RICE UNIVERSITY

Indigeneity in the Courtroom: Law, Culture, and the Production of Difference in North American Courts

By

Jennifer Anne Hamilton

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE

Doctor of Philosophy

APPROVED, THESIS COMMITTEE:

James D. Faubion, Professor, Chair
Anthropology

George E. Marcus, Professor and Department Chair
Anthropology

Lynne Huffer, Professor
French Studies

Hannah Landecker, Assistant Professor
Anthropology

HOUSTON, TEXAS

MAY 2004
INFORMATION TO USERS

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleed-through, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

UMI Microform 3122475
Copyright 2004 by ProQuest Information and Learning Company.
All rights reserved. This microform edition is protected against unauthorized copying under Title 17, United States Code.

ProQuest Information and Learning Company
300 North Zeeb Road
P.O. Box 1346
Ann Arbor, MI 48106-1346
ABSTRACT

Indigeneity in the Courtroom: Law, Culture, and the Production of Difference in North American Courts

By

Jennifer Anne Hamilton

This dissertation considers how culturalist arguments are being deployed and interpreted in legal cases involving indigenous peoples in both Canada and the United States. Focusing specifically on three court cases, it asks how a certain kind of difference, indigeneity, is produced in both legal and extra-legal spheres. Rather than having a specific referent that is indigenous cultural practice and epistemology, indigeneity references the idea that indigenous difference is produced in particular contexts, in response to a variety of sociopolitical forces.

The dissertation closely examines these three recent cases involving indigenous peoples, one from the U.S. and two from Canada. In each of these cases, the courts deploy the idiom of indigenous difference, indigeneity, in purportedly novel and unexpected ways. The dissertation argues that despite their superficial novelty, these cases are not especially anomalous; they are, in fact, part of continuing processes which rely on reductive multiculturalist discourses of indigeneity to continue to manage and even deny the existence of a colonial past and a postcolonial present.
ACKNOWLEDGEMENTS

As with any individual project, the contributions of others are essential to its successful completion. I have been especially fortunate to have been surrounded by a wonderful community during my academic career. I would like to thank the following people:

The members of my committee: Jim Faubion, Lynne Huffer, Hannah Landecker, and George Marcus who have been exemplary mentors to me. Each has brought a different perspective to this work, and I have deeply appreciated their commitment to and enthusiasm about this project. I would especially like to thank Jim Faubion, who directed this dissertation, for his extraordinary generosity and for his rare ability to interpret what I’m really trying to say.

Other mentors who have offered me advice, constructive criticism, and inspiration throughout my undergraduate and graduate careers: Nia Georges, Randy Hanson, Mette Hjort, Berkeley Kaite, Kathryn Milun, Kristin Norget, and Pat Seed.

Professors Dara Culhane and Bruce Miller, and fellow students Caroline Butler, Hülya Demirdirek, Patty Ginn, and Jennifer Kramer, who were generous with their time and their ideas during my fieldwork in Vancouver.
The many unnamed interlocuters who gave generously of their time and ideas while I conducted fieldwork in Vancouver and Seattle. I would especially like to thank Fay Blaney and Audrey Huntley of the Aboriginal Women’s Action Network (AWAN) for their insights into the often difficult conditions facing Aboriginal women in Canada.

Current and former Rice Anthropology graduate students for their intellectual engagement and emotional support throughout this process: especially Mitra Emad, Andrea Frolic, Laura Helper-Ferris, Lamia Karim, Nahal Naficy, Kris Peterson, Aimee Placas, Deepa Reddy, and Brian Riedel.

My students both at Rice and at the University of Houston—Clear Lake, especially those from the various incarnations of Law and Society and Gendered Perspectives on the Law, who helped me see things from fresh perspectives and whose enthusiasm invigorated me.

Carole Speranza, Joy Bryant, and Maya Grosul for keeping the Anthropology Department going and for helping me with the administrative end of things.

Jacob Speaks for his never-ending love and support, his wonderful mind, and his extraordinary editorial skills.
I am particularly indebted to the members of the Rice University Interdisciplinary Writing Group in its various incarnations: J. Kent Fitzpatrick, Chuck Jackson, Shannon Leonard, Kris Peterson, and Kayte Young.

The following institutions generously provided funding at various stages of this project: Social Sciences and Humanities Research Council of Canada (SSHRC), the SSHRC Federalism and Federations Program, the Wenner-Gren Foundation for Anthropological Research, Rice University Department of Graduate Studies, and Rice Department of Anthropology.

Any errors or omissions are my own.

For Jacob, with love and deepest gratitude.

“… and then he asked me would I yes to say yes…and yes I said yes I will Yes.”
TABLE OF CONTENTS

Abstract

Acknowledgements

Preface
A Comment on the Role of Law in the Research Imaginary

Chapter 1
Indigeneity in the Courtroom: An Orientation to Issues of Cultural Difference and the Law

Interlude: What Happens to Mary? Some Orienting Thoughts on the Project

Chapter 2
The Banishment Case: Justice and Difference in Washington v. Roberts and Guthrie

Chapter 3
Resettling Musqueam Park: Property, Culture, and Difference in Glass v. Musqueam Indian Band

Chapter 4
Healing the Bishop: Indigeneity, Consent, and Colonialism in R. v. O’Connor

Conclusion
Some Speculations on Indigeneity in the Courtroom

References Cited
PREFACE:
A COMMENT ON THE ROLE OF LAW IN THE RESEARCH IMAGINARY

Law is the way in which I came to this project. In many ways, it has created boundaries, relationships, allowed for a certain level of abstraction, allowed connections to be made. It is "the semi-stable conduit" through which I articulate "points for intersecting levels of analysis as well as intersecting persons or groups."¹

The argument that law itself is inherently cultural, and that legal phenomena are not apolitical and value-free, has become, in many circles, axiomatic. Such ostensibly neutral conceptions of law have been particularly vulnerable to certain kinds of deconstructive critiques whose focus on discourse and larger dynamics of power demonstrate the necessity of interpreting legal phenomena through larger and more inclusive frameworks, frameworks which account for, among other things,

Nowhere is this more true than in law and nowhere can the lessons of deconstruction, of certain forms of literary engagement, teach us more about the limitations of language and truth, and about the exercise of power. Law is the conceptual nexus through which the foci of this dissertation come into connection with each other. It is both social phenomenon and research imaginary; a "semi-stable" point of departure, one which articulates "points for intersecting levels of analysis as well as intersecting persons or groups."² As Hannah Landecker remarked:
...law [is] a relatively stable conduit between multiple sites. Law is reasonably stable and wonderfully documented, like a cockfight with a court stenographer, a place for the formal stylized discrete accretion of norms, conventions and taboos, and their challenges. The precedents, formal analogies and metaphors by which law makes decisions on the present—or the novel object—on the basis of particular pasts is a formalized abstraction of many of the shifts and negotiations that anthropologists would like to track.  

As Landecker points out, the objectification of law is not in itself difficult. It is rather the projection of law that, as a phenomenon that quickly moves beyond the boundaries of a stable project, as a phenomenon so rich, can quickly mire a researcher in its richness; a source of difficulty at both the conceptual and pragmatic levels. Law, as concept, as institution, as social phenomenon, motivates the multi-sited in my project. It provides the points of departure to examine a range of issue as well as provides the analytical framework to tame the immoderation of my research imaginary. More importantly, it is through the imposition of a particular set of questions about the nature of law, the deployment of law, the epistemological underpinnings of law, which creates the connections that motivate this research.

1 Landecker 2002: 2.
2 Ibid.
3 Ibid: 1.
CHAPTER 1:

INDIGINEITY IN THE COURTROOM: AN ORIENTATION TO
CULTURAL DIFFERENCE AND THE LAW

The First Nations are a part of the fabric of Canada, a brave federation of differences: multiculturalism, official bilingualism, minority rights, cultural and geographic diversity, ancient grievances. Managing these differences is constant juggling act, a high stakes poker game, an act of faith.¹

Tribes are faced with the inevitable conflict created by two justice paradigms competing for existence in one community. Many Americans believe the law is something to be applied and justice is something to be administered. In contrast, tribes traditionally believe law is a way of life and justice is a part of the life process.²

Arguably, no other group has a more confounding relationship to European-settler legal institutions than North American indigenous peoples.³ Historically, Euro-settler systems of law developed in part as a response to settler encounters with indigenous populations. Particularly in the Western part of the U.S. and Canada, law was central to colonizing projects, both in terms of exercising control over indigenous populations and creating national settler identities.⁴ Although indigenous peoples have been making claims in North American settler courts since the establishment of those courts, there nevertheless
has been a flurry of legal activity on the part of indigenous groups since the 1960s, in part because of the legacy of the civil rights movement in the U.S. and the increasing numbers of indigenous peoples participating in mainstream legal systems as practitioners (i.e. lawyers, judges, etc.). As a result, “the interpellation of political into legal questions” has become one of the primary ways in which indigenous peoples make political claims in postcolonial nation-states (Dirlik 2001: 182).

As assertions of traditional and cultural rights have become increasingly important for indigenous peoples throughout the world, these assertions have been critiqued, particularly within certain branches of the academy, as simplistic, essentialist, and incomplete. Debates about what constitutes “culture” or, more specifically, “a culture,” have been rampant within the Americanist tradition of anthropology. Cultural anthropologists have generally been uncomfortable with “culture talk,” and often wince when someone talks about “the culture of so-and-so” or “my culture.” This discomfort, however, rarely extends beyond academia, and institutions like courts have become increasingly fluent in “culture talk.” U.S. and Canadian courts have picked up this highly politicized discourse and have begun a process of legal interpretation that has far-reaching consequences for the indigenous peoples living within (and beyond) their borders. This dissertation considers how these cultural arguments are being deployed and interpreted in both U.S. and Canadian law, particularly in the courts. More particularly, I ask how a certain kind of difference that I call indigeneity is produced in both legal and
extra-legal spheres. Rather than having a specific referent that is indigenous cultural practice and epistemology, *indigeneity* references the idea that indigenous difference is produced particular contexts, in response to a variety of sociopolitical forces. In other words, I am not exploring the nature of cultural difference itself, but rather “the processes of *production* of difference in a world of culturally, socially, and economically interconnected and interdependent spaces” (Gupta and Ferguson 1997: 43; authors’ emphasis).

Law and legal cases provide a necessary framework for exploring and understanding the circulation of ideas and discourse. In this work, I closely examine three recent cases involving indigenous peoples, one from the U.S. and two from Canada. In the first, I consider a criminal case in which a Washington state court allowed for the imposition of a traditional sentence for two Tlingit youths convicted of a violent assault. In the second, I look at a recent civil case involving leased land in the city of Vancouver that was ultimately decided by the Supreme Court of Canada. And, in the third, I contemplate the use of an indigenous healing circle for a white Catholic bishop accused of sexually assaulting young indigenous women in British Columbia. In each of these cases, the courts deploy the idiom of indigenous difference, of *indigeneity*, in novel and unexpected ways. Yet it is not simply the novelty of these cases that marks them as important. Rather, I want to suggest that despite their superficial novelty, these cases are *not* especially anomalous; they are in fact part of continuing processes
which rely on reductive multiculturalist discourses of indigeneity to continue to manage and even deny the existence of a colonial past and a postcolonial present.

* * *

In postcolonial democracies such as the U.S. and Canada, nation-states which are considered to be culturally and legally plural, issues of cultural difference circulate in multiple spheres and permeate many institutional fields including education, medicine and, in particular, law. The espousal of tolerance and respect for difference has become an important value; one expressed both in political and moral terms. As political philosopher Charles Taylor argues in his influential essay, “The Politics of Recognition,” the failure of nation-states to recognize the differences among their plural citizenry has not only political dimensions, but ethical ones as well. Taylor posits that such a failure can be psychologically damaging to minority groups (1994); in such a conception, 

\textit{difference} takes on an almost sacred character and becomes a compelling idiom for articulating rights, values, and identities.

Yet oftentimes, the discursive and ideological dimensions of this attention to culture have gone unexplored in both political and legal spheres, alternatively, the inevitable conflicts and contradictions that emerge as part of discourses of difference push the boundaries of tolerance and respect, and are often described as threatening to a national culture. In a U.S. context, Norgren and Nanda describe this tension as existing between “the need to create national institutions, including law which unify culturally different groups, and on the other, the need to protect
human rights by allowing some degree of religious, personal, cultural and local political autonomy” (1996: 1). This context of multiculturalism is essential to an understanding of how indigeneity functions and is produced in North American courts.

During moments when many cultural anthropologists argued to “forget culture,”\textsuperscript{10} or, at the very least, argued its limits, the “culture concept” began to have significant import in communities and contexts outside of anthropology and outside of academia. Cultural relativism, most simply the idea that cultures have their own internal logic and should be understood and evaluated by these internal rules, and not be subjected to foreign moral or evolutionary schemes, has been one of cultural anthropology’s most influential concepts. Particular forms of cultural holism, especially the idea of culture and tradition as bounded and static entities, became passé within anthropology just as indigenous peoples were asserting forms of cultural holism with particular political force. And, of course, the moral and ethical dilemmas inhering in ideas of cultural relativism have only become more complex and more controversial over time. So where does this leave the culture concept, especially for a younger anthropologist, seeking to explore the dynamics of law, colonialism, gender, and culture in theoretically sophisticated and politically sensitive ways?

Anthropologist John Cove, among others, has argued that cultural relativism “has provided indigenous peoples in a number of countries with a basis for political action—a factor that has global import for anthropology” (Cove 1999:
109). Some, in fact, have argued that those who urge us to move beyond the culture concept are part of a continuing colonialist model, one which short-circuits one of the most powerful discursive tools available to indigenous peoples and other oppressed groups.

My interest into these questions of culture emerged early in my dissertation research. My dissertation project began with a term paper in my third year about a controversial and unprecedented criminal case adjudicated in Washington State in 1994. Two Tlingit youths, convicted in state court of a violent assault in an urban area, outside of Indian country, were released to the custody of a traditionalist tribal body for what was called a customary sentence: banishment to remote islands in Alaska. My initial analysis of this case elucidated many issues inhering in indigenous struggles for self-determination. These include the complex legal, historical and political relationships between government entities and indigenous communities; the cultural politics of identity in the pluralist nation-state; and the competing conceptions of law and justice among different communities. One of the most interesting things to emerge from this research, however, was an interview I did with a member of the Tlingit-Haida Central Council, the federally-recognized tribal body who did not ask for the banishment, and was in fact opposed to it. This person was also a state court judge in Washington, and one of the things he told me was that banishment was, in fact, not a traditional Tlingit practice. Rather the people involved in asking for the banishment had taken the concept from Llewellyn and Hoebel's 1941 legal ethnography of the Cheyenne
called *The Cheyenne Way*. Although this case is discussed extensively in Chapter Two, I bring it up here to point to the moment for me in which ideas of culture and tradition within a postcolonial moment became particularly fraught.

My ethnographic project was originally concerned with how indigenous legal concepts, especially as they pertain to criminal justice matters, were being defined and used in urban contexts among First Nations and American Indian peoples living along the Northwest. In my fieldwork, I sought to investigate how processes of law and justice were being defined and negotiated among individuals, community groups, and government institutions.

**Introduction to Restorative Justice**

As indigenous peoples throughout the world continue to assert self-determination and to make claims to territory, intellectual property, artifacts and human remains, and as more nation-states begin to formally recognize indigenous peoples as having certain rights within their systems of law, ethnographic research becomes invaluable by elucidating subtle forms of local knowledge and by making sense of these forms in larger contexts. Many claims made by indigenous communities in Canada and the United States have coalesced around issues of law and justice including the implementation of restorative justice.

While restorative justice is a broad term encompassing diverse ideas and activities, it is generally understood as an alternative system of justice concerned with restoring balance and harmony to a community damaged by criminal or anti-social activity. Proponents of restorative justice define it in opposition to
mainstream or “retributive” justice systems that only seek to punish, arguing that restorative justice is focused on healing all parties affected by crime, namely the victim, the offender and the community.\textsuperscript{12}

Although not limited to them, restorative justice has become a guiding principle for many indigenous groups seeking to gain control over the administration of justice in their communities, especially during the last decade.\textsuperscript{13} Restorative justice is seen as a return to earlier or ‘traditional’ principles and forms of justice that existed in pre-contact communities prior to the imposition of foreign laws and practices by colonial governments.\textsuperscript{14} Also called tribal law, popular justice, peacemaking, and customary law, indigenous justice is considered to be epistemologically distinct from (and often diametrically opposed to) Western legal formations.\textsuperscript{15} While there are subtle variations in the nature of these distinctions, some of the more consistent assertions are that indigenous justice is based on traditional egalitarian principles, and that it works by consensus to restore harmony and heal the community.\textsuperscript{16} Restorative justice is considered to be inherently informal and many advocates view it as an articulation of community healing, cultural revitalization, and self-determination in response to the ineffective, culturally insensitive, and discriminatory criminal justice systems of the state.\textsuperscript{17}

Despite its implied critique of statist justice systems, restorative justice has also become an important alternative for nation-states grappling with the expense of courtroom procedures and ever-expanding rates of incarceration. In both
Canada and the United States, indigenous peoples comprise a much larger percentage of the prison population than the general population and are also more likely to be the victims of crime.\textsuperscript{18} As a result, governments and courts have been more willing to consider restorative justice measures whether formally or informally. Formalized restorative justice measures, often adapted to be “culturally specific” for Indigenous peoples, include mediation, alternative dispute resolution (ADR), diversion programs, and family group conferencing (FGC), all of which look for alternatives to traditional courtroom procedures and incarceration.

Restorative justice has become a highly politicized field, especially in indigenous communities. Critics of restorative justice in its current forms have argued that measures like family group conferencing, created and sanctioned by the state, are mere “indigenizations” of extant bureaucracies that are firmly rooted in colonial structures and fail to relinquish any real power to Indigenous groups.\textsuperscript{19} Further, the formal nature of state-sanctioned restorative justice programs is often considered antithetical to Indigenous cultural conceptions of justice.\textsuperscript{20}

Others critique the ideological dimensions of restorative justice, asserting that it rests on oversimplified and stereotypical notions of cultural difference with no attention to cultural specificity, histories of religious and political colonization, and anthropological contextualization. They argue that counter posing typologies of western versus indigenous justice is a part of “continuing colonization” as it fails to address the complexity of these issues (LaRocque 1997: 87). Some
scholars also suggest that while state law has historically co-opted customary law for its own coercive purposes, it is possible for laws based on indigenous ideas to be counter-hegemonic.\textsuperscript{21}

There has also been an increased interest in using formal restorative justice approaches in sexual assault and domestic violence cases because mainstream approaches are culturally biased and considered largely ineffectual.\textsuperscript{22} Gender violence in indigenous communities in Canada and the US is prevalent, a fact many attribute to the violence of colonialism and the resulting denigration of women’s status.\textsuperscript{23} Critiques from indigenous feminist-activists and others argue that so-called restorative measures are inappropriate and unsafe for victims of gender violence.\textsuperscript{24} These critiques challenge the offender-based/male-focused nature of restorative justice measures, asserting that, despite its claims to the contrary, victims are not integral to the process, and restorative justice projects generally work to decriminalize violence against women and children. Further, they contend that the position of indigenous women is already compromised by the patriarchal nature both of indigenous communities and mainstream societies, and that restorative justice must be seen not as only as “tradition” but as an extension of institutionalized power. Critiques of restorative justice employing gender analyses are controversial, and proponents of restorative justice often dismiss these critiques as oppressive, hegemonic, and counter to indigenous self-determination.\textsuperscript{25}

**Legal Anthropology**
Early legal anthropologists looked at different forms of social interaction in order to excavate and articulate the legitimate "rules" of so-called primitive societies.\textsuperscript{26} They described these rules as "customary law" and as part of discrete, homogeneous, and relatively static communities and paid little or no attention to outside historical forces or power relations. By the 1960s and 1970s, the focus of legal anthropology began to shift away from this "rule-centered paradigm" to a processualist one that understood law as diachronic and as inextricably linked to wider historical, political, social and economic systems including colonialism.\textsuperscript{27} Later studies asserted that so-called customary laws were not simply ancient indigenous practices, but rather constructs of colonial governments, initially created as forms of domination and control, and rooted in the complex historical, political, and economic relationships of colonial projects.\textsuperscript{28} Recent works have made more explicit law's relationship to power, especially in the postcolonial context.\textsuperscript{29} Within legal anthropology and other sociolegal disciplines, there has been a great deal of recent interest in the postcolonial manifestations of indigenous law and custom throughout the world.\textsuperscript{30} Such works have shifted their focus away from more descriptive modes to analyses of how concepts of indigenous culture, tradition, and difference function in complex and often deeply politicized ways.

Despite academic critiques of the colonial invention of tradition,\textsuperscript{31} arguments advocating a "return" to an idealized pre-contact epistemology and practice in the realm of indigenous justice have great moral and political force.\textsuperscript{32} Some scholars have argued that contemporary invocations of "customary law" are
not mere descriptions of practice but are rather strategic political assertions used to further the claims of indigenous peoples. Others have demonstrated that state institutions and practices constrain indigenous peoples, compelling them to define themselves in the very terms imposed by European colonialism including contemporary forms of multiculturalism. Specifically, the importance of missionization and other forms of religious colonization in the constitution of discourses about "harmony" and "healing" go unexamined. Further, restorative justice discourses about "traditional" legal practices often rely on these same ethnographic sources and notions of culture from early legal anthropologists.

2 Melton 1995: 133.
3 In this context, I use the term North American to refer only to indigenous peoples in Canada and the United States. The treatment of indigenous populations in Mexico is beyond the purview of this dissertation. Further, I use the term indigenous to refer to a heterogeneous group of people who are the descendants of populations who lived in North America prior to European contact and colonization.
5 Other factors include the sheer volume of legislation and precedent concerning indigenous peoples in European settler nations (see Canby 1998) as well as the introduction of national policies of multiculturalism in Canada.
6 See e.g., Darnell and Valentine 1999.
7 For responses to Taylor’s essay, see Gutmann 1994.
8 See e.g., Bannerji 1996; Moodley 1983; and Razack 1998.
9 See e.g., Cairns 1999; Gordon and Newfield 1996; Okin et al. 1999; Minow 1995; Povinelli 2002; and Sarat and Kearns 1999.
10 Brightman 1995.


Greenfeld and Smith 1999; Monture-Angus 1996.


See Matsuda 1988; McNamara 1995.


Fieldnotes.

See e.g., Bohannan 1957; Gluckman 1955; Llewellyn and Hoebel, 1941; Pospisil 1958.

See Moore 1978; Nader and Todd 1978; see Comaroff and Roberts 1981.


E.g., Collier 1999; Merry 2000; Miller 2001; Sierra 1995.

See most famously Hobsbawm and Ranger 1983.

E.g., RCAP 1996; Yazzie and Zion 1995.


INTERLUDE
WHAT HAPPENS TO MARY? SOME ORIENTING THOUGHTS ON THE PROJECT

And my poor fool is hang'd: No, no, no life?

Why should a dog, a horse, a rat, have life,

And thou no breath at all? Thou'lt come no more,

Never, never, never, never, never.

--Shakespeare, King Lear

One of my later interviews during my fieldwork in Vancouver was with an indigenous woman, Dora, who worked as an advocate at a government-funded victims' services organization in the Downtown Eastside (DES). Dora’s job was to help victims of violent crime and/or their families maneuver through the legal system as they sought justice for themselves or their loved ones. At the time, Dora was worried that victims were not a primary focus of some of the recent indigenous justice initiatives in the city. As I was especially interested in the tensions existing between anti-violence policies for women and culturally-specific justice programs, Dora was a natural choice to interview.

During our interview, I asked banal questions, and Dora told me horrific things. She told me about the high number of women, especially indigenous women, who go missing from the DES. Those who are first violated by men and then again by the system. Those who, when they testify against criminal defendants, have their reputations impugned on the stand. How many of these women make their living as sex workers which is often enough to cancel out any
of the claims they make on their own behalf or on behalf of their friends, family, acquaintances. In sum, women whose experience with the criminal justice system is often a profoundly negative one, who are simultaneously defined as both perpetrator and victim—a kind of perpetrater victim.

Dora described the remains, human and material, of the victims of violent crime. She described the devastation of family members as they came to pick up trash bags of personal belongings. She showed me pictures of friends, now dead or missing.

