INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

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 bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI 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.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

**ProQuest Information and Learning
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA
800-521-0600**

UMI[®]

**The 'Noble Savage' in Western Thought: Re-Constituting
Colonial Stereotypes in Sentencing Aboriginal Sex Offenders**

By

Catharinah Faux, B.A. (Hons.)

**A thesis submitted to
The Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of**

Master of Arts

Department of Law

**Carleton University
Ottawa, Ontario
September 22, 2000**

**© Copyright 2000
Catharinah Faux**

**National Library
of Canada**

**Acquisitions and
Bibliographic Services**

**395 Wellington Street
Ottawa ON K1A 0N4
Canada**

**Bibliothèque nationale
du Canada**

**Acquisitions et
services bibliographiques**

**395, rue Wellington
Ottawa ON K1A 0N4
Canada**

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-60983-9

Canada

**Thesis Acceptance Form
M.A. Candidate**

**The undersigned recommend to the Faculty of Graduate Studies
and Research acceptance of the thesis**

**The 'Noble Savage' in Western Thought: Re-Constituting
Colonial Stereotypes in Sentencing Aboriginal Sex Offenders**

Submitted by

Catharinah Faux, B.A. (Hons.)

**in partial fulfilment of the requirements for
the degree of Master of Arts**

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a large, stylized 'R' and a smaller 'D'.

Thesis Supervisor

A handwritten signature in black ink, appearing to read 'M. McNeil'.

Chair, Department of Law

**Carleton University
September 2000**

This thesis will reveal how juridical efforts to address the failure of ‘conventional’ sentencing dispositions to adequately deal with sexual violence in Aboriginal communities can be informed by the colonial ideological trope of ‘noble savagism’. Through an analysis of the development of the ‘noble savage’ stereotype and the ideological effects of this perspective on Aboriginality, this thesis will reveal how judicial attitudes as expressed in sentencing Aboriginal sex offenders show an ambivalence that can be linked to historical understandings of Aboriginality. The presence of ‘noble savagism’ in these juridical discourses suggests a need for greater judicial attentiveness to the assumptions that are guiding the way they relate to the Aboriginal peoples that appear before them. By examining how the ambivalence of ‘noble savagism’ can be reproduced in contemporary juridical discourses, this thesis will raise some important questions that suggest areas for future research, exploring some issues that arise in judicial attempts to take culture into account in the sentencing process. For while culture and the needs of Aboriginal communities are being considered in sentencing dispositions, some judges seem to be unaware of the potential dangers in failing to exercise caution in interpreting the relevance of Aboriginality to the sentencing process.

Table of Contents

Introduction.....	1
Chapter One.....	6
Conceptualizing ‘Otherness’: Stereotyping, Discourse and Ideology	
Discourses on Race.....	7
Stereotyping.....	7
Ideology.....	11
Discourse.....	13
The Juridical Implications of ‘Noble Savagism’	17
Chapter Two.....	24
The Development of the ‘Noble Savage’ Stereotype in Western Thought	
Cultural Differences as ‘Otherness’	24
Constituting ‘Savagery’	25
The Mythology of the ‘Noble’ Primitive.....	30
‘Nobility’ and the Non-Aboriginal Cultural Identity.....	35
Cultural Evolutionary Theory.....	37
‘Noble Savagism’ in Colonial Canada.....	41
Chapter Three.....	49
‘Noble Savagism’ and Juridical Discourses in Sentencing Aboriginal Sex Offenders	
Statement of Method.....	54
Major Findings.....	56
‘Noble Savagism’ in Juridical Discourses.....	58

Aboriginality, Alcohol and Sexual Violence.....	67
Conclusions.....	74
Concluding Remarks.....	75
List of Sources.....	78

Introduction

From the spiritually rich, peaceful Amerindian of North American mythology to the pejorative imagery of the 'dirty drunken Indian', Euro-Canadian society appears to possess contradictory stereotypes of Aboriginal peoples. While the mythological and pejorative stereotypes appear unrelated, in fact both positive and negative images reflect colonial ideological beliefs as manifested in the stereotype of the 'noble savage'. The 'noble' and 'savage' images coexist in popular stereotypes of Aboriginal peoples, who are often admired for their 'nobility' yet simultaneously denigrated for their 'savagery'. The term 'noble' as used here represents references to characteristics coinciding with mythological images of pre-contact Aboriginal culture, as well as the tenacity of Aboriginal peoples in struggling to overcome post-contact obstacles. This 'nobility' stands in constant tension with discourses of 'savagery' which are associated with more pejorative imagery, referring in current discourses to the symptoms of colonial-related deprivations of Aboriginal communities, as well as the putatively impulse-driven state of so-called 'primitive', pre-contact Aboriginal societies. Attitudes towards Aboriginal peoples as expressed in juridical discourses can reflect the ambivalence of this juxtaposition, vacillating between the protection of Aboriginal 'nobility', that is, the spiritual and artistic elements of Aboriginal culture and communities that have survived colonial aggression, and the governance of Aboriginal 'savagery', a status suggested through references to the severely marginalized status, alcoholism and violence of contemporary Aboriginal culture and community life.

In this thesis, the term 'noble savagism' then, is an idiom through which the view of Aboriginal culture underlying many contemporary juridical discourses will be explored and ultimately exposed as premised on ideological beliefs and stereotypes first formulated and

articulated in Canada's early colonial history. The focus of this examination will be upon the sentencing of Aboriginal sex offenders, as this thesis will suggest that current attempts to consider culture in the sentencing process can sometimes be premised on the assumptions that underlie 'noble savagism', namely: a tension between a need to both protect and also regulate Aboriginal peoples. Through an examination of colonial ideology and the stereotype of the 'noble savage' in Western thought, this thesis will reveal a continued reliance of the judiciary on the historically-derived imagery of 'noble savagism' in comprehending Aboriginal culture when sentencing Aboriginal sex offenders. While current attempts to provide a more culturally appropriate sentence to Aboriginal offenders do show promising potential, the presence of 'noble savagism' within these juridical discourses suggest that stereotypes are influencing some judicial perceptions of Aboriginal culture and thus playing a role in the sentencing process.

Aboriginal culture has been, and often continues to be, comprehended as 'primitive', a relic of Canada's pre-colonial past. This thesis will show that cultural differences are understood not only through references to the self-identity of Aboriginal peoples, but also through the self-identity of non-Aboriginal Canadians. As a result, images of Aboriginal peoples may be primarily drawn from a contrast between Aboriginal and non-Aboriginal cultural values. Euro-Canadian perceptions of Aboriginal culture largely stem from our attempts to better understand our weaknesses as a society and our past wrongdoings against Aboriginal peoples, as well as perhaps our strengths, our capacity to learn from the mistakes of our predecessors. As such, through the ideological trope of 'noble savagism' Canada's colonial past and its most brutal practices have come to be identified as the essence of the Aboriginal experience, the overwhelming and all-encompassing source of the Aboriginal cultural identity. The predominant image of Aboriginal culture underlying colonial ideology and legal thought drawn from that

ideology is a picture of the spiritually rich Aboriginal person who hunts for food for his family, who conveys the teachings of his ancestors, who desires 'healing' rather than retribution for wrongdoers, yet whose victimization by colonialism has caused him to become alcoholic and constantly on the verge of turning violent against a family member when colonial difficulties become too debilitating. As will be seen, it is this Aboriginal person that judges are sometimes looking for when assessing the Aboriginal sex offender, and it is these characteristics of the Aboriginal offender that the judiciary may emphasize. In encounters with Aboriginal offenders, a judge can obscure the unique characteristics of the individual, and instead look for attributes of the stereotypical 'noble savage' revered in Canadian mythology, transformed by a horrific past into an impulse-driven yet 'noble' victim of colonial aggression. That which does not fit within the stereotype of the 'noble savage' is rendered peripheral.

While the unique difficulties of, for example, the residential school victim turned victimizer can be recognized through 'noble savagism', experiences that do not appear to be distinctive to Aboriginal peoples may be denied significance. This very narrow conception of Aboriginal culture as perceived through the aperture of 'noble savagism' involves the emphasis on Aboriginal peoples as different from non-Aboriginal peoples in a way that can allow the judiciary to appear to be acting in a culturally sensitive manner when imposing Euro-Canadian perceptions of Aboriginality onto Aboriginal peoples. I will show the ambivalence of the 'noble savage' stereotype in racial discourses and the resulting tension that lies within attitudes derived from an image of 'noble savagism'; so while some judges express admiration for Aboriginal steadfastness and resilience, and seem to recognize the importance of community and culture, Aboriginal communities may be simultaneously portrayed as disordered and dysfunctional. In the process, Aboriginal cultural identity is expropriated and redefined in a way that can serve to

transform the victimization of Aboriginal peoples from a problem of a fundamental power imbalance, into the more simple issue of a conflict between Aboriginal and non-Aboriginal concepts of justice. Through an analysis of 60 cases involving a consideration of the relevance of Aboriginality to sentencing Aboriginal sex offenders, we will see some of the potential hazards in assuming the judiciary can appropriately provide a culturally sensitive sentence.

Chapter one will provide a general framework for this paper, establishing the conceptual basis for chapters two and three. We will explore how to locate the 'noble savage' stereotype, colonial ideology and discursive references to 'noble savagism' in judicial discussions on Aboriginal culture. Chapter two provides a historical background of 'noble savagism', examining how the 'noble savagery' of Aboriginal peoples has been discursively formulated in various historical contexts. Through an analysis of the ideas of such theorists as Rousseau, Locke and Morgan, images of the 'noble savage' will be shown to underlie Western thought on the natural state of man in the absence of Western forms of government. This endeavour will be facilitated by some literature on Aboriginal culture in Western thought. Chapter two will demonstrate how the ambivalence of 'noble savagism' leads to an inherent tension between the desire to protect what has been deemed desirable about Aboriginal peoples, and efforts to eradicate more negative elements through the imposition of putatively superior Western political structures.

