"Sliver of a Full Moon":
The limits of policies to redress violence against First Nations women in Canada and the United States[1]

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2017

Work in Progress

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Abstract

Implementation varies not only across countries and issues, but also *across groups of women*. What accounts for the variation in the form and degree to which gender equality policies are implemented across such groups? Understanding the role of norms in structuring policy implementation illuminates at least some of the mechanisms behind this differential impact. Informal norms about gender (especially about the meaning of sex, family and nation) structure policy implementation. Informal rules about the meaning of family, nation, sex and community, shape the implementation of formal measures to advance gender equality. As a result, these measures have different consequences for different groups of women.

Examining informal dimensions of gender, then, helps to account for the differential effects of formal institutions on different groups of women. To illuminate this argument, in this paper I show how a persistent but partly informal colonial understanding of *nation* blocks First Nations women in both Canada and the United States from benefitting from formal policies to address VAW, in spite of repeated attempts at reform. This understanding of the place of First Nations women in their communities persists mostly in informal ways that undermines efforts to address VAW by placing aboriginal women in a jurisdiction that offers them no justice. This is one reason that laws to redress violence against women in the United States and Canada have failed adequately to confront violence against First Nations women. I conclude by considering the implications for policy implementation as it affects intersectionally marginalized women more generally.

[1] I would like to thank all the members of the Research Group on Constitutional Studies (RCGS) at McGill for helpful conversations, especially Christa Scholtz. I am also grateful for terrific comments from the Gender Equality Policies in Practice (GEPP) group at the 2016 meeting at Birkbeck in London.

Introduction

What accounts for the variation in the form and degree to which gender equality policies are implemented? In this essay, I argue that implementation varies not only across countries and issues, but also across groups of women. Understanding the role of norms in structuring policy implementation illuminates at least some of the mechanisms behind this differential impact. Informal norms about gender (especially about the meaning of sex, family and nation) structure policy implementation, and are particularly evident when we consider gender equality policy. Examining informal dimensions of policy implementation, or norms, brings this into sharp relief. Informal rules about the meaning of family, nation, sex and community, shape the implementation of formal measures to advance gender equality. As a result, these measures have different consequences for different groups of women. I illustrate this argument with respect to laws to redress violence against women in the United States and Canada, and their failures adequately to confront violence against First Nations women. I conclude by considering the implications for policy implementation as it affects intersectionally marginalized women more generally.

Gender, Intersectionality and Nation

Some scholars see gender as an analytic category, while others focus on gender as an identity (Hawkesworth 2003; Beckwith 2005). Here, we define gender as a configuration of institutions (Young 1990; 2005; Htun and Weldon 2010) -- a form of organization that socially constructs sex and imbues categories of sex and sexuality with meaning. Gender describes the way these sexual categories organize society into hierarchies of power, definitions of heterosexual normativity, sexual divisions of labor and categories of nationality and citizenship (Young 2005; Weldon 2007).

As this definition suggests, gender operates at multiple levels, and intersects with other institutionalized social divisions (such as race, sexuality and class) (Crenshaw 1991; Collins 1998). Most

generally, institutions – formal or informal -- "are the rules that structure social and political life" (Lovenduski 2011). Gender institutions include formal rules, as in the U.S. tax regulations' refusal to recognize childcare as a legitimate business expense, and informal rules, such as the norm that women do most childcare and domestic work. These institutional systems are entwined with institutions delineating societal relations among class, religious, ethnic or racial groups.

Gender is never a single experience or identity that applies to all women or men. In any society, multiple gender categories result from the intersection of gender with race/ethnicity, class, sexuality and other important social groups (Harris 1989; Collins and Bilge 2016; Crenshaw 1991; Hancock 2007; 2016; Simien 2006). For example race, class and sexuality influence the experiences of motherhood and fatherhood. In the United States, for example, African American women's experiences will differ considerably from those of white women. Moreover, gender differs across contemporary societies and changes over the centuries. Indeed, feminist scholars have constructed typologies of gender relations, documenting the many different societal and family forms over the centuries (e.g. Collins 1998; Walby 2007; Duncan 1996). These qualitative variations across gender groups go beyond discourses of "double" or "triple" burdens or oppressions. The concept of intersectionality seeks to highlight the distinctive character and experiences of social groups defined by the combination of multiple social structures, dimensions or identities (for a review see Chepp and Hill Collins 2013; Collins and Bilge 2016; Hancock 2016). These distinctive experiences are often invisible unless the analysis takes a disaggregative approach, examining each specific group in turn (Hancock 2007).