Dora showed me photographs of Mary, a woman whom I did not know, a woman whom I cannot know. Her picture is no longer clear to me, although I can still envisage pink hues in the background, and I can still see Dora’s face as she watched me flip through the photos. Dora had worked with Mary as her advocate during a criminal trial. Mary had been assaulted and had been called to testify against her attacker. Mary was a woman who made her living as a sex worker in the DES. Through the course of this criminal trial, Mary and Dora became friends.

Some time after that trial, Mary was murdered in the DES. Although she’d been missing for awhile, they found her stuffed in a garbage bag. Mary was smiling in the pictures. She had a teenage son. She’d worked in the DES for awhile. She wasn’t originally from Vancouver, but from a reserve community somewhere in BC.
Dora is a smart woman and a sympathetic woman. She learned in her capacity as a victim’s advocate to force people to remember victims. She doesn’t forget them herself. I’ve often wondered how she sleeps at night. Not how can she sleep at night, but rather how she manages to fade into sleep, to somehow banish, or to rest, the ideas, the images, the anger, the brutality. And I’ve often thought of Mary, and of Dora, in the years since I’ve left Vancouver.

At the time, I did not consider my interview with Dora to be central to my field research. Nothing she said shocked me. And although I left Dora’s office angry and sad, I never anticipated that Mary would still be with me all these years later.

What can the figure of Mary, as expressed through Dora’s narrative of Mary and my narrative of Dora, as distanced from the life of Mary herself, tell us about justice, restorative and otherwise? What does its analysis reveal about colonialism and neo-colonialism? About limited notions of culture and the limitations of multiculturalism? About the gendering process of law and the legal process of gendering? In other words, what can the figure of Mary as a particular kind of victim tell us about the social world I am seeking to apprehend and to describe? What can the figure of Mary tell us about critique, about critical anthropological engagements with contemporary, highly politicized, ethically challenging issues like restorative justice and its relationship to a broader social justice?
I distinctly remember leaving Dora’s office after the interview. It was raining in Vancouver that day (although even if I hadn’t remembered that it was raining in Vancouver that day, it would have been a safe assumption). I walked up the street from the provincial court (located directly next to the police station), past the low-income housing with words like “HOPE” written on the outside of the patios, past the community bank, across the street to catch the bus (hopefully the #10 because otherwise I’d have to walk from Fourth Avenue in this rain). I no doubt passed a lot of people on the street that day, even though it was cold and raining outside. I always passed a lot of people on that street.

It is often only in memory that we can begin to trace how our ideas were shaped, how they shifted over time, how they reveal what really matters to us. I think I wanted to keep the picture of Mary, although I would never have asked. I wanted to show people, and I wanted to remember her better myself. I think it was at this moment, or at this moment in retrospect, that I was finally able to articulate my intense discomfort with the process of culturally-specific justice initiatives. I simply could not see what such a process could offer Mary. This is not to say that Mary would necessarily agree with me, or even that Dora would necessarily agree with me; rather, as I thought about what Dora had told me about Mary, some of the chinks, some of the cracks, in the restorative justice process became clearer.

In large part, the driving force of this entire project was to answer the question, “What happens to Mary?”2 I do not want the reader to mistake this orientation—Mary is a figure, in large part a figment of my imagination, although
she is part of an imaginary deeply rooted in the social world. This is not only not an anthropological life history, but it is also not, in any sense, a history of Mary’s life. If I knew Mary—mother, friend of Dora, Aboriginal woman living in the Downtown Eastside of Vancouver, person who made her living as a sex worker, person with a beautiful smile—these are the only things I know of her—if I knew her differently, if I knew her intimately, this might very well have been a different piece. It is Dora’s generous narrative of Mary that I pick up here, both as a way to point to the fundamental injustices faced by indigenous peoples, and as a way in, as a way to engage the critical issues I see as central to this work. These include restorative justice both philosophically and substantively; the position of indigenous peoples in Canada and the United States; the neo-colonial configurations of the contemporary political landscape; the problem of culture; the specific reach of law in the lives of indigenous peoples, and the general reach of law in the lives of all; the particular concerns of indigenous women, and the complex landscape made up by permutations of the analytical holy trinity: race, gender, class. Mary’s life, at least the parts I’m retelling here for ethnographic purposes, was not anomalous. Her experiences and her fate are similar to the experiences and fate of many others.

In her piece On Being the Object of Property (A Gift of Intelligent Rage), Patricia Williams warns us against the power of the law to abstract, to reduce parties to the passive, to transform illusion into non-illusion (1990). While this dissertation focuses mainly on legal discursive constructions of indigeneity in
North American courts, and contextualizes these in somewhat abstract terms, it is nevertheless important to remember that legal discourse circulates in multiple fields with real social and material power. As anthropologist Sally Merry reminds us: “Law is a discourse which interprets and conveys meaning, but it is a discourse with force behind it. Its impact is not only in the realm of meaning” (1994: 37). What happened to Mary memorializes the impact of law beyond this realm of meaning.

The fact is that I didn’t know Mary. I don’t know what Mary would say about my perspective, partly because I can no longer ask her because she’s dead, partly because the nature of my fieldwork, and fieldwork more generally, precluded a particular kind of engagement with Mary and people in her situation. The great tragedy, of course—one too easily forgotten in a work such as this one—is that no one knows Mary any longer because she was murdered.

**Epitaph**

“Can I...claim to revive these stifled voices? And speak for them? Shall I not at best find dried-streams? What ghosts will be conjured up when in this absence of expressions...I see the reflection of my own barrenness, my own aphasia.”

--Assia Djebar, *Fantasia: An Algerian Cavalcade*

---

1 Pseudonym
2 I am grateful to Bruce G. Miller for his serious and generous engagement with my work and for helping me to conceptualize this section entitled “What happens to Mary?”
CHAPTER 2

THE BANISHMENT CASE: JUSTICE AND DIFFERENCE IN
WASHINGTON v. ROBERTS AND GUTHRIE

Introduction

In the mid-1990s, what I term “the banishment case” excited, among others, anthropologists, criminologists, and indigenous rights activists working in the fields of law and justice. In August 1994, Washington State Superior Court Judge James Allendoerfer agreed to a “unique experiment in cross-cultural justice” when he allowed two Tlingit youths convicted in a brutal beating and robbery to delay their mandatory jail sentences and face a tribal court in Alaska. The Kuye di’ Kuiu Kwaan tribal court banished the two youths, Simon Roberts and Adrian Guthrie, both seventeen at the time, to remote and uninhabited islands in Southeastern Alaska for a period of twelve to eighteen months.

Allendoerfer’s experiment attracted national and international attention and initiated widespread debates about the role of cultural difference in mainstream U.S. law; these debates centered on the extent to which indigenous cultural traditions and epistemologies should (and could) be accommodated by American legal systems. Despite the controversy, the banishment also generated a great deal of optimism about the potential of tribal law to revive cultural traditions and to offer positive judicial alternatives for American Indians facing high rates of incarceration. Constructed by scholars and activists as diametrically opposed to
the "retributive" nature of mainstream U.S. law, the banishment and other "culturally-specific" initiatives seemed to present great possibilities for change.

The banishment also dovetailed with broader trends including a burgeoning international restorative justice movement; the success of tribal courts on some reservations; and an explicit interest on the part of the Clinton administration to develop tribal courts as an expression of American Indian sovereignty.¹ Yet, by the time the banishment ended in late 1995, it was surrounded by controversy and, by most accounts, believed to be a definitive failure. The tribal court that arranged the banishment was accused of mismanaging it. There was dissension within Tlingit communities as to who legitimately could represent their issues to the state court, who could participate in the tribal court, and even whether banishment was a legitimate and authentic form of punishment. Both youths ultimately served their full prison sentences in addition to the time they spent on the islands. Further, many at the time expressed concern about the negative impact the banishment case might have on the future of other tribal justice initiatives, and critics have more recently argued that the banishment has worked to discredit the idea of tribal justice in the eyes of the non-Indian public.²

But why was the banishment such a definitive failure? According to mainstream accounts, internal tensions between traditionalist tribal bodies and federally-recognized tribal organizations undermined the legitimacy of the process. Further, the credibility of Rudy James, the driving force behind the traditionalist Kuye di' Kiuu Kwaan tribal court, was consistently challenged.
Many questioned both his motives and his authority, and charges of nepotism, opportunism, and corruption were leveled against James and his supporters. In earlier works, I argued that these are all issues rooted in historical processes and caught up in contemporary issues around the role of cultural difference in post-colonial democracies, and that this case functioned as a microcosm of wider issues facing American Indians (Hamilton 1998). For instance, I demonstrated that the controversy surrounding the banishment exemplified issues of crime and punishment; race and pluralism in America; American Indian sovereignty and legitimacy; and the law and its fictions. Additionally, I argued that an analysis of this case revealed many of the issues inhering in American Indian struggles for sovereignty including the complicated legal, historical, and political relationship between tribal, federal, and state governments; the cultural politics of identity in the pluralist nation-state; and the competing conceptions of law and justice among different communities. While all of these are still important elements to an understanding of Washington v. Roberts and Guthrie, I now believe that wider issues involving the production of indigenous difference were also at stake. In this chapter, I argue that the conception, execution, and ultimate collapse of the banishment demonstrates how the cultural production of indigeneity generates the ability for indigenous peoples to make compelling legal claims in U.S. courts based on difference while simultaneously pre-destining those claims to failure. First, I will show how the problems surrounding this case were narrated in terms of indigeneity. Second, I will demonstrate how the deployment of such culturalist
discourse in law creates a specific interpretive context in which broader political assertions, especially those concerning sovereignty and land rights, are undermined.

**Washington v. Guthrie and Roberts**

In August 1993, two 16-year old Tlingit cousins from Alaska were visiting family in Everett, Washington. After ordering a pizza, they robbed and beat a 25-year old delivery-man, Tim Whittlesey, with a baseball bat, and left him for dead. Although a passerby rescued Whittlesey, he nevertheless sustained permanent injuries to his hearing and eyesight. In 1994, the youths, Adrian Guthrie and Simon Roberts, pleaded guilty to aggravated robbery in Washington State Superior Court and faced mandatory prison sentences of between 3 and 5 ½ years.³ By the time their case came to court, the youths had spent nearly a year in detention. Nonetheless, after a petition from Rudy James, a self-appointed Tlingit tribal court judge from the Kuye di’ Kuiu Kwaan court in Klawock, Alaska, Allendoerfer agreed to release the boys to his custody to face a different kind of sentencing. It was understood that the youths would most likely face what James claimed was a traditional Tlingit sentence: banishment.⁴

Thus, Allendoerfer delayed the teens’ prison sentences for the robbery and granted temporary custody to Rudy James. Controversy from different sources erupted before the custody transfer even took place. The assistant deputy criminal prosecutor for Snohomish County, Michael Magee, presented a motion in late July of 1994, asking that Allendoerfer reconsider his decision. Magee asserted, “It
seems in reality the defendants are simply being released to their respective grandparents for the next 18 months, and the court would be without jurisdiction to direct the grandparents...." He also pointed out that Rudy James' authority as a tribal judge was disputed by the Klawock Cooperative Association—the only Tlingit tribal entity recognized by the federal government's Bureau of Indian Affairs (BIA). Further, according to Magee, the banishment plan was also challenged by another tribal body, the Tlingit-Haida Central Conference, the tribal court association recognized by the BIA. The state of Alaska also opposed the plan, arguing that banishment of a minor "could constitute criminal non-support under the law." Another concern cited in the motion was the lack of availability of Tlingit-owned islands appropriate for the banishment; Magee's motion contended that "'banishment to an island' is not possible as circumstances now stand."

In response to Magee's motion, Allendoerfer presented a list of ten questions about the banishment plan to defense attorneys, giving them two weeks to answer. Allendoerfer asked for assurances that the tribal court proposed by Rudy James actually existed, and that banishment and restitution were in fact Tlingit traditions. Among the questions the judge asked were a definition of "community" willing to stand behind Guthrie and Roberts, more information about the legitimacy of the Klawock Council of Elders, a determination as to
whether government permission was needed for the use of federally-owned lands, and more detail on the plan for restitution.

Around this time, Allendoerfer also received a letter from the president of the Klawock Cooperative Association (KCA), the tribal body officially recognized by the BIA. The KCA had initially opposed the banishment plan. KCA president Roseann Demmert wrote that while the association council “agreed in principle” with the Klawock elders’ support for holding a combined tribal court, “Unfortunately we are unable to take a formal position of support at this time due to a verbal warning from the Bureau of Indian Affairs of possible negative consequences toward our membership.” The newspaper report stated Demmert did not say who made the threat or what the threat entailed. Demmert later said she did not like “what may happen to the boys in prison. . .but [she] worries about them being placed on an island and whether they will survive.”

Despite these early concerns, Allendoerfer signed the release order on August 24, 1994, giving custody of Guthrie and Roberts to Rudy James with the understanding that they would be tried and sentenced by the tribal court. Certain conditions applied including no involvement with drugs, alcohol, or firearms; Allendoerfer warned that if any of the conditions were violated, the teens immediately would return to his court for conventional sentencing. In addition, the tribe was supposed to post a $25,000 property bond to the court. As part of the arrangement with the state court, Diana Wynne-James, a tribal social worker
and Rudy James’ wife, was required to write a report to Allendoerfer every three months.\textsuperscript{16}

Prosecutors continued to vehemently oppose the arrangement. Chief Deputy Prosecutor Jim Townsend vowed to petition for an appellate review. In a news report, he stated, “We consider it [the banishment] illegal, improper, unconstitutional and wasteful of taxpayer resources. We firmly believe the criminal justice system should try to eliminate racial and ethnic bias and not build it into the system.”\textsuperscript{17}

While the custody transfer was going ahead, the mainstream press reported on Rudy James’ questionable credibility. According to a Dateline NBC report broadcast the day after Allendoerfer’s ruling, James had nine outstanding civil judgments against him totaling around $60,000. Those judgments included approximately $10,000 in back child support for James’ sixteen-year-old son.\textsuperscript{18} A Tacoma News Tribune report stated that Allendoerfer was aware of James’ debts; James was quoted as saying, “I do owe that $60,000, there’s no question about that. I don’t know anybody who doesn’t owe somebody money. . . . I’m ashamed of it, and I’m attempting to pay it back.”\textsuperscript{19} According to the same report, James had earlier denied to an NBC reporter even knowing the people who had sued him and won judgments; he “then stormed away from the correspondent, calling him a ‘queer.’”\textsuperscript{20}

The press reported on further credibility problems with James involving allegations of nepotism and conflicts of interest. Five of Rudy James’ brothers
were judges on the Kuye di’ Kuiu Kwaan tribal court, a fact that James relayed to Judge Allendoerfer in Superior Court.\textsuperscript{21} Presented by the mainstream press as an impenetrable family unit and an impediment to justice, the tribal court was also seen as a problem by some from within the Klawock community. In the documentary film, \textit{The Eagle and the Raven}, one irate Klawock resident lists other community members who oppose the Kuye di’ Kuiu Kwaan tribal court and the banishment because “everyone” knows you can only have one family member on the tribal court (Amiotte: 1996).

An even more damaging allegation was that Rudy James’ brother Daryle, who had served time on a rape charge, was listed on court documents as a tribal judge; Rudy James denied that Daryle was ever a tribal judge and disavowed any knowledge of how his name got on court documents. James added that the adverse publicity would not deter him; “The tribal court will go on. I’m not going to let a little wind blowing against me stop me.”\textsuperscript{22}

The tribal court proceedings and the banishment had the initial support of the victim’s family. An uncle of Tim Whittlesey said that it was enough for the family that Judge Allendoerfer was convinced of the tribal court’s legitimacy, saying “It’s not an off-the-wall scenario.”\textsuperscript{23} Max Whittlesey, Tim’s father, said the family had accepted the tribe’s offer to have community members build a duplex in Everett for Tim and his wife Tonya. He said of the tribal court: “I think we saw the beginning of healing of families on both sides. Rehabilitation is a long process. Time will tell for all three of the young men involved, Tim included.”\textsuperscript{24}
On September 1, 1994, the Kuye di' Kuiu Kwaan tribal court convened in Klawock. Guthrie and Roberts were sentenced a banishment set to last twelve to eighteen months. Seventy-five people attended the hearing including the victim Tim Whittlesey and some members of his family. The tribal court proceedings came under the scrutiny of the world. The press was curious about the process, especially focusing on how the court fit into ideas about “native” or “tribal” justice. Note especially the emphasis on tradition, ceremony, and ritual. In an Associated Press newspaper report, the ceremony was described in the following way:

No one was allowed into the hall until it had been ritually cleansed with branches of devil’s club, a thorny plant native to the region. Everyone entering the room submitted to purification by being brushed with a cedar bough and wiping their feet at the door. Guthrie and Roberts entered the room through an “entrance of shame,” wearing their tribal regalia turned inside out. Each boy was allowed to speak and had a tribal advocate at his side.

According to the same report, elders asked questions about the man who Guthrie and Roberts claimed suggested the robbery, and about the pizza (the toppings, who ate it, its size). The reports also said that some of the questions “elicited smirks from the defendants.” When Rudy James expressed disbelief that the crime was done without planning, Guthrie said, “We didn’t sit down and draw a map... I mean, it doesn’t take a lot of skill to rob a pizza man.”
Curiously, this was a front page story in the *Tacoma News Tribune*; the hearings last two days and these were the paper's only comments on what transpired. The credibility of the entire exercise was under fire from the beginning.

The twelve elders deliberated for 3½ hours after two days of hearings and ultimately banished the Guthrie and Roberts to separate islands in the Alaskan archipelago for a year to eighteen months. To ensure their safety during the banishment, the youths were to be trained in hunting, given plenty of provisions, and to be checked on regularly by tribal elders. After the sentence was passed, Rudy James said to reporters, "This is not a punishment of a punitive nature. This is not a punishment of endurance to survive in very harsh conditions. It is the judgment of the court that the aim of the sentence is for rehabilitation."

Guthrie and Roberts were supposed to leave immediately after the court proceedings for the separate islands that would be their solitary homes for the next twelve to eighteen months, but they spent another two days in Klawock while tribal elders gathered provisions for the banishment. According to reporter Brian Akre, the boys were "lounging in the sun" and one listened to a Walkman as two tribal guards stood watch while waiting to be taken to the islands. While this cynical tone was prevalent in the mainstream media, some people argued that the Tlingit system be given a chance, especially considering the corrupt and dysfunctional justice system of American law. As an editorial in the *Tacoma News Tribune* stated, "If banishment does work in their case, the only complaint will be that there aren't enough cold, lonely islands in the North Pacific to
accommodate all of America’s violent punks, regardless of race, creed, color or tribe.”

Tribal officials would not announce which islands had been chosen for the banishment nor would they reveal their general location and who owned them. Most of the region’s one thousand islands officially belonged to Tongass National Forest, thus falling under the jurisdiction of the US Forest Service. Forest ranger Greg Griffith said he told tribal officials that a special-use permit was needed in order to allow the boys to stay on federal land. Griffith further doubted one would be granted, and stated, “[Banishment is] not a function of the national forest. It’s certainly without precedent on a national forest. We’ve suggested to them [tribal officials] that there are more appropriate lands on which to carry out this sentence.” These statements foreshadowed what was to come. It was later suggested that the banishment locations were strategically chosen by tribal officials in order to strengthen Tlingit claims to the land. The islands chosen technically fell under the jurisdiction of the US Forest Service, but their tenure was challenged by the Tlingit.

Even after the teens began their banishment, the tribal court continued to have credibility problems. On September 28, 1994, the Klawock Cooperative Association changed its earlier (unofficial) position and voted overwhelmingly (99-7) not to recognize the Kuye di’ Kuiu Kwaan Tribal Court. The Vice President of the association said in a telephone interview, “All we’re trying to do is straighten up the big mess created by this court.” He asserted that members of
a tribal court are supposed to be selected by the heads of families in a village, and that Rudy James and his court “were pretty much self-appointed.”

By mid-November, however, Diana Wynne James reported to the court that the banishment seemed to be working. She wrote, “There is now an element of sincere sorrow evident in the outlook and demeanor of both youth.” She reported that the youths were living in one-room cabins heated with wood. Guthrie and Roberts each had a shotgun, ax, pitchfork, knife, and other basic tools. They ate wild foods supplemented by dried fish and canned food. Both described a feeling of peace and calm, and said they felt they had changed. Roberts, however, received an unauthorized family visit in October. According to Wynne James, “[t]he tribal court gave warning that any other unauthorized visits would be subject to prosecution for interfering with the banishment process.”

During March and April of 1995, the US Forest Service noted several news reports that claimed the boys were occupying Forest Service lands. In early April, Snohomish County deputy prosecutor, Seth Fine, filed a motion to have Guthrie and Roberts returned because they had violated the terms of their punishment by living on government land and possessing handguns. Tribal judge Byron Skinna responded that Allendoerfer had allowed the teens to possess rifles so they could hunt.

More importantly, however, Skinna claimed that the federal land in question belonged to the Tlingit people “who owned it before the government
purchased it,” explicitly raising the issue of Tlingit land claims as part of the banishment. In response, prosecutor Fine accused the tribal court of simply pushing its own agenda and that the “real problem is that the people who are supposed to be supervising (the teens) have ordered them to break the law.”

Rudy James denied that any laws had been violated, asserting that “[u]ndisputed and unchallenged, under tribal history, law, custom, culture and tradition, the banishment sites have always been the lands of the [Tlingit].” He then urged prosecutors or other government officials “to produce a valid bill of sale and title to Tlingit lands, waters and resources,” challenging the federal government’s legitimacy to, and jurisdiction over, the banishment lands in the process.

Tribal attorney Stephen Karl Kortemeier argued that it would thus be Fine’s burden to prove why the banishment sites did not belong to the tribe; Fine countered it would be the tribe’s responsibility to prove why regulations prohibiting habitation of federal land were illegal. According to Fine, “that kind of dispute does not belong in a criminal case. . . . It is not the business of that [Snohomish County state] court to resolve land-use disputes between native tribal entities and the federal government.” In the documentary film The Eagle and the Raven, narrator George Amiotte states that after an investigation “the tribal court had no other recourse than to remove Simon and Adrian from what was claimed to be tribal land” (1996; emphasis mine).

If James and other Kuye di’ Kuiu Kwaan members hoped for an opportunity to further their land claims in the context of the banishment case, their
hopes were quickly quashed. Despite the fact that Allendoerfer ruled against the prosecution’s motion, stating that prosecutors had not proved any willful violation of the court’s order on the part of the tribal court, he also effectively undermined any political discourse surrounding Indian sovereignty or land claims by using a strictly culturalist discourse. In his ruling, Allendoerfer asserted that “the defendants had been voluntarily relocated out of National Forest lands and no longer possessed firearms,” and that this “voluntary compliance is consistent with the theme of cross-cultural cooperation which is an inherent and integral part of this experiment in cross-cultural justice.”

The Kuye di’ Kuiu Kwaan Tribal Court was dealt a further blow when, in a separate appeal in May 1995, the Washington state Court of Appeals ruled that Adrian Guthrie and Simon Roberts would still face mandatory prison time for robbery despite Allendoerfer's suggestion that their banishment could lead to reduced sentences. At the time of original sentencing, Allendoerfer told Guthrie and Roberts that he “made no promises” and that the teens would be “back to Square 1” when they returned to the court post-banishment; he nevertheless expressed hope that the Washington legislature might by that time have “modified the court’s authority to deviate from the [mandatory] state sentence,” allowing a successful banishment to stand in for prison time.

The Court of Appeals ruled that Allendoerfer's position was improper “because an offender's conduct after the crime cannot justify an exception” and “a court may not delay sentencing to see if the law will change.” At a later hearing
in July 1995, Allendoerfer gave Guthrie and Roberts the option to finish their exile before imposing their mandatory prison sentences, but reiterated that the banishment could not have any impact on sentencing. Allendoerfer said, “I think this experiment has the potential to make a difference, and I’m going to allow it to run its course.” Both youths decided at that time to finish the banishment sentence.