Chapter three analyzes judicial discussions on the relevance of culture and the Aboriginal status of the accused in sentencing for sexual assault. The chapter locates remnants of colonial assumptions in judgements, determining how contemporary juridical discourses can reflect the imagery of the 'noble savage' as seen in chapter two in assessing the culpability of the offender and in deciding if community input into the sentencing disposition is appropriate. We will see

how judicial attitudes can reflect continuity with the paternalistic understanding of Aboriginal peoples seen in the discourses of some colonial authorities, showing an assumption that ultimate jurisdiction over sexual violence in Aboriginal communities must remain with the courts while recognizing the importance of community involvement in establishing the most appropriate sentencing disposition. Chapter three establishes some of the dangers of the judiciary's failure to adequately recognize the importance of balancing between the universal element of the rule of law, that sexual assault is condemned and must be condemned as unacceptable regardless of cultural differences and socio-economic deprivations, and the necessary recognition of cultural differences, that sexual assault in Aboriginal communities has some contextual differences which affect the offender's, victim's and community's experiences of violence, yet which make the assault no less heinous than in non-Aboriginal communities. This paper is limited to an examination of reported cases, and does not contrast Aboriginal with non-Aboriginal cases. An exhaustive analysis of unreported cases and non-Aboriginal case law is beyond the scope of this thesis. This thesis does not purport to consider if differential treatment exists in Aboriginal and non-Aboriginal cases, but simply points out the colonial ideology that can underlie current juridical discourses and sentencing practices.

Chapter One

Conceptualizing 'Otherness': Stereotyping, Discourse and Ideology

The decision of the Supreme Court of Canada in *R. v. Gladue*¹, which renders the reference to alternatives to incarceration and the unique circumstances of Aboriginal offenders in Criminal Code section 718.2(e) a mandatory consideration, and the more recent decision in *R. v. Wells*², reflect a general judicial recognition of the need to consider community input in sentencing Aboriginal offenders. While an assessment of the relevance of the Aboriginal status of offenders to the sentencing process is an important first step towards addressing the over-representation of Aboriginal peoples in Canadian prisons, the emphasis on the Aboriginality of offenders can be a problematic form of racial discourse. As this thesis will suggest, discourses on Aboriginality can be a forum through which colonial stereotypes of the 'noble savage' can influence the sentencing process. A common assumption in juridical discourses is that while Aboriginal peoples remain scarred by colonialism, Euro-Canadians have been relatively unaffected by colonialism, having emerged into a more enlightened and sympathetic era. However, the Euro-Canadian identity has also been significantly affected by colonialism, so that the taken for granted assumptions first articulated in our early colonial history can be an ideological filter through which Aboriginal peoples are comprehended. When confronted with an issue involving Aboriginal peoples, there is a tendency at times to turn to discourses on difference and delimit the problem as one of Aboriginal versus non-Aboriginal peoples. Thus, judicial interpretations of Aboriginal versus non-Aboriginal identity can play a role in the sentencing process. The first task of this chapter is

¹ [1999] 1 S.C.R. 688. A full text of this case can be found at http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol1/html/1999scr1_990688.html

² [2000] 1 S.C.R. 207. The full text is available at <http://www.lexum.umontreal.ca/csc-scc/en/pub/2000/vol1/html/2000scr1>

to delineate the parameters of this inquiry into the nature of racial discourses in contemporary Canada in order to establish how discourses on difference become essential.

Discourses on Race

Racism is an extremely complex and controversial phenomenon. Rather than provide a definition of racism which is bound to be limited in scope, it seems more useful for our purposes to focus on how Aboriginal experiences are understood in essentialist terms, and how we can analyze these as discourses on race. David Theo Goldberg proposes two general theoretical paths through which to analyze discourses on race:

The first consists in analysing the history of *race formation*, that is, the transformation over time in what gets to count as a race, how racial membership is determined, and what sorts of exclusion this entails. The second concerns attention on *racial subjectification and subjection*. The aims of this second concern are twofold: to demonstrate how social agents are defined or define themselves as racial subjects. And to show what sorts of social subjection this entails both for the racially formed (*racialized*) and racially forming (*racializing*) producers (1990: xii).

An analysis of racial discourses then, involves establishing how difference is discursively identified throughout history and the linkage between the identification of racial difference and cultural identity. Racial discourses are dynamic structures which are continuously being formulated and re-defined to conform with experiences, and thus take on innumerable, sometimes contradictory, forms. The 'noble savage' stereotype is one particular form of racial discourse.

Stereotyping

Drawing on Sander Gilman's linkage between self-identity and stereotyping (1985: 20), the negative aspect of the 'noble savage' stereotype can be seen to reflect the anxiety that Canadians feel over what we may become, so that the 'bad self' has been projected onto the

Aboriginal 'other' through 'savagism', while the good 'other' seen in the positive attributes of the 'noble savage' stereotype represents that which we fear we cannot achieve -- in this case the 'nobility' of the Aboriginal 'other'. On the one hand, Aboriginal peoples may be perceived as having brought violence into our formerly safe communities, while on the other hand Aboriginality can also represent the voice of our conscience, expressing our despair over environmental destruction, showing dedication to the community, attentiveness to the teachings of elders, and serving as a symbol of a new re-integrative judicial philosophy. We continue to see in Aboriginal peoples an image of a pristine past that has been destroyed by 'civilization'. Our images of 'others' are a reflection of our anxieties as a society, the ambivalence we feel towards the achievements of our own 'civilization'.

Throughout Canadian history, 'noble savagism' has reflected a commonly accepted assumption that Aboriginal communities could be both sanctuaries from the spiritually empty modern world and a source of 'healing' one's colonial scars, especially when able to successfully fight against colonial intrusions, and yet, as unable to fight colonialism and its effects, thus becoming breeders of the most horrific living conditions in the industrialized world. The ambivalence of the imagery of 'noble savagery' has allowed for the perpetuation of this stereotype in diverse contexts. Ambivalence is in fact crucial to the continued relevance of 'noble savagery'. As Homi Bhabha points out:

For it is the force of ambivalence that gives the colonial stereotype its currency: ensures its repeatability in changing historical and discursive conjunctures; informs its strategies of individuation and marginalization; produces that effect of probabilistic truth and predictability which, for the stereotype, must always be in *excess* of what can be empirically proved (1994: 66).

Ambivalence allows the stereotype to remain valid in varying circumstances, so that behaviour, whether perceived in a positive or negative sense, can be easily linked to the stereotype. The predictability offered by the stereotype gives the illusion of control in a world that appears out of control. Bhabha explains how difference is ideologically formulated through 'fixity':

Fixity, as the sign of cultural/historical/racial difference in the discourse of colonialism, is a paradoxical mode of representation: it connotes rigidity and an unchanging order as well as disorder, immorality and daemonic repetition. Likewise the stereotype, which is its major discursive strategy, is a form of knowledge and identification that vacillates between what is always 'in place', already known, and something that must be anxiously repeated... (*ibid*).

The stereotype lends predictability and order to that which appears incomprehensibly different, yet can simultaneously portray the 'other' as unconstrained and wild. The discursive repetition of the stereotype assures its fixity in society's images of 'others'. While the apparent fixity of the stereotype ensures continuity in the imagery of 'otherness' over time, stereotypes are fluid and malleable sources of reference, adapted to accord with experiences. Gilmen notes that, "The objects in our world are reduced to images. No matter how well articulated, those images are constantly altered by interaction with the realities upon which they are based" (1985: 19). The mutability of stereotypes allows for their applicability and repeatability in differing contexts. The repetition of stereotypes in differing contexts results in a perception that these images are derived from self-evident truths, separate from Euro-Canadian cultural values and interests in the maintenance of colonial relations.

Stereotypes are representations of reality which are formulated and articulated within specific social and cultural contexts, giving meaning and familiarity to a world which often appears foreign:

Every social group has a set vocabulary of images for this externalized Other. These images are the product of history and of a culture that perpetuates them. None is random; none is isolated from the historical context. From the wide range of the potential models in any society, we select a model that best reflects the common presuppositions about the Other at any given moment in history. While all these images exist simultaneously, the ones that are invested with relatively greater force vary over time. An image can gain in potency partly as a result of actions by the corresponding real entities (*ibid*: 20)

Images of 'others' exist in the common knowledge of a society, providing a means of understanding those who are different even in the absence of personal encounters with 'others'. Stereotypical images of 'otherness' derive from the vocabulary a society invokes to promote a shared sense of difference (*ibid*), rendering the unfamiliar entirely knowable. Edward Said explains that stereotypes are a lens through which encounters with the 'other' are experienced, and through which the foreign can be seen as familiar:

Something patently foreign and distant acquires, for one reason or another, a status more rather than less familiar. One tends to stop judging things either as completely novel or as completely well-known; a new median category emerges, a category that allows one to see new things, things seen for the first time, as versions of a previously known thing (1978: 58-9).

One need not encounter an Aboriginal person to feel we 'know' the nature of the Aboriginal as a powerful healer of humanity's ills, and as a potentially violent aggressor. These images exist as a lens through which encounters can be viewed and comprehended. Experiences have shaped these stereotypes, derived from a perspective on the world that we perceive as reality. In the process, a colonial ideology is formed, a point of reference which is both dynamic enough to explain differing situations, yet also offers the consistency and predictability which stereotyping seeks to assure in encounters with those who are different. Despite the mutability of stereotypes, they are remarkably consistent in their portrayal of difference, a consistency based on a repertoire for identifying difference. Gilman argues that the three categories of the Other -- that

is madness, sexuality and race -- hold in common the differentiation between normal and deviant, for "...the idea of the pathological is a central marker for difference" (1985: 23).

