

GENDER AND VIOLENCE: DRAWING ON INDIGENOUS LEGAL RESOURCES

EMILY SNYDER,[†] VAL NAPOLEON[‡] & JOHN BORROWS^{*}

*“Custom”
misapplied
bastardised
murdered
a frankenstein
corpse
conveniently
recalled
to intimidate
women.¹*

[†] BA (Hons), MA, PhD, Social Sciences and Humanities Research Council of Canada Postdoctoral Fellow, Faculty of Law, University of Victoria.

[‡] LLB, PhD, Law Foundation Chair of Aboriginal Justice and Governance, Provost’s Community Engaged Scholar, Faculty of Law, University of Victoria.

^{*} BA, MA, JD, LLM, PhD, LLD (Hons), FRSC, Canada Research Chair in Indigenous Law, Faculty of Law, University of Victoria. A small portion of this text has been published elsewhere. See John Borrows, “Aboriginal and Treaty Rights and Violence Against Women” (2013) 50:3 Osgoode Hall LJ 699 [Borrows, “Aboriginal and Treaty Rights”].

¹ Grace Mera Molisa, “Custom” in *Black Stone* (Suva: Mana Publications, 1983) at 24.

INTRODUCTION

In a recently published report by the Ontario Federation of Indian Friendship Centres, an action plan was proposed for addressing violence against Indigenous women.² This report was a response to the high rates of sexual violence that Indigenous women face from both Indigenous and non-Indigenous men.³ The report articulates several “working assumptions” such as “[s]exual violence is rooted in the legacy of residential schools, colonization and systemic discrimination that resulted in the loss of culture, roles, family and community structure.”⁴ The report’s assumptions are partially premised on the notion that Indigenous societies are historically non-violent and that “[c]ulture provided the guidance for relationships and described what was proper with one another. Violence was not a common element of our lives.”⁵

The efforts by organizations such as these, as well as work done by other Indigenous people and collectives, are an important part of building an ongoing dialogue concerning gendered violence. Generalizations about violence, culture, and gender permeate many proposals about how to deal with this issue. While there is much value in this work, one is often faced with romanticized views about the past and culture. What we consider here are some shifts in focus and some different perspectives to determine what can be added to the present discussions about violence against Indigenous women.

We do acknowledge that addressing culture in a general way can be an important starting point when seeking change within any nation, society or group. Humans are broadly motivated to lead better lives when supported by shared aspirations, world views, beliefs, values, practices,

² Ontario Federation of Indian Friendship Centres, *Aboriginal Sexual Violence Action Plan* (Toronto: Ontario Federation of Indian Friendship Centres, 2011), in partnership with the Métis Nation of Ontario and the Ontario Native Women’s Association, online: <www.ofifc.org>.

³ *Ibid* at 2.

⁴ *Ibid*.

⁵ *Ibid* at 3.

customs, technologies, heritage, art, and symbols. When people feel a commitment to nurture, refine, cultivate, and transmit their best teachings, practices, and traditions through the generations this can often—though not always—be beneficial to the group and those who surround them. Since these and other aspects of human behavior—which may be called “culture”—cannot always be effectively identified and captured by any one label, class, or categorization, it is perhaps necessary to talk in generalities when initiating a discussion about what can be done to change any particular society for the better. However, as most commentators would no doubt acknowledge, proposals to positively change societies must eventually move beyond generalities. We must move from focusing on general claims of culture to considering which specific aspects of Indigenous legal traditions can be deployed to more effectively address this problem.⁶

This shift to specificity is especially important in dealing with gendered violence because culture can be used in ways that are harmful to societies as a whole and to women in particular. Culture is a concept that is always deployed in the real world, where the forces of power, privilege, and hierarchy mingle and compete. In these circumstances culture can be “hijacked” by those in authority to create or replicate a male-dominated status quo. In other words, culture can foster conditions that reproduce individual and institutional violence against women. With this in mind, we believe that discussions of culture should never be disconnected from concerns about power; culture can be a source for the abuse of power, as much as it can be a force for liberation when examined in real world terms.

We believe that a different analysis is necessary when discussing violence against Indigenous women. Further questions must be asked about how legal traditions will be deployed, by whom, and for what purposes. In any discussion about culture, we must ensure that we highlight and defend those cultural practices that allow hard questions

⁶ Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 *Indigenous LJ* 1 at 29 [Friedland, “Reflective Frameworks”].

to form part of our conversations, while also resisting those conventions that are limiting. We believe this takes us into the realm of law.

Of course, Indigenous culture is not disconnected from Indigenous law. Indigenous laws flow from Indigenous cultures as a contextually specific set of ideas and practices aimed at generating the conditions for greater peace and order. What we are interested in doing here involves shifting from broad questions such as “[w]hat are the cultural values?” and “[w]hat are the ‘culturally appropriate’” responses, to questions about legal reasoning and principles within Indigenous legal traditions and decision-making processes.⁷ We ask: How might we begin thinking about violence against Indigenous women through the frame of Indigenous law? Can Indigenous legal traditions—including stories as precedent—and legal processes help us advance this work? What can a critical gendered approach to Indigenous laws offer to this discussion?

Indigenous peoples have long applied their laws to issues concerning gendered violence. In saying this we do not suggest that gendered violence is practised and experienced in exactly the same way today as it was in the past or at the same levels. Furthermore, we do not suggest that Indigenous laws are timeless and that their theories and applications never change.⁸ In fact, we believe that laws in all societies change over time and there is a need to be contextually specific in how they are theorized, taught, and practised.

We are writing this paper because there is a danger in viewing the “Indigenous” past as being non-violent and non-sexist. We are critical of

⁷ *Ibid* at 29. See also the important work of Bruce Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001). Miller argues that the work of Indigenous peoples to establish and re-establish their own justice systems is hampered by an “Edenic” view of the past in which primordial harmony and healing are emphasized at the cost of ignoring and denying internal power relations and conflict: *ibid* at 5–6, 12.

⁸ See Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria Faculty of Law, 2009) [unpublished] at 91 [Napoleon, *Ayook*]; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 60 [Borrows, *Canada's Indigenous Constitution*].

this perspective because it overlooks the lessons Indigenous peoples can learn and have learned through time when they confronted gendered violence in their societies. There are significant intellectual legal resources that exist within Indigenous communities for thinking about and challenging social problems. Unfortunately, these resources will become invisible if we narrate the past as if it were free from violence. There was gendered violence in Indigenous societies historically and sometimes it was very significant. The historic accounts of and responses to such violence provide Indigenous peoples with legal resources for dealing with similar issues of violence today. These resources can be accessed, *inter alia*, through precedent in the form of Indigenous stories, songs, dances, teachings, practices, customs, and kinship relationships. These resources can be used to reason collaboratively within Indigenous communities (and beyond) to discover and create standards and criteria for discussion, debate, and judgment when addressing violence against women.

This is not to say that we believe Indigenous laws are perfect or that they will provide easy solutions. We acknowledge that the authority of these laws flow from many sources and are subject to many interpretations.⁹ Likewise, we recognize that Indigenous law, like all law, has its limits. Law should never be the only system discussed or applied in dealing with violence against women. We believe in process pluralism, which encourages many different systems to operate in harmony and in competition with one another to deal with violence against women as long as they are attentive to the issues of power and gender.¹⁰ Yet even such diversity and careful attention to gendered violence within each system would not lead to a perfect world. Any living system, with humans as its agents, is subject to all the limitations human reason and

⁹ Even among the authors, while we share some similarities in our approach, differences also exist. We consider the tensions between our perspectives to be useful openings for contemplation and discussion.

¹⁰ For a discussion of process pluralism from a feminist perspective, see Carrie Menkel-Meadow, "Peace and Justice: Notes on the Evolution and Purposes of Legal Processes" (2006) 94:2 Geo LJ 553.

action possess. This includes Indigenous legal processes and practice, despite the significant promise and strength law offers.

At the same time, our approach—which draws attention to instances of historically internalized gendered violence—should not be interpreted as saying that we believe the past was one of unremitting violence. Indigenous histories are filled with many inspiring examples and eras of significant peace, friendship, kindness, love, harmony, goodwill, and positive social experiences. Nevertheless, the past also includes significant periods and instances of hostility, aggression, cruelty, abuse, and violence, particularly against women. Indigenous peoples, like all peoples of the world, experienced and are capable of expressing boundless goodness, as well as tolerating and encouraging every form of socially dysfunctional and malevolent human action. This is why we believe law is necessary when discussing culture; it helps ensure that we examine the past and apply its lessons in the light of our complex circumstances, and to ensure that we do not thoughtlessly generate the conditions that allowed or allow the worst within and among us to dominate.

In drawing on the resources of Indigenous law, we emphasize that any approach to dealing with violence against women can be significantly hindered when communities and groups overly romanticize their own historic experiences or fail to take account of their past weaknesses. We take the position that violence against women must matter to Indigenous law and Indigenous law must matter to violence against women. We contend that it is through critically constructive discussions about gender and power which resist romanticizing gender, law, and the past, that Indigenous law will be useful for thinking about today's legal challenges.

As a caveat, it should be noted that responding to these challenges with Indigenous law does not mean the same thing as responding with restorative justice. In her work on sexual violence, Sarah Deer notes that “[m]any scholars of indigenous law, mostly men, have suggested that one of the solutions to violent crime in Indian country is to develop ‘peacemaking’ sessions . . . [that would] include talking circles, family

meetings, and restorative principles.”¹¹ While there is value in using restorative justice principles in certain contexts, we are mindful of the important critiques of using restorative justice processes to respond to violence against women.¹² While restorative justice may have value in certain times and places, those concepts are not the focus of our article. Indigenous law and restorative justice should not be conflated.¹³

This article is divided into two parts. In Part One, we discuss the necessity of recognizing the prevalence of violence against women as well as gendered legal realities of Indigenous law. We discuss how rhetoric about gender, often deployed in the name of Indigenous law and empowerment, can also be interpreted and experienced as damaging to legal processes and harmful to Indigenous women. We consider different ways that Indigenous people have attempted to address violence against women using state law and modern Indigenous law, and we suggest here that an additional way for thinking about gendered violence is to draw law from stories.

In Part Two, we take up two different approaches for critically engaging with stories. First, we apply an adapted case method analysis to a story. Second, we use Indigenous feminist legal methodology to think through another story. By working with these methodologies and stories, we aim to provide examples of different ways for critically engaging with Indigenous law as a means to address violence against women. We do not

¹¹ Sarah Deer, “Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty” (2009) 24:2 *Wicazo Sa Rev* 149 at 155 [Deer, “Decolonizing”].

¹² See e.g. Deer, “Decolonizing”, *ibid.* For additional discussions about restorative justice, see also Andrea Smith, “Beyond Restorative Justice: Radical Organizing Against Violence” in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 255; Angela Cameron, “Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective” (2006) 18:2 *CJWL* 479 [Cameron, “Sentencing”].

¹³ See Val Napoleon et al, “Where is the Law in Restorative Justice?” in Yale D Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed (Saskatoon: Purich, 2008) 348 [Napoleon et al, “Where is the Law”]; Angela Cameron, “Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence” (2006) 10:1 *Theoretical Criminology* 49.

say that stories are the only source for reasoning with Indigenous law, but we do believe they provide rich legal resources and information regarding legal principles, processes, reasoning, and precedent.¹⁴

PART ONE: THE IMPORTANCE OF CONTEXT: GENDERED LEGAL REALITIES

1.1. WHY VIOLENCE AGAINST WOMEN HAS TO MATTER TO INDIGENOUS LAW

1.1.1. *Gendered Legal Realities*

Indigenous women are beaten, sexually assaulted, and killed in shockingly high numbers.¹⁵ They experience violence at rates three times higher than the general population of women.¹⁶ This violence is also

¹⁴ See John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out Law*]; Val Napoleon & Hadley Friedland, "An Inside Job: Developing Scholarship from an Internal Perspective of Indigenous Legal Traditions", in José Antonio Lucero, Dale Turner & Donna Lee Van Cott, eds, *Oxford Handbook of Indigenous Peoples' Politics* [forthcoming] [Napoleon & Friedland, "Inside Job"].

¹⁵ See Statistics Canada, "Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009", by Shannon Brennan, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2011) at 5 ("In 2009, close to 67,000 Aboriginal women aged 15 or older living in the Canadian provinces reported being the victim of violence in the previous 12 months. Overall, the rate of self-reported violent victimization among Aboriginal women was almost three times higher than the rate of violent victimization reported by non-Aboriginal women. Close to two-thirds (63%) of Aboriginal female victims were aged 15 to 34. This age group accounted for just under half (47%) of the female Aboriginal population (aged 15 or older) living in the ten provinces"). For commentary related to this violence, see Anita Olsen Harper, "Is Canada Peaceful and Safe for Aboriginal Women?" (2006) 25:1-2 Canadian Woman Studies 33.

