: Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 *Canadian Journal of Women and the Law* 174 at 183; Smith, "Against the Law," *supra* note 78.

⁸⁷ Such as Andrea Smith, Joyce Green, Val Napoleon, Emma LaRocque, Verna St. Denis.

⁸⁸ Green, *supra* note 41; LaRocque, *supra* note 42; St. Denis, *supra* note 42; Smith, *supra* note 80.

⁸⁹ *Supra* note 88.

⁹⁰ Snyder, *supra* note 6 ["Indigenous Feminist Legal Theory"]. I first heard the term 'Indigenous feminist legal theory' used by Val Napoleon, in one of her classes, in which she encouraged us to consider what this term might mean (Val Napoleon, *Course Description: Aboriginal Women and the Law*, Syllabus, Faculty of Law, University of Alberta 2010, 1 at 1).

with (or resistant to) dominant cultural and social ideas, rather than natural givens that just exist and are unchanging. Many Indigenous cultures long interpreted gender and sex in ways that were diverse and flexible.⁹¹ Notions of multiple genders and different ways of imagining the relationship between gender and sex have been challenged and denigrated by colonial imposition of Victorian European gender norms.⁹² Though we should be careful to not romanticize gender relations prior to contact as perfect and balanced.

This discussion on thinking about how one defines and interprets gender and sex is important, as a critical gendered analysis resists reinforcing the gender binary man/woman (in which the male side is superior to the female side); and resists explanations of gender that rely on biology or notions that all folks with breasts, for example, will act the same, have the same talents, desires, knowledge, etc.⁹³ In assuming that only two genders exist, many whom desire to live gender differently are excluded and marginalized. Further, in suggesting that gender is rooted to physical bodies we limit the agency and possibilities of both women and men. A critical gendered analysis includes acknowledging the reality of sexism and dominant rigid notions of gender, while also advocating for a more flexible approach that works to challenge current gendered power dynamics and hierarchies.

Connected to the idea that ‘gender’ needs to be examined, is the work of examining ‘tradition.’⁹⁴ Gendered analysis encourages an approach that de-naturalizes tradition, and challenges fixed notions of tradition. What I mean by ‘de-naturalizing’ involves thinking carefully about assertions that state that certain people have to act a certain way, because of their bodies. For example, it is common in discussions on

⁹¹ See Ladner, *supra* note 42; Napoleon, *supra* note 80. To clarify, this does not mean though that gender norms never existed prior to contact.

⁹² *Ibid.*

⁹³ I have spoken a few times throughout this paper of ‘women’s knowledge’ – discussing how women’s ideas and insights are often absent from current discussions on Indigenous law. Some interpretations of Indigenous women’s knowledge is that it is deeply connected to their bodies, and that their physical bodies enable certain understandings and power that Indigenous men do not have (see for example, the Cree section of www.fourdirectionsteachings.com). How we live and relate to our bodies is part of all of our experiences, though when I talk about women’s knowledge, I am not referring to knowledge that stems naturally from gendered biological bodies. Rather, I am referring to Indigenous women’s social and lived experiences that can create some common understandings and perspectives, but which are interpreted differently by Indigenous women given their specific experiences and diverse ideas.

⁹⁴ When I use the term ‘tradition’ I understand it as something that is fluid and changes over time.

Indigenous gender relations and roles to talk about Indigenous women as mothers who are responsible for nurturing and taking care of the nation. These responsibilities are framed as traditional roles that are attached specifically to female bodies. I do not mean to suggest that women who take pride in mothering are misguided, but it is important to ask questions about traditions, to consider under what circumstances women are being obliged to take up this role, and to ask about what the implications are for women who do not see themselves as nurturers or mothers. Further, it is important to ask about what other skills, experiences, and knowledge are overlooked when women are imagined primarily as fulfilling one gender role. Rather than interpreting ‘tradition’ as frozen, tradition can be treated as living, flexible, and changing, to deal with present social issues.⁹⁵ It is unreasonable and unjust to expect Indigenous peoples to engage in tradition in exactly the same way today as they have in the past, given that social contexts change and that other societies (for example, Canadian society) gets to change its traditions over time while still retaining its identity and sense of culture.