By the summer of 1995, however, it was apparent the banishment experiment was deteriorating. Troubling reports were appearing in local newspapers. For instance, the Tacoma News Tribune reported the new banishment sites were in very close proximity to Klawock. Guthrie and Roberts were allegedly receiving unauthorized visits from family members, the media was pursuing them, and other Klawock residents were interfering in the banishment process. Adrian Guthrie was spotted in Craig, Alaska taking a test to obtain his driver’s license. Simon Roberts was reportedly living on junk food in a messy campsite. Tribal social worker Diana Wynne James wrote in her report to the court: “It appears that the Klawock community has injected itself into the banishment process, contrary to the intent of the Tribal Court, that this has been to the detriment of the youth.” Tribal court members were describing it as a failure. Embert James, tribal court member and brother of Rudy James, said:

They’re not out on their own, they’re not by themselves, they’re not thinking about things.... At first, when we had them way out by themselves, you could see a definite improvement in those boys. But then their families
came in and got their hands on them, and they quit being dependent on themselves.\textsuperscript{54}

Guthrie himself expressed the sentiment that the present banishment location was terrible and made the concept of banishment "an embarrassment and a joke."\textsuperscript{55}

By August 1995, Judge Allendoerfer's frustration with the banishment process was evident. After learning of repeated transgressions, Allendoerfer called a status hearing with the tribal court. Rudy James admitted there had been a breakdown of control and that there was "no way of getting around that."\textsuperscript{56} Allendoerfer blamed James for failing to get support from other tribal leaders to help to maintain the banishment. He told James, "This crisis in your relationship is at the root of many of your problems."\textsuperscript{57}

At the end of September, Allendoerfer ordered Guthrie and Roberts back to court. On October 4, he ruled to end the banishment, citing "some flaws which unfortunately threaten its credibility and integrity."\textsuperscript{58} Allendoerfer said he wanted to terminate the experiment while it could still end "on a positive note."\textsuperscript{59}

Guthrie and Roberts were sent to prison to serve their original sentences. Guthrie was released in August 1996, and has since been in trouble with the law.\textsuperscript{60} He has failed to make restitution payments to Tim Whittlesey.\textsuperscript{61} Guthrie told Allendoerfer in June 1997 that after the media scrutiny died down and the people talking about book and movie deals left, "everybody else left, too, and left me holding the $40,000 bag with my cousin still in prison."\textsuperscript{62} A Community
Corrections Officer, John Balmat Jr., accused Guthrie of having “a ‘poor me’ attitude” and feeling “very put out that he has. . .to pay restitution.” Balmat also noted Guthrie’s “profane, interruptive, argumentative and abusive” tone during a July 1997 telephone conversation. Simon Roberts was released in December 1997, and by all accounts seems to have turned his life around while in prison.


The banishment was part of an emergent trend among indigenous peoples internationally (but especially in Anglo postcolonial democracies like the US, Canada, Australia and New Zealand) to reclaim customary or tribal law as practice and to make assertions of self-determination through particular legal claims. For instance, throughout the late 1980s and 1990s, many indigenous groups asserted jurisdiction over their members in criminal sentencing, arguing both that the postcolonial nation-state had failed in its mandate to provide equal and effective justice for all, and that it had an obligation to recognize the legal autonomy of indigenous peoples. This trend marked a specific shift, from mainly seeking redress through statist legal institutions to asserting greater legal autonomy in national and international frameworks. Further, these indigenous assertions underscored the legal fictions operating in western legal systems including the failure to recognize the social, cultural, and historical specificity of concepts like rights, justice, punishment, and evidence.
At the time of the banishment, there seemed to be great hope for the power of this type of “legal pluralism” to address weaknesses existing in the mainstream legal system. Mainstream courts were seen to be parts of a bloated and overextended system which offered little or no hope for justice, healing or rehabilitation. Activists, scholars, and the public alike looked to tribal courts for solutions. These solutions were nearly always posited as completely Other to mainstream jurisprudence. In what follows, however, I argue that the conception of an alternative, *indigenous*, justice system is seriously limited by appeals to romanticized notions and by a failure to acknowledge the historical conditions that shape indigenous/settler relations.

American jurisprudence and tribal law are frequently considered to be competing or incommensurable systems, based on different epistemologies. Posited as polar opposites, “restorative” justice is meant to provide a counterpoint to mainstream, “retributive” justice. 65 Throughout the 1980s and 1990s, increasingly pervasive discussions about the seemingly essential differences existing between indigenous and settler societies emerged. These differences were framed as a clash of cultures, and scholars and activists alike argued that these encounters produced conditions of cultural irreconcilability. These debates tended to look at such assertions as potent epistemological challenges to the legitimacy of mainstream law, and there were further attempts to implement these challenges into politically progressive policies, especially in the realm of justice. Borrowing heavily from poststructuralism, the academic elements of this discourse have
generally been sympathetic to the often difficult and unequal conditions faced by indigenous communities. While assertions of difference can serve as morally forceful critiques, I argue that structural and discursive conditions limit the strength of these assertions, especially those of indigeneity. Ironically, often the poststructuralist works mentioned above uncritically accepted assertions of radical indigenous cultural difference, usually in the name of a progressive politics that recognized the rights of indigenous peoples. More recently, concerns about the limitations of what Spivak famously called “strategic essentialism” (1996) have emerged, and scholars and activists alike have realized that politically strategic claims can work in ways that are unexpected, and in many cases, are not in any way politically progressive.

In fact, the deployment of concepts of indigenous difference in US law has a long history that has often been anything but progressive. Legal scholar William Canby describes federal Indian law as the “body of law dealing with the status of Indian tribes and their special relationship to the federal government” (1998: 1). Arguably the most complex and contradictory body of law in U.S. history, federal Indian law developed on a case by case basis as a response to a variety of colonial encounters between diverse indigenous groups and settler populations. Throughout its history, the shape of federal law and policy towards Indians shifted in line with more general social attitudes about indigenous peoples, vacillating between the idea that “tribes are enduring bodies for which a geographical base
would have to be established and more or less protected” and the idea that “tribes are or should be in the process of decline and disappearance” (ibid.: 10).

Rooted in pervasive ideologies of indigenous inferiority and connected to the larger project of U.S. nation-building, federal Indian law was mainly concerned with acquiring indigenous territory and gaining access to natural resources. But the effects of federal Indian law were not just economic; as Shari Huhndorf argues, settler concepts of indigenous peoples were central to the constitution of American national identity (2001).\(^6\)

While the emergence of the banishment was represented as novel, the characterization of Indian law as being incommensurably different from mainstream U.S. law has a long history. In fact, the banishment was not the first time that U.S. settler society responded negatively to the idea of indigenous justice. In August of 1881, on the Great Sioux Reservation in Dakota Territory, an American Indian, Crow Dog, shot and killed another Indian man, the BIA-appointed chief, Spotted Tail. In response, the families of both men came up with a settlement, “in accordance with tribal law, for six hundred dollars in cash, eight horses, and one blanket” (Harring 1994: 1). This decision infuriated government agents and the settler public more generally, and the following year, Crow Dog was tried and convicted in the Dakota territorial court. He was sentenced to hang. In December 1883, the U.S. Supreme Court overturned Crow Dog’s conviction, arguing that the right to make legal decisions was a right of inherently sovereign tribes and that the United States had no jurisdiction over crimes committed in
“Indian country.” The decision stood, but the furor it provoked ultimately lead to the 1885 passage of the Major Crimes Act in the United States Congress, extending federal powers over crimes such as murder in Indian Territory.

In another historical case just over one hundred years ago, a U.S. federal court made a decision regarding William Tiger, a man belonging to the Creek Nation and convicted of the murder of another Creek man in a Creek tribal court. In the newly created federal court of appeals for the Indian territory, Mr. Tiger’s lawyer had filed a writ of habeas corpus on his behalf, arguing that the tribal court had not followed proper procedure in his indictment under Creek law. The court’s decision in Ex parte Tiger was both curious, given the legalistic nature and dominance of white American culture at the time, and important, because it recognized, to a limited extent, the autonomy of Creek law within the nascent American nation-state. The court asserted: “If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning [the writ of habeas corpus]. But they are strangers to the common law. They derive their jurisprudence from an entirely different source” (cited in Harring 1994: 69). The court’s assertion of difference and autonomy for American Indians, as “strangers to the common law,” has peculiar resonance for our contemporary context.

**From Crow Dog to Banishment**

Participants in the banishment case, Klawock community members, and other Tlingit tribal law practitioners disagreed about many aspects of the
banishment and its unfolding. These disagreements or "crises in leadership" as Allendoerfer called them, illustrate a complex and highly politicized system of relationships that is more generally present in contemporary American Indian issues. In this case, claims to leadership and legitimacy were constituted in different ways. For example, when I interviewed Douglas Luna, Chief Judge of the Tlingit-Haida Central Council, the BIA-recognized tribal court entity, he was angry with the media's portrayal of a case he believed did not warrant the attention. He challenged Rudy James' legitimacy and credibility, asserting that James had no jurisdiction because he was not a member of a BIA-recognized tribe. Rudy James, however, refers to himself as "ThlauGoo YailthThlee -- The First and Oldest Raven," asserting that he is directly descended from the men who were leaders at the time of European conquest, and that his leadership was foretold in dreams (James 1997). Luna further questioned whether or not Guthrie and Roberts were really "Indians" (i.e. on any tribal membership list).

Initially, I wrote that this case was a quest for cultural and political recognition on the part of the Tlingit tribe, recognition from the state and federal governments and from a wider public. Through the process of researching and rewriting, it became increasingly apparent that the reified category of Tlingit was untenable. This reification effaces the complex set of historical and political relationships that are the legacy of European colonialism in the Americas. For instance, as we have seen in the banishment case, legitimate tribal courts in the United States are those sanctioned by the Bureau of Indian Affairs (BIA), a legacy
that has its basis in the Indian Reorganization Act of 1934. As Ward Churchill and Glenn T. Morris argue, the Indian Reorganization Act “was imposed by the United States to supplant traditional forms of indigenous governance in favor of a tribal council structure modeled after corporate boards” (1992: 15). An ostensibly democratic process, each native nation was required to hold a referendum. These were rigged by Commissioner of Indian Affairs, John Collier, and have had long-reaching effects including “a deep division between ‘traditionals’ and ‘progressives’ (who endorse the IRA form of government) on many reservations to this day.” Thus, any attempt to inscribe the term “Tlingit” or “indigenous” with some kind of strictly culturalist meaning not only ignores historical and political processes that have shaped much of contemporary indigenous social life, but also enables the state to discredit any claims that violate this reified and constructed category. In other words, such terms operate in a context in which political conflicts, like the one exemplified by the clash between James and Luna, must emerge; dominant culture, as represented by Allendoerfer’s court and the media, then uses those very conflicts to delegitimate the banishment.

American Indians often find themselves in the position, ironically, of having to mediate between competing systems or worldviews, of having to ‘play’ the Western legal game in order to assert what they believe to be inherent rights (e.g., inherent right to self-government). As Torres and Milun point out in their
discussion of the Mashpee, the legal and political history of Native peoples frequently results in paradoxical and conflicting situations with the government:

The politics of historical domination reduced the Mashpee to having to petition their “guardian” to allow them to exist, and the history of that domination has determined in large measure the ways the Mashpee must structure their petitions. The conflict between these systems of meaning - that of the Mashpee and that of the state - is really the question of how we can “know” which history is most “true” (1995: 49).

This type of conflict is present is the banishment case. For instance, a contradiction inheres in the American Indian claim to inherent self-government or always-existing sovereignty. In the film *The Eagle and the Raven*, Tlingit tribal elder Byron Skinna contends that the Tlingit never conceded their sovereignty to the American government; “We've always had it but now we need to relearn to assert it” (Amiotte: 1996). Rhetorically, this stance is imperative to begin legally to declare sovereign status; it must not be seen as a request for status, but a demand for recognition of something already extant. Nonetheless, American Indian sovereignty within the contemporary American context remains an issue of negotiation. In which forms will a limited sovereignty be allowed by the US government?

As sociolegal scholars have long argued, it is crucial that we look at a broader political and cultural context to understand the operation of the law. In other words, where and how laws and policies are applied is contextually
dependent. This is an obvious point, but within the context of this case where “tribal culture” and issues of its legitimacy and authenticity are of the utmost importance, it demonstrates how many different sites are engaged in such an issue. For instance, this type of sentencing has been legally possible for some time.\textsuperscript{71} Why and how did it come to be at this particular moment? To argue that the potentiality for such an unprecedented sentence lay solely within the law itself is counterintuitive. Other factors must have contributed. For example, a widespread disillusionment with American jurisprudence engenders the search for an alternative to it. In the banishment case, editorials often pointed to the sorry state of crime and punishment in the US, arguing it was time to try something new. “His [Allendoerfer’s] action shows a respect for the tribe’s cultural approach to punishment, and if it results in restitution - something all too absent from mainstream justice - all the better.”\textsuperscript{72} A certain legal literacy within the American Indian community itself is also necessary (Pommersheim 1995a).

Another factor that has characterized the emergence of tribal law is the distrust of the white mainstream system. One needs only to look at a case like Leonard Peltier’s and the surrounding controversy to recognize the suspicion with which many indigenous people approach mainstream legal systems. Peltier himself has written about his disappointment in the US government’s treatment of indigenous peoples, asserting that it “gave its word to Indian people and violated it, which in our culture is a dishonor. We had depended on the government's word only to be betrayed time after time” (1993: 199). A consistent concern in Guthrie
and Roberts’ case, continually brought up in the documentary film *The Eagle and the Raven*, was fear of what happens to juveniles in jail (Amiotte: 1996). The general consensus was that juveniles are never rehabilitated in the American prison system; they come out better conditioned in criminal ways.

**Conclusion: Where to go from here?**

The case itself can be understood both as an assertion of sovereignty, and a struggle for recognition and legitimacy from a wider public. The negotiations between the Kuye di’ Kuu Kwaan tribal court and the Washington state criminal justice system exemplify, on the one hand, the seemingly irreconcilable positions occupied by the players involved, and, on the other, the consistent bargaining as to the extent to which sovereignty will be allowed. For instance, the need rhetorically to assert sovereignty (as something inherent and pre-nation-state) is directly opposed to Congress’ position of plenary power. Each stance recognizes that tribes are, in some form, governments, but the operating definitions of “governments” in this instance are radically different: full sovereign with jurisdiction over land and people versus domestic dependent nation. The Department of Justice, in its vague policies, has no intention of fully turning over jurisdiction to American Indian tribes; instead, it wishes to find a complementary system, integrating Western and tribal law, but nonetheless maintaining its status as guardian.

The way the debate about the banishment case was framed by prosecutors and others in the public, refused, in large part, to engage the discussion about
sovereignty, arguing instead that the real issue was the introduction of a “competing system” that challenged the authority of American law on the basis of race and minority status. Attempts to delegitimize the banishment process often fell into the rhetoric of the unfairness of differential treatment, asserting the law’s objectivity and color-blindness. It was also the contention of the prosecution that sovereignty claims have no place in a criminal proceeding. Nevertheless, claims to sovereignty did occur within the confines of the criminal justice system: claims over jurisdiction, land tenure, and conceptions of law and justice. The tribal court still operated within the system, but outside of the usual fora (e.g., land claims trials). It is a different way of framing issues both within the court system and for a wider public. The notoriety of the criminal case brought attention to Tlingit issues in a way usual land tenure hearings do not. The tribal court was able to critique the criminal justice system from inside by offering an alternative to it, and by asserting its jurisdiction over Guthrie and Roberts.

What happens to the idea of critique when, by all accounts, the banishment sentence failed? The objectives stated by the Kuye di’ Kuiu Kwaan tribal court (i.e., that the boys be rehabilitated and that restitution be paid to the victim) were not entirely met, Allendoerfer ended the experiment in frustration, and, as was shown in the preceding section, public reactions to the case were overwhelmingly cynical. The suggestion that the boys were used to put forth another agenda and were left holding the proverbial bag when that agenda was unsuccessful must
certainly be considered. What do such suggestions do to the legitimacy of tribal courts and of American Indian claims more widely?

I want now to return to Allendoerfer's claim that the "crisis in [the] relationship" among members of Tlingit communities was "at the root of many problems" in order to discuss the ultimate failure of the banishment. Allendoerfer's statement reflects a lack of understanding on the part of the court about the historical emergence, and continuing political complexity, of tribal courts. I want to point out that Allendoerfer represents his state court as distanced from these "crises"; further, he presents himself as simply a neutral arbiter rather than as a representative of an institution deeply implicated in colonial and neo-colonial relationships. Matters of indigenous difference were treated as issues of cultural sensitivity, with the court poised as benevolent pluralist. The court, however, was unprepared to encounter another kind of indigenous difference, one that recognizes the complex and multilayered cultural and political lives of contemporary indigenous communities. Rather, Allendoerfer was looking for a coherent representative/representation of the Tlingit community, one lacking the conflict and contradiction so often reflected in so-called modern societies, but considered antithetical to indigenous ones. This, of course, was a need the involved parties were unable to fulfill.

When interviewed about the case in 1994, Judge Allendoerfer told reporters, "I am pleased and proud of what I did. If it turns out well, I will do it again. And again." While it seems likely that Allendoerfer will not be
attempting another “cross-cultural experiment” in the near future, what will courts
in other parts of the country try and to what effect?

1 See e.g., Reno 1995.
2 E.g., Bradford 2000.
3 31 to 41 months for Guthrie; 51 months for Roberts.
6 Ibid.
7 Ibid.
9 The Council of Elders was the tribal court body that Rudy James represented and would
  carry out the trial and banishment. Klawock, Alaska is the hometown of Guthrie and
  Roberts.
10 For use as possible banishment sites.
13 Oddly, this line of investigation is omitted from the dozens of news reports following
  this one. To my knowledge, this alleged threat made (unofficially) by the BIA to the
  Klawock Cooperative Association was never pursued. In his list of questions,
  Allendorfer asks for “[a]n estimate on when the association will be able to take a
  ‘formal position of support’ . . . ?” and “[w]hat is stopping it?”, but the answers to these
  questions were never pursued by the media. I include it both to demonstrate the
  complexity of this case, and to suggest the federal government’s involvement in it.
14 D. Glamser, USA Today, “Alaskan teens’ prison may be the great outdoors,” Aug 12-
  14, 1994: 13A.
15 M. Campobasso, Tacoma News Tribune, “Judge lets pair face exile by tribal
  court/Tlingit youths may be banished to remote island for robbery,” Aug 13, 1994: B6.
17 Tacoma News Tribune, “Judge clears way for banishment/Allows tribe to punish teens
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid.
23 B. Akre, Tacoma News Tribune, “Tlingit teens stand before elders to account for
24 B. Akre, Tacoma News Tribune, “Solitary confinement without the walls,” Sep 4, 
26 Ibid.
27 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
35 Ibid.
37 The boys’ possession of shotguns became a point of contention later on when the prosecution argued it contravened Allendoerfer’s ruling that no firearms be allowed. The Tlingit tribal court argued the boys needed shotguns to protect them in the wild. See following paragraph.
38 *Tacoma News Tribune*, “Banishment said to be working,” Nov 17, 1994: B6. It should also be noted, however, that Theodore Roberts, grandfather of Simon Roberts, was a tribal judge on the Kuyé’di Kuiu Kwaan Tribal Court.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.
44 Ibid.
48 Ibid.
50 Ibid.
51 The nature of this interference was not specified in the report.
According to an Associated Press report, Guthrie has been arrested for drunken driving, assault, and disorderly conduct (P. Andersen, Tacoma News Tribune, “Tlingit judgment put on hold,” Jul 30, 1994: A6). According to a Seattle Times report, he was arrested for attempting to buy alcohol as a minor, writing bad cheques, and ignored a request to talk to police (R. Denn, Seattle Times, “Tlingit man gets another chance,” Nov 20, 1997).

Guthrie is supposed to make restitution payments to the court in the amount of $43,000. The money is earmarked for the state Department of Labor and Industries, which covered Whittlesey’s medical bills and lost wages (Seattle Times, “Tlingit man who served banishment for assault ordered to pay restitution,” Aug 13, 1997).


For instance, restorative justice expert Diane LeResche distinguishes between mainstream American jurisprudence and tribal law by calling the former, “wild-and-rough justice”, and the latter, “sacred justice.” In summary, Western law (exemplified by the American legal system) is concerned with punishment and retributive justice. Conversely, “[s]acred justice is concerned with reconciling, mending broken relationships, providing healing solutions, and addressing the underlying causes of a disagreement (which are often perceived as indicative of someone’s failure to live according to prescribed spiritual ways)” (LeResche 1993: 893).

In her examination of nineteenth-century American Indian writings, Cheryl Walker (1997) rightly points out that many academic narratives about the encounters between settler populations and indigenous peoples have a tendency to characterize the effects of these encounters as unidirectional.

See also the official website of the Kuiu Tlingit Nation at http://www.geocities.com/CapitolHill/5803/.


Ibid. The Indian Reorganization Act (IRA) is also known as the Wheeler-Howard Act. For a further discussion of the development of American Indian self-governance in the United States, see Robbins 1992; Taylor 1980.

For an analysis of the ways in which different European colonial policies in the Americas have influenced and shaped contemporary indigenous, see Seed 2001.
Allendoerfer used a legal mechanism known as *deferred sentencing*. It is usually used in cases wherein defendants are addicts and need to participate in a rehabilitation program prior to serving their prison sentences.


CHAPTER 3
RESETTLING MUSQUEAM PARK: PROPERTY, CULTURE, AND DIFFERENCE IN GLASS v. MUSQUEAM INDIAN BAND

Introduction

Throughout the late 1990s, a controversial property dispute dominated the public imagination in Vancouver, British Columbia. At issue was how properly to interpret the terms of a series of long-term leases. The residential tenants in this case had leased land from a landlord, paying an annual rent to occupy lots on the landlord’s property. In 1995, as per specific provisions in the leases, the landlord sought to raise annual rents for these lots from approximately $400 to over $20,000 per year. The tenants vociferously objected to these increases, and the ensuing dispute provoked a nation-wide controversy, ending up before the Supreme Court of Canada.

Clearly, the jump from $400 to $20,000 is a substantial one, and one might assume that this in itself explains the controversy. Yet public discourse about, as well as the Supreme Court’s ultimate decision in, this case revolved instead around the identities of landlord and tenant, revealing a distinctly Canadian coding of property, race, and cultural difference.

Throughout the dispute, the landlord maintained that this was a case about property, merely a “private contract matter,” and that it had followed established law in recalculating the rents. The tenants countered that the application of the law was discriminatory, asserting that they were victims of both “apartheid” and
“ethnic cleansing by fiscal means.” 2 The landlord was further decried in the media; as one editorial insisted, the “ultimate effect” of the rent increases was “to discriminate on the basis of race.” 3 What, then, accounts for these radically different interpretations?

In a strange reversal of more familiar roles, the landlord in this case was the Musqueam Indian Band, 4 a First Nation 5 with just over a thousand registered members, and three urban reserves 6 around Vancouver. The tenants, more commonly known as leaseholders, were a group of seventy-three affluent non-Indian homeowners living in Musqueam Park, a residential subdivision located on reserve land leased from the Band. The leaseholders owned their homes, but not the underlying land on which they were located. Instead, they held 99-year leaseholds, originally negotiated in 1965, and paid small fixed annual rents for rather large lots during the first thirty years. In 1995, however, the leases specified that the method for calculating annual rents was to change. Rather than fixed rents, the Band and the leaseholders were to negotiate a “fair rent” based on six percent of the “current land value” of the property. Because of a booming real estate market in Vancouver, land values had skyrocketed, especially in the late 1980s and early 1990s, and this boom resulted in much higher property values throughout the city, but especially in Musqueam Park.

The legal crux of the dispute was to determine how fairly to appraise “current land value” in Musqueam Park, and each side had their own interpretation. The Band argued that the appraisal should follow common law real
estate practice; that is, the leaseholds should be appraised based on the recent values of similarly situated freehold properties. The leaseholders countered that because of its nature as "Indian land," the reserve was profoundly different from (and, consequently, not as valuable as) other freehold properties, and thus should be appraised accordingly. In 2000, after a lengthy legal battle, the Supreme Court ruled in favor of the leaseholders, accepting their contention that reserve land was both legally distinct and less valuable, and discounted rents in Musqueam Park by fifty percent.7

Between 1995 and 2000, the battle over rents in Musqueam Park reverberated across Canada. Emerging at a time when many First Nations were battling for legal recognition of their rights to land, to resources, and to self-determination, issues involving indigenous peoples were perceived to be particularly threatening by many non-indigenous Canadians, especially in the province of British Columbia. Within this context, the leaseholders argued that they were not only victims of unscrupulous profiteering on the part of the Band, but also of reckless government policies willing to sacrifice the rights of 'ordinary' citizens in a wrong-headed and discriminatory attempt to bring closure to the longstanding claims of indigenous peoples.8 In this context, debates about "fair rent" and "current land value" exceeded the boundaries of the courtroom, often becoming deeply racialized debates about what and who were fair and valuable.