Such a disaggregative approach not only shows variation across groups of women, it also reveals the multidimensional nature of gender- there is no single core experience, no boldily function or essence that makes one a "woman" or "man," rather there are several distinct but interrelated institutions that define gender, institutions that define the basic axes of gender structures (Young 2002: 422).These institutions include the status hierarchy, the sexual division of labor, and normative heterosexuality. An additional dimension (not delineated by Young but implied by some of her other work) is a dimension

partly defined by the concept of citizenship and community, a dimension of belonging and obligation, a delineation of nation and kinship (Collins 1998; Weldon 2007).

Understood in this way, nation or imagined community is a basic axis of gender structure, another basic way that embodiment structures citizenship. It relates to the institutionalized boundaries of community, defined by legal rules of family formation, institutional rules about reproduction and the consequences for citizenship, and for the delineation of national boundaries. Membership in communities is determined differently for men and women of different social groups (defined by race, class and sexuality). Institutionalized notions of nation undergird the institutions of the state and the formal definition of citizenship (including, for example, constitutional equality) as well as state action on reproduction (for example, pro-natalist or anti-natalist policies) that have differentiated impacts on women depending on the specific groups of women involved. Institutionalized hierarchies between these groups create race, and race relations, within and between countries, including relations of colonialism between countries as well as racial groups (Harris 1999; Marx 1998; Razack 2001). The institutional legacies of colonialism are one key way to capture this.

Distinguishing Formal and Informal Institutions

Most political science definitions of institutions include both formal and informal institutions; for example, Ostrom (2005, 3) defines institutions as "the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sports leagues, churches, private associations and governments at all scales." Formal institutions should be distinguished from informal institutions because doing so illuminates both the mechanisms of and opportunities for institutional change.

Informal institutions are "socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels. By contrast, formal institutions are rules and procedures that are created, communicated and enforced by channels that are widely accepted as official"

such as written constitutions, gender quotas, and marriage contracts (Helmke and Levitsky 2006, 4; See also Krook and MacKay 2011; Peters 1999). Formal institutions are authoritative articulations around which expectations converge.[2] Informal institutions are special kinds of norms[3] -- those sanctioned through informal channels (social ostracism, harassment, etc). Informal institutions are not enforced using formal sanctions, like prison sentences. Although informal institutions are usually enforced by informal third party punishment, compliance is experienced as intrinsic, or internally motivated (Sripada and Stich 2005; Raymond et al 2013).

Informal practices and norms are critical to the operation of institutions, as March and Olsen (1989) noted in their discussion of the "logic of appropriateness" (cf. Chappell 2006; Krook and MacKay 2011). Informal institutions overlap with, but are not equivalent to, culture. Some informal institutions are culturally embedded, and some are not (Helmke and Levitsky 2006). Yet, comparative politics scholars outside of gender politics have largely studied formal institutions, with only a few attempts to examine informal institutions (see among others Helmke and Levitsky 2004; Mershon 1994; MacKay and Krook 2011), and these scholars focus on machine politics, corruption or larger cultural practices at the national level with little attention to federalism or gender (except Rubin and Feeley 2006; Publius special issue, etc). Formal institutions need to be distinguished from informal ones because the promulgation and enforcement processes are different, making the process of institutional change different for these two types of institutions as well. As North (1990) notes: "formal rules may change overnight as the result of political or judicial decisions, [but] informal constraints embodied in customs, traditions, and codes of conduct are much more impervious to deliberate policies" (cited in Krook and McKay 2011, 11).

[2] This notion of convergent expectations as part of norms comes from Krasner originally, and is amended by Keck and Sikkink (as in note 3 below) to include the elements pertaining to identity. Thanks to the RCGS group for help in settling upon this particular version of a definition of formal institutions.

[3] Norms are defined as standards of appropriate behavior for a given identity around which expectations converge (Finnemore and Sikkink 1998)

All formal institutions are embedded in, and have elements of, informal institutions in, their operation: They cannot operate without these underlying meanings or context (Habermas 1987). [4] Although formal institutions always have informal elements, but the reverse is not true. Informal institutions need not have any formal elements.

Both informal institutions and the sanctions that enforce them vary across social groups and other axes of identity. This accounts for some variation in policies. Informal and formal institutions establish different standards for different groups of women (and men), and different standards for different spaces or jurisdictions (Razack 2001). Hence, it is important to examine institutions with an eye to the intersectionality of race/ethnicity, class, and sexuality, and with a focus on specific policies in particular periods and contexts.