Emma LaRocque explains that Indigenous women “are being asked to confront some of our traditions at a time when there seems to be a great need for a recall of traditions to help us retain our identities as Aboriginal people. But there is no choice – as women we must be circumspect in our recall of tradition.”⁹⁶ In an article on Navajo beauty pageants, Jennifer Denetdale shows very well that notions of what is ‘traditional’ is tied up with power dynamics.⁹⁷ She discusses how Navajo women are most visible in the work of the nation through the Miss Navajo Nation office, whereas the men represent the nation through leadership positions in Navajo governance.⁹⁸ The women are often discouraged from running for political office on the grounds that it is not a traditional role for Navajo women.⁹⁹ Denetdale highlights how ideas about tradition can get used to limit and control women, when the governance structures that the men are leading are not even themselves traditional structures.¹⁰⁰ What her work shows is that, “[t]radition becomes a tool that Navajo men and women use to legitimate claims about appropriate gender

⁹⁵ See Napoleon, *supra* note 13; Borrows, *supra* note 24.

⁹⁶ LaRocque, *supra* note 8 at 14.

⁹⁷ Jennifer Denetdale, “Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition” (2006) 21:1 *Wicazo Sa Review* 9.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 17.

roles.”¹⁰¹ The women, as potential representatives of the nation through the beauty pageant, are scrutinized and held to rigid ideas about gender roles and behaviour (nurturing, mothering, ‘pure’ morals, etc.),¹⁰² while the male leadership are regulated less and are able to (publicly even) engage in sometimes unethical practices.¹⁰³ Again, what ‘tradition’ means and how it is used is not free from power dynamics and serious questions need to be asked about how ‘tradition’ is used in sexist contexts. As Kim Anderson explains,

[a]s we fervently recover our spiritual traditions, we must also bear in mind that regulating the role of women is one of the hallmarks of fundamentalism. This regulation is accomplished through prescriptive teachings related to how women should behave, how they should dress and, of course, how well they symbolize and uphold the moral order.¹⁰⁴

At its core, a gendered analysis encourages one to pay close attention to power dynamics. To further show what a gendered analysis involves, I include below a list of questions.¹⁰⁵ These questions could be used to bring gender into conversations on Indigenous law – to talk about gender and legal process, legal reasoning, and legal principles. The questions can also be used to reflect on written materials, recordings, or stories. People of all genders can engage with these questions about power.

- Who is included in discussions about Indigenous law? Are women present?
- Who is leading these discussions? What is the gender of the leaders or of authoritative decision-makers?
- Are there specific contexts in which men are considered authoritative speakers and decisions-makers? Specific contexts in which women are?
- How are women and men involved in the legal process similarly and/or differently? What are women talking about? What are men talking about?

¹⁰¹ *Ibid* at 17.

¹⁰² *Ibid* at 18.

¹⁰³ *Ibid* at 18-19.

¹⁰⁴ Anderson, *supra* note 40 at 88.

¹⁰⁵ This list of questions has been modified from my PhD dissertation research in which I discuss Indigenous feminist legal methodology. Part of this framework includes a revised version (that ‘genders’ the approach) of the legal synthesis method (though not the briefing of materials) that Friedland discusses in her work on methods (see Friedland, *supra* note 6 at 35-38 [“Reflective Frameworks”]).

- Is gender talked about? If so, how is it talked about? Is the discussion limited to two genders? How might the discussion change if gender was discussed more fluidly?
- If legal decisions are made, are women and men impacted differently by them? In the short-term? In the long-run?
- How are legal principles (for example, respect, reciprocity) talked about? Is it possible that women and men are not held to these principles in the same way? Do contradictions exist between what is being said in principle, and what happens in reality?
- What is missing? Does gendered conflict need to be acknowledged? If it were, how might it change the discussion?
- Are the specific gendered challenges that Indigenous women face necessary to acknowledge in your analysis? How do you think they relate (or not) to what you are analyzing?
- Are the legal processes, interpretations, and decisions empowering for Indigenous women? Do they treat women as complex legal agents who possess valuable knowledge and opinions?
- Is there space in the legal process for people to disagree with one another? Is there space for women to challenge the process if need be?

There are many more questions that could be added to this list.