Not only was this a high-profile dispute, revealing some of the deep cleavages extant in Canadian society, but it was also a significant decision in
Canadian Aboriginal law, marking a profound moment in indigenous legal history. In order to understand the particular significance of this case, two key points must be articulated. First, the legal claims made by the Musqueam Indian Band in *Glass* were not based on traditionally "indigenous" legal concerns (e.g., treaty rights or Aboriginal title) nor were they expressions of what Macklem calls "indigenous difference" (2001: 4). Defined as those "social facts" which are "exclusive to Aboriginal people in North America," "indigenous difference" references the profound cultural and legal differences said to exist between indigenous and non-indigenous peoples (ibid.). Many indigenous claims, both in legal and extra-legal spheres, have been articulated using an idiom of *difference*, and, in this context, the notion of cultural difference has been particularly useful in pointing out assumptions embedded in ostensibly neutral institutions such as law, and revealing the power inequities inhering in them. Yet, in *Glass*, the Band articulated its claim in the capitalist idiom of Canadian property law, seeking legally to maximize its profit in Musqueam Park. In contrast to other First Nations’ claims in recent Supreme Court cases, the Musqueam did not go before the Court to seek legal recognition of their *difference*, but rather asked it to recognize their *sameness* before the law. Yet the leaseholders contended, and the Supreme Court ultimately agreed, that indigenous difference was a key part of "the nature of Indian land," and thus fundamental to resolving the legal dispute in Musqueam Park. Although not originally an Aboriginal rights case, *Glass* was
transformed into one, creating a precedent that could have potentially profound effects for how reserve land is understood and valued in the future.

Second, the Court’s decision in Glass relied on unquestioned, and often contradictory, notions of property to construct “the nature of Indian land.” Missing from this account, however, was any sustained discussion of the role of colonialism in creating the legal, cultural, and economic conditions out of which Glass emerges. The effacement of this colonial history was not merely incidental to the Supreme Court’s decision, but rather constitutive of it. In other words, it is not just that the Court neglected to give a historicized and more complete account of this case; rather, the decision itself would not have been possible without the effacement of this history.

Legal scholar Carol Rose argues that claims to ownership must be understood as culturally-specific narratives in which “the would-be ‘possessor’ has to send a message that others in the culture understand and that they find persuasive as grounds for the claim asserted” (1994: 25). The controversy surrounding Musqueam Park and the Court’s ultimate decision in Glass demonstrate that the Band’s claim, articulated in a capitalist idiom of private property and equality, was not especially persuasive in the cultural context of settler Canada. But why were the Band’s claims to sameness under the law unsuccessful? And further, what is “the nature of Indian land,” and why is it less valuable than other forms of property?
By examining the conceptions of property deployed in this case and their relationship to race and class. I explore not only why this case provoked such fervent and widespread controversy, but also why and how the Musqueam claim ultimately failed in the Supreme Court. More specifically, how did Glass work to re-inscribe reserve land as fundamentally different, as “Indian land,” and in many ways inimical to capitalism and profit-making? And, how did racialized settler/colonial narratives intersect with contemporary discourses of multiculturalism to create an interpretive context of difference?

**When the Excluded Re-enters: Property, Race, and the Terrain of Difference in a Settler Society**

In ascribing what is excluded to the colonized, peasants, and other incommensurables, not only must their difference to what emerges be fabricated and asserted but also their similarity to what is within must be denied.

--Peter Fitzpatrick, *Laws of the Postcolonial*[^10]

Ideas of property and ownership not only structure Canadian legal and economic systems, but also are central cultural metaphors through which citizens articulate entitlement and belonging. On its surface, the dispute in Musqueam Park seemed to be a rather routine dispute about leases, rents, and real estate, yet a deeper analysis reveals not only the centrality of property in the organization of

Canadian settler imaginaries but also how terms of cultural difference operate in novel and unexpected ways at this historical moment.

Throughout the histories of colonization, indigenous peoples have been consistently and deliberately excluded from settler societies. Such exclusions have been integral to the organization of these societies (not simply unfortunate consequences of it) and have helped to shape a variety of social dimensions including the legal organization of space and conceptions of difference.11 In this section, I contextualize the dispute in Musqueam Park by providing a brief history of race and its relationship to property in British Columbia.

In attempting to redress both the historic and contemporary injustices wrought by colonialism, indigenous peoples in Canada, and throughout the world, have sought legal remedies in settler courts. A wide body of literature has demonstrated the serious limitations placed on indigenous peoples when they are required to articulate their claims in the institutions and language of their colonizers.12 These works skillfully describe and analyze the complex terrain of law and its relationship to postcolonialism, demonstrating how epistemologically distinct claims made by indigenous peoples have been either managed or completely dismissed by settler courts. This literature examines the evocation of difference in legal cases involving indigenous peoples, especially the use of difference as critique. In this sense, indigenous claims are used to defamiliarize the familiar, and to point out some of law’s fundamental assumptions.
Some scholars have further argued that the articulation of indigenous claims in settler courts produces conditions of irreconcilability. The argument goes that because indigenous epistemologies (including concepts of identity, land, and time) are fundamentally incommensurable with the terms of European modernity, their legal encounter inevitably "highlights a problem inherent in the post-modern condition—the confrontation between two irreconcilable systems of meaning produced by two contending cultures" (Torres and Milun: 2000: 52). While others have challenged such arguments, asserting that they fail to take into consideration the deeply political postcolonial conditions that influence how these self-consciously cultural assertions are made, nevertheless concepts of indigenous difference have been powerful rhetorical tools both for critiquing settler courts and for articulating claims in them.

Yet these types of analyses cannot account for what happened in the Musqueam Park dispute. The Musqueam Band did not make its claims through the idiom of indigenous difference, but rather through attempted participation in the private sphere of Canadian capitalism while the only group to make self-consciously cultural (qua racial) assertions was the leaseholders. Ironically, the dominant rhetoric of opposition to indigenous claims in Canada usually operates "by emphasizing the liberal-democratic ideals of individualism, private property, and equality for all" (Bateman 1997: 61). In this instance, however, the Band's claims were commensurable with these liberal-democratic ideals, and created a
need for a different oppositional discourse, (or, in this case, an oppositional discourse of difference).

The Musqueam Band’s commensurable claims confound notions of indigenous difference, notions that are central both to settler identity and to associated concepts of property. This commensurability was deeply unsettling to the leaseholders and other settler Canadians. Legal scholar Peter Fitzpatrick offers a way to read the dispute in Musqueam Park:

This construction [of an Other] involves that which is acceptable or within the identity being created in its difference to that which is unfit and excluded. Looked at in reverse, if the excluded were to reenter, as it were, then the identity would disintegrate… (1999:55).

To reformulate Fitzpatrick’s insight: it is not if the excluded re-enters, but rather when the excluded, in this case the Musqueam Band, re-enters. Indigenous peoples have traditionally been excluded from the liberal-democratic spheres of “individualism, private property, and equality for all,” an exclusion which allowed settler identities to be forged in opposition. The Band’s re-entry occurred when it asserted its similarity by declaring its entrepreneurial desires, and demanding a legal remedy in line with common law real estate practice. It provoked a crisis in the leaseholders and other settler Canadians. In response, settler Canadians created an oppositional discourse of difference, one which relied on naturalized social and legal categories of race and property. In the following section, I
analyze how this discourse ultimately reveals (and simultaneously threatens) a racialized investment in property.

**Property of the White People Forever: Race and Property in BC**

The national mythologies of white settler societies are deeply spatialized stories. Although the spatial story that is told varies from one time to another, at each stage the story installs Europeans as entitled to the land, a claim codified in law.

---Sherene Razack, *Race, Space, and the Law: Unmapping a White Settler Society*¹⁵

Legal scholar Cheryl Harris argues that “whiteness and property share a common premise—a conceptual nucleus—of a right to exclude” (1993: 1714). Through an examination of the emergence of whiteness and the evolution of American property law in relation to the exclusion of Blacks and Native Americans from these spheres, Harris asserts that race and property are inextricably linked, contending that a privileged concept of whiteness comes to be “embedded...into the very definition of property” (ibid.: 1721). Thus “American law has a recognized property interest in whiteness,” one which creates unacknowledged conditions “against which legal disputes are framed, argued, and adjudicated” (ibid.: 1714). I extend Harris's insights to encompass Canadian law, arguing that “a property interest in whiteness” frames the Musqueam Park dispute,
creating a nexus of symbolic and material conditions through which both the controversy and the Supreme Court’s decision are articulated.

* * *

Race profoundly structures Canadian society, yet there are discursive conditions which severely limit discussion of these issues. For instance, it is a longstanding myth, oft-reproduced in history textbooks, news media, and other sources, that Canada has been gentler with the indigenous peoples now encompassed by its boundaries than have other nation-states, most notably the U.S. While this myth has been debunked, or at the very least problematized, in academic and activist literatures, it is nevertheless prevalent in public discourse and still frames the reception of many First Nations’ claims.

In Canada, as in other postcolonial nations, the racial categories of white and Indian have been mutually constitutive; that is, these categories developed in tandem with each other. This has been the case historically and it is still the case now. There is a burgeoning literature in Canadian critical race theory that deals specifically with the racial construction of indigenous peoples, specifically the prevalent native/non-native dichotomy that is more familiar in Canadian race relations. As Schick argues, “[T]he construction of white-identified people is established through the production of Aboriginal peoples as Other” (2002: 105-6). Unlike the U.S., however, it is very rare in public discourse in Canada to speak overtly about race in reference to either indigenous peoples or whites; rather, “culture” is the preferred term used to evoke specific kinds of difference, often
effacing the racialized (and gendered) dimensions of Canadian society, and thus limiting critical intervention in larger questions about racism and equality. Building on the work of earlier critical race theorists, Sherene Razack calls this process “culturalization,” arguing that in these circumstances “[c]ulture then becomes the framework used by white society to pre-empt both racism and sexism” (1998: 60).

Concepts of race have a long history in British Columbia, and while these concepts have been by no means monolithic or necessarily coherent, they have been nevertheless consistently premised on settler assertions of difference from, and superiority to, indigenous peoples. At the time of early resettlement during the mid-19th century, British colonial officials envisioned their westernmost colonies in racial terms by imagining them as spaces for white resettlement, the creation of which would require the formation of sharp legal and spatial divisions between indigenous and white populations. The racialized legacy of these divisions is still apparent today in the province. Paul Tennant argues that despite an increased racial tolerance in the province since the late 1940s, “the pejorative image of the Indian long held by Whites still underlies provincial government policy,” and whiteness is still publicly evoked by settler British Columbians, especially in controversies over land (1990: xi-xii). Thus, an examination of this legacy provides a necessary interpretive context for understanding both the Glass decision and the controversy surrounding it.
An oft-cited fact about BC’s racial history is that a series of treaties negotiated with indigenous peoples on Vancouver Island in the 1850s stated that the purchased land would become “property of the White people for ever.”\textsuperscript{16} This assertion locates, in early colonial law, the desire for difference among white settler populations in BC, a desire intimately linked with notions of race and of property, and one which has been present throughout BC’s history. Tennant points out that from the early days of resettlement until the postwar era, “Whites in the province were eager to distinguish themselves from non-Whites” in part as a way of protecting their political and material interests (1990: xi). While these distinctions were organized and expressed in a variety of ways,\textsuperscript{17} they were especially manifest in the racial, spatial, and legal dimensions of property.

Historical geographer Cole Harris makes the argument that white resettlement in BC coincides with some important shifts in the trajectory of British colonial thought, shifts which reformulated concepts of race and humanity, thus differently shaping the form and experience of colonization in western Canada. He points to the diminishing popularity of the liberal humanitarian tradition in the 1840s and 50s, a tradition which, although premised on the inferiority of indigenous peoples, still presumed a “universalistic vision of a common humanity” (2002: 10). However, an increasing reliance on evolving “scientific” arguments about racial difference (specifically the racial immutability and inferiority of non-Europeans) slowly emerged and eroded this perception of a common humanity (2002: 11). As these new racial concepts gained currency, and
were reinforced by the resistance of indigenous populations to colonial reforms throughout the British empire, colonial attitudes about indigenous peoples grew more negative. Further, throughout the colonized world, a growth in white immigrant populations was concurrent with a decline in indigenous ones, the latter having been subjected to the ravaging effects of often violent colonial policies and European diseases. This historical moment buttressed white settler beliefs both in the biological inferiority of indigenous peoples and in the pervasive idea that these peoples represented ‘a dying race.’ Thus there was a pervasive colonial belief in the inferiority (and fundamental difference) of indigenous peoples, a belief that under girded colonial law and policy especially in the realm of property.

Property was a central organizing metaphor for colonial ideology. Historically, private property was considered to be exclusive to Europeans, and it was widely believed that indigenous peoples either had a very primitive understanding of property, or had none at all. Colonizers justified the appropriation of indigenous territories by asserting that these lands were either uninhabited or underused. As both Fitzpatrick (2000) and Seed (2001) point out, even when confronted with contradictory evidence (i.e. indigenous agrarians), colonists either ignored this evidence or they reconstructed concepts and laws which continued to relegate indigenous peoples to lower forms (or as “outside” of political society and property). As Patricia Seed suggests:

Those taking others’ property needed to see a clearly defined boundary between themselves and the others to justify seizing assets belonging to
those others. If the line dividing the two were indistinguishable, then the colonizer’s certainty about their right to seize resources might vanish, or at least become open to question (2001: 116).

Thus concepts of private property themselves evolved in relation to these kinds of colonial encounters and the presumed inferiority of indigenous peoples.

In her discussion of mixed-race identity in colonial British Columbia, Renisa Mawani (2002) suggests that late 19th century Canadian legal definitions of “Indian” were not simply a reflection of racial categories extant in settler society, but rather were also ways of protecting government interests in Indian land. She examines those late 19th/early 20th century legal definitions of “Indian-ness” that relied on blood quantum, arguing that by restricting the ability of mixed-race people to assert indigenous claims to land, these definitions “linked blood with real property and citizenship” (2002: 56). Because it increased the number of people who could claim Native ancestry, and thus the number of people who would have a right to reserve land under the preceding legal regime, Mawani argues that the social phenomenon of “race-mixing in British Columbia potentially jeopardized European efforts to appropriate indigenous land” (2002: 50). As a result, the federal government became progressively more restrictive in its legal definitions of who was and was not “Indian,” thus limiting the amount of land it was legally required to allocate for reserves. An important insight in Mawani’s work, then, is that colonial fear and anxiety around mixed-race progeny cannot be construed as merely symbolic or metaphorical concerns about racial purity; rather,
this fear and anxiety was also deeply rooted in material concerns about land. The racialized fear and anxiety expressed by the leaseholders and other settler Canadians during the Musqueam dispute are also deeply rooted in material concerns about land, concerns ultimately mitigated by the Supreme Court’s decision in Glass.

**Background to the Dispute**

Described by a federal judge as “one of the most attractive and desirable locations in Vancouver,” the Musqueam Park subdivision sits on approximately forty acres of Musqueam Indian Reserve No. 2 in the affluent southwest part of the city. The subdivision consists of seventy-five relatively large lots zoned for single-family residences, ranging in size from approximately 8600 to 27,000 square-feet. It is centrally located, in close proximity to several golf courses, and adjacent to the largest green space in the city, the beautiful Pacific Spirit Regional Park. Pacific Spirit is a 763-hectare area that includes dense forests, natural beaches, and walking and cycling paths; because of its designation as a regional park, it is also protected from further development. Because of its location, size, and status, Musqueam Park had, in the years preceding 1995, been an attractive and sought-after residential area in the very competitive Vancouver housing market.

Musqueam Park itself was created in 1960 when, under the terms of the **Indian Act**, the Musqueam Band “surrendered” its interest in those forty acres to the federal government. The federal government, on behalf of the band, then
brokered a deal with a private company to develop the land as an income-generating strategy. While the Musqueam Band Council was involved with the development of Musqueam Park, it was ultimately the responsibility of the federal government to arrange for lease terms that it felt were “most conducive” to the welfare of the Band.21

Beginning in 1965, the land was leased for a period of ninety-nine years to leaseholders who would own their homes, but would not hold title to the land on which they were built. The original lease term would last thirty years, after which time leases would be reevaluated every two decades.22

Since the beginning, the leaseholders had been paying below fair market value to live in Musqueam Park. The rents during the original thirty year lease term were fixed rates with minimal increases every ten years based not on inflation or the land’s market value, but rather on a percentage increase of the original lease amount. As a result, during this thirty-year period, land values in Vancouver’s west side increased substantially, but the leases in Musqueam Park did not reflect this market growth. The average fixed rents during the first thirty years ranged from $298 to $375 per lot per year,23 an amount less than the price to rent a parking space in downtown Vancouver.24 The terms of the leases stipulated, however, that in 1995, rents were to be recalculated to reflect a “fair rent” based on six percent of the “current land value.”

There are differing interpretations about the level of involvement of the Band Council in the original lease negotiations25 as well as the federal government’s
desire or ability to arrange a good financial deal for the Musqueam back in 1965. Some have argued that it would have been impossible for negotiators to know just how desirable land on the west side of Vancouver would become, others have countered that by the 1960s the government and the development company were well aware of the potential value of Musqueam reserve land, asserting that it was for this reason that a residential development project was chosen for the site in the first place. For instance, in 1956, the Indian Affairs Branch stated that the reserve was “the most potentially valuable 400 acres in Vancouver today.” By the 1960s, when the leases were originally signed, developers were predicting big things for the area. A private development company called the remaining land within IR 2 “the most valuable undeveloped acreage remaining within the City limits of Vancouver” (Rawson & Wiles 1967: 23). Regardless, from 1965 to 1995, the Band had little choice but to adhere to the original lease terms despite the fact that land values in southwest Vancouver increased exponentially during that time.

In 1980, the federal government transferred certain powers to First Nations across Canada. This legislation enabled the Musqueam Band to both collect property taxes and administer the leases in Musqueam Park. At this point, the Band offered leaseholders an opportunity to convert their leases into prepaid ones, like those in adjacent Salish Park, a move that would have eliminated the need for renegotiation throughout the duration of 99-year lease term. Less than a quarter of the leaseholders expressed interest, a percentage that the Band felt did
not justify the expense of appraisal and renegotiation.\textsuperscript{30} The Band has suggested that the majority of the leaseholders were not interested in renegotiating their leases at that time because they recognized the rents were extremely low. In a 1999 editorial, Musqueam Chief Ernest Campbell quoted one leaseholder as asking, “Why would we accept your offer and give up the low rents that we had then under our leases?”\textsuperscript{31}

Clearly because of the fixed lease rates, increased property values on Vancouver’s west side during the original lease term did not translate into increased profits for the Band. Rather, Musqueam Park became an even hotter housing commodity precisely because, in addition to its desirable location and beautiful homes, annual rents for the sizeable lots were very low, especially in comparison to other west side properties. Part of what contributed to the skyrocketing property values in Musqueam Park was the fixed rate of the original lease term, a rate which made it possible to for leaseholders to live in an enviable location well below its market value. Throughout the first thirty years, even into the early 1990s, many residents of Musqueam Park sold their homes \textit{and their leases} for high profits, profits in which, again, the Band did not share.\textsuperscript{32} Yet, from the outset, it was clearly stipulated in the leases themselves that the way in which rents in Musqueam Park were initially calculated would change in 1995 to reflect the market value of the properties. This recalculation would most certainly result in a substantial increase in rents given the consistent and significant market growth during the original lease term. Yet there was very little public concern expressed
about the impending increase prior to 1995, despite the fact that it was common knowledge in the area. In 1995, the mainstream media began to report on the dispute in Musqueam Park en masse. Many of the news stories and editorials focused on the uncertainty surrounding the dispute, and wrote about its negative impact on property values.

While the Band and the Musqueam Park leaseholders began rent negotiations in February 1995, these discussions soon broke down. Because the leases stipulated that any disagreements over terms were to be resolved in federal court, both the Band and the leaseholders articulated their claims to Judge Marshall Rothstein in the trial division of the Federal Court of Canada (FCC). Two federal court decisions, in 1997 and 1998, differently interpreted the meaning of “current land value,” assessing rents per lot per year at an average of $10,000 and $28,000 (later reduced to $22,800) respectively. The Band appealed the 1997 decision to the Federal Court of Appeal; the leaseholders appealed the 1998 decision to the Supreme Court.

Settler societies have relied, both materially and symbolically, on the displacement of indigenous peoples for the settlement of “new” colonial territories. When confronted with political and legal challenges from indigenous groups, settler societies have developed narratives to make sense of them (e.g., Dominy 1995; Furniss 1997/98; 1999). In Canada, the idiom of cultural difference has enabled settler mentality to maintain clear distinctions between indigenous and non-indigenous, between Indians and other Canadians, often to the exclusion of
any nuanced understanding of the complex political and cultural dynamics that inform situations like the Musqueam Park dispute (Furniss 1999: 15). In this section, I provide a brief mapping of the terrain of cultural difference in Canada, and examine how it is expressed through claims to property. More specifically, I analyze how the leaseholders and other settler Canadians narrated the dispute in deeply racialized ways, and suggest that they deployed concepts of difference to create a moral discourse legitimizing settler claims to Indian land.

Distinctions like “native/non-native” and “native/ordinary Canadian” are common in Canadian public discourse. Such concepts are necessary to the settler Canadian imaginary; it is possible under this schema for settler Canadians to keep indigenous peoples as radically Other. The dispute over Musqueam Park, however, confounds these concepts because, within the confines of the Canadian legal system and its accompanying ideologies of capitalism and equality, the Band’s claims were not different or incommensurable; rather, they make sense. The Band is doing what the Canadian state, through legislation like the Indian Act, had legally prevented it from doing for years: attempting to maximize the profitability of prime real estate in west Vancouver based on favorable market conditions. Within Canadian capitalist logic, the Band’s raising of rents was reasonable, legal, and lucrative. It was, as Chief Ernest Campbell characterized it, “a private business arrangement with our tenants.” Describing the dispute in this way confounds the notion of the Musqueam as radically Other, shutting down the opportunity for the leaseholders to object to the Musqueam claims on the basis of
liberal-democratic ideals. Thus the commensurability of the Musqueam claim required that the leaseholders and other settler Canadians express their opposition in a different way; namely, they evoked an oppositional discourse of difference including attempts to re-inscribe reserve land as “Indian land” with profound material effects as well as a focus on the ability, and indeed desirability, of indigenous peoples to conduct business in Canada. Additionally, leaseholders appropriated languages of oppression including comparisons of their situation to apartheid, ethnic cleansing and colonialism in order to mediate between the seemingly irreconcilable representations of the Musqueam Band as landlords and the Musqueam Band as “Indians.”

* * *

Several months prior to the Supreme Court’s decision, the Canadian edition of Time Magazine ran a cover story entitled “The Struggle Over Native Rights,” asserting that “flash points of irritation and hostility are erupting as non-natives struggle to come to terms with the most sweeping and comprehensive social adjustment in the country’s history: the attempt to bring justice and closure to the frustrated claims of aboriginal peoples.”36 Although the text only featured a brief discussion of the Musqueam Park dispute, the second-largest photograph in the article was of one of the leaseholders, Kerry-Lynne Findlay, as she stood protectively holding her two young children. The photo spans two pages, and as they stand under a tree on their well-groomed leasehold, with their house in the background, the caption reads: “Stuck: Kerry-Lynne Findlay’s land lease went
from $450 to $36,000 a year.” Next to the photo of Findlay is a smaller photo of Gail Sparrow, the former Chief of the Musqueam Band and a vocal opponent of the Band’s position. Sparrow is pictured leaning on a white picket fence in front of her home, and the caption below reads: “Former Chief Gail Sparrow objects to sky-high rent hikes.” Across the bottom, spanning two pages and flanked by two arrows, was the following caption: “The Musqueam Indian Band wants 7000% land-rent increases from some resentful homeowners.” Except for Sparrow, no one else from the Band is quoted or pictured in this article.