¹⁶ Statistics Canada, *supra* note 15 at 7. For a more general discussion of Aboriginal women and the law, see Patricia Monture-Angus, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack, ed, *Locating Law: Race/Class/Gender/Sexuality Connections*, 2nd ed (Halifax, NS: Fernwood, 2006) 73 [Monture-Angus, "Standing Against"].

extremely brutal in comparison to that in the general population.¹⁷ Indigenous women are five times more likely to be killed or to disappear as compared to non-Indigenous women.¹⁸ Indigenous women also face higher rates of incarceration than the general population of women, due in part to their response to this violence against them.¹⁹

Violence against women is sustained and perpetuated in this climate, in which Indigenous women are devalued and violence is normalized. Indigenous women face marginalization both formally (through state and modern Indigenous policies, laws, and institutional practices) and informally (through gendered norms and destructive stereotypes).²⁰ Although much of the discussion in this article might appear to be focused on more commonplace conceptualizations of violence against women (domestic violence, sexual violence, and physical violence),

¹⁷ See generally Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Queen's Printer, 1991) (Chairs: AC Hamilton & CM Sinclair) at 475–87.

¹⁸ See Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada* (London: Amnesty International Publications, 2009) at 1, online: <www.amnesty.ca>.

¹⁹ Patricia Monture-Angus, "Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice" (1999) 19:1–2 *Can Woman Studies* 24; Fran Sugar & Lana Fox, "Nistum Peyako Schr'wawin Iskwewak: Breaking Chains" (1990) 3:2 *CJWL* 465. This paragraph is quoted from Borrows, "Aboriginal and Treaty Rights", *supra* note * at 700.

²⁰ See Joyce Green, "Taking Account of Aboriginal Feminism" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 20 [Green, "Taking Account"]; Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 233 [Napoleon, "Aboriginal Discourse"]; Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 *American Quarterly* 259; Mishuana R Goeman & Jennifer Nez Denetdale, "Native Feminisms: Legacies, Interventions, and Indigenous Sovereignities" (2009) 24:2 *Wicazo Sa Rev* 9 [Goeman & Denetdale, "Native Feminisms"].

Indigenous women also experience economic violence, emotional violence, spiritual violence, and symbolic violence. When we talk about violence against Indigenous women, this includes acknowledging and thinking about the complex ways in which violence manifests both socially and personally in ways that are seen, unseen, heard, unheard, felt, anticipated, and feared. In thinking about Indigenous legal orders today, Indigenous laws need to be able to challenge violence against Indigenous women in all its forms—from physical violence to degrading stereotypes.

In practicing and theorizing Indigenous laws, the prevalence of violence against women needs to be fully comprehended. Too often in discussions about Indigenous law, women are overlooked or gender is talked about in limiting ways (this is discussed below). It would be remiss to talk about Indigenous laws (which are to be practised by and for an entire citizenry) without understanding that Indigenous legal subjects have different lived realities because of their gender.²¹ There are similarities in the experiences of Indigenous women and men; however, Indigenous women have different lived realities, especially in relation to violence.²² Indigenous scholars and activists who write about gender have illustrated the need for an intersectional analysis.²³ Race, gender, sexuality, class, ability—these are all connected constructs that impact

²¹ Emily Snyder, “Indigenous Feminist Legal Theory” (2014) 26:2 CJWL 365 [Snyder, “Indigenous Feminist Legal Theory”].

²² See generally notes 17–22.

²³ See e.g. Green, “Taking Account”, *supra* note 20; Monture-Angus, “Standing Against”, *supra* note 16; Verna St Denis, “Feminism is for Everybody: Aboriginal Women, Feminism and Diversity” in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 33; Andrea Smith, “Native American Feminism, Sovereignty and Social Change” in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 93 [Smith, “Native American”]; Emma LaRocque, “Métis and Feminist: Ethical Reflections on Feminism, Human Rights and Decolonization” in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 53 [LaRocque, “Métis and Feminist”]; MA Jaimes-Guerrero, “‘Patriarchal Colonialism’ and Indigenism: Implications for Native Feminist Spirituality and Native Womanism” (2003) 18:2 *Hypatia* 58.

one's life. Indigenous feminist theory makes it clear that racism, colonialism, sexism, and patriarchy, for example, are all interconnected forms of violence that support one another.²⁴ Thus, in decolonization efforts, systemic sexism must be explicitly acknowledged and challenged.²⁵

Sexism is a major social problem in Indigenous communities today (as with other communities) and violence against Indigenous women does not only come from settler violence, but is also perpetuated internally.²⁶ Indigenous women will continue to be marginalized within their communities (and in Canada) if Indigenous communities are not recognized as having responsibilities in relation to overturning the male dominance and privilege that exists on too many reserves.²⁷ Indigenous women can face economic oppression in part because Indigenous men are more likely to be in leadership positions in communities and are

²⁴ Green, "Taking Account", *supra* note 20; St Denis, *supra* note 23; Smith, "Native American", *supra* note 23; LaRocque, "Métis and Feminist", *supra* note 23; Jaimes-Guerrero, *supra* note 23.

²⁵ See Napoleon, "Aboriginal Discourse", *supra* note 20 at 234; Green, "Taking Account", *supra* note 20 at 23; Luana Ross, "From the 'F' Word to Indigenous/Feminisms" (2009) 24:2 *Wicazo Sa Rev* 39 at 50; Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, Mass: South End Press, 2005) at 137–39 [Smith, *Conquest*]; Goeman & Denetdale, "Native Feminisms", *supra* note 20; Lisa Kahaleole Hall, "Navigating Our Own 'Sea of Islands': Remapping a Theoretical Space for Hawaiian Women and Indigenous Feminism" (2009) 24:2 *Wicazo Sa Rev* 15 at 28–31.

²⁶ See Kiera L. Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13:1 *Austl Indigenous L Rev* 62 at 66.

²⁷ Though in saying this, we do not suggest that settler Canadians are exempt from responsibilities in relation to the overall problem of violence against Indigenous women (and violence against women generally). Given that patriarchy and colonialism are intimately connected, and the devaluation of Indigenous women is perpetuated by mainstream Canadian society and institutions, non-Indigenous Canadians, especially those in positions of social privilege, have much work to do in challenging destructive ideologies and practices that sustain a culture of violence towards Indigenous women.

more likely to be able to control resources.²⁸ Further, Indigenous women face political marginalization,²⁹ which no doubt contributes to the overall problems being discussed here, as their voices and knowledge are seldom deemed authoritative in the political sphere. Addressing the high levels of violence perpetrated by men must be a part of theorizing and practicing Indigenous law, since “[v]iolence against women is one of the key means through which male control over women’s agency and sexuality is maintained.”³⁰ Violence against women, though often experienced in interpersonal relationships, is connected to larger social structures of inequality within any society.³¹ Violence against women is therefore intimately linked with the broader colonial context, which must be accounted for when engaging with Indigenous law.³²

²⁸ See Green, “Taking Account”, *supra* note 20 at 24.

²⁹ See Joyce Green, “Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government” (1993) 4:4 Const Forum Const 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 Political Economy 65.

³⁰ UN, *Ending Violence Against Women: From Words to Action – Study of the Secretary General* (New York: UN, 2006) at 1. This sentence, as well as the next two sentences are drawn directly from Borrows, “Aboriginal and Treaty Rights”, *supra* note * at 708–09. See also *In-Depth Study on All Forms of Violence Against Women: Report of the Secretary General*, UNGAOR, 61st Sess, UN Doc A/61/122/Add.1 (2006).

³¹ *Ibid.* See also Hillary N Weaver, “The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women” (2009) 24:9 J Interpersonal Violence 1552; Ladner, *supra* note 26.

³² For a discussion of how colonization is linked with violence against women see generally Smith, *Conquest*, *supra* note 25; Mary Ellen Turpel, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” (1993) 6:1 CJWL 174; Ladner, *supra* note 26. For a discussion of how section 35(1) of the *Constitution Act, 1982* is designed to address colonialism, see *R v Sparrow*, [1990] 1 SCR 1075 at 1101–06, 70 DLR (4th) 385; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 141, 153 DLR (4th) 193; *R v Côté*, [1996] 3 SCR 139 at para 53, 138 DLR (4th) 385:

[A] static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in

Not only do Indigenous laws need to reflect the gendered realities and prevalence of violence against women, those who practise and theorize Indigenous laws need to also recognize how systemic sexism shapes law. As Emily Snyder has argued elsewhere, Indigenous laws need to be understood as gendered.³³ Indigenous law, like all other forms of law, is not neutral; rather, it is heavily influenced by dominant social norms. Countless legal scholars, including Indigenous legal scholars, have shown how systemic racism plays out in state law.³⁴ Scholars have also shown that state law perpetuates and relies on sexist ideologies (and classist, heterosexist ideologies),³⁵ and feminist legal scholars, as well as Indigenous legal scholars, have written on state law's discriminatory and oppressive practices against Indigenous women.³⁶ Given the prevalence of sexism in Indigenous communities, Indigenous laws can perceive and treat Indigenous women and men differently.³⁷ In other words, Indigenous law can be influenced by sexist ideologies and can be a site for reproducing power dynamics in ways that discipline gendered legal subjects.³⁸

the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.

³³ Snyder, "Indigenous Feminist Legal Theory", *supra* note 21.

³⁴ See e.g. Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2:1 *Indigenous LJ* 67.

³⁵ See e.g. Margaret Davies & Kathy Mack, "Legal Feminism – Now and Then" (2004) 20:1 *Austl Feminist LJ* 1; Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) [Smart, *Feminism*].

³⁶ See e.g. Monture-Angus, "Standing Against", *supra* note 16; Joyce Green, "Balancing Strategies: Aboriginal Women and Constitutional Rights", in Joyce Green, ed., *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 140; Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 *CJLS* 91.

³⁷ See Snyder, "Indigenous Feminist Legal Theory", *supra* note 21.

³⁸ See *ibid.*

Power dynamics play out in legal practices and processes. They also play out in interpretations of the present and the past. While many Indigenous societies have principles about gender relations (e.g. respecting women), there is a widespread disjuncture between these ideals and everyday gender norms and practices.³⁹ Given the prevalence of violence against women—and, more generally, sexism in Indigenous communities—gender norms, or dominant patterns of behaviour, are not congruent with principles of respect. “To characterize Indigenous law as gendered does not mean seeking out what the different ‘legal rules’ are for Indigenous women and men (if these exist in a given Indigenous legal order)”; rather, it is about considering the “intellectual processes and the various discourses that sustain dominant truths about Indigenous laws and legal subjects.”⁴⁰ Some of these gendered discourses might be read as “traditional” and some might be read as colonial. This is discussed in further detail below; however, *all* gendered discourses should be engaged with, discussed, and re-evaluated if they are oppressive. Further, while our focus in this article is on violence against women, this is not just a “woman’s problem”, and speaking of law as gendered goes far beyond “women’s issues”.⁴¹ We are all gendered (albeit in different ways and in relation to a multitude of intersections such as class, race, and sexuality) and thinking about law as gendered includes thinking about all genders and considering the complex ways that gendered subjects are privileged, disempowered, enabled, and restricted via law. By focusing on predominate patterns pertaining to violence against Indigenous women, our discussion is overwhelmingly focused on violence as it falls along the gender binary—largely between cisgendered women and men. As such, our discussion is only one part of a much larger discussion that needs to be had. It is crucial that Indigenous laws be understood as resources that are accountable to, and useful for, challenging this very binary and for understanding all forms of violence as it occurs between variously sexed and gendered people.

³⁹ See *ibid*; St Denis, *supra* note 23 at 39–40.

⁴⁰ Snyder, “Indigenous Feminist Legal Theory”, *supra* note 21 at 391.

⁴¹ *Ibid*.

We draw on Indigenous feminist legal theory for a critical gendered analysis of violence against women and Indigenous laws.⁴² Indigenous feminist legal theory encourages analysis that is attentive to power not only in terms of constraints that exist and are reproduced, but also in terms of recognizing agency and resistance.⁴³ In moving forward with our discussion on how we can begin thinking about violence against women through the frame of Indigenous law, we emphasize the deliberative aspect of Indigenous legal processes. Discussion, debate, and revision are necessary for Indigenous laws to remain pertinent and useful to Indigenous peoples (as is the case with all law).⁴⁴ Retrospectively anchored “originalist” interpretations of law should be resisted in an Indigenous context because of their tendency to freeze and romanticize the past.⁴⁵ Though Snyder is writing about Indigenous law and gender generally, her questions are pertinent to our discussion here. “[W]hose experiences and knowledge are valued” and shape legal practices and interpretations?⁴⁶ Also,

[a]re men benefitting from particular legal practices, processes, and principles, while women are being marginalized by them? What resources are available in Indigenous legal traditions to address gendered oppressions? What would it take to draw on these resources in practice? What space exists for dissent?⁴⁷

Law, as Carol Smart has emphasized, is a site of gender struggle.⁴⁸ Law is about conflict.⁴⁹ As we have been emphasizing, Indigenous laws

⁴² See generally *ibid.*

⁴³ See *ibid.* at 395.

⁴⁴ See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at 7–10.

⁴⁵ John Borrows, “(Ab)originalism and Canada's Constitution” (2012) 58 SCLR (2d) 351 at 360–61.

⁴⁶ Snyder, “Indigenous Feminist Legal Theory”, *supra* note 21 at 391.

⁴⁷ *Ibid.*

⁴⁸ See generally Smart, *Feminism*, *supra* note 35; Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London, UK: Sage, 1995).

can be used in ways that perpetuate systemic sexism if they are not contextually deliberated with power dynamics in mind. Indigenous feminist legal theory “is an important analytic tool that is intersectional, attentive to power, anti-colonial, anti-essentialist, multi-juridical, and embraces a spirit of critique that challenges static notions of tradition, identity, gender, sex, and sexuality.”⁵⁰ With this in mind, we now turn to a discussion on rhetoric that often negates or denies the breadth of gendered conflict and violence. We engage in this discussion before turning to our analysis of stories because much of this rhetoric is commonly deployed in ways that halt the critical discussions so vital for maintaining healthy legal orders.