Paying close attention to power dynamics is not meant to undermine the value of Indigenous laws, but rather is consistent with what Napoleon described in her quote at the start of this paper – that Indigenous laws will be most useful and vibrant when engaged with today’s contexts in mind.¹⁰⁶ There are resources within Indigenous laws for thinking about citizenship, gender, and oppression. For example, as was emphasized at the workshop at the conference, Indigenous stories, can contain within them information about legal principles, processes, and responses.¹⁰⁷ The ongoing work for those who practice and engage with Indigenous laws is to understand, discuss, and debate how these intellectual resources can be applied today in ways that work for Indigenous citizens. Being explicit about gender can help with this application.

¹⁰⁶ *Supra* note 1.

¹⁰⁷ *Supra* note 18. See also Napoleon, *supra* note 1; Napoleon and Friedland, *supra* note 6 [“An Inside Job”]; Snyder, Napoleon & Borrows, *supra* note 27.

4.2 How Is a Gendered Analysis Consistent with the Work Presented at the Conference?

The above questions and method, while generally absent at the conference, do work well with the critical approach to Indigenous law that the student researchers took, and with the project overall. Not only can a gendered analysis deepen the conversations that can be taken away from the conference, the insights from the conference also offer much to think about for those who do work on gender and Indigenous law. A critical gendered analysis should not just be added alongside the work of the conference, rather we can consider that at their core, they have much in common, and that they need to be recognized as *tangled* up with one another.

To reiterate, the strengths of the conference include an attentiveness to: conflict, complexity, inclusivity, specific discussions, and serious critical engagement. These are well in line with gendered analysis. Again, it can be useful and practical to imagine law as being about disagreement and conflict.¹⁰⁸ As Napoleon noted at the conference, disagreement does not invalidate law, instead it *validates* it – shows that there is a need for law and that legal discussions and processes will necessarily include different opinions.¹⁰⁹ This debate keeps law alive and aims to ensure its relevance.¹¹⁰ An approach to law that treats it as attending to, and shaped by conflict, necessarily requires thinking about power. Discussions at the conference needed to pay closer attention to gendered conflicts and power dynamics, however it is clear that in moving forward, gendered analyses will work well with approaches to law that embrace thinking about conflict.

The idea that stories are about rare events came up in the discussion at the conference.¹¹¹ It was further suggested that if Indigenous children are raised with stories, then people will not break the law.¹¹² The approach that I am taking here, and which I believe draws on the overall approach taken at the conference, is that another interpretation of stories is that they are about ongoing, persistent social and legal problems that need to be addressed. I purposefully use the language above of ‘*tangling*’ work on gender and Indigenous law because thinking about the complexity of conflicts,

¹⁰⁸ Napoleon, *supra* note 15.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* See also Borrows, *supra* note 24.

¹¹¹ Christie, *supra* note 29.

¹¹² *Ibid.*

how gendered citizens are differently impacted and implicated in the law, and how deeply entrenched social problems (such as sexism) can be challenged is messy work. The work of law is perhaps not to imagine these knots as rare, or to imagine that they can all eventually, cleanly be untied. Law is difficult, sometimes hurtful, and messy work that can challenge social problems but is also, realistically, about managing ongoing conflicts.¹¹³

In engaging in these difficult discussions, Napoleon suggested that we need to begin to define elements of Indigenous legal theories.¹¹⁴ These theories about law are also theories about citizenship – what it means to live and engage with one another.¹¹⁵ Inclusivity is vital for legal processes to be relevant and useful.¹¹⁶ Inclusion necessarily means making sure that Indigenous girls and women – their experiences, knowledge, realities, and ideas – are recognized as an essential part of law. To talk of citizenship, is to talk about gender, especially when living in a society in which a large group of citizens are devalued because of their gender.

The emphasis on the need for specific discussions and critical engagement put forth at the conference, and in the above discussion about gender, will guide a way into more inclusive and practical approaches to Indigenous law. As Friedland noted at the conference, moving beyond generalities helps to ensure that legal theory and methods are accessible and usable for communities.¹¹⁷ It is crucial to also move beyond general discussion and rhetoric about gender to thinking about the complicated realities that girls and women experience. The list of questions about gender that I have included could be applied to theories and different methods for engaging with law. You might find that you need to alter the list for it to be useful for you. The list is, like the work of the project, meant to encourage ongoing practical discussion.