A closer look at these images can reveal some of the popular discourses surrounding the dispute. In Time’s configuration, the dispute in Musqueam Park is framed as an indigenous rights issue rather than a civil dispute over property. The leaseholders are described as “homeowners” rather than “tenants,” and the specific legal claims of the Band are not are not well-defined. As part of “The Struggle Over Native Rights,” Findlay and the other leaseholders are presented as iconic of what could happen to “ordinary Canadians” if the pendulum of “social adjustment” were to shift too far in the other direction.

The piece also features two very important settler symbols of property: the idea of home ownership and fencing. Their description as “homeowners” rather than “tenants” firmly places the leaseholders as differently entitled, as deserving of protection. Reinforced by Findlay’s statement on the preceding page, “Most people look on their homes as a sanctuary from the world. We’ll never feel comfortable here again.” Findlay evokes powerful symbols of home and
ownership, demonstrating that the leaseholders experienced not only a material threat, but a symbolic one. Also an appeal to sense of entitlement, translated into threat felt throughout Canada.

Sparrow’s support for the leaseholders was widely reported and, in her opposition to it, she became a prominent symbol of the Band’s unreasonableness. In placing her on a white picket fence, Time Magazine visually represented Sparrow as part of a particular property regime with clear boundaries defined by recognizable symbols of ownership. Patricia Seed’s historical account of the importance of fences in English claims to land offers a way to read this picture:

To Englishmen...fences terminated the rights of communal landholders. Thus laying out boundaries, building stone walls, and putting up hedges created the reliable sensation of familiarity and rightness among English colonists dispossessing “communal” Indian landowners in the New World (2001: 39).

Thus Sparrow is associated with those fences that “terminated the rights of communal landholders” (the Musqueam Band) as well as with the symbol of the “white picket fence” and its connotations of home and safety.

* * * *

BC Report, a conservative newsmagazine, published an article entitled “Circling the wagons: Musqueam leaseholders refuse to pay crippling rate increases and look to Ottawa for relief.”40 “Circling the wagons” refers to
confrontations between pioneers and Indians on the frontier. Such language was common in more conservative news media, and can be read as part of what Furniss has called the “frontier complex”: a form of historical epistemology “that provides a certain set of rules and assumptions that guide how ‘truths’ about the past, and by extension the present, are to be created, understood, and conveyed” (1999: 17). In this instance, the Musqueam Park dispute is interpreted through the myth of the frontier, revealing historical continuities between the colonial and the postcolonial. The leaseholders (settlers) are taking their “last stand” against the Musqueam Band (Indians) in this contemporary battle, staking a claim and finding solidarity as non-Natives, and looking to the (colonial) government for aid. The leaseholders are constructed as a moral force, as innocent, not only battling hostile attacks from savages on their property and privilege, but also forced to rely on the whims of a faraway colonial government.

The leaseholders believed they would be protected from paying full market value for the land. Contending that the federal government had abandoned them, they organized protests, waving placards that read: “Government of Canada has betrayed non-natives on Crown land. Shame on them.” They demanded a government buy-out which would have compensated them, not only for the fee simple value of the homes they owned, but also for a portion of the land value.

When the Band attempted to enforce a legally binding agreement, signed by the leaseholders, the leaseholder’s asserted “indigenous difference”: the land was not like any other land and the Band could not be treated as any other landlord.
The Band’s claims were simultaneously constructed by settler Canadians as morally unjust as well as economically unsound.

The non-native Musqueam Park residents who built their homes and signed a 99-year lease are trapped. The band has demanded inappropriately high levies for the land. Yet in today’s market the homes are no longer sellable, insurable or useful as equity. Would you wish to conduct business in this environment? Is this good for any Canadians, whether native or non-native? Is the Musqueam impasse the flagship for future business operations with natives?42

This appeal to the rhetoric of market forces made a clear connection between the “demands” of the Band and the lack of marketability of Musqueam Park homes. It continued to naturalize the argument that the Band and its “punitive” rents were solely responsible, suggesting that the Band’s attempts to work within a capitalist system had failed dismally. The leaseholders and their supporters argued that Musqueam Park, as Indian land, is incommensurable with Canadian capitalism; its uncertainties are different than the usual uncertainties inhering in real estate. This discourse moves to keep reserve land, and the Musqueam band, out of the market, out of the private sphere of capitalism.

That the leaseholders, and other settler Canadians, have a material stake in keeping Musqueam Park as “Indian” land is obvious, but there is another, more symbolic, issue at stake. Settler culture has a deep ideological commitment to the
idea that First Nations are radically Other, a commitment that enables a naturalization of the status quo by seeing differences as purely “cultural” and dislocated from any historical, political or material context. First Nations marginalization from the benefits of capitalism is a complex issue, but a popular conception is that it is incommensurable with their ‘culture.’ Through this kind of reading, Canadian settler culture can simultaneously reaps the material benefits of this marginalization and conceives of itself as non-violent, non-racist and benevolent. The Musqueam claim, however, unsettles this ideology by confounding notions of cultural incommensurability.

The leaseholders and their supporters counter the Musqueam claim not by the usual appeal to liberal-democratic ideals of equality or sameness, but rather by appealing to powerful moral discourses of oppression. By constructing themselves as victims of apartheid, ethnic cleansing and colonialism, the leaseholders simultaneously assert their innocence and construct the Band’s claims (and the Band itself) as morally bankrupt.

Appealing to the values of an ostensibly politically and culturally neutral multiculturalism (see Mackey 1999), settler Canadians accused the Musqueam of defining themselves and their interests through the non-transcendent and taboo category of “race.” Another Sun editorial responded to the dispute by writing, “Ahead...lie infinite down-and-dirty scrambles for land, money and other compensation by aboriginals whose claims rest on race, family, clan, ‘purity’ of Indian/tribal blood, and so on.”
Characterizing race as a naturalized category, created by First Nations, again elides the history of colonial policies like the imposition of Canada's *Indian Act*. Canada has been throughout its existence explicitly concerned with defining who is and is not "Indian," and with separating, physically and materially, legally and ideologically, actual "Indians" from "ordinary Canadians." The effects of these separations, including the expropriation of Aboriginal territories and the use of Aboriginal peoples as wage laborers for colonial capitalist expansion, the creation of reserves, the imposition of colonial legal systems and the persistent and pervasive negative stereotyping of Aboriginal peoples as noble savages or child-like drunks, are constitutive of the current marginalization that Aboriginal peoples experience in BC and Canada more generally. As Sherene Razack argues, "The forgetting or disavowal of bodies of colour in the national story secures specific material arrangements and simultaneously shapes dominant subjects' understanding of themselves as entitled and good" (1999: 174).

In her discussion of Canadian multiculturalism and its reliance on "difference" to create a national identity of "pluralism, diversity and tolerance," Eva Mackey asks how those differences perceived to be "dangerous" or "threatening" are "contained, controlled, normalised, stereotyped, idealised, marginalised, and reified" (1999: 5-6). Musqueam Park leaseholders responded to perceived threats against their privilege by appropriating powerful symbols of racial oppression and recreating themselves as *different*, as "marginalized." But again, as "ordinary Canadians," as "non-natives," they create their marginalization
and yet maintain the privilege of always invisible “whiteness” in contrast to the very visible racialization of the Musqueam, and Indians more generally. By marking the Musqueam Band as “Indians” and the leaseholders as “ordinary Canadians,” settler discourse simultaneously reinscribes “race” on First Nations, tapping into and reinforcing extant racism and hostility towards them as it creates the leaseholders as victims of marginalization. As one leaseholder said to journalist Suzanne Fournier about Wendy John, former chief of the band and the only Musqueam homeowner in Musqueam Park, “Doesn’t it look as though a native lives here? Have you seen their homes, with cars and junk everywhere?” The leaseholder went on to add, “This dispute has made me a bigot.” Fournier, however, describes the John home as “well kept” and “sporting a 1998 Volkswagen bug outside.” The contrast in these descriptions of the John home demonstrate that, despite actual conditions, racist stereotypes circulate widely and can be deployed when rhetorically expedient.

Common statements such as “The roots of the controversy reach back to 1965,” and “You can’t make up for years of injustice on the backs of 74 residents” place the dispute in a particular spatial and temporal configuration, limiting the relevance of colonialism and attempting to write the indigenous/settler experience as something distant and devoid of context.

They have lived on the land for many years. They are being forced to leave by a series of duplicitous legal manoeuvres [sic]. And they have no recourse through the political system. The plight of the Musqueam Park
residents sounds rather like most native groups’ tales of their own experiences during the settlement of early Canada. And yet those forcing the residents off their land are not nasty colonial settlers, but a native band council.50

The replacement of “nasty colonial settlers” with “native band council,” an ironic inversion of the usual players, first retells a history of colonialism as a phenomenon long past, without any contemporary relevance for indigenous or settler Canadians. Colonial violence and its effects are temporally distanced, part of “the settlement of early Canada,” suggesting that they do not persist in Canada’s current liberal democratic incarnation. Second, this passage appropriates the language of colonial oppression, thus rehistoricizing the perceived victimization of the leaseholders. By using narratives “rather like most native groups’ tales of their experiences,” settler discourse asserts its innocence itself in the face of First Nations’ challenges to its legitimacy.

In this same editorial, the Post argues that the Musqueam Park dispute has resulted in “Fiscal cleansing in BC.” It contended that should the Band win the Supreme Court decision, “the result will be the effective expropriation of property and deliberate de-population of Musqueam Park.”51 This rhetoric was picked up by the leaseholders during a protest of Indian affairs minister Robert Nault when they sported t-shirts saying “Victims of Fiscal Cleansing.”52
Statements like “It’s apartheid. It smacks of the same kinds of injustices...”\textsuperscript{53} and “The new apartheid: what happens when the job of racially partitioning Canada through the land claims process is complete?”\textsuperscript{54} were pervasive, both in the Musqueam Park dispute and in others involving encounters between settlers and First Nations (e.g., Bateman 1997; Tennant 1992). Apartheid, ethnic cleansing and colonialism, powerful moral symbols of discrimination and oppression, are removed from their violent, historically-specific contexts in order maximize the rhetorical strength of the leaseholders’ claims. Any sustained comparison of the conditions of apartheid, ethnic cleansing or colonialism with the conditions in Musqueam Park reveals them as absurd. Why, then, was this strategy of “oppression” so ubiquitous in settler discourse, and why was it so effective in asserting a sympathetic claim for the leaseholders?

The radical decontextualization that occurs in these juxtapositions is important to settler discourse because it relies on the \textit{symbolism} of oppression as opposed to any lived experience of it. This creates a double movement. First, the leaseholders claim a quasi-indigenous identity\textsuperscript{55} (as oppressed) in order to create sympathy and to demand a remedy for their situation. Second, a symbolic claim to oppression can also work to diminish the force of the other legitimate claims and these kinds of equations can have a neutralizing effect. Leaseholder discourse, then, mediates the \textit{unsettling} of Musqueam Park, articulating its own marginalization by marking the racial difference of “Indians” against the invisibility of “whiteness” and by evoking the symbolism of oppression. This
ideological attempt at a re-settlement of Musqueam Park appropriates the language of oppression while reinscribing the "unspeakable" racism that exists against First Nations in Canada.

Throughout 1999, the mainstream media was describing the "drastic" and "sudden" nature of the rent increases, often downplaying or forgetting the very specific terms of the lease and that the impending increases were common knowledge in the area prior to 1995. The news media rarely reported that the Musqueam band was negotiating a fixed lease rate for the next twenty years, again without any compensation for potential growth in land values. Instead, a series of alarmist editorials (and news stories that were suspiciously like editorials), presented the Musqueam band members as conspiratorial, opportunistic and avaricious, "abruptly" hiking "the rate by 7000%." 

Through its deployment of laden and dichotomous categories such as "native/non-native" and "native/ordinary Canadian," leaseholder discourse further reveals a racialized interest in law and property. By evoking certain forms of whiteness, especially those that preclude any explicit discussion of race with the effect of effacing its very existence, leaseholder discourse intersects with Canadian law, working in tandem to secure the symbolic and material conditions needed for a 21st-century resettlement of Musqueam Park.

*   *   *

Can it be argued that a fundamental legal issue revealed through the Musqueam Park dispute is the way in which rents for leased land are calculated in
all cases? Are particular tensions engendered by a legal system that proposes to calculate rents based on what the landowner could potentially sell the property for as opposed to what the tenants are using it for? Are there fundamental inequities set in motion by a regime of private property, a regime in which the structures of law and of the market economy overwhelmingly favor the interests of some (property owners) over the interests of others (tenants)?

While the scope of this paper does not permit a careful examination of these issues, I nevertheless evoke them to demonstrate that there are important rhetorical choices being made in the Musqueam Park dispute. More specifically, there were other narratives available to the leaseholders and their supporters through which they could articulate their anger and frustration at what is indeed a legitimate concern: namely, the sharp and substantial increase in their housing costs.

Stories abound about the gentrification of formerly modest, often impoverished communities. Proponents of gentrification generally argue that these communities can be revitalized by the influx of capital, and that the wealth generated by development will ultimately trickle down to the more marginalized members of the community. Opponents argue that gentrification results in the legal and spatial displacement of marginalized residents, and does nothing to redistribute wealth more equitably. In such scenarios, low-cost housing is razed (or never built) to make room for condominiums. Tenants are evicted from residential hotels in urban centers in order to build new conference facilities. New interest in an old neighborhood drives up property values and long-time residents
must sell their homes because they can no longer afford the property taxes. Such processes of gentrification are on-going, and being actively resisted, in other parts of Vancouver outside of Musqueam Park, especially in the inner-city Downtown Eastside community (DES) (e.g., Blomley 1997, 1998; Blomley and Sommers 1999).

While I, like Blomley, feel I must “flag my partiality to those who would seek to resist gentrification” (1997: 190), my purpose here is not to provide a critique of this process. Rather, I wish to point out that other disputes also shape the “landscapes of property”\(^{60}\) in Vancouver, and that these cannot be seen as disconnected from the events in Musqueam Park. In fact, I propose that the leaseholders and other, more marginalized residents of Vancouver could be seen to have certain economic interests in common, but that these interests are never articulated in the deeply racialized dispute over Musqueam Park. This absence is not only significant but central to the construction of racialized narratives used by settler Canadians. These racialized narratives not only work to cast the Musqueam and other indigenous peoples in a negative light, but also serve to exclude of any discussion of the affluence and privilege shared by the leaseholders, thus reinforcing a particular racialized and classed investment in property.

In some ways, the rent increases faced by the leaseholders placed them in circumstances not unlike some of their more marginalized neighbors in other less affluent parts of the city. For instance, the leaseholders were subject to onerous, yet legally sanctioned increases in their cost of living, a condition shared by many
low-income Vancouver residents. Leaseholders routinely articulated concerns about their ability to continue to be able to afford to live in Musqueam Park. (Several leaseholders dramatically offered to sell their homes for a dollar, asserting that, "We can't sell these homes. They're totally a liability.") They questioned the morality of the rent increases, and articulated a sense of belonging and entitlement to that space despite their lack of ownership rights to the land itself. They were angered by what they saw as profit-driven legal and economic maneuvering on the part of the Band, asserting that the latter was attempting to void the leases and to force the leaseholders out of Musqueam Park. Echoes of these concerns can be heard in Blomley's discussion of gentrification in the DES: "The rights of low-income residents to remain within the neighbourhood...relies upon the simultaneous celebration of a localised collective entitlement to a space, and the moral condemnation of a predatory, profit-driven property regime" (1997: 201).

A significant difference between Vancouver's low income residents and the Musqueam Park leaseholders is that the leaseholders were able to amass and mobilize substantial resources, both economic and political, to fight the Band in court. For instance, attorney Kerry-Lynne Findlay, Musqueam Park resident and leaseholder representative, was invited to speak before the Vancouver City Council and the Canadian Senate. She was also granted meetings with other government representatives, including high-ranking Ottawa officials. As described earlier, the cause of the leaseholders was also featured prominently in
the media, and they became iconic of the "ordinary Canadian" at the mercy of indigenous avarice and bad government.

Although their affluence was generally downplayed in the media, the leaseholders argued that they were unfairly characterized by some as affluent or as "rich people." They claimed that the average income in Musqueam Park was a mere $38,000, implying that they were financially incapable of paying the rent increases. This average income figure was widely accepted and circulated in the press.

The leaseholders did not specify how they arrived at $38,000, although it is only slightly less than the average income figures for their provincial electoral district, Vancouver-Quilchena (VQ), published by the government. Nevertheless, this figure is misleading because it has been removed from any interpretive or comparative context. According to Statistics Canada, the average employment income per person in the Vancouver-Quilchena district in 1990 was $39,042, a figure that had risen to $41,151 in 1996 (see Figure 1). However, the average household income of residents during the same years was $79,449 and $82,683 respectively, substantially higher than the average for the city of Vancouver and for the province itself (see Figure 2).
In 1995, the year the controversy exploded, the average household income in Vancouver-Quilchena was 53% higher than the average for the city of Vancouver, and 58% higher than the average for the province.63

Underestimating wealth is not uncommon among affluent Canadians. In fact, a recent poll of the most affluent 20% of the Canadian population found that the majority (95%) do not consider themselves to be wealthy; rather, most describe themselves as “comfortable.”64

Through the evocation of terms such as “fiscal cleansing” and “apartheid,” leaseholders presented themselves as the victims of race-based oppression, of “ethnic cleansing by fiscal means,” a discursive move which simultaneously effaces their economic and political privilege and casts aspersions on the moral legitimacy of the Band’s legal claims. To focus on power inequities inherent in the landlord-tenant relationship would be unsettling to both the symbolic and material capital of the leaseholders. Leaseholder discourse, then, focuses not on the possibility of displacement itself, but rather who is potentially displaced by whom in Musqueam Park. Ironically, this situation reveals a series of contradictions extant in free market discourse, most notably the conditions under which the public sphere of law and government should regulate the private sphere of the market economy. As one of the few pro-Band editorials published in the Vancouver Sun challenged:

Was that really B.C. Reform leader Jack Weisgerber, savior of free enterprise[,] arguing that the government should intervene in a private land
deal gone sour? Here’s our champion of the marketplace pleading the case of rent freezes. The poor and dispossessed can fend for themselves.65

It is not insignificant that leaseholders do not articulate any symbolic relationship to the poor and indigent, to the residents of homeless shelters or expensive one-room apartment hotels in the inner city, people often at the mercy of rent increases, evictions, and changes in ownership in the name of market forces.

Even if one accepts the claims of economic marginalization made by leaseholders, they nevertheless opted for a racial explanation over an economic one; their prime narrative has been one of racial oppression rather than class oppression. In this formulation, class becomes quasi-taboo under the racializing rubric of “non-native” and “ordinary Canadian,” and race becomes the idiom through which the leaseholders and other settler Canadians make sense of the dispute in Musqueam Park. More importantly, they are able to discursively efface their economic, political and racial privilege, a discourse that is central to expressing their claims to legitimacy and entitlement.

**Looking through Glass: Property, Difference, and the Nature of Indian Land**

Moreover, as a safeguard and protection to these Indian Communities, who might, in their primal state of ignorance and natural improvidence, have made away with the land, it was provided that these Reserves should be the
common property of the Tribe, and that the title should remain vested in the Crown, so as to be inalienable by any of their own acts.

--Letter from BC Governor James Douglas to Indian Superintendent I.W. Powell, 1874

The hypothetical used to establish market value in the absence of an actual market should reflect the land as it is in its actual circumstances and should not change the nature of the land appraised. Since it has chosen not to surrender the land for sale, the Band holds reserve land and must accept the realities of the market for this capital asset."

--Supreme Court of Canada, majority decision, Glass v. Musqueam

Indian Band, 2000

How should "Indian land" be understood in the specific context of assessing its hypothetical value for the purpose of calculating annual leasehold rents? According to the Supreme Court's majority decision in Glass, the inalienability of reserve land was a key factor in appraising its value, and the Band's "choice" not to surrender the land for sale ultimately lessened its worth. But why was the inalienability of reserve land relevant to this kind of appraisal? In this section, I will examine historical-legal legacies which challenge the Supreme Court's majority interpretation in Glass.

* * *
Reserves were not part of an indigenous geography, but were rather imposed colonial constructions based on settler concepts of property and of difference, forming “the basis on which a new geography of colonial settlement would be constructed and an older Native geography effaced” (Harris 2002: 17). The significance of reserves in BC must be understood not only in terms of their historical and legal development, but also in terms of their spatial dimensions. Established during the latter part of the 19th and early part of the 20th centuries, reserves were central to the colonial project, especially as they enabled large tracts of territory to come under colonial control. The legacy of the legal circumscription of these spaces persists and shaped the contours of the dispute in Musqueam Park. Historical geographer Cole Harris argues, “Discontinuous as it was, the line separating the Indian reserves from the rest became, in a sense, the primal line on the land of British Columbia” (2002: xviii). Harris’ spatial metaphor of the “primal line” is still fundamental to the landscape of BC. The Supreme Court’s interpretation of the Musqueam Park leases represents a key shift in the legal and cultural geography of this “primal line.” In Glass, the Court re-inscribes the reserve as “Indian land,” not only failing to address the problematic colonial history attending this term, but also creating a new legal precedent that makes living on reserve land less threatening for burgeoning non-Indian populations.

Described by Harris as “the province’s most basic colonial spaces,” BC’s reserves were established between 1850 and 1938, and currently comprise less
than one half of one percent of the province's land base. Because the reserve system emerged over a long period of time, under the direction of different colonial regimes with often dramatically different land policies, its development was not monolithic. Yet for nearly a century, the establishment of Indian reserves was a key element of the colonizing project in BC, as it had been throughout the lands claimed by the British Empire. The relegation of indigenous peoples to a mere fraction of their traditional territories enabled European settlers to appropriate the majority of land in the province for their own use as well as to exert greater control over resistant indigenous populations. Reserves were not, however, simply manifestations of self-interested economic or political policy; they were also legally circumscribed spaces of segregation, premised on the inferiority and radical difference of indigenous peoples.

While early land policies in BC recognized Indian title and focused on purchasing land from indigenous peoples in order to establish settlement, later policies shifted, denying the existence of Indian title and appropriating much indigenous land through the creation of reserves. By the time the two colonies became the province of British Columbia in 1866, and by the time the province was incorporated into the Dominion of Canada in 1871, European (mainly British) settlement was well underway and was having a profound effect on indigenous populations.

Land was of central concern to settlers in the province, and the creation of the reserve system enabled them to appropriate large tracts of indigenous territory
for individual settlement as well as for economic activities such as mining and agriculture. Settler British Columbians while often holding different aspirations for the land were nevertheless deeply invested in concepts of private property. Whether seeking to settle and farm, to participate in land speculation, or to develop the land in keeping with the demands of industrial capitalism, settlers generally did not question their entitlement to what they perceived as the "wasteland" and "wilderness" of BC.

An essential institution in the colonization of BC, law was both a means of expression and legitimation of British values and culture. Vestiges of colonial law continue to shape postcolonial indigenous/settler relations; thus, an examination of the historical legacies and continuities can explicate contemporary conflicts.

The legal and political foundation of Musqueam Park was laid early, in fact, as early as the Royal Proclamation of 1763. In the Proclamation, the British Crown codified the concept of Indian title, distinguishing it from other types of property recognized in common law. As Tennant points out, Indian title differed in three important ways from the typical British fee simple title granted to white settlers, and these differences "sharply curtailed the freedom of the Indians to do as they wished with their lands" (1990: 11). First, Indian title would be held collectively as opposed to individually. Second, unlike fee simple land, Indian land could not be bought or sold; rather, it could only be transferred to the Crown. Finally, Indian title was recognized rather than created by the Crown, and was thus
considered to be a codification of "aboriginal arrangements" predating European colonization rather than a wholly new law (ibid.).