State making involves making nations as well, that is, forging political coalitions and supporting institutions across groups (often defined by race, class, religion and gender) to build a national identity (Marx 1998; Htun and Weldon 2011). The interpretation of women's rights as challenges to the very authority and structure of government, rather than a claim about women's status, is often one that accepts male-dominated traditional structures as legitimate expressions of "the nation," while simultaneously dismissing complaints of secondary minorities, such as women or sexual minorities, as extraneous to the matter at hand, or as an internal matter for the "nation" in question. Sub-national gender, class or ethnic elites often respond to the perceived challenges to their authority represented by gender equality measures by reasserting their authority, reasserting the importance of maintaining gender inequality and defying any limits on their authority to make laws or other authoritative decisions affecting women's rights.

Constitutional divisions of power rarely explicitly relegate women's concerns as such to a national or sub-national level. Nor do most modern constitutions explicitly disempower women. Formal provisions that appear gender neutral produce inequality because of informal institutions, that is, social

[4] If one thinks of formal institutions as being "system", in Habermasian terms, and informal institutions or norms as being "lifeworld," formal institutions are embedded in norms in the way thst system is embedded in lifeworld.

norms and conventions concerning federal divisions of powers. In Nigeria, for instance, the constitution is interpreted as saying that national legislation pertaining to women and children must be re-adopted by every state, even though this is not written explicitly in the constitution. Consequently, the informal norms about the vertical division of power significantly increase gender hierarchy. The Nigerian government, which ratified the UN Convention on the Rights of the Child in 1991[5], only "domesticated" it, or adopted it as the Child Rights Act (CRA) in 2003, but for this act to take effect outside of the Federal Capital Territory of Abuja, it must also be adopted by individual states. Thus, the Constitution is interpreted as reserving policy issues concerning women and children to the states, although this is not stated explicitly, and despite constitutional guarantees of women's rights (Toyo 2006; NGO Comment to CEDAW; Obiora and Toomy 2009). Thus despite the neutrality (or even equality-guaranteeing) character of the written constitution, informal institutions protecting ethnic harmony through local autonomy take precedence over formal institutions inculcating gender equality.

Violence Against First Nations Women in the United States

The understanding of national identities and relationships that undergirds such federal arrangements has ramifications for the implementation of policies advancing women's rights, such as policies to redress violence against women. Since 1994, the *Violence Against Women Act* has been the law of the land in the United States.[6] This Act represents a comprehensive attempt to redress violence against women, outlining measures to create safe streets and safe homes for women by creating greater penalities for sex crimes, providing grants to improve the operation of law enforcement authorities, legal reforms to protect victims in legal processes, funding for shelters and crises centers, training for law enforcements and service providers, and supporting public education and awareness measures. In spite of

[5] Toyo, N. 2006. This UN Convention defines children's rights that should be protected by governments including freedom from sexual abuse and trafficking.

[6] Title VII of Violent Crime Control and Law Enforcement Act of 1994,H. R. 3355 https://www.gpo.gov/fdsys/pkg/BILLS-103hr3355enr/pdf/BILLS-103hr3355enr.pdf

the comprehensiveness of this Act, the benefits of this act have mostly been unavailable to Native American women.

Native Americans are subject to higher rates of violence crime than any other group in the United States, and Native American Women suffer gendered violence (rape, intimate violence, stalking) at a higher rate than any other group of women. For example, nearly a third of Native American women are raped, a much hgher rate than their non-Native counterparts. While most sexual assault in the USA is interracial (victims and perpetrators are of the same race), this is not true for Native American women who are mostly assaulted by non_native men.

Native American women face heavy institutional barriers to addressing violence against women on Indian Land, because of the complicated way that legal systems combine. Jurisdictional issues mean that Native American women sexually assaulted by non-Native American men have little recourse, despite legal reform to improve government responsiveness to violence against women (Amnesty International 2008; Duthu 2008). Even though reservations are seen as sovereign nations with their own police departments and courts in charge of prosecuting crimes on tribal land, Indian police in most places do not have the legal authority to arrest non-Native people on Indian Land, and Tribal Courts do not have the authority to prosecute them (Horwitz 2014). As a consequence, women assaulted by non-Native men who call the Tribal Police are told that the police (and the Tribal Courts) can do nothing about men who are "not enrolled" as Native Americans. If they then turn to State authorities, they are told that these police do not have jurisdiction on Indian Land. And the federal authorities who may have jurisdiction are remote, under-resourced and generally ill-equipped and unresponsive to these cases. These are not unusual or exceptional situations: As the AI report notes, the government's own statistics find that "Native American and Alaska Native women are more than two and a half times more likely to be raped

or sexually assaulted than women in the USA in general and that 86% of the reported crimes are committed by non-Native men."[7]