4.3 What Are Some of the Possibilities When Taking Up a Gendered Analysis?

I hope to have shown the possibilities of using a gendered analysis. In this section I write more specifically about applying this approach to an example. I recently watched a video

¹¹³ Napoleon, *supra* note 1.

¹¹⁴ Napoleon, *supra* note 15.

¹¹⁵ Napoleon, *supra* note 10.

¹¹⁶ Napoleon, *supra* note 15.

¹¹⁷ Friedland, *supra* note 10.

on YouTube that had been recorded during an Idle No More protest on Parliament Hill in Ottawa.¹¹⁸ The video shows a group of people (primarily Indigenous women) blocking the entrance to the Prime Minister's Office, so as to stop several chiefs from entering who were planning to meet with Prime Minister Stephen Harper on that day.¹¹⁹ The part of the video that I want to focus on involves an Indigenous woman confronting and responding to Chief Matthew Coon Come (Grand Chief of the Council of the Crees), as he enters the building. Entitled, 'Matthew Coon Come vs. Women,' this video encourages thinking about internal gendered conflict. Several of the women in the video attempt to block, and also reason with, Coon Come as he approaches the doors. The discussion between him and several women is brief, and he enters the building as they shout their disapproval at him. The woman focused on in the video encourages others to take up social media to hold him accountable and to inform others of his actions. Then she angrily says, "I'm going to talk to his mom."¹²⁰ This is a complex moment in the video that has to do with thinking about Indigenous legal contexts and laws as gendered.

There are different ways to analyze this moment (and the moments after in which the women around her break out in laughter after the statement about contacting his mom). The moment speaks to complex histories and present oppressions that Indigenous women face. The women unite in an attempt to have their voices heard and included. The meeting with the Prime Minister was organized in large part by the Assembly of First Nations (AFN) – a male-dominated organization in which women are poorly represented, and which has a deep history of sexism.¹²¹ Nor are the women listened to (by Coon

¹¹⁸ Idle No More is a social, political, and legal movement, led by Indigenous peoples in Canada (and joined by non-Indigenous supporters) to challenge the state's (and often settler) violation of treaty relations and to raise awareness about the social and legal realities, as well as the colonial violence, that Indigenous peoples are faced with. While the movement developed as a response to specific legal changes, and has been accompanied by Chief Theresa Spence's hunger strike regarding the conditions in Attawapiskat, the movement is on the whole, about Indigenous-settler relations. Idle No More is ongoing and has involved gatherings of protest, such as flash mob round dances, teach-ins, and transit blockades, as well as blog posting, media interviews, and substantial, repeated use of social media (such as twitter and facebook). The video that I discuss here was taken on the day that the Assembly of First Nations' chief, as well as several other chiefs, were meeting with the Prime Minister to discuss the issues raised by the movement. "Matthew Coon Come vs Women" posted by anishinabemowin on 11 January 2013, online: <<http://www.youtube.com/watch?v=YnFQT1-zlBw>>.

¹¹⁹ The day of that meeting was 11 January 2013.

¹²⁰ "Matthew Coon Come vs Women," *supra* note 118.

¹²¹ See Joyce Green, "Constitutionalising The Patriarchy: Aboriginal Women and Aboriginal Government" (1992) 4 Constitutional Forum 110; Jo-Anne Fiske, "The Womb Is to the Nation as the Heart Is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51 Studies in

Come, anyways) when they attempt to create space for dissent and acknowledgement. In saying that she is going to speak to Coon Come's mother, the woman attempts to go above and beyond his authority, to someone that she perceives as a more powerful and authoritative decision-maker, who will hold him accountable. She invokes ideas about Indigenous women's historical roles in legal processes and decision-making, yet this video is particularly complex because it highlights contradictions between gendered legal ideals and gendered legal realities.

One response to the video could be that the women are asserting their roles as Indigenous women. This interpretation suggests that they are fulfilling obligations to protect the land and nurture the people, that they are valuing women's traditional roles as leaders, and that they are upholding the role of mothers. This video might be read as an example of Indigenous women's power, rather than as an attempt to gain empowerment. Read in these ways, the statement that she is going to talk to his mother, 'puts him in his place,' so to speak. Further, the video might be read in a way that treats these values and principles about women's roles in law as highly respected and as central to Indigenous laws. Yet we risk in these interpretations an oversimplification of gender, of law, and of the social context from which this video is born.