In part because the Royal Proclamation recognizes these pre-existing arrangements, it has been read by many scholars as an essential legal document in the articulation and protection of indigenous rights in Canada and elsewhere (e.g., Harring 1998; Slattery 1985). For instance, Slattery argues that under the terms of the Proclamation, "aboriginal peoples hold continuing rights to their lands except where those rights have been extinguished by voluntary cession," and thus "the Indian interest constitutes a legal burden on the crown’s ultimate title until surrendered" (1985: 122; cited in Tennant 1990: 11). Such arguments have been central to indigenous land claims throughout the former British empire. This is particularly so in BC where most of the province’s land mass was appropriated neither through purchase nor conquest; as a result, these appropriations violate recognized European law about the acquisition of property.68 In late 1997, the Supreme Court recognized in the now-famous Delgamuukw decision that Aboriginal title had never been extinguished in much of the province (including the city of Vancouver).69 Although the implications of this decision are still unfolding, it was nevertheless considered a watershed moment in the recognition of indigenous rights in Canada and throughout the world.70

Despite the seemingly progressive nature of decisions like Delgamuukw and Mabo, the Supreme Court’s decision in Glass demonstrates the serious limitations of European legal categories like Indian title; namely, the arguments
which produce decisions recognizing Indian title are the very same arguments
which severely limit what the Musqueam and other First Nations can do with
reserve land. Further, these same categories become a part of an essentialist legal
discourse that works to devalue “the nature of Indian land.”

*   *   *

In 1997, the Federal Court of Canada heard *Musqueam Indian Band v. Glass* in order to determine the meaning of “fair rent” and “current land value” as
stated in the leases. In this case, the Band argued that the lots in Musqueam Park
should be valued as though “for sale in the real estate market, *i.e.* [for] their fee
simple value.” They asserted that the Musqueam Park assessments should be
based on the value of other nearby freehold lots in southwest Vancouver, and their
appraisers estimated the average value of the unimproved land in Musqueam Park
to be between $600,000 and $700,000 per lot. Conversely, the leaseholders
argued that the land should be “valued on the basis of a leasehold interest in land
on an Indian reserve,” and their appraiser estimated the average lot to be worth
$132,000. Judge Marshall Rothstein also argued that Musqueam Park lots are
“unique” (and less valuable) because they are part of an Indian Reserve and thus
subject to “uncertainties related to property taxation, native self government,
servicing and other matters.”

Rothstein ruled against the band, concluding that the value of the land
could not be determined as though the land was freehold. Citing reasons such as
“the Indians’ jurisdiction over the land and uncertainty relating to such matters as
property taxation," "the publicized unrest" on Indian reserves in BC,\textsuperscript{71} and the inability for non-Aboriginal residents to participate in Band government, the judge asserted that "it is clear that the leasehold and Indian Reserve aspects had a significant negative influence of [sic] the marketability and value of the property."

Rothstein also agreed with the leaseholders that the Band should not be compensated for the value of improvements to the land (i.e., servicing and development paid for by the leaseholders). He concluded that "current land value" for the Musqueam Park lots should be fifty percent of the fee simple value less the value of improvements, resulting in an average rent per lot per year of $10,000.

While one might assume that Rothstein made a distinction between Musqueam Park and other adjacent settlements based on the idea that leasehold land is inherently less valuable than freehold land, in fact, he ruled that "there is no material difference" between them. Instead, the "material difference" in the value of the lots in Musqueam Park comes from "the nature of [Indian] land."

The lots in Musqueam Park were desirable because of their location in one of the wealthiest neighborhoods in Canada and because they were undervalued. Paying less than $400 per year for land in an affluent neighborhood enabled people to purchase larger homes on larger lots for less than they would have paid elsewhere. The land was undervalued because it was Indian land, subject to the limitations imposed upon it by the federal government through legislation like the \textit{Indian Act}. There is a real circularity here. The land is desirable because it is undervalued. It is undervalued because it is Indian land. By distinguishing it as
Indian land, and by arguing that it is inherently less valuable because of its "nature," its value is diminished, thus depriving the Band of income and making it more valuable for leaseholders in Musqueam Park, reinforcing what Cheryl Harris calls a "property interest in whiteness." In the schema outlined by Rothstein, the Musqueam Band is excluded from fully participating in the capitalist sphere; as a result, both the economic and symbolic value of Musqueam Park adheres mainly to the (non-indigenous) leaseholders.

Further, the conception of "the market," of "market conditions," in these legal decisions is circumscribed very deliberately and very particularly by a singular focus on negative factors that are said to undermine the value of reserve land, eliding other factors which could result in a more positive valuation of it.

The Band appealed Rothstein's decision, and a three-judge panel at the Federal Court of Appeal (FCA) overturned part of Rothstein's decision in 1998, asserting that the land should be treated as fee simple land for the purposes of determining its current value. The court argued that "there is no authority for taking into account the identity of the owner in the determination of the land value. Aboriginal land should not be treated differently from other land." Although the appeals court agreed with Rothstein that the Band should not be awarded the costs of improvements made by the leaseholders, it did maintain that the reference to "current land value" in the original lease was intended to mean six percent of the fee simple value of the land. The FCA held that the trial court had erred in its assessment of "current land value," that the latter should be based on
freehold land rather than on leasehold reserve land, and thus in its determination that the land should be devalued by 50%. The court argued that it was a “long-standing practice...to value the land at its fee simple value”; had the parties intended otherwise, they would have stated so in the contract. Justice Sexton also argued that this was not an atypical lease and that to link rents with the underlying value of the land “ensure[s] that the rent represents the true return negotiated by the parties on the market value of the land. It reflects the fact that the lessor could sell the land at its current land value and reinvest the proceeds at market rates of interest, if not subject to a long-term lease” (cited in SCC: 7).

* * *

In November 2000, the Supreme Court overturned the appeals court’s decision in a split 5-4 decision. The Supreme Court’s narrative in Glass locates the origins of the conflict in 1960, the moment at which the Musqueam Band surrenders forty acres of IR 2 to the Crown. While this certainly makes for a coherent legal narrative, it nevertheless occludes the conditions under which the reserve comes into being. In Glass, the Court presents a de-historicized, and consequently naturalized, vision of “Indian land” as though legal constraints largely imposed over a century and a half of colonization are in fact based on pre-contact ‘indigenous’ categories. This naturalization of “Indian land” rests on prevalent settler assumptions about both cultural difference and property. Thus the colonial legal categories of collective ownership, inalienability of land, and the
idea of Indian title are presumed to be essential categories inhering in the land itself and are used to justify the rent discounts in Musqueam Park.

Anthropologist Stuart Kirsch argues that a profound limitation of Anglo-American property regimes is “the assumption of alienability—the view that all forms of property are inherently convertible into other forms of property” (2001: 176). An ironic inversion of the assumption of alienability is expressed in the Glass decision; because the Court defines reserve land as inalienable, as a sui generis category, reserve land is considered to be outside of the regular ambit of the market. It is precisely its definition as inalienable that provides justification for the Court to deny the Band’s claim of sameness under the law.

The inalienable nature of reserve land is a colonial imposition, one tied both to a civilizing project and to a particular vision of white settlement in what became the province of British Columbia. In Glass there is an de-historicized vision of “Indian land,” one which fails to account for the development of a complex legal system that First Nations had very little to do with creating. For instance, the idea that reserve land is held collectively, and thus cannot be bought and sold as fee simple land, is naturalized as though these were “indigenous” qualities inhering in the land itself while the specific historical development of Musqueam I.R. 2 remains invisible. Indigenous peoples across North America had, and continue to have, very different conceptions of territory and ownership. For instance, oral histories and the ethnographic record reveal that many indigenous groups in pre- and early contact periods organized their territories
collectively. Nevertheless, the development of the reserve system in the province cannot be seen as a straightforward reflection of these practices. These conceptions should not be conflated with either the historical development or the current configuration of the reserve system in BC.  

If the Band did choose to surrender its reserve land to the Crown, it would then cease to be reserve land. Title would convert to fee simple title held by the Crown, and then the land could be bought and sold on the open market. In other words, to sell reserve land in the market requires an additional legal step, one steeped in historical and legal circumstances of colonization. As dissenting Chief Justice McLachlin points out, the “only impediment to Band’s selling its land is the leases themselves,” impediments that the majority decision states should be disregarded.  

What would happen if the Musqueam Band did choose to sell its land? What would that mean for its claims to territory not encompassed by current reserve boundaries? What would be the implications for its participation in the BC Treaty process? Further, how would that affect a community who defines its relationship to particular territories in cultural terms, and for whom a specific land base has been central to political organization and activism? The Supreme Court justices never raise, let alone answer, these questions. Thus, in Glass, the profound political and cultural implications of the Band’s decision not to surrender its land to the Crown, couched in the legal language of rationality and choice, have been completely effaced. The issue then becomes whether or not the Band prefers
to maintain its only legally guaranteed land base; if so, according to the Court, it must then accept the political and economic consequences.

Several contradictions emerge in this discourse. First, although the reserve has been inscribed in particular ways that both create and severely limit the Band’s choices, neither these limitations nor their origins are explored in the decision. Second, by maintaining its land base, the Band faces serious economic loss. The choice articulated in the Court’s majority decision is basically this: surrender the reserve to the Crown or suffer the economic consequences of holding reserve land. Either way, the Musqueam Band is legally prevented from participation in free market capitalism. Third, if the Band were to surrender its land, would it not be the case that after surrender it would be ineligible to collect on the leases, thus making the entire dispute a moot point? As Chief Justice McLachlin asserted:

…the proposed 50 percent reduction for reserve related factors depends on the valuation of an interest that could simply never exist. As the trial court noted, reserve land can be converted to fee simple only by surrender to the Crown. Once reserve land is surrendered to the Crown, it loses all the characteristics of reserve land. Thus there can be no such thing as fee simple title to reserve land. Given that no such interest can ever exist, it is difficult to see how it could be valued in any principled way (9).

If one follows the Court’s logic, then, the only way it would accept the Band’s appraisal of Musqueam Park would be if the Band no longer held title to Musqueam Park. Thus, the majority decision rests on the evocation of specific
(and logically impossible) circumstances to justify a hypothetical appraisal, an appraisal that must necessarily be seen as deeply politicized given the controversy surrounding it.

Arguably, the majority decision relies on the assumption that the Band had no desire or intention to surrender its land at that time. This would be a safe assumption. As the Band’s participation in the BC Treaty process demonstrates, it has, in fact, been trying to regain territory, not further diminish its land base through sale.

If the land were sold, it would no longer be reserve land. In other words, the only way in which the land could be sold is if the Band surrendered the land to the Crown at which point it would cease to be reserve land and would convert to fee simple land anyway. So, in other words, whether or not the Band sells the land is irrelevant to determining its current land value based on similarly situated freehold land; if they chose to surrender it, it could potentially end up in open market with one extra step (i.e. actual surrender to Crown).

Conclusion: Resettling Musqueam Park

While the official version of the Canadian national anthem begins, “O Canada, our home and native land,” another version has circulated widely as a critical reminder of longstanding indigenous claims. This other arrangement, “O Canada, our home on native land,” challenges the legitimacy of European settlement and claims to ownership. While this newer formulation has, of course, been hotly contested, it nevertheless points us to a key element in this dispute. In
Musqueam Park, the leaseholders literally make their homes on what the government legally categorizes as “Indian land.” The Musqueam Park leaseholders are by no means unique in British Columbia, and represent a growing trend. According to economist Jonathan Kesselman, in the decade between 1986 and 1996, the number of non-indigenous residents living on Indian reserves in the province nearly doubled while the number of indigenous residents grew at a much slower rate (approximately 15%) (2000: 8). As of 1996, non-Indian residents outnumbered Indian ones on reserves in the Greater Vancouver area, with the former comprising approximately 65% of the population (ibid.: 120). Yet more than three-quarters of BC’s Aboriginal population live off-reserve (Urban Futures Institute: 2001).

What distinguished Glass from many others is that the Indians involved articulated their claim in the legal idiom of Canadian capitalism, attempting to maximize profit on an investment through the application of a common real estate practice. While the outcome of this case was structured by the specific historical, legal, and political landscapes of Canada and British Columbia, it can nevertheless offer a point of departure for a more general discussion about the nature and reception of indigenous claims throughout the world in the late 20th/early 21st centuries, especially in former British colonies where issues involving land and property are paramount. As indigenous peoples continue to participate in the realm of capitalist enterprise, and as their lives are increasingly ordered by the
vagaries of late capitalism, how they are legally allowed to function in this realm becomes increasingly important.

1 National Post, Jan 20, 1999: A14.
4 A band is a form of First Nations governance roughly analogous to the legal category of tribe in the United States. Canada’s Indian Act defines a band as “a body of Indians…for whose use and benefit in common, lands, the legal to which is vested in Her Majesty, have been set apart,” (cited in Muckle 1998: 5). See also the official Musqueam Indian Band website, www.musqueam.bc.ca
5 Muckle defines First Nation as “a group of people who can trace their ancestry to the populations that occupied the land prior to the arrival of Europeans and Americans…” (1998: 2). In this instance, First Nation refers more specifically to the community formed by Musqueam band members.
6 Reserves are analogous to reservations in the U.S.
7 Glass v. Musqueam Indian Band
10 1999: 55.
11 For a discussion of other contexts, see Razack’s edited volume, 2002.
13 See e.g., Denis 1997; Drummond 1997; Torres and Milun 2000.
14 See e.g., Carrillo 1998; Miller 2001; Povinelli 2002. Povinelli points out “the impossible demand” placed on indigenous peoples to “desire and identify with their cultural traditions in a way that just so happens, in an uncanny convergence of interests, to fit the national and legal imaginary of multiculturalism” (2002: 8). See also Carrillo’s critique of Torres and Milun in which she argues that “while the commentary noted that identity is negotiated and dependent on circumstance, it nevertheless conceptualizes identity as something separate and apart from social life” (1998: 46).
15 2002: 3.
16 Cited in Tennant 1990: xi.
17 These distinctions were not expressed exclusively in relation to indigenous peoples, but also to other “non-white” populations, especially Asian immigrants. See e.g., Anderson 1991; Backhouse 1999; Lamberton 1995; Roy 1989; Ward 1990.
19 http://www.britishcolumbia.com/ParksAndTrails/Parks/details/?ID=483. For photo, see http://seattlepi.nwsource.com/getaways/060597/vanpix5.html
20 Musqueam Indian Band 1989.
21 From the surrender form; cited in Musqueam Indian Band v. Glass, F.C.C., (1997).
22 2015, 2035, 2055; last lease term only 5 years.
25 There has been disagreement among Band members about the extent to which the Band
council was informed about the negotiations. Further, some have questioned the federal
government’s motives back in 1965 (see e.g., “Musqueam chief’s arguments challenged,”
*Sun*, Mar 18, 1999).
26 It should be noted, however, that in 1975, the Musqueam band successfully sued the
federal government for $10 million for breach of trust in another set of leases negotiated
with a golf club in the late 1950s (*Guerin v. R.*, [1984], 2 S.C.R. 1075). *Guerin* was very
influential in determining the federal government’s position in the Musqueam dispute.
27 “In 1966, neither the Band nor the lessees could have known what course real estate
prices would take over the next 30 years, let alone the next 99.” Cited in *Glass* p. 8
28 (*Guerin v. R.*).
29 Also located on Musqueam I.R.#2.
31 Ibid.; see also http://www.aicn-inac.gc.ca/pr/info/musq_e.html
32 As the Band pointed out in a presentation to government officials, “...a significant
number of Musqueam Park tenants purchased assignments of their leases and paid
amounts of up to $585,000 as recently as 1992, with just three years to go before the rents
were scheduled to be adjusted to market rates. The house on that particular lot had an
assessed value of $170,000. Given that the rents were about to be adjusted to 6% of
current land value, one has to question what this purchaser was paying the other $415,000
for. That kind of price would only have been justified if the lease were a prepaid lease
33 Bruce Miller, personal communication. In 1990, the *Vancouver Sun*, the newspaper
with the highest circulation in BC, published a piece entitled “1995 Rent Shock in Store!”
(Feb 15: C1).
34 As Said (1978) and others have pointed out, radically Other usually means inferior and
this presumed inferiority is necessary for the constitution of the dominant identity. See
Francis (1992) for a discussion of the importance of images of “Indian” in the Canadian
culture.
37 Ibid.: 22-3.
38 “In 1995 a 30-year fixed rate for the lease expired, and the band council demanded rent
increases to match rents on homes just outside Musqueam property lines. The concept
seemed reasonable, since homeowners had leased the land for several hundred dollars a
year...but the rent increases amounted to 7000% or more. They sparked sticker shock
and anger” (ibid.: 20).
40 Jul 26: 26-27.
43 For a discussion of the importance of First Nations labor in BC’s capitalist expansion,
see Knight 1996.
For analyses of settler Canadians’ self-understandings as non-violent, non-racist and benevolent, see e.g., Bannerji 1996; Francis 1992; Mackey 1999; Razack 1998, 1999, 2000.

Jan 9, 1999: A23.

For discussions of legal constructions of whiteness, see e.g., Lopez 1996.


Ibid.


See Dominy 1995.

Bruce Miller, personal communication.

See e.g., “Feuds over native lands flaring up across B. C.” (Sun, Jan 16, 1999: A1) and “B.C. residents balk at native band’s huge hike in leases: May appeal court ruling: Families fear losing homes on native lands” (Post, Nov 8, 1999: A6). Two University of Victoria law students filed a formal complaint against the Vancouver Sun with the BC Press Council. Bonnie Day and Alisia Adams stated that the Sun’s coverage of the dispute was “blatantly discriminatory” against the band, and that “the number of articles was disproportionate to the number of people affected and many articles contained no new information” (Sun, Mar 31, 1999: B4). The Press Council refused to hold a hearing into the matter “because there was not enough evidence to support the complaint” (Sun, June 16, 2000: B5).


See e.g., Blomley 1997.

Blomley 1998.


Sun, Nov 1, 1999.

The average household income in Musqueam Park’s federal electoral district, Vancouver-Quadra, is 52% higher than the national average. Source: Statistics Canada – Cat. No. 95F0180XDB96001.

Ipsos-Reid/RBC Investments, “Wealthy Paupers: Canada’s Affluent Top 20% Don’t Feel Rich,” http://www.ipsos-reid.com/pdf/media/mr020429-4_2.pdf, April 2002. “The poll shows the average affluent Canadian as unassuming about his or her financial status. Only five per cent of the full group and 26 percent of the millionaires consider themselves as wealthy. Overall, 85 per cent think of themselves as comfortable.”

Editorial, Sun, Jan 9, 1999

Cited in Harris 2002: 44.

See legal histories of Canadian West, especially BC; e.g. Loo; Foster 1992, 1994

See e.g. Seed 2001.

Delgamuukw

Culhane 1998; see also Australia’s Mabo decision.
As Nicholas Blomley argues, First Nations blockades can be seen as "an assertion of place, implying a Native rejection of systemic racism, territorial dispossession, and economic marginalization" directed toward the dominant society (1996: 24). A way of managing this kind of activism, however, has been to equate it with market "uncertainties," thus framing it in terms of "marketability" and shifting the focus away from the legitimacy of the claims themselves.


Glass

Nor is collective organization or ownership monolithic.

"This removes the justification for discounting the value of the land. The fact that the Band has chosen not to sell its land cannot bear on the land’s value" (9) (emphasis in original).

As Tennant and others have pointed out, that although their land base was severely diminished during colonization, indigenous peoples in British Columbia were generally not forcibly moved from one location to another.

In 1986 there were 10,285 non-indigenous residents living on BC Indian reserves compared to 37,073 indigenous residents. By 1996, the non-indigenous population had increased to 20,086 while the indigenous population only increased to 42,455.
CHAPTER 4

HEALING THE BISHOP: INDIGENEITY, CONSENT, AND COLONIALISM IN R. V. O’CONNOR

Introduction

During the summer of 1998, Hubert O’Connor, a white Catholic bishop and former Indian residential school principal, participated in what a local magazine termed “a centuries-old native ceremony”: an indigenous healing circle.¹ Seven years earlier, O’Connor had been indicted on criminal charges for sexual offences he had allegedly committed in the 1960s while principal of the Cariboo Indian Residential School in Williams Lake, British Columbia. Six charges, ranging from rape to indecent assault, were brought on behalf of five indigenous women, all of whom were O’Connor’s former students and/or employees. While O’Connor acknowledged having sexual relations with these women, and admitted to fathering a child with one of them, he denied having committed any illegal acts, maintaining that these relationships had in fact been consensual.

In 1996, after two trials and multiple appeals, O’Connor was ultimately convicted in a Vancouver provincial court on two of the counts: rape and indecent assault. Yet two years later, in 1998, the British Columbia Court of Appeal (BCCA) overturned these convictions, citing errors by the trial judge, and ordered another trial for only the rape charge.²

Faced with another trial, O’Connor’s defense attorney proposed the healing circle “to try and bring resolution without going any further in the court process.”³
The Crown, under the auspices of the province’s attorney-general, accepted the proposal, in part because the last remaining complainant, Marilyn Belleau, and other members of her community agreed to it, and in part because it was unclear whether or not O’Connor would be convicted in a third trial. Circle organizers also presented the circle as an instance of indigenous restorative justice, part of an emergent re-imagining of the justice system that would foster an intersection between the cultural traditions of indigenous peoples and mainstream criminal processes. Further, in the context of widespread allegations of rampant physical, sexual, and emotional abuse at church-run Indian residential schools across the province, and of a burgeoning number of lawsuits against participating churches, the circle was presented as an example of “the possibility of healing between individuals and between B.C.’s natives and the Catholic Church.” As a result, the first government-sanctioned indigenous healing circle in the province of British Columbia was for Bishop O’Connor.

As one might imagine, the province’s decision to convene a healing circle for a white bishop accused of assaulting indigenous women infuriated many and provoked a national outcry. Yet the furor focused almost exclusively on the healing circle itself (specifically on the inappropriateness of such a sanction for a white bishop) with virtually no discussion of how or why the BCCA overturned O’Connor’s convictions in the first place. In both public and legal discourse, the courts and the healing circle were consistently treated as separate spheres, and there was a troubling lack of attention paid to how they were connected to each
other. The courts were constructed as normative legal spaces while the healing circle was presented as an “alternative” sphere charged, in large part, with the task of addressing the inadequacies of the former. Absent from the normative was any explicit appeal to indigeneity whereas the alternative rested heavily on romanticized notions of indigenous peoples, including reductive appeals to ideas of restoration, healing, and egalitarianism.

In this chapter, I look beyond the outrage at the participation of a white bishop accused of sexually assaulting indigenous women in a healing circle. Instead, I examine the production of a particular type of difference, *indigeneity*, in the realm of law. I challenge the tacit presumption that the courts and the healing circle are absolutely discrete and make explicit some of the ways in which these spheres are structurally and discursively interconnected in order to discuss how idioms of indigeneity are functioning in postcolonial courts. By examining both the healing circle *and* the BCCA’s decision to overturn O’Connor’s conviction in *R. v. O’Connor*, I argue that the culturalist discourse surrounding O’Connor’s circle elides the very thing it is supposed to address: namely, the ongoing effects of colonization on indigenous peoples, and on indigenous women in particular. In this configuration of legal spaces, the healing circle is posited as the cultural space of *de-colonization*, thus enabling the mainstream courts to ignore the legacies of colonial history that create the very conditions that bring O’Connor into prolonged contact with the plaintiffs.

**Healing the Bishop: Indigeneity and Legal ‘Alternatives’**
Aboriginal perspectives on justice are different. That difference is a
reflection of distinctive Aboriginal world views and in particular a holistic
understanding of peoples’ relationships and responsibilities to each other
and to their material and spiritual world.

--“Bridging the Cultural Divide,” Royal Commission on Aboriginal
Peoples, 1996

As the nation stretches out its hands to ancient Aboriginal laws (as long as
they are not “repugnant”), indigenous subjects are called on to perform an
authentic difference in exchange for the good feelings of the nation and the
reparative legislation of the state. But this call does not simply produce
good theater, rather it inspires impossible desires: to be this impossible
object and to transport its ancient prenational meanings and practices to the
present in whatever language and moral framework prevails at the time of
enunciation.”

--Elizabeth Povinelli, The Cunning of Recognition: Indigenous Alterities
and the Making of Australian Multiculturalism

In this section, I discuss the emergence of indigenous forms of justice in
postcolonial Canada, and place O’Connor’s healing circle, and his case more
generally, within a particular “time of enunciation”—a time when discourses of
culture and difference are the prevailing language and moral framework for
indigenous peoples in settler Canada. By demonstrating how the healing circle is
constituted as an “indigenous,” and thus explicitly culturalized, space, I show
how this focus elides a range of factors important for understanding *R v. O’Connor* in broader perspective.

Because official discourses marked the healing circle as a distinctly “indigenous” space, the reductive culturalist discourse of indigenous tradition and healing was left virtually unchallenged in mainstream discourse. Such reified notions of indigeneity are common in the Canadian public sphere. Especially problematic, however, was that the circle itself was the only space wherein the complainants were recognized in any sense as *indigenous* legal subjects.