These jurisdictional issues persist in spite of multiple efforts at reform. For example, when VAWA was reauthorized for the first time in 2000, it was amended to grant tribal courts full civil jurisdiction to enforce all protection orders, regardless of what jurisdiction issued the original order (Tribal Court Clearinghouse 2015). [8] In 2005, the reauthorization including a special Title specifically intended to address these legal gaps and address VAW for Native American and Alaskan Native women. Title IX, adopted in 2005, mandated that 10% of funds to provide services under VAWA (STOP funds) be earmarked for tribal programs, mandated coordination between Tribal, State and Federal governments, and otherwise sought to enhance the ability of law enforcement to respond to violence against First Nations women. Nevertheless, even in 2008 these problems persisted. In that year, Amnesty International wrote a scathing report about the jurisdictional mess that obstructed the administration of justice for Native women on Indian Land, called *Maze of Injustice*. [9]

In 2013, another amendment to VAWA, *The Violence Against Women Reauthorization Act of 2013*, provided for the prosecution of certain crimes of domestic violence committed by non-Indians in Indian country by Indian prosecutors. With this measure, finally, after 35 years, Congress tried to fix, through Title IX of the reauthorized VAWA of 2013, the jurisdictional mess that blocked an effective response to crimes committed by non-Indian offenders in Indian country. This Act amended the Indian Civil Rights Act (ICRA) of 1968 to give special jurisdiction to tribal courts over non-Indian offenders who commit (1) domestic violence, (2) dating violence, or (3) violate a protection order in certain circumstances. However, the law, which takes effect this year, does not address the problem of sexual

[7] Note that this is not a case of "protecting brown women from brown men," in Spivak's pithy terms. This is about protecting women on Indian Land from perpetrators of violence, the vast majority of whom are non-Indigenous.
[8] Victims of Trafficking and Violence Protection Act of 2000, AWA 2000, H.R. 3244, Division B, 106th Congress, 1999-2000.

[9] Amnesty International. *Maze of Injustice*. 2008. http://www.amnestyusa.org/pdfs/MazeOfInjustice_1yr.pdf

violence more generally, leaving those women subject to random violence by non-Native men (e.g. stranger assault), in a jurisdictional vaccum. It also does not extend to Alaska. It is only a "sliver of the full moon" that Native American women need (Brunner in Horwitz 2014).

What explains the delayed and inadequate nature of government response to this problem? In spite of the pressure brought by civil society and human rights groups such as Amnesty International and having the support of Eric Holder, then attorney general, legislators were unable to get the holistic response that the situation required. An important part of the answer lies not in any formal delineation of jurisdictions but rather in the application of a colonial understanding of the nationhood of Native American tribes during the judicial process of implementation of VAWA. This idea persists in the present and continues to bedevil attempts to achieve justice for Native American women.

In the United States, the development of a colonial understanding of the status and sovereignty of Native AmericanTribes has contributed to problems in addressing the human rights of Native American women. The jurisdictional problems described above can be traced to the understanding of Native American tribes as dependent and conquered nations who cannot be relied upon to behave in a "civilized" manner and to adequately safeguard the interests and safety of the white population. The *Oliphant* decision is based on a review of Congress longstanding policy of limiting Native American self-governance in such a way as to ensure the "safety of the white population." The decision also cited the intention "to encourage them as far as possible in raising themselves to our standard of civilization." This policy, CJ Rehnquist writes, was reaffirmed in the 1960 Senate report that " Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders." The historical inadequacy of Indian systems of justice, and the incompetence of Indian authorities in interpreting and applying federal law, is repeatedly invoked as a the rationale for this policy, and although there are places where these systems of justice are seen as having been "improved," the decision portrays it as the job of Congress to assess whether these tribes have improved to such a degree that they can be entrusted with the safety of the non-Native population. It is fine, it

seems, following the logic of the decision, that the Native population be governed by these allegedly inadequate systems of rule - as long as they do not endanger (white, Non-Native) others. Throughout, the Tribes are described as conquered and dependent, and yet retaining some aspect of sovereignty. They are denied these powers because the powers are "inconsistent with their status" as domestic dependent nations (Frickey 1999).