A critical gendered analysis of this video would ask questions about power, tradition, and gender roles. What does it mean to appeal to Coon Come's mother as a higher authority in a social context in which she, comparatively to Indigenous men, has much less power? Will her authority be recognized? Cultural norms and rhetoric in many Indigenous contexts do dictate that she has power but on-the-ground realities show otherwise. While it is no doubt important to advocate that Indigenous women be respected, the fact of the matter is, is that Indigenous women are devalued and marginalized in Indigenous communities today. This does not mean that every single woman is always treated badly by all Indigenous men. Though it does mean, as discussed above in the section on gendered context, that Indigenous women overall operate in constraining social circumstances, and that men experience greater participation,

Political Economy 65; Sharon McIvor with Rauna Kuokkanen, "Sharon McIvor: Woman of Action," in Green, ed, ["Making Space"], *supra* note 41.

privilege, and power in legal processes and decision-making. Assertions of tradition and motherhood should open up space for asking questions.

When talking about tradition, Métis scholar Emma LaRocque cautions us to be careful that Indigenous women's potential and humanity not be limited within the language of gender roles and respect.¹²² She asks, "is 'respect' and 'honour' all that we can ask for?"¹²³ Are there other ways to assert and demand legal, political, and economic inclusion? If notions of motherhood limit women to particular gender roles, traditions, and responsibilities, are there other ways to advocate the empowerment of Indigenous women in law? If Indigenous women are being devalued rather than upheld as valuable members of a society, are there other ways to speak out against male leadership? Critical gendered analysis encourages answers to these questions that are practical and resist romanticizations about gender and tradition. Napoleon noted at the conference that dichotomies – the idea that a person must be one way or the other – can silence people.¹²⁴ Discussion about the above video could be most productive if we can avoid falling into ideas (dichotomies) that suggest, for example, that Indigenous women have to take up traditional gender roles or else they are colonized. A more complex conversation than that, which includes a variety of Indigenous women's voices and perspectives can be had. Given the difficult reality of representing all Indigenous peoples in Canada, the video clip is perhaps still a bit too general and superficial. However, the video could be further discussed in relation to specific Indigenous legal orders. What resources exist within those legal orders for thinking about external conflict and legal negotiation? What can the above questions about gender contribute to this discussion?

4.4 What Are Some of the Challenges?

While I fully support the possibilities and importance of gendered analysis (including Indigenous feminist and Indigenous feminist legal analysis) there are significant challenges when trying to talk explicitly about gender and Indigenous law. In this section of the paper, I turn to these challenges and discuss responses to them, although I want to

¹²² LaRocque, *supra* note 8 at 14.

¹²³ *Ibid* at 14.

¹²⁴ Napoleon, *supra* note 15. Green likewise notes that simple assertions that things must be one way or the other (e.g. 'Indigenous'/'colonized'; 'authentic'/'traitor') "stifles critique – and also political debate" (*supra* note 41 at 25).

be clear that there are not straightforward responses to the complicated social and legal issues discussed above.

First and foremost, I want to acknowledge that it can be frustrating, troublesome, and demanding to try to talk critically about gender in a climate in which sexism is the norm. Both men and women will challenge you. Sexism, male privilege, and commonplace ideas about gender play out in obvious ways (such as women being paid less money), but also in more subtle ways that can sometimes be really difficult to see and name. For example, if a facilitator at a meeting (be they a man or woman) calls on men for their opinions more frequently, or responds to the men positively and takes their ideas seriously, as compared to the women, this can be a more 'subtle' form of sexism. It can be really difficult to ask critical questions about gender in contexts in which gender norms are so pervasive that they treat current gender relations as normal, and sometimes even natural. It is difficult to make space for speaking out against subtle sexism, as well as really obvious and explicit forms of sexism.