The healing circle was a seven-hour, private ceremony, led by complainants’ spokesperson, Charlene Belleau, and then-assistant deputy attorney-general for BC, Ernie Quanz. Its stated purpose was to allow the victim and the perpetrator, as well as their families and communities to come together to reach an understanding in an attempt to begin a process of healing and reconciliation. The healing circle was seen as an example of restorative justice—such a process is supposed to allow the victim to confront her perpetrator without interruption, something arguably not possible within the confines of conventional courts. Charlene Belleau asserted the benefits of such a process: “In a circle, there is no hierarchy; everyone is equal.”

There are no public transcripts from the healing circle, only published newspaper reports based mainly on post-ceremony interviews as well as O’Connor’s formal public apology. Reporter Barbara McLintock describes the healing circle in the following way:
In the Hubert O’Connor case, the circle was divided into three parts. In the first and smallest circle, victim Marilyn Belleau confronted O’Connor with her feelings about the wrong he had done, and O’Connor apologized. A total of 38 people participated in the next phase, in which members of the victim’s family and native elders also talked about the pain they’d suffered, not just from O’Connor’s actions but also from the residential-school system. O’Connor then had a chance to reply and apologized to them. In the final phase, more community members joined the circle to hear formal, written apologies from O’Connor and from Bishop Jerry [sic] Wiesner on behalf of the Roman Catholic Church. The circle then closed with native songs, drumming and prayers.¹¹

According to press accounts, the main participants found the circle a gratifying experience. Complainant Marilyn Belleau expressed both her satisfaction with the process and her weariness at “being victimized by the courts”:

I chose to participate in this healing circle to empower myself. I was able to confront him [O’Connor] with the hurts and pains he has caused me. I have had to live with this pain for over 30 years.¹²

O’Connor did not speak to the press, but rather communicated through his attorney. Defense lawyer Chris Consadine said the bishop “found [the circle] very, very difficult,” but felt more at peace afterwards.¹³ Only O’Connor’s formal written apology, in which he apologized for his “breach as a priest” and his
“unacceptable behavior,” was made public. His apology enraged many, especially because he admitted to no criminal behavior; instead, he spoke rather euphemistically about the “the harm” he caused and his hope that there would “be a healing of the rifts between our communities.”

Some of the most trenchant critiques focused on the case’s offensive ethical aspects and its potential for setting dangerous legal precedents, especially in cases involving violence against women. Proponents of the use of restorative justice initiatives in indigenous communities throughout the province were concerned about the negative publicity and its possible impact on nascent initiatives.

The Crown’s decision not to further pursue O’Connor in the courts and to allow him to participate in the healing circle was very controversial. Many felt that O’Connor, as a white priest, was an inappropriate candidate for a culturally-specific indigenous healing circle, and, that his alleged violations were far too serious for such an option. Women’s groups in particular argued that the decision exemplified the province’s ongoing lack of concern for violence against women, especially indigenous women. There was a sense that O’Connor had been given ‘the easy way out’ by the province and had not been suitably punished for his violation of Belleau and the other women. While feminist critics were careful to point out that they supported Belleau’s and the other complainants’ decision to participate in the healing circle, they nevertheless maintained that it was an inappropriate sanction for O’Connor, and that it set a dangerous precedent for future cases involving violence against women.
Restorative Justice

Restorative justice is a term that has come into wide usage in Canada during the last ten or fifteen years. The Conflict Resolution Network of Canada defines it in the following way:

Restorative Justice is a way of viewing justice that puts the emphasis on repairing harm caused by conflict and crime. In this approach crime is understood as a violation of people and relationships and a disruption of the peace of the community. It is not simply an offence against the state. Restorative justice is collaborative and inclusive. It involves the participation of victims, offenders and the community affected by the crime in finding solutions that seek to repair harm and promote harmony.16

The 1990s were an especially fruitful time for restorative justice initiatives both in indigenous communities throughout the world, but also in other non-indigenous contexts including state-sponsored experiments such as Alternative Dispute Resolution (ADR), Family Group Conferencing (FGC), and mediation. Critiques of both the philosophy and practice of mainstream legal systems were appearing with greater frequency not only in academic spheres, but in the public as well.17 Restorative justice was seen as diametrically opposed to the “retributive justice” meted out by conventional courts, with the potential to reform the latter. Additionally, a number of high profile public inquiries into Canada’s criminal justice system presented damning evidence that indigenous peoples were
disproportionately targeted at all levels of the system. Particularly relevant for indigenous communities were the high rates of incarceration and victimization experienced both by men and women in those communities. As the now famous Report of the Manitoba Justice Inquiry asserted in its introduction:

The justice system has failed Manitoba’s Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated.

It is not merely that the justice system has failed Aboriginal people; justice also has been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency.

Such reports made a very clear link between the devastation wrought by colonization and the present conditions of indigenous peoples. Justice was thus identified by both indigenous groups and governmental institutions as an arena for a kind of de-colonization; a space of “self-sufficiency” not only to implement
practical solutions to the specific injustices endured by indigenous peoples within the criminal justice system, but also to revitalize indigenous epistemologies and cultural practices.\textsuperscript{21} Thus, within this context, concepts of restorative justice were especially current because they offered not only a compelling moral critique of the institutions of settler society, but they were also seen as an opportunity for indigenous peoples to gain greater powers of self-determination. Throughout the 1990s, federal and provincial governments were especially interested in supporting (both philosophically and, in a limited way, fiscally) certain kinds of ‘culturally-specific’ justice initiatives, and many groups invested their energies and resources into delimiting and defining the nature of ‘traditional’ indigenous justice.\textsuperscript{22}

In 1996, the \textit{Royal Commission on Aboriginal Peoples} (RCAP) released an influential report on Aboriginal justice, entitled \textit{Bridging the Cultural Divide}. The comprehensive report, several hundred pages long, reviews “the historical and contemporary record of Aboriginal people’s experience in the criminal justice system to secure a better understanding of what lies behind their over-representation there” (RCAP: xi). Like the \textit{Manitoba Justice Inquiry}, RCAP affirmed what many indigenous peoples had been consistently asserting for years—that it is impossible to understand the contemporary situations faced by them without making an explicit link to the impact of colonization: “In large measure these problems are themselves the product of historical processes of dispossession and cultural oppression” (ibid.: xi). Yet, despite this initial
contextualization, the RCAP report goes on to assert the following in its final recommendations:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. *The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people* with respect to such elemental issues as the substantive content of justice and the process of achieving justice (RCAP 1996: 309; my emphasis).

Although the report presents a structural understanding of how colonialism has shaped criminal justice institutions and practices in relation to indigenous peoples, the “crushing failure” of these institutions and practices is nevertheless primarily defined as a *cultural* problem, the result of “fundamentally different world views.” Such a conception was reproduced in the context of the healing circle and is thus essential to understanding how indigeneity was produced within it.

RCAP’s explanation appeals to a particular conception of indigeneity, without recognizing the reductive nature of “the fundamentally different world views of Aboriginal and non-Aboriginal people.” Moreover, beyond the obvious reductive nature of this conception, it also shapes the discourse in such a way that even the critiques are limited in particular ways. Because this conception of indigeneity is defined primarily in terms of culture, critiques of cases like
O'Connor's tend to focus narrowly on cultural concerns while completely missing the larger structural forces that set up the situation in the first place and allowed O'Connor's convictions to be overturned.

*Bridging the Cultural Divide,* while presenting a reasoned critique of colonialism, nevertheless defines its legacy as a problem of cultural insensitivity rather than an ongoing phenomenon with real symbolic and material stakes. In other words, indigenous peoples are forced to articulate their critiques and their desires through a discourse of culture and difference, the prevailing "language and moral framework" in late 20th century settler Canada. The problem is not only that this language and moral framework is limiting—all discourses, to some extent, are—but rather that it serves to elide the very processes that produce it in the first place. In other words, indigenous culture and difference are represented as something outside of the difficult conditions of postcolonial Canada rather than as a construct produced in the context of these very conditions (see Povinelli 2002).

Anthropologist Elizabeth Povinelli further argues that postcolonial nation-states place "an impossible demand" on indigenous peoples to "desire and identify with their cultural traditions in a way that just so happens, in an uncanny convergence of interests, to fit the national and legal imaginary of multiculturalism" (2002: 8). She demonstrates that the process of defining culture in postcolonial contexts is both deeply fraught and politicized, and that this process must be seen as part of broader structural and discursive forces. The specific discourse of indigeneity exemplified in *Bridging the Cultural Divide* not
only reflects a more general Canadian multicultural imaginary, one that fits with statist interests, but it also permeates Canadian legal spaces including courts and their ‘alternatives.’ The healing circle is an example of such an impossible demand. In O’Connor’s case, the discourse of indigeneity profoundly enables and shapes not only the healing circle, but also the mainstream court decisions themselves albeit in different ways. The healing circle is posited as the pre-modern, pure space in contrast to the morass and excesses of the mainstream legal system, and, within this discursive framework, “recognition” of difference is the path to mend “the crushing failure.” It enables the courts, for example, to avoid addressing larger structural issues of the residential school experience in evaluating O’Connor’s case, and the discourse of “bridging the cultural divide” mobilizes the healing circle as a legitimate option.

*   *   *

Having given a background for the emergence of discourses of culture and difference in the context of indigenous justice in Canada, I want now to return to a discussion of O’Connor’s healing circle; specifically, I examine the constitution of that circle as an explicitly indigenous cultural space as well as the implications of such a constitution. What makes this an “aboriginal healing circle,” and how do we recognize it as such? I begin with a brief discussion of the media accounts of the circle. These accounts are coded for their specific ‘indigenous’ content:

The circle then closed with native songs, drumming and prayers.24
Healing circles are a traditional native Indian way of repairing harm to people through dialogue among the affected parties in a carefully controlled and private setting under the leadership of tribal elders.\textsuperscript{25}

So with the smell of sacred sage smoke drifting through a native meeting hall in Alkali Lake on Monday, O'Connor apologized to his former students for what he called “my breach as a priest and my unacceptable behaviour, which was totally wrong. I took a vow of chastity and I broke it.”\textsuperscript{26}

In these accounts, indigeneity is evoked through culturalized objects such as drums and sage, as well as through reductive discourses of sacredness, healing, and tradition. Such descriptions mark the space as indigenous, as outside of settler culture and its legal institutions, and as representative of true difference. The healing circle is a space not only physically removed from the court, but it is also temporally distanced from it through the invocation of “centuries old” tradition.

Such accounts should not be read as simply culturally sensitive accounts of indigenous practice, but rather as part of a broader postcolonial settler discourse as it struggles to come to terms with its colonial past. For instance, the descriptions of the healing circle must be understood as part of longstanding evolutionary paradigms wherein indigenous peoples were seen to represent earlier (and inferior) stages in human development. At certain historical moments, however, settler societies have inverted these positions, positively valuing aspects of indigenous
life and practice (as long as they were not objectionable) as a way “to resolve widespread ambivalence about modernity as well as anxieties about the terrible violence marking the nation’s origins” (Huhndorf 2001: 2). Even when valued positively, this inversion leaves intact the radical distinction between settler and indigenous, a distinction deeply rooted in colonial practice and ideology.

The healing circle was presented in the press as a manifestation of the “fundamentally different world views” described in RCAP’s report as opposed to a materialization of complex postcolonial conditions. The healing circle itself rests on the presumption that centuries of colonialism can be erased (or, at the very least, mitigated) by the invocation of “authentic” or “pure” culture. In such a context, indigenous culture takes on a kind of mystical quality, one which can magically transform a racist and bankrupt process into a moment of true interpersonal connection. The healing circle becomes a way of “bridging the cultural divide” between indigenous and settler peoples. As one of the newspaper accounts asserted without irony: “The traditional healing circle gives victims, their families and perpetrators the chance to fully express themselves and reach an understanding, with no one being allowed to interrupt the other.”

Challenging the deeply problematic constructions of culture which circulate in these discourses, Emma LaRocque calls this “the misuse of ‘traditions,’” distinguishing between oversimplified anthropological or legal constructs and the contemporary lived experience of indigenous peoples (1997: 75). In his discussion of indigenous justice practices among Coast Salish peoples in both
Canada and the U.S., anthropologist Bruce Miller cautions against the use of "primordialist discourses that uncritically incorporate concepts of healing, restoration, and elderhood without due regard for the relations of power between the various segments of the community" (2001: 5-6). Finally, demonstrating that notions of tradition cannot be seen outside of the institutional structures that define and deploy them, Sherene Razack reveals that it "continues to be primarily white male judges and lawyers with little or no knowledge of history or anthropology who interpret Aboriginal culture and its relevance to the court" (1998: 72). What all of these scholars point out is that there needs to be a distinction made between the complex cultural lives of contemporary indigenous peoples, and the culture concept deployed in the context of settler institutions.

Another place in which the discourse of "bridging the cultural divide" was deployed was in the official discourse of the Roman Catholic Church (RCC). As Gerry Wiesner, then vice-president of the Canadian Conference of Catholic Bishops, said:

As a Catholic bishop I am ashamed of the violations that were actually committed by Catholic people in a school that taught Catholic values and beliefs.... We find wisdom in aboriginal spiritual traditions for restorative justice and reconciliation. I do not presume to know whether or not Wiesner is sincere in his claim about the value of aboriginal spiritual traditions and their presumed wisdom. To a great extent his personal sincerity is irrelevant. The important question here is what it
means to “find wisdom in aboriginal spiritual traditions for restorative justice and reconciliation” in the specific context of O’Connor’s case and in the broader context of widespread physical, emotional, and sexual abuse in Catholic-run Indian residential schools. In Canada, the RCC has been notoriously reluctant to settle civil residential school claims, and has mounted vigorous defenses for its criminally accused, including O’Connor. In what has come to be called the residential school scandal, RCC organizations are named in nearly 70% of the 12,000 lawsuits filed. There has been particular concern about the financial stability of the Church as well as the health of their missionary endeavors. Recently some Oblates have even filed for creditor protection, although the RCC in Canada recently boasted that its membership had increased despite the sex scandals.

Yet, the RCC’s recalcitrant stance toward the settlement of residential school claims seems diametrically opposed to the values of restorative justice and reconciliation evoked in the healing circle. Wiesner’s emphasis on healing is not idiosyncratic in the least, but rather is reflected in broader RCC discourse. Discourses of healing and reconciliation are widespread, especially in the context of residential schools, and they are ubiquitous tropes in Catholicism more generally. I contend, then, that these are not in fact opposed at all. I take very seriously Razack’s contention that an “emphasis on cultural diversity too often descends, in a multicultural spiral, to a superficial reading of differences that makes power relations invisible and keeps dominant cultural norms in place”
(1998: 9). The specific marking of the healing circle as an “indigenous” space entails a particular reading of the cultural. Such a reading references imagined precontact or prenational egalitarian traditions, extant prior to colonization, and assumes that their contemporary invocation respatializes the violent relationship between colonizer and colonized. Thus what allows Wiesner and others to simultaneously appreciate “aboriginal spiritual traditions” in the specific context of the healing circle, and to be part of a body actively resisting the settlement of claims is a particular conception of cultural difference, one that fails to recognize how “power and dominance function through more liberal, inclusionary, pluralistic, multiple and fragmented formulations and practices concerning culture and difference” (Mackey 1999: 5). “Culture talk” only emerges in reference to the healing circle—it is not referenced in any of the criminal court decisions, and nothing explicitly cultural is used to better understand the events in question.

In the context of restorative justice, there is often a tenuous relationship between what we know of precontact justice practices and contemporary ones. I do not read the tenuousness of this relationship as particularly problematic nor am I challenging the ‘authenticity’ of the healing circle. The focus of my critique is the need for indigenous peoples to perform authenticity in order to make gains in postcolonial, multicultural settler societies (see Povinelli 2002). The problem is the presumption of, and, in some cases, the insistence on, direct continuity between the pre- and postcolonial. Also problematic is the notion that all indigenous difference can be distilled into several major traits, ones articulated in
opposition to the perceived traits of mainstream or “non-indigenous” justice systems. Such a context elides articulation of the racialized and gendered spatial relationships that bring people into contact in the first place, a context that is absolutely necessary to understand Bishop O’Connor’s case. Attention to these historicized aspects of indigeneity by the courts may have produced a very different outcome in R. v. O’Connor.

Consent in R. v. O’Connor

And so the issue that this court is going to have to come to grips with...is whether or not, in the context of the relationship that had developed, whether or not the failure to articulate the lack of consent and whether or not any failure to physically resist in terms of attempting to fight off this man who was considerably larger than any of these complainants at the time, by the way, whether or not in circumstance that can be taken to signify actual consent or perhaps apparent consent, and that’s an issue that I anticipate counsel are alive to and the court will be as well.\(^{35}\)

The legal dimensions of R v. O’Connor hinge on issues of consent (or lack thereof). Did the complainants consent to have sexual relations with O’Connor, or did his authority as priest, principal and employer vitiate any genuine consent? Did the complainants sufficiently resist O’Connor’s advances? Did they resist at all? Is mere submission adequate to constitute legal consent, or is consent “a matter of the conscious exercise of the will”?\(^{36}\) And even if there was no genuine consent, did the complainants adequately indicate their objections to O’Connor?
In his 1996 ruling at O'Connor's trial, Justice Oppal accepted the Crown's position that while there was "no evidence that the consent was extracted by threats and violence," there nevertheless could be "no genuine consent on the part of the complainants due to their particular circumstances as former students and then employees of the school."\textsuperscript{37} Despite the absence of any statutory reference to the vitiation of consent by the exercise of authority at the time of the violations, Oppal contended that there was sufficient precedent in both English and Canadian common law to support the Crown's position. However, in 1998, the British Columbia Court of Appeal accepted the defense's argument, and found that "the trial judge was wrong in concluding that the exercise of authority could vitiate consent under the rape provisions of the Code as they existed at the time of the events in question."\textsuperscript{38} As a result, the court asserted that Justice Oppal had not adequately resolved the issue of consent in O'Connor's criminal trial, and it was thus left with no choice but to overturn both convictions, and to order a new trial for only the rape charge.

Oppal's decision produces a narrative wherein consent is the key legal issue to be resolved; when it cannot be resolved, the BCCA overturns O'Connor's conviction, thus precipitating the healing circle.

One of the main problems with laws concerning sexual assault is that they most often hinge on issues of consent, narrowly defined. Despite the emergence of a category of consent as part of feminist-inspired legal reforms that eliminated the need for victims to physically resist their perpetrators in order to prove rape, "a
disjuncture between rules...and practice” nevertheless persists (Frohmann and Mertz 1994: 833). As many feminist scholars have convincingly argued, the legal construction of rape as an issue of consent seriously limits how the victim can tell her story and how her story is interpreted, and it still often places the burden of proof on the victim to demonstrate how she actively did not consent to her assailant’s sexual violence. As Susan Ehrlich argues in her recent analysis of American rape trials, “the overarching interpretive framework that...structured these proceedings was so seamless in its coverage that subaltern (i.e., victims’) understandings of the events were rendered unrecognizable or imperceptible” (2001: 1). Further, legal reforms involving sexual violence rarely, if ever, address how larger social structures and categories function in courtroom discourse, and how extant cultural scripts inform juridical procedure and interpretation.

In this section, I supplement this gendered analysis of consent by arguing that the both Oppal’s and the BCCA’s decisions in R. v. O’Connor not only reveal consent to be an inadequate legal category, one which does not allow sufficient attention to be paid to the operation of factors such as race, gender, and colonization, but also a fundamentally ironic one because the relations that bring the indigenous complainants into prolonged contact with O’Connor were anything but consensual. Legal discourse in R v. O’Connor virtually erases colonial history, an erasure which rests on particular notions of temporality and subjectivity—revealed in the construction of the legal case as an issue of consent.
By denaturalizing the concept of consent, I want to shift the orientation of the question in O'Connor's case from "Did she consent or not?" to "What does consent look like when refracted through the prism of colonialism, in particular the residential school experience?" I demonstrate how the courts and the healing circle cannot be seen as discrete spheres; specifically, I argue that the courts' failure to properly resolve the issue of consent is what mobilizes the 'alternative,' the healing circle, as a legitimate option. Further, the "bridging the cultural divide" discourse that epitomizes the healing circle is noticeably absent from the courts—an absence that is not peripheral to Oppal's and the BCCA's decisions, but rather constitutive of them.

In order to make these arguments, I first highlight some of these non-consensual acts and demonstrate how these not only shape and inform, but, in large part, bring about the conditions necessary for the sexual assaults to occur at all. Second, I discuss what I call the temporality of consent. I demonstrate how the courts locate the moment of violation in a very specific temporality, one occurring in a moment between two individuals, outside of any collective histories that shape such encounters. Third, I ask how consent, and more specifically the consensual agent, is dependent on the erasure of indigeneity, sharply contrasting with the space of the healing circle which depends on the complainants' "indigeneity" in order to exist. I further explore the dichotomy between "erasing indigeneity" in one sphere and "becoming indigenous" in another.

Consent and Colonial History
Consent in *R. v. O’Connor* is narrowly defined and limited to a particular set of legal issues. A key element in understanding *R v. O’Connor* is to broaden the notion of consent to include the broader historical and social forces that shape the relationships between O’Connor and the complainants. More specifically, I argue that the very conditions which both literally and historically brought O’Connor into long-term contact with the complainants are conditions which are the very definition of *lack* of consent. I will briefly reference some well-traversed historical terrain in order to argue that issues of consent in this case must extend beyond where the law locates them: in a temporally-fixed interpersonal moment between two autonomous adult subjects. Rather, consent must be located in an understanding of BC’s colonial history and postcolonial present, as well as in the context of what indigeneity had come to symbolize in late 20th century multicultural Canada.

I first want to highlight some of the historical non-consensual acts that bring O’Connor into prolonged contact with the complainants and to demonstrate how they are part of the broader social conditions that shape and inform the contemporary context of O’Connor’s case. In her discussion of the violent murder of an indigenous woman, Pamela George, at the hands of two white men, Razack reminds us that we must pay close attention to “the spatiality of the violence and its relationship to identity as well as to justice” (2002: 127). Her insight applies equally in O’Connor’s case because we can then see that a variety of factors
including race, gender, and colonial history contribute to a specific spatial configuration necessary for the sexual assaults to occur at all.

While colonial encounters between indigenous groups and Europeans, and the results of such encounters, varied significantly depending on both chronological and regional factors, there were some general trends that shaped the overall experiences of colonization of indigenous peoples in Canada. For instance, colonial land policy resulted in the widespread and often illegal appropriation of indigenous territories by European colonial officials and settlers. This was non-consensual, especially in the context of BC. The imposition of colonial British and later Canadian law was also non-consensual. As the RCAP report argues, this imposition resulted in far-reaching structural violence, and is indeed the element of colonial history that the discourse of “bridging the cultural divide” is meant to address.

Perhaps most relevant to understanding R. v. O’Connor in historical perspective is that from 1879 until 1986, indigenous children were often forcibly removed from their families and communities without consent and placed in residential schools. Conditions in residential schools, sponsored by the government and run by Christian churches, were notoriously abusive, and many have argued that their long-term effects have devastated indigenous communities for generations. O’Connor was principal at the Cariboo Indian Residential School in Williams Lake, BC for many years, and all of the complainants were his students at some point in time.
Consent and the Effects of Indian Residential Schools in Canada

The Canadian government, in conjunction with Christian churches of different denominations, ran residential schools for indigenous children for over a century. Part of the more general “civilizing mission” of imperial Indian policy, residential schools were created in the 1870s to assimilate indigenous children into the ways of settler society. Ideologically rooted in the colonial dichotomy of the savage Indian/civilized settler, education was seen as a critical step “to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit to change.”

Most residential schools were purposely located far away from indigenous communities in order that the children could be “caught young to be saved from what is on the whole the degenerating influence of their home environment.” The government, encouraged by the churches, often forcibly removed children from their homes to live at the schools, and their parents were threatened with legal sanctions if they attempted to resist. While at school, the children were not permitted to speak their native languages, wear Indian clothes, or engage in other indigenous cultural practices. Further, Indian residential schools failed to provide the education they promised, and, throughout the history of the schools, the children were subject to systemic abuse and neglect.