Frickey (1999) describes the ideology behind the decision as follows:

> Under this vision, the United States involuntarily incorporated the tribes and achieved dominant sovereignty over them by an assertion of colonial prerogatives that eventually reached contemporary contextual fruition. The colonial process did not end at some point in the distant past. Instead, it is an ongoing process that is not even limited to new congressional exercises of its plenary power over Indian affairs. The ongoing colonization of the continent now includes a judicial role as well, adjudicating the depreciated status of tribal authority on a case-by-case basis.

This ideology, and the concomitant decision, was not based on formal agreements or decisions, but rather on an understanding of the status of Indian nations in contemporary United States. [10]

This decision has been extensively criticized, yet the decision has even been extended in other decisions and remains accepted as precedent. " In short, Oliphant is controversial because it signaled that the project of imperialism is alive and well in Indian Country and that the courts can now get into the action"(Duthu and Calloway 2009, 21) Burger (2006) similarly argues that the authority of tribal officials has been eroded over the past few decades.

Echoes of this view can be heard in the debates surrounding efforts to craft a legislative solution tio the situation of Native American women. One Senator, Sen. Charles E. Grassley (R-Iowa) said that "under the laws of our land, you've got to have a jury that is a reflection of society as a whole." Adding that: "On an Indian reservation, it's going to be made up of Indians, right?" Grassley said. "So the non-

[10] The respondents in the case had argued that Tribal jurisdiction over non-Natives on reserve "flows automatically from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation."" In his dissent, Justice Thurgood Marshall agreed: "I agree with the court below that the "power to preserve order on the reservation . . . is a *sine qua non* of the sovereignty that the Suquamish originally possessed." *Oliphant v. Schlie,* 544 F.2d 1007, 1009 (CA9 1976). In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy, as a necessary aspect of their retained sovereignty, the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent."

Indian doesn't get a fair trial." (cited in Horwitz 2014). Other members of Congress raised concerns about "retribution" for a long "history of white mistreatment" being exacted against non-Natives by Native authorities. (Horwitz 2014) (It is worth noting that these questions have been empirically investigated, and there is no evidence for bias against non_natives in Native judicial proceedings (see discussion in Berger 2004)). And Alaska was excluded because of what was viewed as overly complicated jurisdictional issues (Horwitz 2014). Although the amendment to the VAW law finally passed, the narrowly drawn nature of the solution owes in part to these concerns raised by opponents, and the persistent situation of limited sovereignty of Tribal authorities on Tribal lands reflects the persistence of the colonial understanding of nationhood for Native peoples, lurking in the background and undermining attempts to craft more just arrangements for Native American women.

Violence Against First Nations Women in Canada

A similar crisis afflicts First Nations, Inuit and Métis women in Canada.[11] Indeed, the issue of "missing and murdered aboriginal women" was a focus of the 2015 election campaign. Aboriginal women in Canada are three times as likely as non-aboriginal women to be victims of violence (Brennan 2011), and the violence to which they are subject is likely to be more severe (Amnesty International 2014; ODonnell and Wallace 2011).[12] The Native Women's Association of Canada has identified more than 500 missing or murdered aboriginal women just from the last two decades.[13]

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[11] Violence Against Indigenous Women and Girls in Canada: A Summary of Amnesty International's Concerns and a Call to Action.
https://www.amnesty.ca/sites/amnesty/files/iwfa_submission_amnesty_international_february_2014_-_final.pdf

[12] An earlier report found that Status Indian (Indigenous) women between the ages of 25 and 44 were five times more likely than all other women of the same age to die as the result of violence. (Aboriginal Women: A Demographic, Social and Economic Profile, Indian and Northern Affairs Canada, Summer 1996; Amnesty International, 2004. Stolen Sisters.)

[13] Native Women's Association of Canada, What their voices tell us: Research findings from the Sisters in Spirit Initiative (March 2010), www.nwac.ca/sites/default/files/reports/2010_NWAC_SIS_Report_EN.pdf.