Stereotypes of Aboriginal peoples as 'noble savages' are malleable reference points that have been re-defined based on personal and group experiences with their 'otherness'. The source of the 'otherness' of Aboriginal peoples is a reflection on the ideological basis from which these stereotypes are derived and the experiences that have formed Canada's colonial ideology. The mutability of images of Aboriginal peoples can allow for the recognition of distinctions between the stereotypical Aboriginal and individual Aboriginals. The process of categorizing peoples as Aboriginal or non-Aboriginal is, in and of itself, not problematic but in fact a normal and necessary way of understanding the world (*ibid*: 18). However, when stereotypes are, to use Gilman's term, pathological, portraying group members as possessing essential, unchanging characteristics that reflect unbridgeable inter-group differences, or 'otherness'³, stereotyping becomes a very dangerous source of justification for racist institutional practices. The over-emphasis on the differences between Aboriginal peoples and non-Aboriginal Canadians promotes a division of society, as if we are constantly and inevitably in a perpetual war to have our opposing visions of a just Canada realized.

Ideology

John B. Thompson proposes that the study of ideology involves an examination of the "...ways in which certain relations of power are maintained and reproduced by the endless array of expressions which mobilize meaning in the social world" (1987: 517). Colonial ideology actively establishes a social reality through expressions, such as stereotypes. Colonial ideology is thus a source of reference by which lived experiences are interpreted in ways which convey a

belief that colonial power relations are necessary and inevitable. Stereotypes are drawn from colonial ideology, yet appear to be separate from our socially created version of reality. Aboriginal culture is constituted in colonial ideology in ways which serve to justify and reproduce existing inequalities, for within colonial ideology it is believed that until Aboriginal peoples have fully regained this lost 'nobility' or else been fully integrated into the Canadian polity, the Crown, through the courts, must intervene to ensure 'savagery' does not get further out of control. Thompson further distinguishes between power and domination, in that domination:

...occurs when the relations of power are 'systematically asymmetrical' when particular agents or groups are institutionally endowed with power in a way which excludes, and to some degree remains inaccessible to, other agents or groups, irrespective of the basis upon which such exclusion is carried out (*ibid*: 519).

As chapter three will show, in encounters between a Euro-Canadian judge and an Aboriginal offender, the intoxication of an Aboriginal person can be seen as evidence of colonial-related ills based on a presumption that alcohol has caused the downfall of many Aboriginal peoples, a belief that has been promoted through colonial ideology and reinforced by each successive experience with an intoxicated Aboriginal offender. As a result, the sentencing judge may emphasize alcohol use as a distinct characteristic of many Aboriginal peoples, and an explanation for impulse-driven, violent behaviour in Aboriginal communities. Aboriginal offenders then may be understood according to their characteristics which coincide with (i.e., the 'drunken Indian') or contradict (the well adjusted and successful Aboriginal person) these colonial stereotypes.

³ See discussion of the 'other' in chapter 2, pg. 24..

Discourse

Trevor Purvis and Alan Hunt argue that while both discourse and ideology refer to the means by which the social world is understood and how this view is transmitted through action or inaction, they are distinguished by their focus:

If 'discourse' and 'ideology' both figure in accounts of the general field of social action mediated through communicative practices, then 'discourse' focuses upon the internal features of those practices, in particular their linguistic and semiotic dimensions. On the other hand, 'ideology' directs attention towards the external aspects of focusing on the way in which lived experience is connected to notions of interest and position that are in principle distinguishable from lived experience (1993: 476).

While ideology involves the experiential aspect of social reality, discourse is the linguistic element. Colonial discourses linguistically express and transmit a colonial ideology, while colonial ideology is a lens, a particular construction of social reality, through which experiences with Aboriginal peoples are interpreted. Underlying discourses are particular ideological beliefs that have been discursively formulated and re-constituted to reflect lived experiences. The repetition of ideological beliefs in discourse is an important means of reinforcing the legitimacy of that ideology and justifying particular power relations.

As the previous section illustrated, colonial ideology provides a filter through which Aboriginal culture can be understood, mediating how experiences inform one's interpretation of social reality. The colonial gaze more easily recognizes experiences that conform to the ideological beliefs that lay within 'noble savagism'. Discourse is a key justificatory mechanism for colonial ideological beliefs, one way by which 'noble savagism' is articulated and re-defined to conform to experiences. Juridical discourses are often informed by, but are not necessarily limited to, the ideological trope of 'noble savagism' in explaining real-world experiences with Aboriginal peoples. Much like ideology is a filter by which some experiences are more easily

recognized than others, discourse also places limitation on which aspects of the social world are acknowledged. The capacity of discourse to render non-conforming perspectives irrelevant is both the greatest strength of discourse and its most substantial weakness. The experiential element of social reality found in ideology means that by obscuring certain perspectives, discourses are inherently unstable and engaged in a constant process of adaptation to address experiences that challenge dominant understandings of social reality.

Bhabha suggests that: "...the point of intervention should shift from the ready recognition of images as positive or negative, to an understanding of the *processes of subjectification* made possible (and plausible) through stereotypical discourse" (1994: 67). In this regard, we must examine how these images of Aboriginal peoples as reproduced in discourses allow for their de-humanization, portraying them as passive recipients of colonial aggression who require the intervention of the courts to re-establish their lost 'nobility', yet whose concerns can be legitimately disregarded when politically expedient. For example, the media is often accused of promoting stereotypes⁴. The repetition of stereotypes in the media can discursively reinforce the validity of these images of the noble/ignoble savage who should be pitied yet censured. Earlier, it was shown that stereotypes are malleable, capable of adapting to conform to real-world experiences. However, those who have minimal contact with Aboriginal peoples other than through the media may have no means of questioning the validity of these images. Limited

⁴Augie Fleras argues in *Please Adjust Your Set* (1997) that "...media stereotypes of aboriginal peoples dwelt on themes of "the noble savage", the "savage Indian," the "drunken Native," and the "subservient squaw," also entitled "Stereotypes" at <http://www.media-awareness.ca/eng/issues/minrep/issues/stereotype.htm>. Also, see the Ottawa Citizen, Wednesday, February 12, 1997, "Images on screen promote aboriginal clichés" reprinted at <http://www.media-awareness.ca/eng/issues/minrep/resource/articles/cliche.htm>, "The fighting warrior, sexual savage and mystical Indian are all stereotypes that undermine aboriginals searching for a positive self-image, says a native actor. And Gary Farmer lays the blame on TV and the movies. There's rarely a dramatic movie made with aboriginals that doesn't involve scenes of violence and alcohol, says Farmer".

personal experiences with the real-world entities that are the subject of stereotypes can mean a diminished capacity to challenge these stereotypes.

Similarly, the judiciary normally encounter Aboriginal peoples through the courts, and thus are likely to be ideologically informed by a perspective on Aboriginality derived from experiences with Aboriginal peoples in conflict with the law. Discursive references to 'noble savagism' thus have an important ideological effect in that daily experiences with Aboriginal peoples are mediated through a vision of reality formulated in a specific social and cultural context, the courtroom, and yet these interpretations appear external to that context. Experiences with Aboriginal offenders may be seen as representative of Aboriginality. Thus, the problem of alcoholism and sexual violence in Aboriginal communities appears as if it were the quintessential Aboriginal experience, successive experiences with Aboriginal offenders confirming the legitimacy of these stereotypes. The stereotypical discourse obscures difference, suggesting that the behaviour of individual Aboriginal sex offenders can be explained through references to their Aboriginal status, diminishing micro-level factors and individual agency. Upon encountering an Aboriginal person, one may note the positive or negative attributes seen in that individual's status as an Aboriginal person, obscuring their humanity as an active agent who has chosen to respond to life's difficulties in a particular manner.

The discursive repetition of the linkage between Aboriginality, alcohol abuse and sexual violence can justify colonial ideology. In the process, alcoholism and sexual violence in Aboriginal communities appear to be their problem, a problem that is uniquely Aboriginal, one that requires the intervention of non-Aboriginal institutions to correct. The capacity of Aboriginal peoples to respond to community difficulties without court intervention is perceived as questionable through a colonial ideology, hence suggesting the legitimacy of asymmetrical

power relations until sexual violence is no longer a problem in Aboriginal communities. Yet persistent contact with Aboriginal peoples in conflict with the law suggests a continued problem.

Although it is beyond the scope of this thesis to effectively address the potential for resistance that lies within juridical discourse, it is important to acknowledge its presence. While discourse is an important means of reaffirming the 'noble savagery' of Aboriginal culture, discourses are not simply a reflection of existing power relations. Michel Foucault elaborates on the instability of discourses, and the potential for resistance which lies within dominant discourses:

Discourses are not once and for all subservient to power or raised up against it, any more than silences are. We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it (1978: 100-101)

Legal discourses thus can both legitimize colonial ideological beliefs by reaffirming these stereotypes at the same time that they serve to de-stabilize colonial relations. Thus, judicial discursive references to images of 'noble savagery' are a forum through which Aboriginal needs can be considered in the legal process but, by allowing Aboriginal culture to be a relevant consideration in the legal process, one must also accept judicial definitions of culture. Legal discourses remain the domain of non-Aboriginal persons and thus are an area through which unwary legal personnel may utilize a colonial ideology to comprehend Aboriginality. While the capacity of legal discourses to provide a forum by which to challenge colonialism can often be seen in land claims cases such as *Delgamuukw*⁵, the limitations and hazards of reliance on such

⁵ The decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 is a good example of how discourses can threaten colonial power relations. The oral history of the Gitksan and Wet'suwet'en were accepted as valid forms of evidence, largely because the law can accept the legitimacy of certain Aboriginal cultural traditions which conform to these stereotypes. The capacity of the Gitksan and Wet'suwet'en to maintain

an approach, especially in sexual assault cases, are far too significant to be ignored. Although this thesis will focus only on the presence of 'noble savagism' in juridical discourses, it should be recognized that challenges to 'noble savagism' do occur through juridical discourses.