1.1.2. “Intellectual Black Holes”⁵¹: Oppressive Conceptualizations and Uses of Gender and Tradition

We encounter idealistic rhetoric throughout our work on Indigenous law. This rhetoric is widespread in academic texts,⁵² in discussions at conferences and workshops, in classrooms, in universities, at meetings, in the media, and in everyday conversations. Both Indigenous men and women take it up. In discussing this rhetoric we ask after who and what these discourses serve. What do they tell us about gender? What do they tell us about law? How can we engage productively with this rhetoric? In identifying and critiquing this rhetoric, we ask readers to consider how it contributes to systemic oppression by erasing social context and silencing critical discourses. This is difficult and contentious work; it is also urgent. The binaries of authentic/inauthentic and traditional/colonized,

⁴⁹ Jeremy Webber, “Naturalism and Agency in the Living Law” in Marc Hertogh, ed, *Living Law: Reconsidering Eugen Eherlich*, (Portland: Hart, 2008) 201 at 202. See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada’s Indigenous Constitution*, *supra* note 8 at 10–11.

⁵⁰ Snyder, “Indigenous Feminist Legal Theory”, *supra* note 21 at 401.

⁵¹ See Napoleon, “Aboriginal Discourse”, *supra* note 20 at 235.

⁵² See Emily Snyder, *Representations of Women in Cree Legal Educational Materials: An Indigenous Feminist Legal Theoretical Analysis* (PhD Thesis, University of Alberta Department of Sociology, 2013) [unpublished] [Snyder, Representations].

which are firmly rooted in this rhetoric, create intellectual black holes that have lived consequences for Indigenous peoples, especially women.

As noted, one of the more powerful discourses that is deployed in conversations about gender is the assertion that Indigenous societies had (and some argue, still have⁵³) perfectly balanced gender roles prior to contact.⁵⁴ The notion here is that Indigenous women and men each had their roles, and that these were equally valued, and they were complementary. In this discourse, Indigenous women are talked about as being respected and highly regarded participatory members of society. Here, colonialism brought gendered violence and imposed European gender roles that devalued Indigenous women. However, life has always been more complicated for Indigenous women and for Indigenous communities. While there are some limited oral traditions and written accounts that describe how historic Indigenous societies did not deploy power in ways that were damaging to gendered relations, there are also extensive contrary oral and written sources.⁵⁵ There is also no doubt that colonialism severely and negatively affected how Indigenous men and women related to one another—Indigenous people are dealing with distinctly high levels of violence today that need to be understood in relation to contemporary contexts and challenges. There were significant impacts via colonial patriarchal and patrilineal policies, residential schools, and colonial economic practices more generally. These forces have had exceedingly negative impacts on Indigenous gender ethics and

⁵³ For a discussion on this, see St Denis, *supra* note 23 at 37–40.

⁵⁴ For a short discussion on “balance” rhetoric, see LaRocque, “Métis and Feminist”, *supra* note 23 at 55.

⁵⁵ See e.g. Mary-Ellen Kelm & Lorna Townsend, eds, *In the Days of Our Grandmothers: A Reader in Aboriginal Women's History in Canada* (Toronto: University of Toronto Press, 2006); Sarah Carter & Patricia Alice McCormack, eds, *Recollecting: Lives of Aboriginal Women of the Canadian Northwest and Borderlands* (Edmonton: Athabasca University Press, 2011); Brenda J Child, *Holding Our World Together: Ojibwe Women and the Survival of Community* (New York: Viking, 2012); Laura F Klein & Lillian A Ackerman, *Women and Power in Native North America* (Norman: University of Oklahoma Press, 1995).

roles.⁵⁶ Furthermore, matrilineal societies, and societies that strived to embrace gender fluidity, were condemned and forced to take up structures based on the male/female binary wherein the male side received privileges and were recognized as having the most valued attributes.⁵⁷ Colonialism was, and still is, reliant on patriarchal, heterosexist violence.⁵⁸ On this point, Kiera Ladner has observed that “gender must be decolonised and decolonisation must be gendered.”⁵⁹

Given these insights, we contend that it is possible to work with the idea that colonialism has negatively impacted gender norms and is reliant on gendered violence without necessarily having to also claim that gender relations prior to contact were perfect. Joanne Barker explains that “[t]he important conceptual challenge in understanding the impact of these [patriarchal, heterosexist, and homophobic] ideologies on Indian peoples is refusing a social evolutionary framework in which pristine, utopian Indian societies degenerate into tragically contaminated ones.”⁶⁰ The past ought not to be seen as only perfect and the present ought not to be seen as beyond repair. Further, Emma LaRocque

⁵⁶ See generally Ladner, *supra* note 26; Val Napoleon, “Raven’s Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues” (2002) 17:2 CJLS 149.

⁵⁷ See *ibid.*

⁵⁸ See generally Smith, *Conquest*, *supra* note 25; Ladner, *supra* note 26 at 63. The scholarship of other Indigenous scholars, notably Taiaiake Alfred and Patricia Monture-Angus, has addressed colonization and decolonization extensively. However, since their critiques of law as a colonizing force obscures the potential of Indigenous law for rebuilding citizenries as part of the decolonizing project, we do not engage with their work here. See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999); Patricia A Monture-Angus, *Journeying Forward: Dreaming First Nations Independence* (Halifax, NS: Fernwood, 1999).

⁵⁹ Ladner, *supra* note 26 at 63.

⁶⁰ Barker, *supra* note 20 at 262.

emphasizes that even in matrilineal societies, gendered violence (targeting women) can be imagined.⁶¹

We are particularly concerned about how conceptions of gender balance are used to deny sexism in Indigenous communities today.⁶² The “traditional” gender roles that Indigenous women are encouraged to practise are often framed in ways that are restrictive and at odds with today’s social context. This is similar to the rhetoric of motherhood raised in discussions on Indigenous women’s gender roles. This motherhood rhetoric ultimately obscures, mischaracterizes, and too narrowly frames Indigenous women’s options, choices, and contributions within their societies. This is particularly problematic when women’s responsibilities and contributions as citizens are only framed in relation to nurturing and caring for the nation. While “mothering the nation” is espoused as something to take pride in as a highly respected role, this discourse too often forecloses a multitude of other functions and roles that Indigenous women assume in their societies.

While, for some, the responsibility of Indigenous women to mother is not necessarily an obligation to have children, for others physically and literally birthing the next generation is said to give women particular spiritual connections and specific knowledge of how to relate to others.⁶³ In her work on tribal governance responses to sexual violence in the US, Sarah Deer claims that “[p]rotecting women—the *life-bearers* and

⁶¹ See Emma LaRocque, “The Colonization of a Native Woman Scholar,” in Christine Miller & Patricia Chuchryk, eds, *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 11 at 14 [LaRocque, “The Colonization”]. LaRocque, citing historical observations and indigenous stories, notes that “[i]t should not be assumed, even in those original societies that were structured along matriarchal lines, that matriarchies necessarily prevented men from oppressing women. There are indications of male violence and sexism in some Aboriginal societies prior to European contact and certainly after contact”: *ibid* at 14.

⁶² St Denis, *supra* note 23 at 37–40.

⁶³ See Kim Anderson, “Affirmations of an Indigenous Feminist” in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: UBC Press, 2010) 81 at 86–88.

life-givers of nations—is central to the *well-being* of nations.”⁶⁴ We agree that Indigenous women’s well-being is vital to the overall well-being of a nation; however, we also believe that probing questions need to be asked when the rhetoric of motherhood is framed in the language of culture and tradition. The need for such questions extends to instances of evoking “the sacred”, particularly when the sacred is placed beyond human challenge and understanding. While we believe much can be considered sacred in the world, we do not believe this label should shield justifications for gendered violence and the subordination of women against human inquiry and interrogation. In relation to the rhetoric of motherhood, we ask: Who and what do these discourses serve? Motherhood is no doubt powerful and meaningful to many Indigenous women, and can be imagined in non-essentializing, non-oppressive ways. While we can also imagine work and responsibilities occasionally being allocated along gendered lines for limited tasks and periods of time, in ways which are tentative, provisional, contingent, and non-essentializing, and which do not lead to violence and subordination, we still need to interrogate the rationale and motivation for such arrangements. So what happens when motherhood is rhetorically evoked in fundamental ways which treat motherhood as a compulsory aspect of being an Indigenous woman?

What this rhetoric tells us about gender is that Indigenous women are valued and defined largely in relationship to their bodies. An anti-essentialist approach would ask how this limits what we imagine Indigenous women’s being, capabilities, and contributions to be.⁶⁵ In challenging violence against women, we assert that Indigenous women deserve the right to safety and bodily integrity simply because they are humans. Rhetoric about sacred bodies, special roles, and special gifts may have a place if such language could be interrogated, and if it were applied in non-essentialized ways with respect for the dignity and agency of all genders. However, in its present form, such rhetoric does not generate

⁶⁴ Deer, “Decolonizing”, *supra* note 11 at 152 [emphasis added]. Deer says this in response to sexism—not as a way to deny its prevalence.

⁶⁵ See Snyder, *Representations*, *supra* note 52.

effective grounds upon which to fight against violence. Indigenous women, regardless of their enactment of gender, have the right to safety on the grounds of their humanity.

Motherhood rhetoric also limits Indigenous women in that it insists on a lens that relies heavily on heterosexuality. Further, the insistence that Indigenous women are to nurture the nation creates substantial burdens for women. As noted above, Indigenous girls and women are limited when they are imagined first and foremost (and sometimes only) as mothers or future mothers. Motherhood rhetoric also creates burdens in that women who are economically, politically, and socially disadvantaged, as well as at risk of high rates of violence, are being pressured to somehow find their way to nurture and take care of everyone. Kim Anderson notes that strong kinship and support systems are not in place, and remarks, “[w]hat, we may ask, are the fathers of the nation doing for children”?⁶⁶ Further, she asks people to consider what it means to insist on valuing and taking up motherhood in a patriarchal context.⁶⁷

Reflecting on “tradition”, Anderson suggests that

[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.⁶⁸

⁶⁶ Anderson, *supra* note 63 at 87.

⁶⁷ *Ibid.* LaRocque discusses how “motherhood” is often touted in a way that treats women’s domestic roles as empowering and having “cultural” status. She considers that this concept of “balance”—between women’s roles and men’s roles—might just be “a new buzzword for keeping women to domestic and nurturing roles”: LaRocque, “Métis and Feminist”, *supra* note 23 at 55. She further explains that “it does remain that for many, idealization of nurturing/motherhood has been reified and has gained political currency within nationalist and cultural difference discourses”: *ibid* at 55. For an in-depth study of poverty and federal policy on reserves, see Hugh Shewell, “Enough to Keep Them Alive”: *Indian Welfare in Canada, 1873–1965* (Toronto: University of Toronto Press, 2004).

⁶⁸ Anderson, *supra* note 63 at 88.

While the rhetoric of motherhood is advanced as empowering to Indigenous women (and is likely also felt and experienced as such for some Indigenous women), we question how well this rhetoric actually serves Indigenous women, how it mitigates violent realities, and how it silences other ways of being. Emma LaRocque urges that

as women we must be circumspect in our recall of tradition. We must ask ourselves whether and to what extent tradition is liberating to us as women. We must ask ourselves wherein lies (lie) our source(s) of empowerment. We know enough about human history that we cannot assume that all Aboriginal traditions universally respected and honoured women. (And is “respect” and “honour” all that we can ask for?)⁶⁹

Throughout this article, we advocate against understanding Indigenous legal traditions and Indigenous peoples as being frozen in history. It is unjust to claim that Indigenous peoples cannot change (like everyone else does, and all other cultures and societies do). So too must we resist treating historic gender roles as frozen and static. Indigenous women in particular have paid a high price for having to conform to so-called traditional gender roles and will continue to do so if we cannot see past the rhetoric.⁷⁰

This is why we are concerned about assertions of perfect and balanced gender roles prior to contact; these views can lead to a romanticization of the past wherein gendered conflict and violence are erased. In her work on sexual assault laws and Indigenous sovereignty,

⁶⁹ LaRocque, “The Colonization”, *supra* note 61 at 14. Green also notes that “[r]ejecting the rhetoric and institutions of the colonizer by embracing the symbols of one’s culture and traditions is a strategy for reclaiming the primacy of one’s own context in the world, against the imposition of colonialism. But, in the absence of an analysis of the power relations embedded in tradition, it is not necessarily a liberatory strategy”: Green, “Taking Account”, *supra* note 20 at 27.

⁷⁰ See Jennifer Nez Denetdale, “Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition” (2006) 21:1 *Wicazo Sa Rev* 9 [Denetdale, “Chairmen”]. Denetdale’s work on power and tradition is important. A reading of her work should include, however, an approach that asks after how all assertions of tradition should be discussed, not just assertions of tradition in which colonial ideals seem to exist.