The problem of violence against aboriginal women in Canada is structured by informal practices and policies. Formally, there are many elements of the relationship between the Canadian state and First nations communities that might seem to work against the continuation of the kind of informal colonial understanding of nation outlined above.,In Canada, section 35 of the Constitution Act of 1982 provides a basis for Aboriginal self-governments, a change that some have seen as transformative for First Nations governments in Canada. Moreover, the guarantees of aboriginal rights are expressly guaranteed equally to men and women. Some read this provision of the Act as guaranteeing an aboriginal right to self-government; Others see it as guaranteeing only a narrower set of rights, such as rights to use natural resources for traditional purposes (hunting and fishing, etc); Last, some First Nations people reject the authority of the federal government to delineate the rights of self-governing aboriginal nations. Successive government documents have recommended the transformation of Canada's approach from a colonial stance to one that is more focused on self-government (Eg Royal Commission on Aboriginal Peoples 1996, final Report). [14] While the federal government has failed to act on these recommendations in a holistic way in a constitutional setting, several developments have contributed to growing autonomy for aboriginal governments, including 1986 SBSG Policy (Community Based Aboriginal Self Government) and the 1995 (Liberal) Inherent Right of Self-Government Policy which provided that Bands may negotiate new treaties with federal and provincial govenrments to be removed from the Indian Act. Tens of aboriginal governments have availed themselves of this process, while some have unilaterally asserted their independence.

Nevertheless, informal attitudes towards these communities undermine the administration of justice for First Nations women. For example, an Amnesty International (2005) report links First Nations' womens' higher risk of violence to racist and sexist attitudes towards First Nations Women on the part of

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[14] **Canada. Report of the Royal Commission on Aboriginal Peoples**
http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637

perpetrators and police. This undermines responsiveness to women victims of violence at the same time as they are made more vulnerable by poverty, which is largely a legacy of federal policies towards their communities, and by the marginal status of their communities. Police played a central role in taking young aboriginal people from their homes and communities and forcing them into residential schools where they were ounished for speaking their native tongues and often subject to horrific abuse. This legacy means many First Nations people view police with skepticism. With no permanent police force assigned to these communities, and with few aboriginal police officers, misunderstanding and mistrust still characterizes these relationships. Amnesty reports that many police see Aboriginal people as a threat to non-Native communities, rather than as people equally deserving of their protection. These problems are compounded by the sexism First Nations women confront in their own communities.

In addition, in spite of the legal changes outlined above, First Nation women in Canada still fall into a jurisprudential vaccum, for example, in the area of matrimonial property, that is surprisingly reminiscent of the situation in the United States discussed above. Indeed, Razack (2001) has identified such women as falling into "zones of violence." There is a "jurisdictional gap" with respect to women's matrimonial property rights on reserve: "The Supreme Court of Canada confirmed in 1986 that courts cannot apply provincial or territorial laws dealing with the division of family assets in a manner that would alter the interests of First Nations in their reserve land because reserve lands fall under federal responsibility."[15] Although women are not formally barred from holding property, the combination of tradition and formal policy structures current access for women to matrimonial property on reserve in such a way to make it difficult for women to assert their rights to live and own property on reserve in rhe event of a conflict with their spouse.

[15] See ***Derrickson v. Derrickson*** [1986] 1 S.C.R. 285 which held that provincial matrimonial property laws cannot take effect on reserves because reserve lands fall under the exclusive jurisdiction of the federal government under section 91(24) of the Constitution.

> The combined impact of colonialism on the landholding traditions of First Nations and on gender relations has been severe and negative. The *Indian Act* regime interfered with the pre-contact gender relations and power relations between women and men as well as indigenous values in relation to land and individual and collective rights in relation to land. This is especially the case in regard to First Nations women's rights to reside and hold individual interests in reserve land, whether single, married, separated or divorced. Contemporary matrimonial property issues on reserve thus occur against a long and fairly consistent historical pattern of disenfranchisement, by which First Nation Women have been separated from reserve communities and their gender equality interests in reserve lands ignored.(Cornet and Lendor 2002)

It appears that First nation women who become victims of domestic violence often have no place to go on reserve, resulting in having to leave their communities to find safety and jeopardizing their rights to the family property on reserve. The Harper government proposed to address this problem in 2007, but this issue was also recognized as a problem by the Assembly of First Nations (AFN) and the National Women's Association of Canada as well (NWAC; AFN 2007). By 2011, however, no solution had been crafted, and the Harper government sponsored and passed Bill S-2: Family homes on reserves and Matrimonial Interests and Rights, [16] in the context of much criticism. This Act provided that matrimonial property be provided equally to men and women on Reserve, and gave Native Bands one year to develop their own laws on matrimonial property on reserve. The Act was denounced as colonial interference by the AFN. The NWAC also criticized the Act as doing very little to assist women victims of domestic violence on reserve because it failed to provide the resources and support needed for women to access the legal system and to escape violence. Although it was presented as an act motivated by concern for Native women, the NWAC argued, the Act actually made little difference for women victims of violence or other women living on reserve.