The Juridical Implications of 'Noble Savagism'

The preceding discussion of stereotyping, ideology and discourse lays out a foundation upon which knowledge of difference has been formulated and articulated. Encounters with these 'others' are mediated through a particular view on social reality that is seen as separate from colonialism, but is in fact derived from a colonial ideology. Through colonial ideology then, an image of the essential Aboriginal, the 'noble savage', is continuously refined to adapt to experiences, providing a lens through which each encounter with Aboriginal peoples can be understood as either reflecting or detracting from the validity of these stereotypes. Each Aboriginal person is seen in the pathological stereotype for their Aboriginality rather than their distinctive human experiences, leading to an emphasis on Aboriginality as an essence, a singular, all-encompassing identity that provides an explanation for all life experiences of individual Aboriginal peoples. In colonial discourses then, the life experiences of Aboriginal peoples, individually and collectively, are re-interpreted as further evidence of the devastating effect of colonialism, or in encounters with those who appear to have avoided becoming the essential Aboriginal, the gumption of some Aboriginal peoples in overcoming colonial devastation. In the process, Aboriginal peoples are de-humanized as passive recipients of colonial brutality, their agency limited to a choice between acting as a typical victim of colonialism, or behaving as a

their cultural tradition ultimately allowed for the admissibility of their oral history into evidence. This case further illustrates the role of judicial discretion in determining whether Aboriginal culture will be deemed legally relevant. While the lower courts rejected the relevance of the oral history of the Gitksan and Wet'suwet'en peoples, the Supreme Court of Canada deemed their oral history a legally relevant form of evidence. A full text of the case can be found at http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_1010.html

'savage', or not acting as a victim of colonialism, or serving as a 'noble' community member.

This version of Aboriginal reality is transported, via the personnel of the legal system who are participants in a society that has accepted this form of knowledge, into legal thought, and subsequently the legal process. The second task of this thesis is to consider how this knowledge is put into practice, how 'noble savagism' can influence the daily practices of the legal system.

The ideological effect of 'noble savagism' can be found through an analysis of the assumptions that have underlain the attitudes of some Canadian authorities towards Aboriginal peoples. These attitudes express a belief that the 'nobility' of Aboriginal peoples is endangered by contact with Euro-Canadian society and its vices, vacillating between the paternalistic acknowledgement of the fiduciary duty of the Crown to protect Aboriginal peoples from the evils of white colonial society such as alcohol and land encroachment, and the desire to promote Crown sovereignty over Aboriginal affairs. So although Canada's Aboriginal peoples were often seen as 'noble', possessing many characteristics admired by English colonial society, they were, above all, still 'savages', and thus would benefit by the introduction of Western political structures to their communities. An analysis of the complexities of 'noble savage' imagery in Western thought on Aboriginal culture and its ideological effect throughout Canadian history provides a basis for locating colonial ideological beliefs in contemporary juridical discourses on Aboriginal culture.

Chapter three will show that in current sentencing practices, we see a great deal of attention drawn to the connection between Aboriginal criminality, especially in alcohol related crimes and violence against women, and socio-economic/cultural difficulties that are explicitly or implicitly linked to colonialism. To address Aboriginal concerns for the lack of community input into the administration of justice for Aboriginal offenders, the courts have been returning

“non-dangerous” Aboriginal offenders to their community to carry out the sentencing disposition. The courts have relied on the provisions of the Criminal Code for probation orders, conditional sentences and suspended sentences to include Aboriginal communities in sentencing dispositions, seeing the incorporation of restorative justice principles into the criminal justice process as an effective solution to the lack of community input in conventional sentencing practices. Yet these initiatives are premised on a belief that court intervention is necessary to ensure the offender is treated, whether in the community or a correctional facility. The judiciary is clearly making a concerted effort to understand Aboriginal peoples and cultural differences, and are struggling to ensure the distinct needs of Aboriginal offenders are taken into account in sentencing. However, an analysis of juridical discourses suggests that the judiciary is not always able to see Aboriginal peoples as autonomous, responsible adults, but instead may view Aboriginal sex offenders through the stereotype of the ‘noble savage’ who must, through the courts, be guided away from the colonial legacy and the evils that were perpetrated against Aboriginal communities by white colonial society. A colonial ideology thus remains one lens through which Aboriginal experiences may be understood.

This thesis will show that the paternalism which frequently informs specific formulations of the legal recognition of the need for Aboriginal input into the administration of justice is consistent with attitudes first articulated in the *Royal Proclamation, 1763*:

And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, the great prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convin[ced] of Our Justice, and determined Resolution to remove all reasonable Cause and Discontent, We do, wit the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to m any purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Colonies where we have thought proper to allow settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be

purchased only for Us, in Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose... (cited in Smith, 1975: 3).

The *Royal Proclamation* remains a recognized source of reference in adjudicating land claim cases. What remains unacknowledged is that in sentencing practices, the judiciary have taken a similar position. The law recognizes the rights of Aboriginal peoples to meet with the Crown to discuss the sale of land, or in this case, appear before the judge to present their view in sentencing dispositions for Aboriginal offenders, but the Crown holds ultimate jurisdiction over Aboriginal affairs, or in this case, the courts must deem Aboriginal input appropriate and must interpret how that input can be translated into an appropriate sentencing disposition.

Building on the ideas in chapter two on the process by which images of Aboriginal peoples as 'noble savages' have been discursively formulated historically, and the ideological effect of this stereotype, chapter three will highlight the continuities between historical and contemporary assumptions of what constitutes Aboriginal culture. Chapter three will examine contemporary juridical discourses on Aboriginal culture in sentencing Aboriginal sex offenders for residues of colonial ideological beliefs. While the judiciary is, for the most part, highly sensitive to the need for an awareness of cultural differences in sentencing Aboriginal offenders, judges can refer to colonial assumptions in attempting to provide a more culturally appropriate sentencing disposition. We are relying on the judiciary to familiarize themselves with Aboriginal culture as a means of addressing the lack of Aboriginal voice in the administration of justice, failing to consider why that voice must come through the judge's attentiveness to Aboriginal culture. The voice we often hear in the juridical discussion of Aboriginal culture is not the Aboriginal voice, but the voice of the judiciary, begging the question whose culture or view of culture is the judge expressing? Can we assume the judiciary can effectively convey an

accurate image of Aboriginal culture? How accurate can we expect judges' articulation of culture to be, if, as often the case, the only contact he/she has with that culture is with those in conflict with the law and, of course, the stereotypes we have discussed earlier? The purpose of the next two chapters is to consider these questions.

This thesis will show that the first question can be answered in the negative. An analysis of juridical discourses for 'noble savagism' demonstrates that, while some judges no doubt can comprehend Aboriginal culture without turning to stereotypes, others show a very limited and highly problematic understanding of the complexities of dealing with sexual violence in Aboriginal communities. Regarding the second question, some juridical discourses seem to blur the distinction between community conditions and Aboriginal culture; alcohol and sexual violence may be more prevalent in many Aboriginal communities, but their linkage to Aboriginal experiences is far more complex than is commonly acknowledged. This thesis will suggest that while culture must be an important consideration in the sentencing process, more imperative than the legal recognition of culture is the acceptance of Aboriginal voices into the administration of justice without having those voices filtered through the judiciary's interpretation of culture.

Chapter Two

The Development of the 'Noble Savage' Stereotype in Western Thought

To concern oneself with the founding concepts of the entire history of philosophy, to deconstitute them, is not to undertake the work of the philologist or of the classic historian of philosophy. Despite appearances, it is probably the most daring way of making the beginnings of a step outside of philosophy (Jacques Derrida, 1978: 284).

This chapter will trace the development of Western thought on Aboriginal 'otherness', establishing how images of the 'noble savage' can be located in discursive references to Aboriginal culture. So while the previous chapter built a conceptual basis through which we will analyze juridical discourses in chapter three, this chapter will demonstrate how Western thought has connected Aboriginality with 'noble savagery' and the racial discourses that have emerged from this particular formulation of 'otherness'. We will see how experiences with Aboriginal peoples in early colonial history were interpreted through an ideology that was derived from pre-contact Western thought on 'others'. By establishing the historical development of Western thought on 'noble savagery' and the ideological effects of this perspective on Aboriginality, this chapter will provide the foundation for locating the presence of a colonial ideology in contemporary juridical discourses. The highly complex and ambivalent formulation of Aboriginality found in the racial discourses on 'noble savagery' seen in this chapter will be shown in chapter three to have been reproduced in some contemporary judicial discussions of Aboriginal culture.

As the previous chapter showed, stereotypes, ideology and discourses are concepts that are related in their capacity to render cultural differences evidence of 'otherness'. To remain valid, the formulations of difference seen through these concepts are engaged in a constant process of adaptation, offering a veneer of both consistency and predictability to a constantly

changing world, thereby also providing a means of explaining widely divergent behaviours through a filter of common reference. While the social reality that is established through these ideological apertures are changed by real-world experiences, stereotypes are drawn from a society's vocabulary for identifying difference, a repertoire that pre-exists these experiences. This chapter will show that although the 'noble savage' stereotype has been shaped and modified by experiences with Aboriginal peoples, the ideological basis of 'noble savagism' is Western thought on the 'otherness' of non-Western peoples, a form of knowledge that pre-existed contact with Aboriginal peoples. It will be demonstrated that, as the previous chapter argued, the source of images of the essential Aboriginal is the non-Aboriginal cultural identity. Thus, experiences with Aboriginal peoples are mediated through a colonial ideology that is rooted in Western thought on 'otherness'.

