

Healing the Bishop: Consent and the Legal Erasure of Colonial History
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Abstract

During the summer of 1998, Hubert O'Connor, a white Catholic bishop and former Indian residential school principal in British Columbia, participated in what a local magazine termed “a centuries-old native ceremony”: an indigenous healing circle. In 1991, O'Connor was indicted on criminal charges for sexual offences he had allegedly committed some thirty years earlier against five indigenous women, all of whom were his former students and/or employees. While O'Connor acknowledged having sexual relations with these women, he denied having committed any illegal acts, maintaining that these relationships had been consensual. While the trial court originally convicted O'Connor of rape and indecent assault, the provincial Court of Appeal asserted that the trial court had not adequately resolved the issue of consent in O'Connor's criminal trial, and that it was thus left with no choice but to overturn both convictions and order a new trial for the rape charge alone. In order to avoid another lengthy trial, the provincial government instead convened an “indigenous healing circle” for Bishop O'Connor and the complainants.

In this paper, I argue that legal discourse in *R v. O'Connor* erases colonial history, an erasure that rests on particular notions of temporality and subjectivity—revealed in the construction of the legal case as an issue of consent. I examine both the healing circle and the Appeal Court's decision to overturn O'Connor's conviction and 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 decolonization, 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. I ask how the court's construction of consent, and more specifically the consensual agent, is dependent on the erasure of indigeneity. This position stands in sharp contrast to the space of the healing circle that depends on the complainants' indigeneity in order to exist.

Healing the Bishop: Consent and the Legal Erasure of Colonial History

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 (Daisley 1998). 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 (R v. O'Connor [1998]).

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” (Daisley 1998). 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.¹ 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.”² 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 sexually 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 paper, 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 discrete spheres and make explicit some of the ways in which they 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 (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 pre-natal meanings and practices to the present in *whatever* language and moral framework prevails *at the time of enunciation* (Povinelli 2002).

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 (Razack 1998), I show how this focus elides a range of factors important for understanding *R v. O’Connor* in broader perspective.

In 1996, the *Royal Commission on Aboriginal Peoples* (RCAP) released an influential report on Aboriginal justice, entitled *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” (Royal Commission on Aboriginal Peoples 1996:: xi). RCAP affirmed what many indigenous peoples had been consistently asserting for years—namely, 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” (Royal Commission on Aboriginal Peoples 1996:: 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 (Royal Commission on Aboriginal Peoples 1996:: 309).

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 forces structured the situation in the first place and allowed O’Connor’s convictions to be overturned.

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 (Povinelli 2002.; Povinelli 2004). 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.³

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”?⁴ 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 O’Ppal 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.”⁵ Despite the absence of any statutory reference to the vitiation of consent by the exercise of authority at the time of the violations, O’Ppal 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.”⁶ 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). 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 (Bridgeman and Millns 1998; Ehrlich 2001). 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.⁷

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 (Razack 2002). 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 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"(Razack 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.⁸ 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.⁹ 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.”¹⁰

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.”¹¹ 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.¹²

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.¹³ 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).

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 (Maurer

and Merry 1997). 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)). 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 (Razack 2002: 131). One cannot ignore the denigrating cultural subtext of the hypersexualized indigenous woman when interpreting O'Connor's case.¹⁴ 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.

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” (Behrendt 2000).

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, *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 *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.

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.¹⁵

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.”¹⁶ 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 paper 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. Neither 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, the structural position of indigenous women is irrelevant to the way in which the legal 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.

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¹ 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.

² Comment attributed to assistant deputy attorney-general, Ernie Quantz. *Vancouver Sun*, "O'Connor appeal dropped after healing circle," Jun 18, 1998: A1.

³ *R v. O'Connor*

⁴ *R v. O'Connor* [BCCA]; p. 14

⁵ *R v. O'Connor* [BCCA] (para. 68)

⁶ *R v. O'Connor* [BCCA] (para. 66)

⁷ See e.g., (Matoesian 1993).

⁸ 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*.

⁹ The Canadian Indian residential school system was in place from 1879 until 1986 (Milloy 1999).

¹⁰ As quoted in M. Montgomery, "The Six Nations and the MacDonald Franchise," *Ontario History* 57 (March 1965: 13). Cited in Milloy 1999: 6.

¹¹ N.A.C. RG 10, Vol. 6039, File 160-1, MR C 8152, the Archbishop of St. Boniface to Honourable Sir [R. Rogers], November [?] 1912. Cited in (Milloy 1999: 27).

¹² See e.g., Indian Residential Schools Survivor Society, <http://www.prsp.bc.ca/>; (Chrisjohn *et al.* 2002); for an intersectional analysis of the impact of juvenile detention centers on First Nations girls, see (Sangster 2002).

¹³ See (Goffman 1961). For analyses of Goffman's concept as applied specifically to Indian residential schools, see (Adams 1999) and Chrisjohn *et al.* 2002.

¹⁴ Milloy also discusses the impact of abuse of the sexuality of indigenous children.

¹⁵ *R v. O'Connor* [BCCA] p. 11; (at para. 25)

¹⁶ *R v. O'Connor* [BCCA]; p. 5