Deer quotes an elder who describes that “‘violence was virtually nonexistent in traditional Indian families and communities. The traditional spiritual world views . . . prohibited harm by individuals against other beings.’”⁷¹ With respect, we believe that as a historical statement this elder’s view is simply wrong; it is both overbroad and does not generally accord with Indigenous societies’ pre-colonial experiences. However, as a legal resource this passage is very significant because it shows that sexual violence was (and is) not acceptable to this respected leader, and we may understand this as a normative commitment and an aspiration of law. This requires re-emphasis: just because something is prohibited by law does not mean that it never happens. Laws exist to respond to conflicts and counternarratives should inform any analysis. Deer asserts that “[r]esisting rape means resisting colonization.”⁷² Her perspective importantly points to the use of sexual violence as a tool of colonization; however, if taken out of context, it also dangerously implies that gendered violence is *only* colonial and that Indigenous histories are pure and non-violent. Professor Deer does not generally take this point of view in her work.⁷³

Again, when Indigenous (and non-Indigenous) people claim perfect histories with perfect laws (laws that worked for everyone and that were miraculously followed by every single person), too much is lost. In

⁷¹ Deer, “Decolonizing”, *supra* note 11 at 152.

⁷² *Ibid.*

⁷³ See e.g. Sarah Deer et al, *Tribal Legal Code Resource: Domestic Violence Laws*, rev ed (Tribal Law and Policy Institute, 2012), online: <www.tribal-institute.org>; Sarah Deer, “Relocation Revisited: Sex Trafficking of Native Women in the United States” (2010) 36:2 Wm Mitchell L Rev 621; Deer, “Decolonizing”, *supra* note 11; Sarah Deer et al, eds, *Sharing Our Stories of Survival: Native Women Surviving Violence* (Lanham, Md: AltaMira, 2008); Sarah Deer & Carrie A Martell, “Heeding the Voice of Native Women: Toward an Ethic of Decolonization” (2005) 81:4 NDL Rev 807; Sarah Deer, “Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law” (2005) 38:2 Suffolk U L Rev 455; Sarah Deer, “Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault” (2004) 4:3 Tribal LJ; Sarah Deer, “Toward an Indigenous Jurisprudence of Rape” (2004) 14:1 Kan JL & Pub Pol’y 121.

particular, we lose precious resources for intellectual deliberation in relation to dealing with violence, safety, conflict resolution, societal regulation, and legal procedures that enabled Indigenous peoples to manage challenges and changes within differing social contexts. These resources are concealed if the past is regarded as perfect and the future is theorized as a return to such perfection through unmediated, spontaneous spiritual living. Verna St. Denis argues that “solutions” to violence against women that rely on romanticized “returns” to the past are misguided and perpetuate further oppression. She explains,

some Aboriginal women regard it as unnecessary to appeal for the attainment of the same rights as men; rather they appeal for the restoration and reclaiming of cultural traditions and self-government that would allow Aboriginal women to be restored to their once and continuing revered position. They insist that the solution to current problems of gender inequality and violence against Aboriginal women is to assert and reclaim cultural traditions. Part of what this call to tradition accomplishes is the erasure of the larger socio-political context in which Aboriginal women live, including being murdered with impunity.⁷⁴

This idea of women taking up historic gender roles as a solution to violence is also often stated in ways that overlook the ethical and legal responsibilities of Indigenous men. While this is problematic for many reasons, one significant flaw is that it can cause Indigenous women to feel primarily responsible for the violence they experience.

Indigenous feminists (and other Indigenous scholars) insist that decolonization must be gendered; otherwise, “sovereignty” will simply be another way to “naturalize” male privilege and oppress women.⁷⁵ Indigenous feminist legal theory, along with Indigenous legal theories in general, should further encourage the revitalization of Indigenous laws while ensuring that gendered contexts and realities are explicitly

⁷⁴ St Denis, *supra* note 23 at 39–40.

⁷⁵ See generally Ladner, *supra* note 26.

included so as to not simply reproduce past or current patriarchal power dynamics.⁷⁶

Gendered violence will not effortlessly disappear if colonialism is fully addressed. Indigenous men do not harm Indigenous women just because of colonialism. Things cannot be so simple. In her work on Indigenous feminism and Aboriginal rights, Emily Luther remarks that “[t]he subordination inflicted on Aboriginal men due to colonialism makes it hardly surprising that they would then turn this subordination on their own culture’s women.”⁷⁷ This passage is important for asking questions about power—for inquiring into how those who abuse others attempt to exert control through their violence. However, this passage seems to imply that Indigenous men abuse Indigenous women solely because of colonialism. It seems to suggest that when Indigenous peoples are decolonized, the abuse will stop. There are many myths about violence, and one of these myths is that people abuse others because of stress.⁷⁸ Indigenous women face as much if not more exploitation than Indigenous men, yet Indigenous women are primarily the ones who are subjected to violence by men rather than being its perpetrators.⁷⁹ There are complicated reasons for the high rates of violence in Indigenous

⁷⁶ See Snyder, “Indigenous Feminist Legal Theory”, *supra* note 21.

⁷⁷ Emily Luther, “Whose ‘Distinctive Culture’? Aboriginal Feminism and *R. v. Van der Peet*” (2010) 8:1 Indigenous LJ 27 at 52. Overall, Luther’s article is quite critical in approach and draws on Indigenous feminism to critique how aboriginal rights (particularly in *R v Van der Peet*) work for Indigenous men but not for Indigenous women. However, her discussion about the relationship between gendered violence and colonialism requires further consideration.

⁷⁸ See Brisbane Domestic Violence Service, “Myths & Facts”, online: <www.bdvs.org.au/information/myths-facts>. For a broader discussion on violence against women, see Holly Johnson & Myrna Dawson, *Violence Against Women in Canada: Research and Policy Perspectives* (Oxford: Oxford University Press, 2011). The analysis of Indigenous social and legal issues presented here should be read alongside this text so as to reflect on the inclusion of critical Indigenous feminist analyses and critical Indigenous legal theories in relation to violence against women.

⁷⁹ This is not to say that Indigenous women are never violent or that they never cause harm to others. Rather, the point here is that overall, men are more likely to be perpetrators of violence and women are more likely to be victims of violence.

communities, and we have to move beyond rhetoric and myths so as to recognize and work with this complexity. Violence and conflict should not be conflated; violence is a learned response to conflict and relates to power.⁸⁰

Having observed that addressing colonialism alone will not adequately deal with the complex forces related to violence against Indigenous women, we must also restate that Indigenous laws have not remained undamaged. While Indigenous law has been, and continues to be practised, it has been undermined and in some cases distorted, or it is incomplete. Given this, we are careful to neither romanticize nor dismiss Indigenous laws as a resource for dealing with such violence. They are imperfect (as all law is) but nevertheless they are a vitally important mode of governance.⁸¹

“Tradition” is not neutral and it can be purposefully deployed in ways so as to discipline and morally police women. Women can be subjugated through the use of tradition at the very moments in which the actions and inactions of men require the most scrutiny.⁸² When deployed at this level of generality, evocations of culture and tradition can corrosively inhibit nuanced, non-essentialized views and practices of Indigenous law, and actually prevent communities from being able to usefully apply it to violence against women. Used in this way, tradition denies the complexity of gendered legal realities and refuses room for examining how today’s sexism influences interpretations of past and present Indigenous legal practices. The rhetoric, masked in overgeneralized shields of sacredness and unassailable truths, is used to silence others and to deflect questions and critical thinking. This rhetoric can be used to assert that there is only one way to be Indigenous and any consequent engagement with law is idealized and non-critical.

⁸⁰ See Alan Edwards & Jennifer Haslet, “Violence is Not Conflict: Why It Matters in Restorative Justice Practice” (2012) 48:4 *Alta L Rev* 893.

⁸¹ See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada’s Indigenous Constitution*, *supra* note 8.

⁸² See generally Denetdale, “Chairmen”, *supra* note 70; Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart, 2012) at 99.

Deliberation, debate, and dissent (as well as the inclusion of different perspectives relating to gendered violence) validate law,⁸³ and are key to approaching Indigenous laws as living public intellectual resources. Such legitimacy would mean that agreement, acquiescence, and accord would follow the implementation of laws in specific contemporary contexts. In the next section, we consider the importance of Indigenous laws to the issue of violence against women.

1.2. WHY INDIGENOUS LAW HAS TO MATTER TO THE ISSUE OF VIOLENCE AGAINST WOMEN

Here we consider the role of Indigenous legislation in addressing this issue. In the United States, Indigenous legal powers and principles have been officially recognized and activated by both tribal and national governments in an attempt to respond to internal and external violence against Indigenous women. Unfortunately, in the Canadian context, the state does not formally recognize Indigenous peoples as having this level of jurisdictional power.⁸⁴ Nevertheless, Indigenous law contains rich intellectual resources that continue to exist within Indigenous communities regardless of what state law dictates. We believe there are important alternatives in the development of Indigenous laws that are attentive to gendered violence and we see these here, in another North American context, where Indigenous processes and principles are more explicit.

⁸³ Jeremy Webber makes the important point that agreement is a necessary part of legality, even in the face of substantial disagreement and discord. See Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167.

⁸⁴ See Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at 239–70.

1.2.1. *The US Context*⁸⁵

In the United States, there is one special area of legislative activity dealing with violence against women on reservations: domestic violence codes.⁸⁶ In addition to their considerable detail, these ordinances often

⁸⁵ The words and citations in this section are reproduced from John Borrows, "Aboriginal and Treaty Rights", *supra* note * at 717–22.

⁸⁶ See e.g. *Makah Tribal Law and Order Code*, Title 11, c 1, § 4 (defining domestic violence as a criminal matter in general terms) & Title 11, c 4, § 9(h) (banishment for domestic violence), online: <www.narf.org/nill/codes/makahcode/index.html>; *Colville Tribal Law and Order Code*, Title 5, c 5, § 3, online: <www.colvilletribes.com> (definitions of domestic violence framed in broad terms); *Siletz Tribal Code Domestic and Family Violence Ordinance*, § 8.105, online: <www.ctsi.nsn.us> (mandatory arrest for offenses involving domestic or family violence), § 12.504 (consequences for violation of protection order)); *Kickapoo Tribe in Kansas Domestic Violence Code*, §§ 205(3), 205(7) (mandatory arrest for predominant aggressor in violence); *Saginaw Chippewa Tribal Law Domestic Abuse Protection Code*, Title 1, c 24 § 12, online: <www.sagchip.org> (mandatory reporting requirements for investigating peace officers), § 2 (first offender counseling for mental health, substance abuse, and sexual offences, as well as victim reimbursement for items including but not limited to relocation expenses, property damage, medical expenses, counseling expenses, and emergency shelter expenses); *Oglala Sioux Tribe Domestic Violence Code* (§ 99.2 of *Oglala Sioux Tribe Law and Order Code*, c 9), c 2, § 218 (duty of tribal court prosecutor to notify victim), c 2, § 214 (tribal court procedures involving pre-trial release), c 3, § 315 (tribal registry for orders for protection to secure full faith and credit state enforcement), c 5 (education for police, court personnel, schools, and tribal employees, as well as prevention and intervention programs); *Yakama Nation Domestic Violence Code*, c 2, § 2.8 (victim's statements admissibility in tribal court); *Sault Ste Marie Tribe of Chippewa Indians Tribal Code*, c 75, online: <www.saulttribe.com> (crime victim's rights include notice of medical services, victim compensation, contact information for a crime victim advocate within a 24-hour period, special provisions for a speedy trial, and separate physical court waiting areas for victims of violence); *Jicarilla Apache Nation Tribal Code*, Title 3, c 5, § 3 (sanctions, including confinement, fines, and mandatory participation in domestic violence programs); *White Mountain Apache Criminal Code*, c 6, § 6.3, online: <www.wmat.nsn.us> (confinement, fines, and participation in domestic violence counseling with levels of increasing sanctions for first, second, and third offences); *Omaha Tribal Code* (2013), Title 11, c 3, § 8,

contain important contextual statements outlining their purposes. As such, they set the tone for domestic violence discussions and action within Native American communities. For example, the *Fort Mohave Law and Order Code* expresses faith in the importance of law in reducing and deterring domestic violence.⁸⁷ The *Hopi Family Relations Ordinance* identifies the scope and tragic consequences of domestic violence for individuals, clans, and communities and specifically mentions the fact that domestic violence is not just a “family” matter.⁸⁸ The *Northern*

online: <Omaha-nsn.gov> (5-year ineligibility of perpetrator for child foster care and guardianship, rebuttable presumption against child custody, firearms prohibition, and ineligibility for Omaha tribe employment); *Muscogee (Creek) Nation Code*, Title 6, c 3.4, online: <www.creeksupremecourt.com> (perpetrator restraining orders); *Hopi Family Relations Ordinance*, c 2, § 6.01, online: <www.narf.org/nill/codes/hopicode/family.html> (victim protection orders); *Salt River Pima-Maricopa Indian Community Code of Ordinances*, c 10, art VII, § 256, online: <www.srpmic-nsn.gov> (orders of protection); *Nez Perce Tribal Code*, Title 7, c 3, § 4, online: <www.nezperce.org> (*ex parte* temporary domestic protection order); *Ninilchik Village Domestic Violence Ordinance*, § 11 (violation of a protective order as civil contempt); *Turtle Mountain Band of Chippewa Indians Tribal Code*, Title 37 (Domestic Violence), c 3, § 6, online: <www.tm.edu> (child custody and visitation).