Thus, in spite of any formal legal difference the act may have made, Native Women on reserve in Canada end up disproportionately victim to violence and find little help in the laws of either their self-

[16] Wingrove, "New Law Sets out Rules for Divorces on Reserve" Globe and Mail, June 11 2013.; See AFN 2007; AFN Position Paper on Matrimonial Law on Reserve http://www.afn.ca/uploads/files/mrp/mrp-law-handbook.pdf; See also "**Proposed Family Homes on Reserves and Matrimonial Interests or Rights Act BILL S-2"** https://www.syilx.org/wordpress/wp-content/uploads/2012/02/Bill-S-2-Homes-Res-Matrimonial-Interest-Rights-Act.ppt.pdf

governing Native communities or the federal government. Efforts to craft a solution fall between the inaction of the local government, which sees the issue as one primarily of colonially-inspired interference, and the federal government, who take up an overly narrow and ineffective solution to the problem that exacerbates intercommunity problems and does little to help the women in question (Razack 2001). It is a surprisingly similar situation to the jurisdictional situation of Native women victims of violence in the United States, surprisingly similar given the formal differences in official policy on aboriginal self-government.

During the Canadian constitutional negotiation aimed at forging a nation that included Quebec, women's groups outside Quebec as well as the Native Women's Association demanded assurances that a distinct society clause or a Notwithstanding clause would not overrule sex equality guarantees. The Native Women's Association vocally opposed the Mulroney governments's proposed constitutional reforms (The Charlottetown Accord) in spite of the measures it included in relation to aboriginal self-governance, because of concerns about protections for First Nations women's rights and representation in the process. NWAC later (unsuccessfully) argued that the process fully included only male-dominated organizations in a case that came before the Supreme Court of Canada.[17] The National Action Committee under Judy Rebick opposed the Charlottetown Accord in solidarity with First Nations women. This was quite controversial, as some activists for First Nations' self-determination argued that women's rights would be secure under self-government. NWAC also intervened in a later case (*Lovelace v. Ontario*) again to argue that when governments undertook to empower or consult with First Nations groups, they were obligated to consult with and include organizations of First Nations women.

For these constituencies, issues of cultural and political autonomy and self-determination are entwined with battles over women's rights. The negative impact of a colonial view of particular cultural groups is not just a problem for women in the context of federalism. Uma Narayan (1998) convincingly

[17] See Native Women's Assn. of Canada *v.* Canada, [1994] 3 S.C.R. 627; For a First Nations legal scholar offering a different view (and who was herself involved in the constitutional negotiations as a part fo the team representing the AFN) see Turpel 1989/90.

shows how taking the colonial stance towards Third World Women relegates them to "death by culture," when courts and public opinion draw the conclusion that violence against women is just an inevitable part of the cultural background for that particular group. Sarah Song (2007) has similarly criticized the use of the "cultural defense" in multicultural policies, arguing that institutional arrangements of multiculturalism undermine gender equality in minority communities.

Conjoining of autonomy to issues of women's rights was central to colonial discourses and resistance to colonialism in many places (Narayan 1998; Jayawardena 1986). This legacy of using women's rights as a pretext for colonial domination is seen as continuous with current efforts to "save brown women from brown men" by many postcolonial feminist scholars (e.g Spivak 1994; Jayawardena 1986; Mohanty 1984). Efforts to enforce policies aimed at ensuring women's rights become complicated in cases of cultural minorities and marginalized groups seeking self-determination, as demands for uniform guarantees of women's rights become conflated with the imposition of alien values and legal systems, obscuring the gender equality at stake (Htun and Weldon 2011; Song 2007).

When women mobilize, informal norms that value ethnic accommodation over gender equality are less likely to prevail by default. Still, when the division of power overlaps with religious or ethnic minority autonomy, efforts to change institutional patterns become entangled in majority-minority power struggles, often placing minority women in the position of defending either centralization of power that diminishes subgroup autonomy or patriarchal minority elites who are unlikely to recognize their rights. Thus, transforming informal federalist institutions is particularly challenging when they pertain primarily to women of ethnic or religious minority groups. Informal understandings of nation and community and women's role in these communities undergird the current obstacles to institutional reform. Thus, the impact of policy on women of majority race and ethnicity involves different issues than studying policy impact on women of disadvantaged and oppressed racial and ethnic groups. Informal institutions are part of the reason for this cross-group variation.