The challenges that I (and I believe others) most often face when I want to talk about gender and Indigenous law, are that 1) people tend not to talk about gender, and 2) when people do talk about gender it is often done in a way that relies on romanticized notions of gender roles and tradition. The invisibility of gender (not talking about it) can be silencing, and talking about it in limiting ways can also be silencing. The challenge in moving forward in discussions on gender and Indigenous law, will be finding a way to create space for different opinions and voices. Currently, critical perspectives and voices that draw on Indigenous feminism are excluded and silenced. As noted above, notions exist that feminism is not traditional, and it is therefore often perceived as disempowering to ask feminist-influenced questions about traditional gender roles amidst efforts aimed at revitalizing Indigenous laws. Even if one does not identify as feminist, draw on feminism, or believe in feminism, raising questions and concerns about gender still often leads to one being labeled a feminist (with all of the negative stereotypes that come along with this). Again, it is crucial to engage with Indigenous laws as intellectual resources in discussions about the misuse of power and to ask after practices of law that are anti-oppressive.

One of the challenges in talking about sexism and power is that it exposes conflict internally and externally. It is concerning to think about what some non-Indigenous people, particularly white settlers, might do with knowledge of this conflict – that they might use it in attempts to further racist stereotypes and assumptions. It is commonly asserted that Indigenous peoples are dysfunctional and/or that Indigenous laws are ‘primitive.’¹²⁵ Depictions of Indigenous law go between extreme representations of ‘savage’ practices, to representations that treat Indigenous laws as perfect. Connected to the first idea is that all Indigenous men are brutish and violent (and this is contrasted with settler societies as ‘civilized’) and connected to the second idea is the notion that Indigenous gender relations are perfectly balanced and that everyone is equal. These extreme representations are both harmful and they deny the complex lived realities of the ways that sexism exists in both Indigenous, and settler societies. It can be really hard to ask questions about gendered conflict when stuck with these two dichotomies.

Part of the challenges in talking about gender also includes thinking carefully about how it can be unsafe for Indigenous women to speak out against sexism in some contexts because of the power imbalances that exist. Realistically, I am not suggesting that everyone should talk about gender all the time, in all contexts, no matter what, because that could cause harm for many women. Indigenous women, who are often in vulnerable positions, could feel the impacts of speaking out through further marginalization, denied resources, and potential violence.¹²⁶ For women who have experienced violence, it can also be difficult to talk about gendered conflict because of trauma that can be associated with this. Talking about oppression and violence is complex, and lived realities and power dynamics are part of the challenge in discussions about gender and Indigenous law. I do think that the questions listed in the section above are important, but I also think it is important to recognize the settings that they would be raised in, and to ensure that thoughtful facilitators are part of the discussion, so as to manage the gendered and power dynamics as they come up in the discussion.

¹²⁵ Napoleon *supra* note 13 at 89; Borrows *supra* note 24 at 12. Bruce Miller explains that Indigenous laws are also often conflated with ‘culture,’ rather than talking about Indigenous laws as law (Bruce Miller, “Justice, Law, and the Lens of Culture” [2003] 18:2 *Wicazo Sa Review* 135 at 135).

¹²⁶ See Green, *supra* note 41.

When talking about gender, male power and privilege need to be discussed. I have focused on Indigenous women in this paper because Indigenous women are too often marginalized and peripheral in discussions on Indigenous law. However, if we only talk about women and their various responses to sexism, then we risk overlooking the responsibilities that Indigenous men have, as citizens living in relation to other citizens, in asking questions about their own social positions and privileges. Granted women (Indigenous and non-Indigenous) do often perpetuate sexism and denigrating gender norms, and many women need to ask questions about the norms that they uphold. However, it should not be the full responsibility of those who are oppressed, and in disempowered social positions, to find their way out of the violence actively caused and sustained by others. What can Indigenous men do to contribute to critical, realistic discussions about gender and Indigenous law that aim to de-center male experiences and privilege so as to work for an entire citizenry? How can men take up gendered analyses?¹²⁷ What intellectual resources exist in Indigenous laws for thinking about these questions?