⁸⁷ *Fort Mojave Law and Order Code*, art XIII, c A, § 1301:

The Fort Mojave Tribal Council finds that:

- (a) All persons have the right to live free from domestic violence;
- (b) Domestic violence in all its forms poses a major health and law enforcement problem on the Fort Mojave Indian Reservation;
- (c) Domestic violence can be reduced and deterred through the intervention of law; and
- (d) There is a need to provide the victims of domestic violence with the protection which the law can provide.

⁸⁸ *Hopi Family Relations Ordinance*, c 1, § 3.01:

The Hopi Tribal Council finds that:

- (a) Many persons are subjected to abuse and violence within the family and clan setting;
- (b) Family members are at risk to be killed or suffer serious physical injury as a result of abuse and violence within the family and clan setting;
- (c) Children suffer lasting emotional damage as direct targets of abuse and violence, and by witnessing the infliction of abuse and violence on other family and clan members;

Cheyenne Tribe Law and Order Code contains strong provisions criminalizing domestic violence,⁸⁹ while the *Oglala Sioux Tribe Domestic Violence Code* contains a bold declaration of purpose that underlines the cultural inappropriateness of violence against women and the importance of safety, protection, prosecution, and education in dealing with this issue.⁹⁰ While there is a tension between some of these measures

(d) The elderly Hopi residents are at risk for abuse and violence, the lack of services available for these citizens and the changing family structure indicates that laws are necessary to insure the protection of elders within the family and clan setting, and in their caretaking settings;

(e) All persons have the right to live free from violence, abuse, or harassment;

(f) Abuse and violence in all its forms poses a major health and law enforcement problem to the Hopi Tribe;

(g) Abuse and violence can be prevented, reduced, and deterred through the intervention of law;

(h) The legal system's efforts to prevent abuse and violence in the family and clan setting will result in a reduction of negative behavior outside the family and clan setting;

(i) Abuse and violence among family and clan members is not just a "family matter," which justified inaction by law enforcement personnel, prosecutors, or courts, but an illegal encounter which requires full application of protective laws and remedies;

(j) An increased awareness of abuse and violence, and a need for its prevention, gives rise to the legislative intent to provide maximum protection to victims of abuse and violence in the family and clan setting; and

(k) The integrity of the family and clan. Hopi culture and society can be maintained by legislative efforts to remedy abuse and violence.

⁸⁹ *Northern Cheyenne Tribe Law and Order Code*, Title 7, c 5, § 10, online: <www.narf.org>.

⁹⁰ *Oglala Sioux Tribe Domestic Violence Code* (§ 99.2 of *Oglala Sioux Law and Order Code*, c 9), § 101:

The OST Domestic Violence Code is construed to promote the following:

1. That violence against family members is not in keeping with traditional Lakota values. It is the expectation that the criminal justice system respond to victims of domestic violence with fairness, compassion, and in a prompt and effective manner. The goal of this code is to provide victims of domestic violence with safety and protection.

2. It is also the goal to utilize the criminal justice system in setting standards of behavior within the family that are consistent with traditional Lakota values and, as such, the criminal justice system will be utilized to impose consequences upon offenders for behaviors that violate traditional Lakota values that hold women and children as sacred. These consequences are meant as responses that will allow offenders the opportunity to make positive changes in their behavior and understand "wolakota".

and our earlier arguments, these detailed statutes, along with tribal court cases that interpret them, are evidence of the pressure tribes face within their communities to effectively deal with domestic violence.⁹¹ Though progress is slow, they demonstrate that even communities facing high levels of trauma are capable of responding to this crisis.

Title 9 of the *Violence Against Women Act* was designed to allow Native American Nations jurisdiction over non-Indians (authority over Indians already existed) who commit crimes on Indian lands, to improve the Native programs for dealing with gendered violence, and to improve data gathering programs to better understand and respond to sex trafficking of Native American women.⁹² When the *Act* was introduced, its sponsor, Senator Akaka, said:

According to a study by the Department of Justice, two-in-five women in Native communities will suffer domestic violence, and one-in-three will be sexually assaulted in their lifetime. To make matters worse, four out of five perpetrators of these crimes are non-Indian, and cannot be prosecuted by tribal governments. This has contributed to a growing sense of lawlessness on Indian reservations and a perpetuation of victimization of Native women.⁹³

The above measures are important, and it is necessary to critically engage with both the language in the domestic violence codes and to

3. The prevention of future violence in all families through prevention and public education programs that promote cultural teachings and traditional Lakota values so as to nurture nonviolence within Lakota families and respect for Lakota women.

⁹¹ See Donna Coker, "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47:1 UCLA L Rev 1. For a discussion problematizing the portrayal of "battered women" in the wider literature, see Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (New Haven, Conn: Yale University Press, 2000).

⁹² See *Violence Against Women Reauthorization Act*, USC 42, Title 9, § 901 (2013), amending 42 USC 13925 (1994).

⁹³ Senator Daniel K Akaka, quoted in United States Senate Committee on Indian Affairs, Press Release, "Senator Daniel K Akaka Introduces Bill to Protect Native Women Against Domestic Violence and Sexual Assault" (31 October 2011), online: <www.indian.senate.gov/news/press-release>.

consider the contexts in which the codes will be practised. These codes challenge systemic sexism and the work that nations face in their implementation must address male privilege and sexism as they play out in the legal process itself. Interestingly, Senator Akaka also acknowledged lawlessness (though not its root colonial cause—that is, the dismantling of Indigenous legal orders) and how this creates the conditions for unmitigated abuse of male power and violence. US tribal court judges are faced with the very real challenge of how to practically access and use Indigenous laws generally, but also in the specific context of using these laws in tribal court systems (which largely reflect Anglo-American court systems).⁹⁴ Although a thorough analysis of tribal courts and codes is beyond the scope of our paper, Indigenous feminist legal theory provides a critical and useful framework for asking questions about power in relation to these (and other) legal mechanisms via its approach to understanding all aspects of law as gendered.

*1.2.2. The Canadian Context*⁹⁵

Indigenous peoples in the United States have different jurisdictional boundaries as compared to Canada. The crisis of violence against Indigenous women is a major problem in both countries, however, this crisis is exacerbated in Canada where Indigenous peoples have fewer jurisdictional options (as recognized by the state, that is). Despite this problem, there has been no significant constitutional response.⁹⁶ While Canadian federal legislative action has directed judges to consider the

⁹⁴ See Friedland, “Reflective Frameworks”, *supra* note 6.

⁹⁵ The ideas in the next three paragraphs are drawn directly from Borrows, “Aboriginal and Treaty Rights”, *supra* note * at 700–03.

⁹⁶ *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385 [*Gladue*] (“The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem”).

special circumstances of Indigenous peoples in some instances,⁹⁷ these efforts are woefully inadequate in addressing broader issues of violence within Indigenous communities.⁹⁸ There has been no sustained constitutional innovation dealing with Indigenous justice issues despite numerous reports recommending greater Indigenous control of justice under section 35(1) of the *Constitution Act, 1982*.⁹⁹

⁹⁷ Section 718.2(e) of the *Criminal Code*, RSC 1985, c C-46 was designed “to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples”: *Gladue*, *ibid* at para 50. That section reads as follows: “A court that imposes a sentence shall also take into consideration the following principles: . . . (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” For further discussion of this issue, see Elizabeth Adjintettey, “Sentencing Aboriginal Offenders: Balancing Offenders’ Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples” (2007) 19:1 CJWL 179.

⁹⁸ There is “a near-fatal lack of resources” dealing with violence against women on reserves: Anne McGillivray & Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 79–80. For an analysis of the context and limits of *Gladue* for Aboriginal women, see Angela Cameron, “*R. v. Gladue*: Sentencing and the Gendered Impacts of Colonialism” in John D Whyte, ed, *Moving Toward Justice* (Saskatoon: Purich, 2008) 160; Cameron, “Sentencing”, *supra* note 12; James Ptacek, ed, *Restorative Justice and Violence Against Women* (Oxford: Oxford University Press, 2009).

⁹⁹ Government reports dealing with Aboriginal justice issues include: Royal Commission on the Donald Marshall, Jr, Prosecution, *Digest of Findings and Recommendations* (Halifax, NS: Government of Nova Scotia, 1989); *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee* (Toronto: Government of Ontario, 1990); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991); *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Aboriginal Justice Inquiry of Manitoba, 1991); *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta: Main Report*, vol 1 (Edmonton: Attorney General and Solicitor General of Alberta, 1991); *Report of the Saskatchewan Indian Justice Review Committee* (Regina:

At the same time, Indigenous women have demonstrated great resilience and leadership in bringing issues of violence more fully into the public spotlight.¹⁰⁰ They have set up shelters, arranged counseling, organized vigils, volunteered in clinics, coordinated media campaigns, appeared before parliamentary committees, cultivated the arts, worked in the civil service, and have been elected as chiefs and councilors—all with a firm public resolve to end violence against women.¹⁰¹ The Native Women's Association of Canada has long been at the forefront of these efforts¹⁰² and their advocacy, research, and on-the-ground efforts have made a difference for thousands of people.¹⁰³ In fact, Indigenous women

Government of Saskatchewan, 1992); *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria, BC: Attorney General of British Columbia, 1993); Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996); *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Supply and Services, 1996) at 54–65; Commission on First Nations and Métis Peoples and Justice Reform, *Legacy of Hope: An Agenda for Change*, vol 1 (Saskatoon: Saskatchewan Department of Justice, 2003); Ontario, *Report of the Ipperwash Inquiry*, vols 1–4 (Toronto: Attorney General of Ontario, 2007).

¹⁰⁰ See Neil Andersson et al, “Rebuilding from Resilience: Research Framework for a Randomized Controlled Trial of Community-Led Interventions to Prevent Domestic Violence in Aboriginal Communities” (2010) 8:2 Pimatisiwin 61.

¹⁰¹ See the media archives of the Native Women's Association of Canada for examples of the broad array of activities undertaken by Indigenous women to deal with the violence against women. Native Women's Association of Canada, “Media Archives”, online: <www.nwac.ca>. See also National Aboriginal Circle Against Family Violence, *Ending Violence in Aboriginal Communities: Best Practices in Aboriginal Shelters and Communities* (Ottawa: National Aboriginal Circle Against Family Violence, 2005).

¹⁰² Recently, the Assembly of First Nations has also become more active in addressing violence against women. See Assembly of First Nations, *Demanding Justice and Fulfilling Rights: A Strategy to End Violence Against Indigenous Women and Girls: Draft—For Discussion & Input* (2012), online: <www.afn.ca>.

¹⁰³ The work of the Native Women's Association of Canada was very significant in securing Indian status for hundreds of thousands of people who were disenfranchised on a sexually discriminatory basis. Loss of Indian status caused many

across the country have creatively developed detailed policy proposals and practical models for dealing with violence against women.¹⁰⁴ Their work includes support for Indigenous self-determination that recognizes and affirms women's rights.¹⁰⁵ This knowledge and experience, and in particular their poignant calls for structural change, must be heeded.¹⁰⁶

harms. See Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 1987). One of these injuries was that the loss of status made Aboriginal women more vulnerable to violence because of the precarious position in which they were placed, relative to Indian men. Indian women's inability to reside or own property on reserve, participate in the political life of the community, and access the support of extended family and kin exposed them to greater challenges in confronting and fleeing abuse. The work of the Native Women's Association of Canada and their allies helped address some of these challenges. See *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, [2007] 3 CNLR 72, var'd 2009 BCCA 153, 306 DLR (4th) 193, leave to appeal to SCC refused, 33201 (5 November 2009). Gender and status issues are ongoing. Additionally, further analysis on how the Native Women's Association of Canada has attempted to frame their politics in relation to gender roles, norms, and notions of tradition requires ongoing consideration. For a discussion on this, see Fiske, *supra* note 29.

¹⁰⁴ For examples of advocacy, see Native Women's Association of Canada, *What Their Stories Tell Us: Research Findings From the Sisters in Spirit Initiative* (Ohsweken, Ont: Native Women's Association of Canada, 2010), online: <www.nwac.ca>; Jeannette Corbiere Lavell, "Statement of the Native Women's Association of Canada; Assembly of First Nations; Chiefs of Ontario; National Association of Friendship Centres; Canadian Feminist Alliance for International Action; Canadian Association of Elizabeth Fry Societies; Canadian Friends Service Committee (Quakers); Grand Council of the Crees (Eeyou Istchee); and Amnesty International: Combating Violence Against Indigenous Women and Girls, Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples" (speech delivered at the Eleventh Session of the Permanent Forum on Indigenous Issues, New York, NY, 7–18 May 2012), online: <www.nwac.ca>. Models dealing with sexual violence in Aboriginal communities are discussed in Jarem Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice: Studies from Hollow Water, the Iona Community, and Plum Village* (London, UK: Jessica Kingsley, 2009).

¹⁰⁵ Sharon McIvor, "Aboriginal Women's Rights as Existing Rights" (1995) 15 Canadian Woman Studies 34.

¹⁰⁶ See e.g. Native Women's Association of Canada, *Arrest the Legacy: From Residential Schools to Prisons* (Ottawa: Native Women's Association of Canada, 2012), online: <www.nwac.ca>. For commentary on Native women's advocacy involving violence

Despite these efforts, section 35(1) does not specifically deal with violence against Indigenous women because, thus far, legislatures and courts do not regard these powers as falling within Indigenous peoples' jurisdiction.¹⁰⁷ Yet Indigenous peoples have their own laws that could be referenced to address this issue, and they could be recognized and affirmed within Canada's constitution. We now shift to discussing how Indigenous peoples' own law could provide important resources for developing better approaches to reducing gendered violence within Indigenous communities.