The key attribute of 'noble savagism' is an ambivalent attitude towards Aboriginal peoples, leading discourses drawn from 'noble savagism' to show a vacillation between admiration and denigration of Aboriginality. This chapter will establish how this ambivalence has been discursively formulated, and the ideological effects of 'noble savagism'. As has already been established, while discourse linguistically transmits the 'noble savage' stereotype, ideology is a lens through which encounters with Aboriginal peoples can be interpreted and particular power relations can be reproduced. Racial discourses and colonial ideology are related in their use of the 'noble savage' stereotype to comprehend Aboriginality, but are somewhat distinct aspects of social reality. The primary concern of the rest of this thesis is to locate, through the concepts of stereotyping, ideology and discourse, how 'noble savagism' depicts Aboriginal experiences as an essence. Hence, racial discourses intersect with colonial ideology in that they hold in common an ambivalent understanding of cultural differences as 'otherness'.

Cultural Differences and Otherness

Jorge Larraín (1994) provides a theoretical framework by which we can problematize the images of difference promoted by modernism and postmodernism. While a modernist analysis often produces universalistic theories that assume all cultures go through similar stages of evolutionary progress, a postmodernist view can lead to the promotion of cultural relativism, with an emphasis on differences and discontinuity. Universal theories that presume European culture to be at a higher stage of development than 'others' have been more easily problematized than the cultural relativist approach, leading Larraín to express concern that the dangers of an unwary attentiveness to cultural differences are not commonly recognized. Larraín argues that approaches which emphasize cultural differences can easily become as racist in practice as more universalistic theories on social justice:

I would contend that there is a deeper form of racism involved in cultural relativism. The absolute denial of a common truth and of universal values may easily lead to the denial of a shared nature among the participants of incommensurable cultures (1994: 31).

Larraín posits that despite the Eurocentrism in universal theories, they tend to recognize that culture is not an essence, but a process. On the other hand, historicist approaches which emphasize cultural specificity can suggest 'otherness', or the existence of an irreconcilable gap between Euro-Canadian values and non culturally dominant groups: "...the emphasis on historical specificity leads historicist theories to conceive of cultural identity ahistorically, as an essence, as an immutable spirit which marks an unbridgeable difference between peoples and nations" (*Ibid.*: 7). Culture then, is a marker of difference much like race, portrayed as being linked to a multitude of other characteristics that convey an image of Aboriginality as an essence.

Aboriginal voices may only be heard then, when speaking of their divergence from Euro-Canadians, differences that coincide with these images of the essential Aboriginal. For example, Aboriginal conceptions of justice are often contrasted with Euro-Canadian values, so that 'healing' and 'reintegration' are commonly understood as fundamentally different from Euro-Canadian beliefs in retribution, providing a rather simplistic portrait of culture as reflecting dichotomous judicial philosophies. Chapter three will suggest that references to concepts such as 'healing' and a desire to reintegrate sex offenders into the community can also lead to the denial of perspectives that do not coincide with this view on Aboriginal culture. Racial discourses can have an ideological effect in that experiences that are invisible to the colonial gaze may be denied significance. Racial discourses are thus a double-edged sword, for by speaking of cultural differences, Aboriginal peoples risk having culture become a means of obscuring the voices of those who cannot convey an image of the essential Aboriginal. The next section will show the ideological foundation of racial discourses by examining the development of Western thought on Aboriginal 'otherness' as 'noble savagery'.

Constituting 'Savagery'

Some affirm, and it is likely to be true, that these savages have no particular property in any part or parcel of that country, but only a general residency there, as wild beasts in the forest; for they range and wander up and down the country without any law or government, being led only by their own lusts and sensuality. There is not *meum* and *teum* [mine and thine] amongst them. So that if the whole land should be taken from them, there is not a man that can complain of any particular wrong done unto them⁶

The Puritan preacher who, in 1609, provided this pejorative assessment of the inherent 'savagery' of indigenous peoples, was promoting an image of non-Western peoples that had

existed in Western thought long before the “Discovery” of the Americas. The term ‘savage’ can be applied to any group possessing a culture that diverges from Western norms, but has been most forcefully implied to characterize Aboriginal culture. Western thought on difference has been guided by an ideological belief in the essential ‘savagery’ of non-Western peoples based on a presumption that the absence of a Western form of government created the conditions for ‘savagery’. The term ‘savage’ emerged out of the Latin *silvaticus*, or forest dweller (Berkhofer, 1978:13). Aristotle’s articulation of the lust-driven and violent ‘savagery’ of man in the state of nature would be echoed in later accounts of Aboriginal peoples:

For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with arms, meant to be used by intelligence and virtue, which he may use for the worst ends. Wherefore, if he have not virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony⁷.

Images of the ‘savagery’ of men in the absence of Western forms of law and justice were thus articulated in ancient Western philosophy, long before contact with Aboriginal peoples. Like the social and political theorists that will be considered later on in this chapter, Aristotle was establishing a framework through which Western peoples could understand their own culture. The ‘savage’ as identified by Aristotle was not a real-world entity, but simply an ideal, created in order to illustrate the benefits of Western forms of government. However, the assumptions underlying images of ‘savagery’, such as those seen in Aristotle, have been a consistent underpinning of Western thought on ‘others’. The ideological effect of images of ‘savagery’ will

⁶ As cited in the Royal Commission on Aboriginal Peoples, hereafter referred to as RCAP. “Royal Commission on Aboriginal Peoples – Final Report, Volume One – Looking Forward, Looking Back,” 1996. [<http://www.indigenous.bc.ca/v1/Vol1Ch4s1tos2.asp>] (25 Jun. 2000).

⁷ Aristotle, “Politics. Book One.” (1993) Translated by B. Jowett <http://classics.mit.edu/Aristotle/politics.html> (26 Jun. 2000).

become apparent in colonial descriptions of encounters with the non-Western 'others' of the "New World".

Although 'savagery' existed as a concept from as early as Aristotle, the 'savage' stereotype appears to have developed in the Middle Ages⁸. Berkhofer suggests that the term 'savage' likely derived from the image of the 'wild man':

According to Medieval legend and art, the wild man was a hairy, naked, club-wielding child of nature who existed halfway between humanity and animality. Lacking civilized knowledge or will, he lived a life of bestial self-fulfillment, directed by instinct, and ignorant of God and morality. Isolated from other humans in woods, caves, and clefts, he hunted animals or gathered plants for his food. He was strong of physique, lustful of women, and degraded of origin (1978: 13).

This image of the 'wild man' could be used to describe anyone who differed from Christian, Western peoples. In the Middle Ages, wildness represented "...everything that eluded Christian norms and the established framework of Christian society, referring to what was uncanny, unruly, raw, unpredictable, foreign, uncultured, and uncultivated. It included the unfamiliar as well as the unintelligible" (in Berkhofer, 1978:13-14). Trinh Minh-ha notes that: "The perception of the outsider as the one who needs help has taken on the successive forms of the barbarian, the pagan, the infidel, the wild man, the 'native', and the underdeveloped" (1994: 54). These various labels for 'others' all represent images of the 'savagery' of man in the absence of 'civilized' restraints, or in other words, the primitivism of man in the state of nature.

The previous chapter established that images of 'otherness', or stereotypes, are set up as a contrary image to one's self-identity. Aristotle's ideas and the image of the 'wild man' were derived from within the cultural identity of the producer of these racial discourses. This brief

⁸ Similarly, Williams argues that discourses of conquest, used to justify actions taken against Aboriginal peoples, were first articulated during the Crusades to legitimize attacks against non-Christian peoples. See Williams, 1990.

analysis of the pre-contact background of the 'savage' stereotype supports the argument made in the previous chapter that images of 'otherness' are a counter-image to the self-identity of, to use Goldberg's terms, the racially forming (*racializing*) producers of stereotypes rather than an authentic image of the racially formed (*racialized*) targets of stereotyping. For if 'savagery' pre-existed experiences with Aboriginal peoples, we can locate the source of this stereotype as lying within the Western cultural identity.

As chapter one illustrated, through the stereotype of the 'savage', the unfamiliar 'other' becomes one whose differences are seen for the first time, yet whose 'savagery' is already well known. Upon encountering the unfamiliar peoples of the "New World", Europeans could turn to pre-existing stereotypes in describing its inhabitants. Experiences with Aboriginal peoples could be filtered through an ideology that deemed the absence of Western forms of government to lead peoples to behave as 'savages'. The ideological effects of the 'savage' stereotype can be seen in early colonial accounts of Aboriginal peoples. Experiences with Aboriginal peoples were often interpreted through an ideology that linked difference with 'savagery'. The pre-existing stereotype of 'savagery' provided a reference point through which Aboriginal culture could be understood. The discursive repetition of the linkage between Aboriginality and 'savagery' could serve to confirm these images of non-Western peoples. Early accounts of the inhabitants of the "New World" could focus on the attributes of the 'wild man' in describing the 'Indian', so that for example, 'Indianness' was equated with engaging in a hunting and gathering way of life and being driven by impulses⁹. A colonial ideology in which non-Western peoples were seen as 'savages' thus provided a filter through which Aboriginal culture could be understood by the

⁹ See, for example, Christopher Columbus' and Amerigo Vespucci's highly influential accounts of the peoples of the "New World", cited in Berkhofer Jr., 1978: 5-12.

Europeans who were encountering Aboriginal peoples for the first time. One way by which discourses could articulate Aboriginal differences was by referring to an already-existing vocabulary for identifying difference.