Similar issues arise with respect to gender and class. Mettler argues that federalism in the United States has resulted in two-tier citizenship that leaves women out of the (limited) social citizenship offered through policies such as old age pensions. When funding is left to subnational units, the realization of some working class women's rights will depend on geographic location. If funding for or access to abortions, for example, varies by state or province (as in Canada), then working class women have less reproductive freedom than middle class women: They are less able to utilize legal guarantees of reproductive rights. On the other hand, women advantaged by class, will have their status dramatically transformed by such legal guarantees (Htun and Weldon 2010).[18] Implementation, in other words, varies across different groups of women.

Informal assumptions about the meaning of the term "women" means that some women (privileged women) are seen as normatively standard while others are seen as "exceptions." These more privileged women benefit most from equality guarantees, unless there is something specific to indicate that other axes of equality are relevant and ought to be taken into account. Even then, informal understandings about the meaning and salience of class, racial, ethnic and sexual divisions among women and men may undermine formal gender equality guarantees.

Conclusion and Implications

Gender equality policies often end up producing substantively different outcomes for different social groups. Informal institutions—especially norms creating gender, class and race hierarchies -- structure the interpretation of formal rules resulting in dramatically different substantive effects from the same formal rules over time, across countries and across groups. Societal inequalities along race/ethnicity, class and/or sexuality lines, mediate the impact of formal institutions, producing substantively different effects for different groups of women (and men).

[18] In the United States, Court decisions bifurcated guarantees of abortion rights from funding for abortions. See discussion in Mackinnon (1989), chapter on abortion.

Implementation of gender policy, then, varies not only according to national and local context, and type of policy, it also varies according to the specific group of women in question. Informal institutions are part of the reason for this variation, for this intersectional effect. This suggests that analysis of implementation of gender policy must be disaggregated not only by issue (Htun and Weldon 2010; Strolovitch 2005) but also by the group of women whose rights or status is at issue (Hancock 2007; Weldon 2008). Policy implementation may be enabled when formal institutions support an active, substantive approach to equality and when women organize on their own behalf.

The relationship between the state and society varies across social groups. Christian Davenport, for example, shows that while the police are most likely to repress white activists challenging property rights, police repress Black activists regardless of the issue they espouse (Davenport et al 2011). First Nations women in Canada have organized on their own behalf, and have sought recognition for their 'secondary marginalization' in indigenous communities in Canada (Cohen 1999). For example in *Lovelace versus Ontario*, the Native Women's Association, which intervened in the case, advanced an interpretation of section 15 (2) that stressed its importance for disadvantaged groups (Stirling 2005). The second part of section 15, they contended, was intended to protect measures designed to advance equality for disadvantaged groups from challenges from advantaged groups, and so should not be used to protect advantaged from disadvantaged groups.

Neither the Supreme Court nor the Court of Appeals accepted this line of argument. The Supreme Court argued that "Governments have no constitutional obligation to remedy all conditions of disadvantage in our society. If government affirmative action programs can be too readily challenged because, for example, they do not go far enough in remedying disadvantage, governments will be discouraged from initiating such programs. Governments should be able to establish special programs under section 15(2) that distinguish between or even within groups protected under section 15(1)." (cited in Sterling). If the standard discouraged programs to assist disadvantaged groups, that would indeed run counter to the whole point of section 15 (2).

The *Lovelace* decision, though, does raise questions about how to think about secondary marginalization, or internal minorities (Cohen 1999, Green 1995) Reading section 15 (2) as the Court did in Lovelace, as permitting "imperfection" or internal discrimination when the case advances the status of a disadvantaged group, may present obstacles to women of color, poor women and other groups subject to secondary marginalization, as their exclusion may be seen as justified. This may be particularly worrying in light of some Courts' propensity to attribute secondary status for minority women and women of color to their "culture," and to see it as allowable on that basis (Song 2013). In order for First Nations women, women of color and other intersectionally marginalized groups to reap the potential benefits of 15(2), it may be that a more nuanced interpretation of the section is needed, one that moves away from "understanding problems in terms of distinct, homogenous social groups" towards a "recognition of overlapping inequalities linked to complex, intersecting and multiple identities." (Sheppard, 2010, 18).

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