Friedland noted at the conference that it can be difficult to do detailed work on Indigenous laws, as not a lot has been written yet on Indigenous legal theory, and methods for engaging with Indigenous laws.¹²⁸ This of course does not mean that Indigenous peoples, stories, and legal traditions are not valuable resources for thinking about Indigenous laws. Rather, the challenge that Friedland is speaking to is that it can be difficult for those who are interested in learning about Indigenous laws (Indigenous and non-Indigenous people), to find methods or ways into specific discussion that treats Indigenous law as law.¹²⁹ Drawing on John Borrows' work, Friedland has shown that significant challenges exist concerning the recognition of Indigenous legal traditions.¹³⁰ Indigenous laws need to be: intelligible, accessible, equally validated and recognized (compared to other legal orders), applicable/useful, and legitimate.¹³¹

¹²⁷ John Borrows, for example, engages in this important work on the topic of challenging violence against Indigenous women. See John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2012) 49:4 Osgoode Hall Law Review [forthcoming].

¹²⁸ Friedland, *supra* note 10.

¹²⁹ *Ibid.*

¹³⁰ Friedland, *supra* note 6 ["Reflective Frameworks"].

¹³¹ See Borrows, *supra* note 24 at Chapter 6.

Even fewer resources exist on Indigenous laws and gender.¹³² Thus one of the responses to the challenges above is continued education and work on critically thinking about the relationship between Indigenous laws and gender. The work from the conference, for example, provides valuable contributions to this ongoing discussion and has opened up important questions. Creative and important research is also being done through the University of Victoria Indigenous Law Research Unit, including a proposed degree in Indigenous laws. This work could include serious discussions about gender. There need to be many different approaches to thinking about the relationship between gender and Indigenous law and what I have presented here is one perspective.

5. Conclusion

There is a continued need in the academic work on Indigenous laws for focused and practical considerations of gender.¹³³ As is evident from the work of Indigenous feminist scholars and other activists discussed here, Indigenous women face marginalization in on-the-ground work as well. There are substantial challenges that exist when trying to talk about gender in Indigenous contexts (and settler contexts) more generally. I have included a discussion on gendered analysis above, in an effort to think about ways into critical discussions about gendered Indigenous legal realities. This approach is by no means perfect or all encompassing, and it needs to be used with power dynamics in mind.

Throughout this paper, I worked with the question: how is gender a necessary part of the ongoing work on Indigenous law? It is difficult to tackle such a complex and significant question in the short space of a paper. Gender needs to be purposefully and explicitly included in future discussions on Indigenous laws, given the gendered contexts and realities that Indigenous laws are practiced in. To ignore these realities, to treat all Indigenous peoples as though they are the same, or to treat Indigenous gender relations as perfect denies the sexism that exists and contributes to Indigenous women's marginalization. It is necessary to think further about how Indigenous laws can respond

¹³² Snyder, *supra* note 6 ["Representations"]. For exceptions see for example: Napoleon, *supra* note 80; Sarah Deer, "Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty" (2009) 24:2 *Wicazo Sa Review* 149; Irene Watson, "Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?" (2007) 26 *Australian Feminist Law Journal* 95; Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, Ottawa, University of Ottawa, 2007) [unpublished].

¹³³ Snyder, *supra* note 6 ["Representations"].

to gendered conflicts and the marginalization of Indigenous women. It is also crucial to recognize that Indigenous laws themselves are gendered and shaped by social norms and power dynamics.

It was important for me to attend the conference in Winnipeg. I had previously worked with the coordinators of the conference (and project), on a different project, in which we took up similar methods for trying to get into detailed conversations about Indigenous laws.¹³⁴ That previous project was smaller in scale and did not have a research component to it, as the “Revitalizing Indigenous Laws” project did. It was important for me to hear the student researchers talk so passionately, and with such detail, about their work, as it helped to accentuate how conversations about Indigenous laws, research methods for thinking with Indigenous law, and theories about Indigenous laws can deepen and grow over time. Part of what is exciting to me, in seeing people engage with methodologies and theory over time, is the different ideas that come together and develop in conversation with one another. I do not mean to romanticize the conversations – I am sure there were tensions and disagreements in the project, as at the conference itself, different ideas emerged amongst the student researchers and attendees. These disagreements and discussions, when taken up as part of a dialogue, rather than as dichotomies or ways to silence others, can help to contribute to the required ongoing conversation that keeps law alive and useful.¹³⁵ I have attempted to take up this spirit of dialogue here.

¹³⁴ “An Exploratory Workshop,” *supra* note 7.

¹³⁵ Napoleon, *supra* note 15.