By turning to the attributes found in the 'savage' stereotype to describe Aboriginal peoples, Western thought has often assumed the inhabitants of the "New World" possess a common culture, showing the fixity of stereotyping. Early descriptions of encounters with Aboriginal peoples across North and South America show the ideological effects of stereotyping, tending to emphasize characteristics perceived as intrinsic to all 'savage' peoples, although, as will soon become apparent, they were not unaware of distinctions between nations:

Common concepts combined with successful conquest reinforced the general impression of the deficiency of primitives everywhere and validated the continuation of the general conception and the glossing over of the growing knowledge of specific social and cultural differences among New World peoples. Even among themselves and the people they had long known well, Europeans correlated whole nationalities with uniform moral and intellectual attributes; it should be no surprise that they should stereotype the new peoples they met elsewhere (Berkhofer, 1978: 24).

The stereotypes of Aboriginal peoples developed in early colonial history led to the creation of knowledge about the characteristics of Aboriginal culture in a way that can suggest the existence of a single Aboriginal culture. The discursive repetition of Aboriginal 'savagery' is an important way of reinforcing these images of a culture held in common by all Aboriginal peoples. Christopher Columbus for example stated that: "In all these islands, I saw no great diversity in the appearance of the people or in their manners and language. On the contrary, they all understand one another, which is a very curious thing..." (in Berkhofer, 1978: 6). However, discourses can only be successfully deployed when capable of adapting to account for Aboriginal peoples who appeared to contradict dominant understandings of Aboriginal 'savagery'. A

colonial ideology could not be sustained if it was unable to account for all experiences with Aboriginal peoples, whether these encounters were perceived in a positive or negative sense.

As the previous chapter showed, the malleability of stereotyping can allow for the recognition of distinctions but, more importantly, the ambivalence of stereotyping provides a means of accounting for both positive and negative experiences with Aboriginal peoples. The 'noble' dimensions of the 'noble savage' stereotype are an important example of one way by which those Aboriginal nations who were admired by early Europeans were differentiated from those denigrated as barbaric. While the ambivalence of 'noble savagism' bolsters the capacity of this stereotype to account for a wide variety of experiences with Aboriginal peoples, the wary eye can easily identify and expose the tension that lies within discursive references to Aboriginal culture as 'noble savagism'. Thus before analyzing contemporary juridical discourses, it is important to consider how we can attribute particular attitudes to 'noble savagism'.

The Mythology of the 'Noble' Primitive

And it is the more absurd to represent savages as continually cutting one another's throats to indulge their brutality, because this opinion is directly contrary to experience; the Caribbeans, who have as yet least of all deviated from the state of nature, being in fact the most peaceable of people in their amours, and the least subject to jealousy, though they live in a hot climate which seems always to inflame the passions¹⁰.

The validity of the 'savage' stereotype, at least as it was articulated before contact with Aboriginal peoples, was threatened by experiences with non-Western peoples who challenged the image of the lustful, violent 'savage'. Images of 'savagery' could not, alone, be sustained in the presence of evidence contradicting the perception of the unrestrained behaviour of man in the

¹⁰ John-Jacques Rousseau, "A DISCOURSE ON A SUBJECT PROPOSED BY THE ACADEMY OF DIJON: WHAT IS THE ORIGIN OF INEQUALITY AMONG MEN, AND IS IT AUTHORISED BY NATURAL LAW?" Translated by G.D.H. Cole [http://www.constitution.org/jjr/ineq_03.htm] (21 Aug. 00).

state of nature. Bartolome de Las Casas for example, emphasized attributes of 'nobility' in lobbying against the Spanish exploitation of Aboriginal peoples:

God created these simple peoples without evil and without guile. They are the most obedient and faithful to their natural lords and to the Christians whom they serve. They are the most submissive, patient, peaceful, and virtuous. Nor are they quarrelsome, rancorous, querulous, or vengeful. Moreover they are more delicate than princes and die easily from work and illness. They neither possess nor desire to possess worldly wealth (cited in Berkhofer, 1978: 11).

As noted in chapter one, the malleability of stereotyping allows for the incorporation of real world experiences into already existing images of 'others'. Through a colonial ideology that portrayed Aboriginal 'savagery' as self-evident, the 'savage' stereotype was discursively modified and adapted to account for the positive attributes seen in encounters with Aboriginal peoples. The imagery of the 'blood-thirsty savage' continued to exist in the repertoire of some colonists as a means of representing Aboriginal peoples who expressed hostility towards settler communities. However, relations between colonists and Aboriginal peoples in the North-East were highly complex, often showing an interdependent relationship which provided experiences that contradicted the negative characterization of Aboriginal culture offered by 'savagism'.

So while the 'savagery' of Aboriginal peoples continued to be discursively repeated, it could also be suggested that they were not without honour: "Bad as these savages are," General James Clinton wrote, "they never violate the chastity of any woman" (in Wright, 1992:139). Clinton's comments reflect the ambivalence of Aboriginal stereotypes, demonstrating how, through a colonial ideology, experiences with Aboriginal peoples were mediated by an assumption of the 'otherness' of non-Western peoples. While the lack of the purportedly positive influence of a Western form of government could be deemed evidence of Aboriginal 'savagery', this also implied the absence of the negative characteristics of Western society.

Aboriginal 'savagery' was not negated by contradictory evidence, for to question their 'savagery' could be seen as a challenge to the Christian European self-identity as a 'civilized' society. The 'nobility' of 'savagery' shows how, as chapter one suggested, the fixity of stereotyping can assure the continued predictability of Aboriginal 'savagery', while ambivalence allows for the incorporation of contradictory evidence into the 'savage' stereotype. The recognition of positive attributes and differences between the various Aboriginal nations could be explained as varying degrees of 'savagery'. Thus, as chapter three will more fully establish, it is the stereotype of the 'noble savage' that has had the greatest influence over Canadian images of the essential Aboriginal.

The ambivalence of 'noble savagism' has been incorporated into Western thought on Aboriginal culture. A colonial ideology is thus no less present in discursive references to positive 'noble' attributes of Aboriginal culture, than in negative, pejorative assessments of Aboriginality as 'savagery'. The ambivalent nature of stereotypes means that images that appear contradictory can in fact be derived from the same ideological source, differing only in emphasis. Thus, we can make a distinction between '*noble savagism*' and '*noble savagism*', a differentiation that, as pointed out earlier, is less significant than the subjectification that occurs through stereotypical discourse, or the essentialization of cultural differences. While the recognized viability of 'noble' aspects of Aboriginal culture may appear to promote a positive image of Aboriginality, '*noble savagism*' simply places pre-existing images of the essential 'savagery' of Aboriginal peoples into a positive light rather than contradicting the basic premise behind 'savagism' that Aboriginal culture is primitive. For example, a common positive image of the 'noble savage' culture of 'Indians' is of a "...life of liberty, simplicity and innocence", while the negative image of 'savagery' provides a contradictory image of violence, nakedness

and sexual promiscuity: "...this list substituted license for liberty, a harsh lot for simplicity, and dissimulation and deceit for innocence" (Berkhofer, 1978: 28). Regardless of whether the mythological 'noble' or pejorative 'savage' elements of the 'noble savage' stereotype was emphasized, Aboriginal culture has been consistently portrayed as existing closer to the state of nature than European culture, resulting in an image of Aboriginality as an essence.

An examination of Hobbes' and Rousseau's seemingly contradictory portrait of man in the absence of Western forms of government can illustrate how seemingly contradictory assessments of the state of nature hold a common ideology. Hobbes argues that:

In such conditions there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth...no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poore, nasty, brutish, and short¹¹.

Hobbes' image of the state of nature could provide a framework for understanding Aboriginal culture, although he never fully elaborates on the connection between Aboriginality and the state of nature hinted at here: "For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all, and live at this day in that brutish manner, as I said before"(*ibid*). So while Hobbes only mentions the 'savage peoples' of America in passing, his ideas can be linked with an ideology that denigrates non-Western forms of government as possessing conditions that promoted 'savagery'.

Thus, racial discourses are not necessarily an articulation of difference based on skin colour, for the concept of race did not yet exist in the time of Hobbes. Rather, racial discourses promote images of difference as essential, and thus hold in common a consistent portrayal of

difference as 'otherness'. The content of racial discourses in describing Aboriginal peoples may have changed over time, demonstrating the mutability of stereotypes as argued earlier, but the assumptions underlying the ideological trope of 'noble savagism' have been a consistent feature of racial discourses on Aboriginality. The ideological effects of these racial discourses will be examined later in this chapter through a consideration of the attitudes of some colonial authorities towards Aboriginal peoples. Rousseau's more sympathetic account of Aboriginal 'savagery' can also be deemed a racial discourse, one that simply placed Aboriginal 'otherness' into a more positive light. Thus, Rousseau offers an image of 'noble savagery' that is drawn from the same ideology to which Hobbes referred, accepting the assumption underlying 'savagery' that the absence of Western forms of government constituted 'otherness':

Hobbes did not reflect that the same cause, which prevents a savage from making use of his reason, as our jurists hold, prevents him also from abusing his faculties, as Hobbes himself allows: so that it may be justly said that savages are not bad merely because they do not know what it is to be good: for it is neither the development of the understanding nor the restraint of law that hinders them from doing ill; but the peacefulness of their passions, and their ignorance of vice: *tanto plus in illis proficit vitiorum ignoratio, quam in his cognitio virtutis*¹².