PART TWO: DRAWING ON STORIES, THINKING WITH INDIGENOUS LAW

We turn to stories for thinking about Indigenous laws for confronting gendered violence. Violence against women has been a concern of Indigenous peoples for thousands of years, as is evident in many ancient stories. Val Napoleon and Hadley Friedland note that "some indigenous stories are about law", "contain law", and "are a deliberate form of precedent".¹⁰⁸ While we address only two stories in this article, many stories must be cross-referenced for a deeper understanding of law and its operation. One story does not show the complexity and breadth of a given legal tradition any more than one legal case (arguably another form

against women, see Wendee Kubik, Carrie Bourassa & Mary Hampton, "Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada" (2009) 33:1-2 *Humanity & Society* 18.

¹⁰⁷ For a discussion of Aboriginal women and constitutional law, see Patricia Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women" in Kerry Wilkins, ed, *Advancing Aboriginal Claims* (Saskatoon: Purich, 2004) 39. For an early article on this issue, see Thomas Isaac & Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21:2 *Man LJ* 453. It should be noted that Aboriginal women possess rights outside of section 35 too. See Jennifer Koshan, "Aboriginal Women, Justice and the Charter: Bridging the Divide?" (1998) 32:1 *UBC L Rev* 23. See also *R v Ewanchuk*, [1999] 1 *SCR* 330 at paras 28, 68–70, 169 *DLR* (4th) 193.

¹⁰⁸ Napoleon & Friedland, "Inside Job", *supra* note 14 at 7.

of story) can represent Canadian law. However, stories can contain important information about legal reasoning.¹⁰⁹ Stories “are structured to record relationships and obligations, decision-making and resolutions, legal norms, authorities and legal processes. Still others record violations and abuses of power, and responses to these breaches of law.”¹¹⁰ Importantly, engaging with stories also opens up space for various interpretations and for deliberation that is essential to understanding Indigenous legal traditions and engaging in its practice.¹¹¹ Stories are tools for thinking and problem solving.¹¹²

When reading the stories below, we kept in mind the following questions: What kind of conversations can we have within and about this story? What are some of the hard edges of this conversation? How can the law from this story, and others, help us to think about violence against women? How can law help us to consider questions about activism and social change? To move away from general discussions about Indigenous law and violence against women, we focus on the two stories and analyze each using a different methodology. We show that there are different ways into discussions about Indigenous law and that a critical reading of gender can be taken up with various methodologies. First, we discuss a Nisga’a story, entitled “Origin of the Wolf Crest”.¹¹³ We analyze this story using an adapted case method. Second, we discuss

¹⁰⁹ *Ibid* at 4.

¹¹⁰ *Ibid* at 8.

¹¹¹ Deliberative law is one source of law found in Indigenous legal traditions. See Borrows, *Canada’s Indigenous Constitution*, *supra* note 8 at c 2.

¹¹² See Napoleon & Friedland, “Inside Job”, *supra* note 14 at 8.

¹¹³ This is drawn from Interview of Arthur Wellington by William Beynan (1915) in Port Simpson, “The Origin of the Wolf Crest”. The story is edited and retold in the words of Val Napoleon. See George F MacDonald & John J Cove, *Tsimshian Narratives 1: Tricksters, Shamans, and Heroes* (Ottawa: Canadian Museum of Civilization, 1987) at 295–304. Friedland and Napoleon parallel story analysis with the development of a broader context within which to make the analysis. This way, the structure of the legal and political order and the law logic and aspirations of law can inform the legal analysis. See Hadley Friedland & Val Napoleon, “Gathering the Threads: Indigenous Legal Methodology” *Lakehead LJ* [forthcoming in 2015].

an Anishinaabek story, entitled, “The Rolling Skull”¹¹⁴ to which we apply an Indigenous feminist legal analysis.

1.1. ORIGIN OF THE WOLF CREST

There was a Chief who would not let his daughter marry because no one could live up to his expectations, no one was good enough.

One morning, a group of men, including a young prince, arrived. They began gambling games with the villagers. Later that night, when everyone was asleep, the young prince woke the chief's daughter and asked her to elope with him. She agreed even though she did not know who he was or where he came from. The prince told her to cover her face, and then he and his men changed into wolves.

He put her on his back and they headed for the mountains. After a very long time, they came to a village. The prince and his men took off their wolf shapes and became human again. The young prince uncovered her face and took her to his father's house, the chief. The chief married the young couple.

Later the young woman looked around and saw many women, old and young, some very beautiful. But their legs were covered in sores from the extreme cold and burns from the fire. One of the slaves took pity on the young woman, “Don't you know the man you are married to is a wolf? All these women are his former wives, now they are slaves. They were all the daughters of chiefs that were too choosy about their daughters' marriages. So these wolves were able to lure them away. The prince once loved us just as he loves you now, but he discarded us and now we are slaves. When he hears of some other woman, he will throw you away too.”

¹¹⁴ The text of this story is found in William Jones, *Ojibwa Texts*, vol 7, part 2, ed by Truman Michelson (New York: Arbor Press, 1919) 405, online: <www.archive.org/details/ojibwatextscoll00unkngoog>. This story is retold in the words of John Borrows.

Now the wolf people hated the smell of human blood. The young woman started to worry because her period was almost due. If the wolves smelled her human blood, they would devour her. She told the prince that she was sick. He pushed her away and called out a warning to the wolves to cover their noses.

The young prince sent his wife and the slave woman that had taken pity on her to a small cedar shelter up the mountain. Together, the women made plans to escape but they only had one pair of snowshoes. The slave woman put snowshoes on and placed the young woman on the snowshoes behind her. They managed to get to the top of the mountain by nightfall. In the morning, they climbed down the other side of the mountain.

The slave woman knew that they would soon be missed. If they were caught, it would mean death. When they reached the top of the next mountain, they could hear a whistling and they knew it was the wolves. The slave travelled as fast as she could, but it was very hard. The wolves were getting closer.

They came to a tall hemlock tree. The slave threw the young woman up into the tree and then she began to climb, but she was so tired that the wolves caught her and dragged her down. They tore her to pieces and devoured her. The wolves surrounded the tree and assumed their human shapes. The young man called his wife, but she refused to listen to any of his promises. The wolves assumed their animal shapes and tried to uproot the tree. They tried everything but they could not fell it.

Night came and the wolves waited. When morning came, the young woman had a plan. She knew that they would hide from the smell of blood so she made her nose bleed and let the drops of blood fall. Seeing the human blood, the wolves hid their heads. At this point, the prince's father ordered the wolves back to their village.

The young woman escaped. She travelled for months. Her moccasins were worn out and her clothes were ragged, but the weather got warmer. She stopped caring what happened to her. An old woman found her. This was Loon Woman, the loon spirit. Loon Woman fed and healed her and clothed her. Finally, Loon Woman said, "I will send you back to your own people." First she painted the young woman's face red with an image of the sun with smaller suns inside it. Loon Woman told her that her new name would be Yalek and she was to wear the sun crest. The sun crest and its songs would belong to her and her children, generation after generation.

The young woman traveled on and finally found her people and her family, and she described everything that happened to her. Her father held a great feast to show his daughter to the world and to name her. The young woman painted her face exactly as loon woman taught her and she became Yalek. The young woman was pregnant and she gave birth to a child that resembled a wolf—he had a pointed nose and a small tail.

2.1.1. The Case Method

The case method analysis is a tool that is used in law schools to draw out the specifics of law in common law cases. It is often used in conjunction with legal analysis and synthesis in which individual analyses of cases are brought together to show a larger picture of legal principles, processes, and reasoning. The case method as conventionally used in common law settings has its limitations. Common law legal synthesis can strip stories of their context. By way of contrast we use a modified case method to do the exact opposite—we seek to re-embed stories (i.e. cases) in a fuller context. Thus, here, we will use this modified case method to "case brief" the details of the above story.¹¹⁵ Napoleon and Friedland reflect on their

¹¹⁵ An early version of this methodology is found in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 17, 47 [Borrows, *Recovering Canada*]. For a discussion of the legal methodologies employed by Borrows, Napoleon, and Fletcher, see generally Friedland, "Reflective Frameworks", *supra* note 6.

usage of this methodology elsewhere and note, “we hope to move from philosophy or theory, to the practices, and legalities of Indigenous legal traditions”.¹¹⁶ This method helps to “mak[e] legal reasoning explicit”.¹¹⁷ Instead of understanding this method as necessarily at odds with Indigenous law, because of its origin in common law, we believe that Indigenous peoples have always practised adaptive management to draw on a variety of skills and tools, and that these can be worked with internally through Indigenous intellectual traditions.¹¹⁸ Napoleon and Friedland describe that in working with the case method analysis, their intention is not to do away with or undermine existing Indigenous legal methodologies; rather, this method can be considered as an additional methodological tool.¹¹⁹ While we (the authors) do not all use the case method in our own work, we can still engage with this method as one way into a dialogue about law. Our space is limited here, but there are many more methods—existing as well as yet to be articulated—that we hope to continue to discuss in the future.¹²⁰ What is important for the

¹¹⁶ Napoleon & Friedland, “Inside Job”, *supra* note 14 at 3.

¹¹⁷ *Ibid* at 17.

¹¹⁸ *Ibid* at 9. Hadley Friedland describes that an internal viewpoint can “enable us to access, understand and apply laws”: Friedland, “Reflective Frameworks”, *supra* note 6 at 30. Importantly, she describes that engaging with legal scholarship and methodologies “from an internal viewpoint does *not* refer to the legal scholar’s Indigenous descent or membership in a specific Indigenous community . . . [r]ather, it refers to a specific *type* of legal scholarship”: *ibid* at 29. This is similar to Snyder’s approach to Indigenous feminist legal theory and methodology, which treats them as analytic tools, rather than markers of identity *per se*. See Snyder, *Representations*, *supra* note 52 at c 3. Snyder, as well as Friedland, contend however that Indigenous people will take up these tools in ways that work for them if they deem them applicable. See Snyder, “Indigenous Feminist Legal Theory”, *supra* note 21 at 28; Friedland, “Reflective Frameworks”, *supra* note 6 at 38.

¹¹⁹ Napoleon & Friedland, “Inside Job”, *supra* note 14 at 13.

¹²⁰ For example, Friedland notes that she has taken up legal analysis and synthesis in her earlier work. See Friedland, “Reflective Frameworks”, *supra* note 6 at 35. She also discusses the linguistic method advanced by Mathew Fletcher; “the source of law method” and “the single-case analysis method” taken up by John Borrows; as well as the “multiple case method” employed by Napoleon. *Ibid* at 18.

operation of law in this methodology is transparency of reasoning and interpretation, and the citation of all sources (e.g., stories and interviews) so that others can go to those same sources and develop their own interpretations and arguments.

The analysis of the stories is determined by the questions one poses. Since we are focusing on violence against women, our case brief analysis reflects this focus. The main elements of the case brief are: (1) What are the relevant facts of the story? (2) What is the main human problem that the story focuses on? (3) What is decided about the problem or how is this problem resolved? (4) What is the reason behind the decision (said and/or unsaid)—is there an explanation in the story? There might also be parts of the story that one needs to “bracket”—aspects that are of interest but not necessarily relevant to the case brief. Often the bracketed content can inform other important questions and generate additional discussion.

Case Brief of “Origin of the Wolf Crest”

The facts of the story are:

- A chief refuses to let his daughter marry. No suitor was acceptable to him.
- A group of men, including a beautiful prince, arrives to gamble. The prince entices the chief’s daughter to elope with him even though she knows nothing about him.¹²¹
- The young woman arrives at the prince’s village and finds many abused slave women who were former wives of the prince. She learns that it is likely that she will be made a slave herself once her prince husband hears of another vulnerable and available woman.
- The young woman escapes with one of the enslaved women. The slave woman is killed by the wolves, but the young woman

¹²¹ It is not our intention here to victim-blame; rather, we are looking closely at vulnerability.

manages to escape by using their fear and dislike of human blood against them.

- The young woman is assisted and healed by Loon Woman who gives her the name Yalek, and the crest and songs that go with the name.
- After several months, the young woman finds her way home. There, she gives birth to a baby with a small pointed nose and small tail.
- This story is the origin of the wolf clan. The story and clan continue today.

Problem (Issue): What is the main human problem that the story focuses on?

The main problem focused on in this case brief is the circumstances of the women being vulnerable and enslaved, and facing oppression and violence.

- (1) What are the consequences of creating vulnerable people—in this case, women?
- (2) How does one respond when facing certain dangerous oppression and perhaps death?

Decision/Resolution: What is decided about the problem or how is this problem resolved?

- (1) Once the young woman realizes her fate, she decides to escape. She is helped first by the slave woman and then by Loon Woman who gives her the name Yalek.
- (2) The enslaved woman also had hopes of escaping and surviving. She was incredibly vulnerable and lacked power in comparison to the young woman. Ultimately, this extreme vulnerability, which caused her to have to make many sacrifices, led to her death.

Reason (Ratio/Ground): What is the reason behind the decision? Is there an explanation in the story?

Unsaid:

- (1) The young woman was vulnerable, in part because her father was controlling.
- (2) The enslaved woman knew that she had no real life continuing as a slave so she might as well try to escape with the young woman.
- (3) The name Yalek and the associated crests and songs will be performed at all the pole-raising feasts and so will always be a reminder about vulnerability and abusing power to control others.
- (4) There will continue to be those that take advantage of those who are vulnerable.