In recent years, widespread allegations of rampant sexual abuse, especially on the part of clergy, have been made by former residential school students, and the government and participating churches have been hit with a series of
individual and class action lawsuits seeking compensation for their suffering. Additionally, an emergent group of personal narratives and academic writings has articulated the profound relationship between contemporary social and economic distress and dysfunction in indigenous communities and the residential school experience.

To place O’Connor’s healing circle in historical context, it is important to note that one of the stated purposes of the “civilizing mission” of residential schools was precisely to erase any “cultural” content from the lives of indigenous children. Residential schools were what Goffman has famously termed “total institutions,” institutions which use rigid structure, discipline, and isolation from wider communities to encompass the lives of inmates. Further, residential schools were institutions premised on racialized beliefs about the inadequacy of indigenous cultures, and indeed of indigenous bodies, and whose entire existence was devoted to eradicating those cultures and changing (disciplining) those bodies. As Milloy argues, “In thought and deed the establishment of this school system was an act of profound cruelty rooted in non-Aboriginal pride and intolerance and in the certitude and insularity of purported cultural superiority” (1999: 302).

But what impact does this “civilizing mission” have on issues of consent in R. v. O’Connor? What relevance do residential schools and other colonial impositions have in understanding O’Connor’s case, both from a legal perspective and otherwise? Foucault’s concept of the docile body is illustrative here, especially to suggest that the courts’ treatment of O’Connor and the complainants
as autonomous individuals without collective histories is deeply problematic. Foucault’s genealogy of the docile body traces the discovery of “the body as object and target of power” and examines the “the body that is manipulated, shaped, trained, which obeys, responds, becomes skilful and increases its forces” (1995: 136). The concept of docile bodies has great import in the discussion of the lingering effects of colonialism, especially in making the link between colonial structures and the individual lives of indigenous peoples. As Mary-Ellen Kelm argues in her discussion of the impact of colonization on health among BC’s indigenous peoples, “The drama of colonization was acted out in Canada not only on the grand scale of treaty negotiations and reserve allocations but on the supple contours, the created representations, and the lived experiences of Aboriginal bodies” (1998: 57). Her insight can be extended to the residential school system and its long-term impact on individual lives and bodies. The following analyses of the residential school system in Canada reveal how indigenous bodies became targets of power:

The residential school system was, beyond question, intolerable. That inescapable reality was determined by the system’s fundamental logic that called for the disruption of Aboriginal families and by the government’s and churches’ failure to parent the children in accordance with the standards of the day or to be vigilant guardians. As a result, all too often, “wards of the Department” were overworked, underfed, badly clothed, housed in unsanitary quarters, beaten with whips, rods and fists, chained
and shackled, bound hand and foot, locked in closets, basements and bathrooms, and had their heads shaved or hair closely cropped (Milloy 1999: 154-5).

Residential schools implemented a well-established technology that targeted the spirits, minds, feelings, and bodies of its wards. Its goal was not so much to create as to destroy; its product was designed, as far as possible, to be something not quite a person: something that would offer no intellectual or spiritual challenge to the oppressors, that might provide some limited service to its “masters” (should the “masters” desire it), and that would learn its place on the margins of Canadian society (Chrisjohn and Young 1997: 76).

Such accounts of residential schools are ubiquitous and suggest the profound power over successive generations of indigenous children exercised by residential schools and their administrators. Clearly, the intersection between docile bodies and issues of consent is a multifaceted one, involving complex questions about the nature of agency and violence. My aim here is not to resolve these questions, but rather suggest both the inadequacy and irony of the legal concept of consent in R. v. O’Connor; consent is limited to a conception based on deracialized and selectively gendered identities as well as a profound lack of attention to colonial history and the larger structural forces which bring O’Connor and the
complainants into a particular set of circumstances both at the time of the violations and, thirty years later, at the time of the law’s intervention.

**Consent in *R. v. O’Connor Revisited***

The legal issue at hand in *R. v. O’Connor* was whether or not the victims had consented to sexual relations with O’Connor, and, if they had, whether or not that consent was vitiated by his abuse of his authority. Except for the issue of O’Connor’s authority in vitiating the complainants’ consent, the courts treat the systematic oppression of residential schools as legally irrelevant. The specific nature of his authority is also not examined. His authority, however construed, is understood by the courts as something rooted in his individual positions as employer and priest rather than as part of a larger colonial structure. For instance, the legal narrative regarding the complainants’ presence at the Cariboo Indian Residential School is to state the date they arrived and the age they were at that time. The circumstances under which the complainants ‘arrived’ at the school remain unstated and unexamined.

Consent in this case is also articulated through cultural norms about sexuality. Sexual relations between white men and indigenous women have been naturalized throughout Canadian history; we thus must pay attention to how cultural norms are reflected in legal norms, and how these norms, in turn, affect legal hermeneutics. In some important ways, the sexual acts between O’Connor and the complainants were naturalized, thus even further limiting the usefulness of consent. This context of normativity creates particular deracialized gendered
subjectivities which take no account of colonial legacies and postcolonial realities. As many scholars have pointed out, the sexuality of indigenous women was at the heart of the colonial project in BC and elsewhere, and it was of particular concern to missionaries (see e.g., Barman 1997/98; Mawani 2002; Perry 2001; Razack 2002; Stevenson 1995). In her discussion of O’Connor’s case in light of historical factors, historian Jean Barman has argued:

In British Columbia gender, power, and race came together in a manner that made it possible for men in power to condemn Aboriginal sexuality and at the same time, if they so chose, to use for their own gratification the very women they had turned into sexual objects (1997/98: 240).

Razack further argues that an analysis of 19th century newspaper accounts demonstrates that there was a prevalent “conflation of Aboriginal woman and prostitute” as well as “an accompanying belief that when they encountered violence, Aboriginal women simply got what they deserved,” a cultural script that continues to this day (2002: 131). One cannot ignore the denigrating cultural subtext of the hypersexualized indigenous woman when interpreting O’Connor’s case. For instance, a major legal hurdle for the complainants was that a significant amount of time had passed between the alleged violations and the court cases. Some of the complainants articulated their deep fear and ambivalence about coming forward at the time of the violations. O’Connor’s defense was either to deny that the alleged events took place at all or to assert that he had been seduced by the complainants. While Oppal argued that despite certain
inconsistencies about places and dates in the complainants' testimony, their narratives nevertheless had "the ring of truth," the BCCA found these inconsistencies especially troublesome.

Arguably, O'Connor's violations were further normalized by a tacit, although pervasive, assumption: namely, that chastity is an 'unnatural' state for a man. In such a view, a priest engaging in sexual relations with young women, while not preferable, would nevertheless be understandable. In his trial, O'Connor consistently maintained that he was seduced by his students and employees, a charge denied by the complainants, but one that intersects with the script of the hypersexualized indigenous woman.

**The Temporality of Consent**

We must also pay attention to the specific temporality on which all of the legal concepts of consent referenced by the court rest. Such legal constructions largely ignore the spatial dimensions of colonialism and gender oppression. More specifically, the historical circumstances which bring O'Connor into prolonged contact with the complainants are not referenced in the courts' decisions nor is there any recognition of the epistemological conditions which create the legal hermeneutics of which consent is a part. For instance, liberal ideology provides a hermeneutic context for the courts to interpret Belleau and O'Connor's sexual relationship as "a contract between autonomous individuals standing outside of history" (Razack 2002: 156).
Both Oppal and the BCCA discuss a variety of legal precedents involving issues of consent before ruling in order to determine whether or not the complainants gave their consent. Both courts also rely on specific temporalities to narrate and understand the events in question, and thus create a particular legal subjectivity that is disconnected from larger structures and discourses. They each construct a certain sequence of events as interpersonal moments between two individuals. Harm or violation occurs in that moment, and it is only that moment that gets named legally. The issue of consent is then abstracted from these events.

The courts locate any violation in a specific moment and attempt to grapple with the nuances of that moment with abstracted legal categories. This kind of temporality locates a moment of violation, enabling the separation of an individual moment from a larger social field. Such a construction presumes not only a normative legal subjectivity, but also a particular relationship between subjects constructed at a specific moment in time. In both the rape and indecent assault claims, each offence is related to the first sexual encounter between O’Connor and the complainants, as though issues of consent did not apply in subsequent ones.

According to trial testimony, the sexual relationship between O’Connor and Belleau lasted for some time, and resulted in the birth of a daughter, given up for adoption. When placed in this context, it is not as easy to locate a precise moment of violation or of consent. Such an analysis should not suggest a radical lack of agency on the part of the complainants; rather, the legal construction of consent (and consent as the key legal issue) is deeply problematic because it relies on a
particular mobilization of legal subjectivity which presumes not only a rational subject, but also one largely free of embodied constraints and pressures. As Behrendt argues in her discussion of Aboriginal women in Australia, “the ability to exercise consent and agency within the colonial context should not obscure the constraints imposed by colonial structures (and their legacies) on the lives of Aboriginal women” (2000: 365).

Again, Oppal attempts to account for some of these in his discussion of how O’Connor’s authority as priest, principal, and employer vitiates the consent of the complainants; nevertheless, both Oppal’s and the BCCA’s omission of any general discussion of colonial history and of any specific discussion of the residential school experience seriously limit their understanding because some of the most relevant evidence was not included in their evaluation. More specifically, there was no probing into larger questions that absolutely inform the events in question. For instance, which structural and discursive relations bring O’Connor comes into prolonged contact with the complainants? How does the residential school experience shape O’Connor’s and the complainants’ understandings of self and their interactions with each other? Why is it that women who ostensibly consented to sex thirty years before would bring a case so many years later?

Regardless of the differences between Oppal’s and the BCCA’s decisions, both of them locate consent in an interpersonal moment between individual actors, and make a determination through a limited view of events, abstracted precedents,
and evaluation of O’Connor’s and the complainants’ testimony. In this sense, \textit{R. v. O’Connor} proceeded in typical legal fashion. Yet some larger questions remain: why were inquiries about the nature of residential schools not included, and through what processes were they excluded? What would consent look like if refracted through these kinds of questions? Could the legal discourse evoked by the courts hold in this context? The \textit{temporality of consent} used in both provincial court and the Court of Appeal seriously limits the kinds of questions asked; ultimately this view rests on the erasure of indigeneity.

\textbf{The Erasure of Indigeneity in Canadian Courts}

In order to explain how “consent could be vitiated by the exercise of authority,” Oppal contextualizes the moment of violation, arguing that factors such as age, religion, and economic need mitigated Belleau’s ‘consent.’ Yet even this contextualization of consent, one sympathetic to Belleau, is problematic:

…her apparent failure to resist his advances is entirely understandable when one considers their relative backgrounds and positions. The complainant went to a residential school when she was 6 years old. As a Catholic, she was taught to respect and obey the priests who were authority figures. Father O’Connor was not only her priest but was also her employer. Father O’Connor was highly respected by the students and former students. As Ms. [S.] said, “We knew our place.” In the circumstances it would have been extremely difficult for her to resist his demands.\textsuperscript{54}
The judge’s account of the complainant’s “apparent failure to resist his advances” is deracialized and removed from any explicit discussion of the conditions of residential schools and attendant colonial ideologies. Thus even in an attempt to legitimate the complainant’s account of events, Oppal constructs an account that conceptualizes the problem in terms of less risky categories: Belleau’s age and O’Connor’s position as principal, employer, and priest. In fact, the only explicit reference to race in *R. v. O’Connor* came from testimony originally given by Marilyn Belleau in the 1996 trial wherein she describes O’Connor’s “really white body.”

Thus, Oppal’s decision is not only not framed in terms of colonial oppression, but also completely deracialized as though these were separate from the question as to whether or not she legally consented. The erasure of indigeneity in *R v. O’Connor* enables the erasure of entire histories of colonization. In stark contrast to the healing circle which depends on indigeneity to function as an “alternative” space, the courts construct an account that is virtually without reference to the complainants’ indigeneity.

**Conclusion**

My purpose in this chapter is not to enter the legal debate around which of the courts’ decisions was better than the other. Rather, it is to point out that both Oppal, through appeal to Anglo common law tradition, and the judges on the Court of Appeal, through appeal to the absence of explicit statutes, wrote legally compelling decisions, yet came to very different determinations. To answer one of the original questions that oriented this section; namely, “What does consent look
like when refracted through the prism of colonialism, in particular the residential school experience?” we must look to the similarities rather than the differences between the decisions. None of them involved any explicit discussion of colonial history nor did they evoke any explicit discussion of culture. To convict O’Connor, Justice Oppal accepted the Crown’s contention that any submission to O’Connor’s advances on the part of the complainants was vitiated by the exercise of authority. The defense team countered that in O’Connor’s case the exercise of authority could not vitiate consent because the concept was not in the Criminal Code at the time of the alleged offenses. Yet colonial relations were not a factor in the BCCA’s decision to overturn O’Connor’s conviction nor were they an explicit factor in Oppal’s original decision to convict him.

O’Connor’s healing circle, when viewed as part of an emerging pattern within a multicultural imaginary reflected in law, is not so anomalous. It functions to deny precisely what it’s supposed to be addressing: the ongoing effects of colonization on indigenous communities as they struggle for greater self-determination. By formulating these issues in terms of an ahistoricized cultural difference, the discourse of “bridging the cultural divide” as it manifests in O’Connor’s healing circle reinforces extant colonial relations. One of the main arguments made by proponents of culturally-specific indigenous restorative justice initiatives is that the forcible imposition of colonial, and later Canadian law, was also non-consensual. Thus, indigenous restorative justice is, at least in part, meant to address the often violent imposition of colonial law on indigenous communities.
by revitalizing traditional forms in contemporary contexts. Yet, as the specific contours of O'Connor's healing circle demonstrate, attempts to address the profound impact of colonial laws and policies on indigenous communities have been hindered by multicultural imaginings that interpret these relations through a culturalized discourse that downplays or effaces the very relations it is supposed to be addressing.

The overdetermined construction of the healing circle as a space wherein the legal subject "becomes indigenous" can only exist in opposition to a mainstream court system in which indigeneity is seen as irrelevant to its operation. More specifically, irrelevant to the way in which the legal-jural category of consent is constructed and deployed. The process of "erasing indigeneity" in these legal contexts is in fact an erasure of entire histories of colonization and their consequences. It is precisely the erasure of indigeneity in the mainstream courts that allows the healing circle, a place wherein indigeneity is ostensibly celebrated, to take place at all. Thus, "indigenous becoming" in one legal sphere rests on its erasure in another. The healing circle was the only forum wherein discussions of residential school experience allowed, wherein connections between O'Connor's violations of the complainants and the broader violations of residential schools were articulated. Yet, despite any benefit that the complainants may have received, the healing circle was legally irrelevant. In other words, it did nothing to reconfigure the relationships and subjectivities produced in the courts, but rather
reproduced them in ways that simultaneously fit a statist multicultural imaginary and downplayed or denied the structural violence of postcolonial realities.

2 *R. v. O’Connor* (1998), BCCA
4 Further, O’Connor had already served six months in jail, almost as much time as he would need to serve in prison on the rape charge before becoming eligible for parole.
6 2002: 6; author’s emphasis.
7 Razack 1998.
8 Also Marilyn Belleau’s sister-in-law.
9 Although recently there has been an increased use of victim impact statements in courts.
14 I have reproduced below O’Connor’s formal apology in its entirety:

“All the hardship I have endured has been a manifestation of my own guilt and remorse. I am deeply sorry for the pain and suffering I have caused. I want to express my sincere regret and apologize for my actions.

I urge everyone to put aside their differences and come together. Let us work towards healing and reconciliation.”

“Thank you for what you have said. I have listened and heard. I only wish that we had had this opportunity eight years ago. I have had a very difficult time and I believe this process will start the necessary healing.

“I am so sorry. I want to apologize for my breach as a priest and my unacceptable behavior, which was totally wrong.

“I took a vow of chastity and I broke it. I apologize for the harm I have done. I have and will continue to do my penance until I die, both in the community and before God.

“I have come here today to apologize for the harm I have done in the hopes that there will be a healing of the rifts between our communities, not because I have to, but because I want to.

“Our views of the case may be different, but I know that it is time to bring us together and to heal. You have spoken about your anger and your sorrow and I respect what you have said. It is a very important step for both of us and our communities to help start healing. I now realize there were incidents and events that occurred at the residential schools that were wrong.”
“But it was not all bad. Please remember the good things as well: the pipe band, the academic education, the good work of many of the priests and nuns. Do not condemn them because of the conduct of myself and others.

“I trust that the meeting today will be a step forward in healing between the complainants and myself.”

15 Fieldnotes.
http://www.restorativejustice.ca/NationalConsultation/ValuesandPrinciplesdraft.htm
17 CITE
19 Although at the time of my fieldwork, all prisons in BC were government-run, I argue that these phenomena cannot be seen as outside of the increasing privatization of the criminal justice system, and what Davis and others have called the Prison Industrial Complex (PIC) (see e.g., Davis 2003).
20 http://www.ajic.mb.ca/volumel/chapter1.html
21 Warry 1998.
22 See e.g., VARJP n.d..
23 This discourse of cultural sensitivity also undermines any explicit discussion of race and of how racism structures Canadian society, undercutting any analysis of indigenous peoples generally, and indigenous women in particular, as a racialized group (see e.g., Dua and Robertson 1999; Razack 1998, 2002.
27 The use of indigenous imagery in environmental campaigns is a good example of this.
29 In what we now call the Americas, there were historically hundreds of different cultural and linguistic groups. In BC, “[t]here were many subtle and not so subtle variations in the Indian cultures of the area, as well as a fundamental division between the coastal and interior tribes” (Fisher 1992: xxvii-xxviii). Thus, to speak of an indigenous culture or worldview is deeply problematic, especially without reference to the specific
regional histories of contact and colonization that have differently affected indigenous groups.  

30 See also Nader 1990; 2002.  


34 Razack 1998.  

35 R v. O’Connor  

36 R v. O’Connor [BCCA]; p. 14  

37 R v. O’Connor [BCCA] (para. 68)  

38 R v. O’Connor [BCCA] (para. 66)  

39 See e.g., Bridgeman and Millns 1998.  

40 See e.g., Matoesian 1993.  

41 See Razack 2002.  

42 A contention legally reinforced by the Canadian Supreme Court’s 1997 decision that most of the land base in BC was never ceded. See *Delgamuukw*.  

43 E.g., decimation of indigenous populations, cultural dispossession, and isolation and poverty.  

44 The Canadian Indian residential school system was in place from 1879 until 1986. See Milloy 1999.  


47 “Law Firms File Details in Native Class Action: Residential School Suit,” Richard Foot, National Post (Canada), August 1, 2003, A2. “Nineteen law firms across Canada have jointly filed details of a class-action lawsuit aimed at compensating more than a quarter of a million aboriginal people for the alleged harms of Indian residential schools. The lawsuit includes at least 58,000 surviving, former students believed to have attended residential schools between 1920 and 1996, as well as 250,000 parents and children of former students.” See http://www.thomsonrogers.com/classaction.htm.  

48 See e.g., Indian Residential Schools Survivor Society, http://www.prsp.bc.ca/; Chrisjohn and Young, The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada, 1997; what they call “the residential school syndrome”; for an intersectional analysis of the impact of juvenile detention centers on First Nations girls, see Sangster 2002.  

49 See Goffman 1961; For analyses of Goffman’s concept as applied specifically to Indian residential schools, see Adams 1999 and Chrisjohn and Young 1997.  

50 See Maurer and Merry 1997.  

52 Milloy also discusses the impact of abuse of the sexuality of indigenous children.

53 Especially in the context of pedophilia scandals.
54 R v. O’Connor [BCCA] p. 11; (at para. 25)
55 R v. O’Connor [BCCA]; p. 5
CONCLUSION:
SOME SPECULATIONS ON INDIGENEITY IN THE
COURTROOM

The legally unthinkable also sets limits on what is politically thinkable.
--Arif Dirlik

A close reading of these three cases demonstrates that indigeneity is deployed by courts in a variety of contexts. I want also to suggest that these cases are not especially anomalous, and, in fact, point to some broader trends which require further investigation. For instance, it might seem that, at first, convening a state-sanctioned healing circle for a disgraced white bishop accused of sexual assaulting indigenous women is somewhat anomalous. Yet I argue that such a phenomenon is in fact part of continuing processes which rely on reductive multiculturalist discourses of indigeneity to continue to manage and even deny the existence of a colonial past and a postcolonial present. Thus, R. v. O'Connor is not simply a question of how a disgraced white bishop accused of sexual crimes against indigenous women ends up in a state-sanctioned aboriginal healing circle at the end of the 20th century, but rather is another example of how indigeneity relegated to the civil sphere.

But for the fact that both involve indigenous peoples and occur somewhat contemporaneously, O’Connor’s criminal case and the civil dispute over Musqueam Park seem to have little in common. However, the critical juxtaposition of these cases suggests that they are both part of a larger operation. In my discussion of the Musqueam case, I suggested that legal subjects “become
indigenous” in contexts that are primarily civil. My discussion of O’Connor’s case complements this conclusion by looking specifically at a context of criminal adjudication wherein any reference to indigeneity is once again relegated to the civil sphere, in this instance, the healing circle.

1 2001: 182.
REFERENCES CITED


Blomley, Nicholas, and Benjamin Forest. 1996. Law, Space and the Geographies of Power. Social science quarterly. 77, no. 4.


Research: On the Contested Careers of Core Concepts," in Justice and Power in
Sociolegal Studies. Edited by B. G. Garth and A. Sarat, pp. 1-18. Evanston, IL:
Northwestern University Press & the American Bar Foundation.

Law and Society Research; V. 1. Evanston, IL: Northwestern University Press &
the American Bar Foundation.

University Press.

Gluckman, Max. 1955. Judicial Process among the Barotse of Northern Rhodesia.
Manchester: Manchester University Press.


—. 2000. A Law of Their Own: Native Challenges to American Law. Law and
Social Inquiry 25:263.

Goldberg-Ambrose, Carole. 1994. Heeding the 'Voice' of Tribal Law in Indian

—. 1994. Of Native Americans and Tribal Members: The Impact of Law on


Loo, Tina. 1994. "The Road from Bute Inlet: Crime and Colonial Identity in 
Justice*, vol. V. Edited by J. Phillips, T. Loo, and S. Lewthwaite, pp. 112-142. 
Toronto: University of Toronto Press.

—. 1995. "Tonto's Due: Law, Culture, and Colonization in British Columbia," in 
Edited by H. Foster and J. McLaren, pp. 128-170. Toronto; Buffalo: University of 
Toronto Press.


232.


MacKinnon, Catharine A. 1987. *Feminism Unmodified: Discourses on Life and 


McIvor, Sharon. 1994. The Indian Act as Patriarchal Control of Women. 
Aboriginal Women's Law Journal 1:42.

Scratching the Surface: Canadian, Anti-Racist, Feminist Thought. Edited by E. 

McKee, Christopher. 1996. Treaty Talks in British Columbia: Negotiating a 

and Legal Anthropology Review 20:70-82.

McLachlan, Campbell. 1988. The Recognition of Aboriginal Customary Law: 
Pluralism Beyond the Colonial Paradigm - a Review Article. International and 
Comparative Law Quarterly 37:368-386.

Elephant, Law for the Beaver: Essays in the Legal History of the North American 
West. Regina, SK and Pasadena, CA: Canadian Plains Research Center, University 
of Regina & Ninth Judicial Circuit Historical Society.

McNamara, L. 1995. "Aboriginal Justice Reform in Canada: Alternatives to State 
Control," in Perceptions of Justice: Issues of Indigenous Community 

McNamara, Luke, and Legal Research Institute of the University of Manitoba. 
1993. Aboriginal Peoples, the Administration of Justice, and the Autonomy 
Agenda: An Assessment of the Status of Criminal Justice Reform in Canada with 
Reference to the Prairie Region. Lri Research Report., Issn 1181-8042; No. 4. 
[Winnipeg]: Legal Research Institute of the University of Manitoba.

Rights in Canada: Essays on Law, Equality, and Respect for Difference. Edited by 
*Juridicature* 79:126-133.


Rawson & Wiles Ltd. 1967. A Development Plan for Musqueam Indian Reserves 2 
& 3. Rawson & Wiles Ltd.


Stasiulis, Daiva, and Nira Yuval-Davis. 1995. "Introduction: Beyond Dichotomies--Gender, Race, Ethnicity and Class in Settler Societies."