Hobbes' and Rousseau's differing interpretations of the state of natural man and, as real-world representations of natural man, the attributes of Aboriginality, represent a continuum of racial discourses, from the overtly negative attributes identified with 'savagery' by Hobbes, to the mythological yet equally denigrating assertions of Rousseau that natural man, or the 'noble savage', lives in peaceful ignorance of social corruption. Rousseau's natural man is not so much a contradiction to 'savagism', but another, somewhat more positive face of 'savagism': he

¹¹ Thomas Hobbes, "The Leviathan" 1998. <http://www.library.adelaide.edu.au/etext/h/h681/> (26 Jun. 2000).

¹² Rousseau offers a Latin phrase translated as "so much more does the ignorance of vice profit the one sort than the knowledge of virtue the other". Rousseau, *supra* note 10.

highlights the 'nobility' of the 'savage'. While racial discourses that emphasize 'savagery' are unapologetically negative, 'noble savagism' is simply a more complicated and ambivalent formulation of racial discourses, one that can denigrate Aboriginal culture as primitive and ignorant while simultaneously expressing admiration for its ignorance of the corrupting influences of 'civilization'. Thus, Rousseau demonstrates how, through a colonial ideology, encounters with Aboriginal peoples can produce images of 'noble savagery' that build upon rather than challenge pre-existing Western thought on difference as 'otherness'. Thus despite the differing attitudes expressed in the racial discourses we have considered thus far, attentiveness to the ideology that lays within these discourses can reveal how assumptions regarding 'noble savagism' have been articulated in racial discourses, thus providing a basis for analyzing current juridical discourses.

'Nobility' and the Non-Aboriginal Cultural Identity

As chapter one showed, the positive attributes seen in stereotypes, in this case 'nobility', provide a counter-image to the negative aspects seen within one's self-identity. Our weaknesses as a society, or the 'bad-self' to use Gilman's term, are projected onto images of the cultural strengths of 'others', most aptly illustrated in Rousseau's as well as Las Casas' articulation of the 'noble savagery' of Aboriginal 'others'. We are a vengeful, hedonistic society, while the 'noble savage' seeks reconciliation and 'healing'; we are a morally bankrupt culture, while the 'noble savage' is spiritually rich; we are an individualistic and materialistic society plagued by inequalities, while the 'noble savage' is communally oriented, concerned only with subsistence and sharing whatever he can with the community. 'Savagery' is not negated by the recognition of 'nobility'. Instead, 'savagery' can be de-emphasized, portrayed as outweighed by the presence of 'nobility'. The essential Aboriginal is, above all, a counter-image to the Euro-

Canadian self-identity, representative of the ambivalence we feel towards our own society.

The 'noble savage' is a relic of a simple, pristine past, an example through which to demonstrate what Western society has become, the horrific conditions that have been created in the transition, or progression, to a more 'civilized' society.

When Western society, or more specifically for our purposes North American society, has questioned its own social values, images of the 'nobility' of Aboriginal culture can be deployed to criticize the more negative features of non-Aboriginal society, particularly the more corrupting aspects of 'civilization' such as those identified by Rousseau. Discourses that emphasized Aboriginal peoples as more 'noble' than 'savage' were thus one way of articulating non-Aboriginal society's fears of what it was becoming. Racial discourses in this context identified 'otherness' as a sign of moral superiority. For example, Pearce (1988) and Berkhofer (1978) establish that in the social upheaval of the mid 1900s, images of Aboriginal culture were used to critique 'civilization', representing a powerful counter-example to the corruption and vices of capitalism and the military industrial complex. As we saw in the previous section, a focus on 'nobility' can be seen in discourses that highlight the assumption that Aboriginal culture involved living a simple, peaceful existence, free from the vices of Western, or more specifically North American 'civilization'. 'Nobility' mythologizes Aboriginal culture as the embodiment of the innocent natural man that had been destroyed by 'civilization' so that, as has already been established, the 'noble savage' represents a counter-image to the non-Aboriginal cultural identity. As Berkhofer argues: "Indians, therefore, were the alien other selves the Whites had destroyed in their own capitalistic, Christian life..." (1978: 111). Yet contact with this corrupted society came to be identified as an important source of 'savagery', for Aboriginal peoples it

appeared could maintain 'nobility' only when insulated from non-Aboriginal society's vices, a theme that will be explored further in chapter three.

Cultural Evolutionary Theory

Thus we see that the kings of the Indians, in America, which is still a pattern of the first ages in Asia and Europe, whilst the inhabitants are too few for the country, and want of people and money gave men no temptation to enlarge their possessions of land or contest for wider extent of ground, are little more than generals of their armies...¹³

We have thus far established that 'noble savagism' assumes that the absence of a Western form of government creates the conditions for the establishment of a society whose major characteristics are understood as a contrast with the non-Aboriginal self-identity. The definitive features of the 'noble savage' are based on the absence of qualities identified with Western culture or 'civilization', so that the positive attributes within the non-Aboriginal self-image are assumed to constitute the opposite of 'savagery', while non-Aboriginal shortcomings came to be seen as wanting in the 'noble' elements of 'noble savagery'. Through a colonial ideology, experiences with Aboriginal peoples perceived in a positive light could affirm the 'nobility' of 'savagery', while behaviour seen as negative could confirm Aboriginal 'savagery' without necessarily rejecting 'nobility'¹⁴. Ever present in discourses on 'noble savagism' is this tension between veneration for Aboriginal culture's 'nobility', or the 'noble savage', yet denigration of

¹³ John Locke "Second Treatise of Civil Government" 1996 [<http://www.swan.ac.uk/poli/texts/locke/locke07.html>] (Aug. 21 2000).

¹⁴ Raymond Stedman, for example, explains how many colonists recognized that 'Indians' rarely raped, pointing out how the capture of Mary Rowlandson in King Philip's War was depicted: "...the Indians who had carried off Mary Rowlandson and her tiny child were portrayed in an influential captivity take as looters and burners and cruel killers but not as rapists" (1982: 77). Raymond Stedman, for example, explains how many colonists recognized that 'Indians' rarely raped, pointing out how the capture of Mary Rowlandson in King Philip's War was depicted: "...the Indians who had carried off Mary Rowlandson and her tiny child were portrayed in an influential captivity take as looters and burners and cruel killers but not as rapists" (1982: 77).

the 'savagery' that is seen to be the inevitable consequence of the absence of Western forms of government.

The juxtaposition of Aboriginal culture with the non-Aboriginal identity is based on a perspective of Aboriginal culture as primitive, consisting of inhabiting a less-developed society that has not yet attained the level of 'civilization' or progress that 'Western' countries have achieved (Turpel, 1990). Hobbes' and Rousseau's assessments of non-Western political cultures reflect a key assumption that has consistently underlain Western thought on 'otherness', namely that culture is progressive. According to Rousseau, the primitive, pre-modern state of natural man leads to his innocence, his lack of awareness of the hedonism and inequalities that characterize Western society. John Hope Mason explains that:

[Rousseau] suggested four main stages [of development]: first, natural man, before language or society; second, men settling in families and villages, early society; third, the development of agriculture and metallurgy, and the institution of property, society became a state of war; fourth, the start of government and political order, which reinforced the unequal conditions that arose in the third stage (1979: 51).

Locke also promotes an evolutionary view of culture that, like Rousseau, assumes Aboriginal peoples to be closer to the state of nature. An examination of John Locke's theory on property rights illustrates both the continuities in discursive conceptualizations of Aboriginality as 'noble savagery' while also demonstrating how discourses on 'otherness' have been adapted to reflect the specific historical context. Further, Locke's statements show the ambivalent attitudes that are reflected in 'noble savagism', for despite the 'nobility' he implies by suggesting Aboriginal cultures do not seek to expand their domain (see above at note 12), his argument on the nature of property rights in the state of nature denigrates Aboriginal culture in terms of land use:

Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labour upon it, though, before, it was the common right of every one. And amongst those who are counted the civilised part of mankind, who have made and multiplied positive laws to determine property, this original law of Nature for the beginning of property, in what was before common, still takes place... And even amongst us, the hare that any one is hunting is thought his who pursues her during the chase. For being a beast that is still looked upon as common, and no man's private possession, whoever has employed so much labour about any of that kind as to find and pursue her has thereby removed her from the state of Nature wherein she was common, and hath begun a property.¹⁵

Locke argues that it is labour that allows for men to claim property rights, later stating that cultivation renders land that had formerly been held in common in the state of nature, the property of the individual who tilled the land. James Tully summarizes Locke's argument:

...the Aboriginal peoples of America, possessing neither government nor property in their hunting and gathering territories, have property rights only in the products of their labour: the fruit and nuts they gather, the fish they catch, the deer they hunt and the corn they pick. Unlike citizens in political societies, anyone in a state of nature is free to appropriate land without the consent of others, as long as the land is uncultivated¹⁶.

Locke can thus demonstrate both the fixity of the 'noble savage' stereotype in Western thought on Aboriginal 'otherness' and the malleability of stereotyping to address differing experiences with Aboriginal peoples. When European peoples sought land in the "New World", the 'noble savage' stereotype could be utilized to explain their 'otherness' as demonstrated by inappropriate land use. So while the lack of a Western form of government was the emphasis of Hobbes' and Rousseau's assessments of natural man, Locke highlighted land use as an important sign of Aboriginal 'otherness'. Locke's, Hobbes' and Rousseau's racial discourses hold in common an ideology that sees 'others' as a counter-image to Western political societies – cultures either possess a Western political structure or they hold no formally recognizable political society.

¹⁵Locke, *supra* note 13.

While Hobbes, Rousseau and Locke were among the numerous Enlightenment theorists that provided a philosophical basis for an evolutionary view of cultural differences, Lewis Henry Morgan took this concept of evolution and promoted a fully developed argument that purported to scientifically explain the divergence of Aboriginal culture from European society. Cultural evolutionary theory focused on Aboriginal 'nobility' by suggesting the existence of a common human race that differed only by varying stages of cultural development. Cultural evolutionary theory assumes, much as earlier philosophers had believed, that:

...uniformity of human mental characteristics and abilities over space and time allowed the comparison of peoples regardless of geography or history; similarity of stages in the course of cultural evolution of all peoples; and the use of European standards and the idea of progress to measure the direction and amount of development (Berkhofer, 1978: 52).