Said:

- The young woman's experience and the birth of her wolf child are recognized as the origin of the wolf crest.

Bracket [What do you need to bracket for yourself in the cases? Some things will be beyond your terms of reference but are not necessary to the case analysis.]

- Where was the young woman's mother? Was she in a position to act on the legal responsibilities that she had to her daughter?
- How will the wolf baby be accepted or not?

2.1.2. Discussion

Law is about creating conditions for healthy, peaceful, and productive living against a backdrop of conflict about why, how, and by whom these conditions should be created. Given this, the theory and practice of law must account for and include differing viewpoints. So even when taking the first step in applying the case brief methodology, something as seemingly simple as stating the facts of the story can be revealing in terms of how stories are interpreted and how "facts" are selected. If we (the

authors and the readers) were in a room together, we might have some debate over the facts. Power dynamics are present in all contexts, and some of our voices and perspectives might be heard over others.

The case brief above is read through a lens of vulnerability. Taking this approach raises questions about the social circumstances that led to the women being in such vulnerable positions. It also highlights the spaces they have for exercising agency in response to their circumstances. Highlighting vulnerability allows us to ask questions about why these women were denied freedom from bodily harm and to live as they wished in conditions that should secure their dignity and safety. The story encourages discussion about power, gendered violence, class, heteronormativity, and gender roles. As noted above, social structure and context can be found in stories. Thus, in identifying the human problems in the story we are encouraged to think about these contexts rather than treating the story as though it is about personal and individual decisions alone. This story is particularly complex because it shows the vulnerability of the young woman and the former wives as a group, while also underscoring the power dynamics between the young woman and the even more vulnerable enslaved women.

In the naming of Yalek, which includes accompanying crests and songs that are publicly performed at pole-raising feasts, there is a response to her vulnerability and agency. Furthermore, the story of the origin of the wolf clan serves as an important reminder about the consequences of vulnerability and violence. One can find law implicitly in this story, through issues concerning responsibility, expectations, obligations, authority, and legal processes. Further, there are explicit ways to see law in the story by looking at kinship systems, ceremonies, and the meanings and processes behind these.¹²² The crests, songs, and origin of the wolf clan include legal processes and serve to encourage discussion about legal reasoning and legal responses. While the story shows concern

¹²² See Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences" (Opinion paper prepared for the Centre for Indigenous Environmental Resources, 2007) at 3, online: <www.caidd.ca>. See generally Napoleon, *Ayook*, *supra* note 8.

about vulnerability and violence (of which the origin of the wolf clan serves as an ongoing reminder), there is no reason to insinuate that violence ceased to exist hereinafter. Not everyone heeds what is stated in the law. The same thing occurs when state laws dictate that violence is unacceptable within Canadian society—even in these circumstance violence does not cease to exist. What the story above demonstrates is that responses to violence are never complete. Indigenous laws, like state laws, are always imperfect in bringing about safety and lasting peace. Legal processes must be perpetually re-inscribed within any community's life, which means that the law can never be completely disentangled from wider social problems and broader power dynamics.

The story above can also (connectedly) be read and briefed through a lens of violence. This would shift our identification of the human problems to ask: What are the consequences of normalizing violence and enabling violent people (which in this case is the men)? How can a collective respond to violent people? How can violent people be held accountable for their behaviour? The prince was preying on vulnerable women, and while the story of the origin of the wolf clan serves to show that vulnerability and violence are unacceptable, what we do not know from the story is if the men were punished or what the response was to their actions. While the story does not tell us what happened to the men (or the other enslaved women), this question can nevertheless be opened up for discussion. We could draw on other stories that focus on responses to those who are violent and who commit gendered violence. We could also collectively discuss what some possible responses could be today. We could ask: Who should have the authority to implement these responses? What might be the challenges in prompting a response? What processes are in place for this? If we are unsatisfied, what space is there for dissent?

What the case brief method allows is a discussion about lived problems, and how they might be addressed through the identification of legal principles, processes, and responses. Even if another case brief looks different from the one above, the method does prompt a consideration about its lived implications and moves us beyond generalities related to Indigenous culture and traditions. Perhaps even more importantly, the above exercise also generally discourages claims

that Indigenous gender relations were perfect in the distant past. The events described herein occurred within a social context in which women were vulnerable and faced violence from many of the men around them, such as: being controlled by one's father, being persuaded into marriage, being a slave, facing the fate of being a slave, the violent death of the woman who was enslaved, and the escape and despair of the young woman who became Yalek. It would have been dangerous for Indigenous women during this earlier time to challenge gender roles and violence against women. The same insight should apply now when invoking rhetoric about historic gender roles in today's social context.

For these reasons the story of the origin of the Wolf Crest is unsettling. It is unsettling because of the violence. It is also challenging because there is no straightforward solution to that violence. Engaging with stories as a way to examine legal practice and theory prevents us from solely looking for rules (or the broad "moral" of the story) and easy solutions to violence. Legal responses to gendered violence are complex and ongoing. This story, as well as the next story, when read through a critical gendered lens, unsettles prevailing rhetoric and asks us to think more deeply about Indigenous legal responses to violence.

The Wolf Crest story reveals issues related to male privilege, male violence, the exploitation of women, the scope of women's agency, as well as activism and social change in light of community, family, and social pressures concerning marriage. We can take up internal legal perspectives when working within the story, but this takes us far beyond simply repeating the story. Napoleon and Friedland maintain that "if people cannot think and reason within [Indigenous law] and apply it to the messy and mundane, then it will continue to be talked about in an idealized way or as rhetorical critiques of Canadian law."¹²³ Borrows has likewise written:

If an overexalted view of a tradition is applied, it could limit ordinary people from connecting to it when faced with their messy and often mundane circumstances. Legal traditions must have an air of reality about their application present-day applications. People will have

¹²³ Napoleon & Friedland, "Inside Job", *supra* note 14 at 9.

trouble making their laws work for them if a hard-edged realism is not combined with the necessary idealism that underlies most legal systems.¹²⁴

2.2. THE ROLLING SKULL

A family was living on the shores of a shining lake. As the fall season approached they began to prepare for the snows. Usually the father, mother and their son would pitch in to ensure they had enough to survive the winter. This year, something was different. The man and his son worked hard to gather wood and put down a store of meat and furs, but the mother was mostly absent.

After this went on for some time the father became suspicious. One day, instead of following the animals on his preparatory hunts, the man stayed close to the camp. He wanted to see what his wife did as he was gone.

After some time the man saw his wife leave the camp, thinking that she was alone. After travelling some distance behind her, he saw that she boldly approached a big tree. She took an axe from her pack and she struck the tree, saying, "Your friend has come."

It was a serpent-tree; and immediately, snakes began to flow from the tree, and there were so many that they couldn't be counted.

The man, who had followed his wife, could not conceal himself any longer. He took out his gun and began shooting the snakes, to try to ensure that they would not harm his wife, and the land around them. The snakes recoiled and reversed their flow and rushed back into the tree.

¹²⁴ Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at 105.

As the man started shooting, the woman tried to protect the snakes as they were slithering back into the tree. The man was furious at his wife's actions; he took his axe, and cut her. He severed her head.

The woman's head fell at the man's feet. He felt the guilt of the moment. Wondering what to do, he reached down, thinking he would tie her head to the tree.

The head rolled away from him. But with some persistence he was eventually able to pick it up. He said to himself, "I wonder what I shall do." He looked at the serpent tree she was visiting and decided to securely tie her head to a tree. After doing this, he ran back home. He wanted to get cloth to wrap her and bring her home for a proper burial.

As he returned he saw the woman's head lying on the forest floor; it was no longer tied to the tree. He tried to grab it but the head eluded his grasp; instead, it rolled into the cloth he had laid beside the tree.

The man next turned his attention to the serpent tree. He began chopping it down and, as he did so, the snakes once again flowed from the tree. He then lashed out at the snakes. The man started swinging his axe, cutting each snake in pieces until they were all killed.

When the man returned home he met his son. The son asked him where he had been. The son asked his father what animal he had killed today, and he wondered why it was wrapped in a cloth.

The father replied, "Don't be afraid, my dear son; don't run away. But I must tell you your mother is dead. I didn't kill her. But we have to flee; we have to get a long way from here."

So the father lifted his son on his shoulders and they started running. They left the head behind, still wrapped in the cloth. They ran all that day

and through the night and only stopped when the glow of the morning sky broke before them.

They stopped by a large rock to rest and waited for the sound of the morning birds.

In the still-dawn silence they heard a voice from deep in the woods behind them.

“There is no place in the whole length and breadth of this earth where you can flee from me.”

The man and his son looked back. On the path on which they had run, came rolling the head of the man’s wife. It bumped against the trees and jostled over the roots, yet it came straight towards them.

The man was shocked, but his instinct took over and he tried shooting the head with his gun. It was of no avail.

The head rolled forward. Snakes rolled out from the woman’s skull and attacked the father, poisoning him to death.

With his father stricken dead, and seeing the snakes flowing from his mother’s still rolling head—the son fled.

As he ran, he cried for his mother, and mourned her death. As he kept running he remembered his father, and mourned him too.

The young boy eventually came to a clearing where he saw an old man. He could not hold his tongue. He said to the old one, “My father has been slain” The young boy then broke into uncontrolled sobbing. He couldn’t stop himself. So the old man picked up the boy and with all speed they started out to his village.

As they were travelling they came to a place where ice was on a large lake, in a place where it narrowed. On the narrows they saw someone standing there; he had one leg.

The old man who was carrying the young boy addressed the person with one leg. He said, "O our grandfather! We are followed by a restless spirit. Can you help us?"

At this point, the man with one leg answered "My grandchildren. Do not be afraid, I myself am a spirit. Pass through me and you will be well."

The old man and the young boy did as they were directed, and passed through the Manitou.

The one-legged figure then spoke to them and said, "Now go in peace. Continue on your way till you arrive at a place where our people are strong, where we live together. When the rolling head comes to that place, keep it occupied and you will be helped."

They did as they were directed.

"Be off! It is on the morrow, before it is yet noon, you shall come to a place where the people are. O my grandchildren! Therefore now do you depart hence."

The boy went on his way, with the old man, up from the lake.

As the old man with the one leg, the Manitou, looked towards the place from where they came out upon the lake, he saw the rolling head of the woman. When it came over to where he was, the Manitou was addressed by the rolling head saying: "Where has the boy gone?"

"What do you want with them?" the Manitou said.

"I wish to kill them."

"If you can (pass), you may kill them. They passed by way of the space here between my legs."

As the head went past the old man, he hurled his spear at it, and the head was broken in pieces. Then he spoke, saying: "And may this have been the manitou? It is not a manitou being."

In time the boy and his older companion, in running, saw a town, and they wept when he saw the people. And all at once (the people heard) the child (as he) came crying; some ran to him, when all the more he cried. And some of (the people) too wept.

"For what reason do you cry?" the townspeople asked.

"My mother wishes to kill me, and in a little while she will be here. Yet we did see our grandfather on our way here."

"Come, let us follow back their trail!" they said. The men that were very fleet of foot started off running together when they followed back the trail. They saw a lake; when they looked, (they saw) the old man with one leg, standing (there). When they were come at where he was, they asked of him: "Has not that woman arrived yet?" They were addressed by him saying: "I have slain that rolling head."

*The people then went back and in a while they arrived at home. The boy was very happy.*¹²⁵

¹²⁵ Jones, *supra* note 114. Other versions of this story are found in Henry Rowe Schoolcraft, *Schoolcraft's Indian Legends* (Lansing, Mich: Michigan State University Press, 1991) at 213; William Berens, A Irving Hallowell & Jennifer Brown, *Memories, Myths, and Dreams of an Ojibwe Leader* (Montreal: McGill-Queen's Press, 1991) at 164.

2.2.1. *Indigenous Feminist Legal Methodology*

Here we apply Indigenous feminist legal methodology for engaging with the story. We draw on this methodology because it encourages analysis that is attentive to gendered power dynamics as they play out in Indigenous legal contexts.¹²⁶ This is not a methodology that all of the authors employ in their work, but as with the case brief, we hope to show that there are various methods for engaging with Indigenous law and that we see the need for an Indigenous legal pluralism. Snyder articulates one approach to Indigenous feminist legal methodology in her work on gendered representations in Cree legal educational materials.¹²⁷ Although her focus is on Cree law, the methodology itself is meant to be more broadly applicable and can be applied here to think about the violence against women in the above story.¹²⁸

Indigenous feminist legal methodology¹²⁹ is expressly political and activist in its orientation, maintaining that there is no such thing as neutrality in how we approach and interpret materials, and all methods have their politics.¹³⁰ Given the present concerns about sexism and the marginalization that Indigenous women face within and beyond their communities, Indigenous feminism is explicitly taken up in this methodology so as to encourage anti-oppressive engagement with law.¹³¹

¹²⁶ Though this methodology could also be taken up to discuss and analyze state law, as well as external relations with other nations and Indigenous legal orders. See Snyder, "Indigenous Feminist Legal Theory", *supra* note 21.

¹²⁷ Snyder, *Representations*, *supra* note 52 at c 3.

¹²⁸ This does not mean that Indigenous feminist legal methodology is intended to be a pan-Indigenous approach; rather, when applied to various legal traditions, the social specificities of that legal tradition should be taken into consideration, and should shape the methodology accordingly.

¹²⁹ Indigenous feminist legal methodology is influenced by the tenets of Indigenous feminist legal theory, as well as by critical discourse analysis, feminist critical discourse analysis, and Indigenous methodologies. See Snyder, *Representations*, *supra* note 52 at c 3.

¹³⁰ *Ibid* at 113.

¹³¹ *Ibid*.

The above story is very uncomfortable, and the methodology in this section “is not meant to be comfortable—it works with difficult tensions and conflicts”,¹³² including distressing internal conflicts. Not only is the application of Indigenous feminist legal methodology uncomfortable, the story itself is purposely framed to make us uncomfortable. It is designed to raise hard questions, within an Anishinaabe pedagogy.¹³³ However, focusing on Indigenous feminist legal methodology, Snyder explains this approach can examine not only how Indigenous women and men are treated similarly or differently in and by Indigenous laws, but also how Indigenous laws are shaped by gendered norms and power dynamics. She emphasizes the importance of “examining discourses that sustain certain ideas about subjectivity, particularly gendered, sexed, and racialized subjectivities as they circulate in and are disciplined by” Indigenous laws.¹³⁴ Indigenous feminist legal methodology can examine materials that are explicitly about gender; however, this methodology is not meant to be used just when “women’s issues” are apparent. Indigenous feminist legal methodology provides an analytic framework for drawing out discussion about gender and power where it may have otherwise remained hidden, naturalized, or framed by rhetoric.¹³⁵

The analytic framework that Snyder employs in her work on Cree law is quite large, and we do not have the space to include it all here. Below, we adapt some parts of the framework as an example, and begin to fill it in as a way into a discussion about gender and power.¹³⁶ The first part of the framework is a revision of Friedland’s legal synthesis

¹³² *Ibid.*

¹³³ For a discussion of this, see Basil Johnston, *Ojibway Heritage* (Lincoln, Neb: University of Nebraska Press, 1990) at 3–6.

¹³⁴ Snyder, *Representations*, *supra* note 52 at 117.

¹³⁵ *Ibid* at 113.

¹³⁶ Because Snyder is looking at an assortment of contemporary materials about Cree law (including videos, a comic, and a game), not all of the questions in her analysis guide would be applicable to an analysis of stories. It is important that frameworks are revised and properly suited for the materials being engaged with. The framework has been revised here accordingly.

method¹³⁷ and questions about gender are written into the synthesis.¹³⁸ These questions move to a necessary level of specificity and away from the generalities.¹³⁹ The remaining part of the framework asks directed questions about citizenship, gendered representations, how gender and sex are imagined, and how law is imagined. Here is part of one approach to an Indigenous feminist legal methodology, applied to the story of ‘The Rolling Skull’:

Legal processes: What are the characteristics of legitimate decision-making processes? Who is included? Is this gendered? Who are the authoritative decision makers?

- Decisions (concerning what the son was to do in his circumstances of his parents’ deaths and his dead mother’s head following him) were made in consultation with an elder, and the help of the Manitou—both of whom are recognized as authoritative decision makers, though arguably the Manitou’s decisions are conveyed through human interpretation.
- Both of the authoritative decision makers in this story are male.

¹³⁷ It should be noted that Friedland’s usage of legal synthesis is employed in a way in which she draws on a multitude of case briefs to fill in the framework for the synthesis. See Friedland, “Reflective Frameworks”, *supra* note 6. Snyder does not start with case briefs; rather, she uses the questions in the synthesis to begin discussions about materials. See Snyder, *Representations*, *supra* note 52 at c 3.

¹³⁸ *Ibid* at 20–21.

¹³⁹ See Friedland, “Reflective Frameworks”, *supra* note 6 at 29, for examples of how to shift from general questions about law, to specific questions about legal processes and reasoning. For Snyder’s purposes, this section of the framework also helps to identify law in materials, as many of the materials that she examines are not easily recognized as being about law. See Snyder, *Representations*, *supra* note 52 at 17–20.

Legal responses and resolutions: What are the responses? Do these responses have different implications for women and men?

- Did the spirits punish the husband with death because of his reckless response and denial about his behaviour towards his wife and the snakes?
- The elder decides to help the young child. The Manitou decides to protect them from the mother's head, which is trying to kill them.
- The decision to stop the rolling head certainly has implications for this specific woman in the story though the response is intended to protect others generally.

Legal rights: What should people and other beings be able to expect from others? Are any of these expectations gendered? Are certain rights overlooked?

- Did the woman have a right to privacy and agency that was overlooked?
- What of her right to bodily integrity and safety?
- Children have a right to protection and to be taken care of.
- Do animals and other beings and spirits, such as the snakes, have a right to physical and spiritual integrity?

Are both women and men present in the material? What are they doing or saying? In what contexts do women and men appear?

- Both women and men are present though the majority of people in the story are males, and the majority of dialogue is from the males' perspectives.
- The husband and the son "worked hard to gather wood and put down a store of meat and furs."
- The husband spies on his wife, causes harm to her, denies this harm, and flees with his son. Later, the husband shoots at his wife's head and he is killed by the snakes that come from her skull.
- The snakes are not gendered in this account. What

implications might this fact have for understanding Anishinaabe law?

- The wife is depicted as a secretive person and when harmed is depicted as vengeful and violent. She tends to appear in the story only in relation to men, and only in relation to scenes of violence against her. Ultimately, her head is speared and she ceases to exist.

2.2.2. *Discussion*

Anishinaabe law has long considered issues related to violence against women. These laws record and comment on the unacceptability of violence and what can be done to address it. While this story must be cross-referenced with other stories to provide a fuller picture of Anishinaabe law,¹⁴⁰ it does illustrate that there are resources for reasoning in Anishinaabe stories that record past acts of violence. “The Rolling Skull” raises much discussion about what is both said and unsaid in the story, as well as about what is unknown/missing. The violent imagery of the wife being decapitated, and her head then rolling around, is disturbing. Likewise, it is troubling to see how the man killed the snakes and hid the truth of his actions from his son. Also troubling are the additional acts of violence against the woman’s head as she seeks to harm others. What does this part of the story open up for discussion? In John Borrows’ view, as a student of Anishinaabe law, he sees the story as purposely highlighting the unacceptability of violence within Anishinaabe law. He believes the story has been told through time to cause people to struggle with their community’s and individuals’ grossest defects, as well as partially suggesting how these offenses might be addressed. As in the case within many interpretative traditions, Anishinaabe peoples tell and create, and recreate stories to highlight and learn from their negative as well as their positive experiences. As a legal resource the story demonstrates the complexities found in the interpretations of Anishinaabe legal traditions.

¹⁴⁰ See Borrows, *Recovering Canada*, *supra* note 115 at 13–26.

Since this story shows legal processes along with legal principles that exist for responding to conflicts, we can make these connections more explicit. In responding to the harms in this story, we learn that an elder is consulted, and a Manitou (or spirit helper) is encountered which helps the young child along to a safer place. We also learn that the community had the responsibility to protect the child and to collectively respond to violence. When read with a lens of gender and power in mind, we can engage in a discussion about these processes and principles.

Upon thinking carefully about the gender of the authoritative decision makers in the story, the responses, and the broad social implications of these responses on women and men, what does this story open up? What does it foreclose? All of the decision makers in the story are men. Is it possible that the men's responses to the woman shut down her experiences, agency, and response to the violence against her? What might this story look like if told from the perspective of the woman? Why did she not want to be around her husband and son? What did the tree and snakes represent to her? How do we interpret these symbols without unreflectively replicating "western" conceptual meanings? How might the woman interpret her husband secretly following her? How might she interpret the violence against her and the legal responses to that violence? How might we understand her following of the husband and son after her death? How might we make sense of her intent to kill her son, later in the story? What are we to make of the continued bodily harm towards the woman? How do we read the gruesome imagery of a decapitated woman's head?

There are other Anishinaabe stories that show that men are not always the authoritative decision makers and there are stories that are told from the perspectives of women. There are also stories where women are violent and harm other women, men, and children in their communities. Again, we could cross-reference other stories to think further about the gender dynamics between the people in this story, and within the legal process itself.

In working with the questions from Snyder's analysis guide, we are able to get into a discussion about violence against women. After we ask how this story is about violence against women and how it is responded to, we can begin to ask questions about the power dynamics present in

the account. Similar to the “Origin of the Wolf Crest” story, our work involves asking questions about male privilege, women’s agency, and social change. In asking questions about the story, it is not our intention to say that Anishinaabe law is misguided, that it is incapable, or that it is violent. Rather, we aim to treat Anishinaabe law as law—as a response to conflict that is socially embedded and that requires ongoing consideration and discussion.

While, as we have stated early on in the paper, it is contentious to talk about gendered violence that historically existed within Indigenous societies, stories open significant space for thinking about power and gender, and for using Indigenous law as a resource for reasoning in through these issues. Stories contain clues about social norms and social structures within historic communities. Stories also encode beliefs and interpretations of those who are telling the story. Furthermore, our interpretations contain within them ideas and practices that stem from our own positionalities, partialities, and limitations. Analyzing law is a complex task that requires sustained critical thinking, debate, and revision.

Again, we see stories as resources, but they are also valuable for many other purposes including entertainment, edification, artist appreciation, spiritual guidance, psychological insight, and other forms of education. Stories should never be pinned down in one forum; they should be open for use and interpretation in many different contexts, for many different purposes, and within many different fields. Nevertheless, in a legal context, we believe that stories cannot be left in the past tense. They need to be analyzed to understand how they relate to today’s challenges. We must ask: Who would authoritative decision makers be today? What would a legitimate process look like within Indigenous laws today for responding to violence against women? Are women a part of articulating these processes? Are these processes practical and can they work with women (and men) as complex, gendered legal subjects? If responses to violence are not working, how can we imagine violence and gendered conflict differently?

Indigenous feminist legal methodology “maintains that multiple, competing, and even contradictory discourses exist in, and shape, indigenous laws”.¹⁴¹ Some discourses are more powerful than others.¹⁴² In this article, we have talked about these discourses and about rhetoric as gendered and as deeply entangled in power dynamics. By talking about Indigenous feminist legal analysis, we do not suggest that everyone must take up feminism. Not everyone will agree with Indigenous feminist legal analysis and there is no one approach to Indigenous feminist theorizing or practice.

In fact, as co-authors of this paper, we individually and collectively draw upon theoretical insights from other traditions (including Indigenous traditions) in our work. We are not arguing that any particular or exclusive theory can explain and/or reveal the entirety of what must be taken into account when working with Indigenous law, including Indigenous feminist legal theory. The world is complicated and no one theory can capture the full range of insights needed to promote clear thinking and best practices related to violence against women or any other challenge which Indigenous peoples encounter. So even Indigenous feminism, with its demonstrated potential for providing profoundly significant and key insights, must be regarded as partial, limited, and open to manipulation if it is used to conceal or eclipse other fields of inquiry. Nevertheless, what we have illustrated in this paper is that when talking about law, a multitude of voices need to be included in the discussions that are so important to the well-being of Indigenous legal orders and the well-being of all citizens.

CONCLUSION

Indigenous laws are valuable living intellectual resources that can be drawn on for thinking about violence against women. As we have demonstrated here, engaging with Indigenous laws does not mean taking law from the past and dropping it into the present—rather, law requires

¹⁴¹ Snyder, *Representations*, *supra* note 52 at 118.

¹⁴² *Ibid* at 118–19.

ongoing dialogue, evaluation, and debate. To this end we have argued that gendered legal realities exist within and outside Indigenous communities. This means that the violence which Indigenous women face must be a focal part of the application of Indigenous laws. We believe this approach will better help us understand how systemic sexism shapes legal processes, practices, and interpretations. Indigenous laws, legal theories, and methodologies will fail in practice if theorists and practitioners are not realistic about gendered power dynamics. Indigenous laws must not be allowed to become irrelevant through neglect and underestimation.

In critically evaluating some of the existing rhetoric about gender, culture, tradition, and law, we have expressed concern that such rhetoric has been used to silence the voices demanding open spaces for dissent or calling for change. This rhetoric is damaging to Indigenous legal traditions because it denies the complexity of conflict by inappropriately romanticizing the past and projecting these views into an impractical and unrealistically idealized future. This view also denies the complexity of Indigenous women and men as legal agents and subjects. As such, it ignores the lessons of the trickster within Indigenous traditions which teaches us that people can be simultaneously kind and mean, charming and cunning, selfless and selfish, helpful and the cause of great harm.¹⁴³ We wrote this article to open spaces for deeper conversations about these issues. We hope we have done this through considering topics like tradition, culture, motherhood, and gender roles in a different light alongside our discussions of legal processes, decisions, hierarchy, and power.

In the end, stories provide a way for thinking about Indigenous laws. Indigenous law has many sources and it can be examined and practiced using many different methodologies.¹⁴⁴ Nevertheless, in focusing on stories as a legal resource, the heart of our discussion has been on stories that discuss violence against women. They demonstrate the challenges

¹⁴³ See Borrows, *Recovering Canada*, *supra* note 115 at 56, 66, 79.

¹⁴⁴ See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution*, *supra* note 8.

and opportunities that exist when engaging across legal traditions and orders. While stories are always partial and imperfect, we believe they provide significant insight for dealing with internal and externalized oppressions faced by Indigenous communities today.