Accordingly, cultural differences were deemed, under the authoritative guise of science, to be the result of differing levels of progress, with European culture having attained a higher stage of development than Aboriginal culture. Morgan (1963) suggests that social diversity is the result of "historical accident" rather than essential human differences, providing 'scientific' proof that all societies progress from 'savagery' to 'barbarism' to 'civilization'. Thus we must understand cultures according to the standards set out by the particular stage of development that the culture inhabits: one must study the 'uncivilized' according to 'uncivilized' standards. Morgan and other proponents of cultural evolutionary theory propose that Western European cultures are not inherently superior to Aboriginal cultures, but that Aboriginal culture has simply not progressed as far as Europeans on the cultural evolutionary scale. So European standards of civilization were seen as an appropriate yardstick for evaluating other cultures, allowing for the paternalistic

¹⁶RCAP, *supra* note 6 [<http://www.indigenous.bc.ca/v1/vol1ch4s1tos2.asp>]

judgement that Aboriginal culture is merely less developed than European culture. The 'noble savagery' of Aboriginal culture could then be portrayed as a scientifically demonstrated phenomenon.

Through the lens of colonial ideology, Aboriginal culture can be understood through reference to non-Aboriginal standards, illustrating how the social reality established through an ideology comes to be construed as separate from one's self-identity. So although images of Aboriginality are derived from Western thought on 'otherness', the 'noble savage' stereotype has been discursively modified to coincide with real-world experiences and thus can appear to be separate from the non-Aboriginal cultural identity. Morgan provides an important example of a discourse that promotes an essentialist approach to cultural differences as identified by Larraín, yet his evolutionary perspective on Aboriginal culture demonstrates how universalistic and cultural relativistic theories are intertwined in colonial ideology. The tension between universalism and cultural relativism is a theme that will be elaborated upon in chapter three's examination of the rule of law and cultural differences.

'Noble Savagism' in Colonial Canada

The rest of this chapter will reveal the continuities that can underlie seemingly divergent attitudes towards Aboriginal peoples, establishing how 'noble savagism' can be found within the discourses of colonial authorities in early Canadian history. We will consider how the particular historical context in which these discourses occurred influenced the discursive formulation of an ideological effect of 'noble savagism'. I will point out the consistencies that underlie the conciliatory attitudes towards Aboriginal peoples expressed in the early colonial era of cooperation and the openly derogatory attitudes found in the period of assimilation. We will see how the ambivalence of 'noble savagism' was also a feature in the attitudes of some colonial

authorities towards Aboriginal peoples, and how this ambivalence could allow for the continued relevance of Aboriginal stereotypes in vastly different historical contexts. So while the previous section examined Western thought on Aboriginal 'otherness' to determine the philosophical basis of 'noble savagism', this section will serve as a bridge between chapters two and three, establishing how 'noble savagism' can be found within the racial discourses of Canadian authorities and the ideological effects of these attitudes.

As we examine some of the racial discourses of early colonial Canada, it will become clear that paternalism has been a fairly consistent feature of colonial ideology. Through 'noble savagism', this paternalism is found in the expressed desire to protect Aboriginal peoples from colonial society -- a reference to 'nobility' -- while assuming that a Western form of government is beneficial to Aboriginal peoples -- an idea we have linked to 'savagery'. As was established earlier, 'noble savagery' is an image of Aboriginality as representative of innocence, a counter-image to the negative attributes seen in Western society. We will see the growth of the belief that it was these negative elements in Western society that posed the greatest danger to the 'noble savage', a belief that will be introduced here, but will be more fully explored in chapter three. Experiences with Aboriginal peoples as allies and trading partners meant that discursive references to 'noble savagism' in the era of cooperation expressed attitudes that emphasized 'nobility' while hinting at 'savagery'. The ambivalence of 'noble savagism' is reflected in an order given by the Crown to the governor of Nova Scotia in 1719:

And whereas we have judged it highly necessary for our service that you should cultivate and maintain a strict friendship and good correspondence with the Indians inhabiting within our said province of Nova Scotia; that they may be induced by degrees not only to be good neighbors to our subjects but likewise themselves to become good subjects to us; we do therefore direct you upon your arrival in Nova Scotia to send several heads of the

said Indian nations or clans and promise them friendship and protection as you shall carry from hence for their use¹⁷.

The Crown's assertions here suggest it held an ambivalent attitude towards Aboriginal peoples, for while it was recognized that Aboriginal peoples should be treated as friends of the Crown, at the same time the Crown is expressing a paternalistic desire to protect Aboriginal peoples and encourage them to become subjects of the Crown. Turning to the concept of discourse as established in chapter one, the discourse seen here linguistically transmits a particular view of social reality drawn from an assumption that Crown sovereignty would be beneficial to Aboriginal peoples (see Williams, 1990). We can see an ideological effect of 'noble savagism' in the attitudes expressed here, for while the benefits of introducing Aboriginal peoples to Western political structures were assumed, suggesting a reference to beliefs that can be linked to 'savagism' as established earlier, the precariousness of the Crown's position in North America meant that friendship with Aboriginal peoples was necessary, and thus the Crown mentions the potential for Crown sovereignty over Aboriginal peoples as an aside. The Crown appears to have held a conciliatory attitude towards Aboriginal peoples at this time, hinting at, but not openly articulating the assumption of Crown supremacy in the "New World", an attitude derived from an image of Aboriginal 'savagery'. Instead, the importance of maintaining friendship with and protecting Aboriginal peoples was emphasized to suggest an image of the more 'noble' than 'savage' Aboriginal person. Although the 'noble savage' stereotype is not readily apparent in this discourse, the discourses found in the *Royal Proclamation, 1763* will build upon the ideas seen here, and the presence of 'noble savagism' will become more obvious.

¹⁷Cited in RCAP, *supra* note 6, [<http://www.indigenous.bc.ca/v1/Vol1Ch5s2to3.4.asp>].

Through the *Royal Proclamation*, the English Crown reserved the land West of the Appalachians for Aboriginal peoples, establishing that the Crown had exclusive jurisdiction over Aboriginal land in Western North America. The Crown was coming to see its role as that of a protector of Aboriginal interests, more openly expressing the assumption of Crown sovereignty over Aboriginal peoples. Thus, the *Royal Proclamation* represents a shift to overtly paternalistic attitudes towards Aboriginal peoples rendering the presence of 'noble savagism' more obvious. An image of Aboriginal 'nobility' being endangered, which threatened Crown interests in maintaining Aboriginal peoples as allies, underlies the Crown's discourses on the need to protect Aboriginal peoples from abuse, while we can link the Crown's assumption of political sovereignty over Aboriginal land to Western conceptions of 'savagery':

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds... (cited in Smith, 1975: 2).

Aboriginal peoples were recognized as having a claim to their land, yet the *Royal Proclamation* makes an implicit assertion that the Crown holds political sovereignty over North America thus suggesting the presence of ambivalence. While the *Royal Proclamation* may appear to place an emphasis on the 'nobility' in 'noble savagism', this document also suggests Western political structures could most effectively protect Aboriginal peoples. The discourses articulated in the *Royal Proclamation* convey a view of social reality that assumes the protection of Aboriginal peoples is best achieved by granting Crown sovereignty over Aboriginal lands. The ideological effect of this attitude is to render Aboriginal political societies circumscribed by the Crown's prerogative to set boundaries on the Aboriginal capacity to exercise sovereignty. Thus, the

tension within 'noble savagism' was becoming more visible in the ambivalent attitudes expressed in the *Royal Proclamation*.

The concerns that were expressed for protecting the 'noble savage', as seen in the previous section, turned into frustration as the failure of Aboriginal peoples to take on European 'civilized' ways, particularly European agricultural methods, seemed to suggest the settler society would have to progress without the 'noble savage'. The emphasis on the 'nobility' of 'savagism' seen earlier came to be replaced by attitudes that highlighted 'savagery'. In the Canadian context, this belief in the 'noble savage' as a vanishing race came after the War of 1812¹⁸, but for America, this sentiment came to be expressed in the 1770s:

When, by the 1770's, the attempt had obviously failed, Americans were coming to understand the Indian as one radically different from their proper selves; they knew he was bound inextricably in a primitive environment, to be destroyed by God, Nature and Progress to make way for Civilized Man (Pearce, 1988: 4).

While Aboriginal 'savagery' was always a barrier to 'civilized' society, their 'noble savagery' had served a purpose for the Crown up until the conclusion of the War of 1812. As Aboriginal support was no longer necessary, the 'noble savage' became construed as more of a barrier to 'civilization', one whose way of life would inevitably be destroyed by the over-powering influence of 'civilized' peoples. A statement by Sir G. Murray reflects this changing attitude towards Aboriginal peoples:

It appears to me that the course which has hitherto been taken in dealing with these people, has had reference to the advantages which might be derived from their friendship in times of war, rather than to any settled purpose of gradually reclaiming them from a state of barbarism, and of introducing amongst them the industrious and peaceful habits of civilized life (Sir G. Murray, 1830 cited in Miller, 1989: 95)

¹⁸ Miller suggests that the Maritimes region manifested these sentiments much earlier than Upper Canada largely because of the influx of mainly white-skinned Loyalists (many of the Crown's Aboriginal allies fled to Upper Canada) and their non-participation in the War of 1812 (1989: 88).

As the above statement illustrates, images of Aboriginal peoples are inextricably linked to the context. As we have just established, when Aboriginal peoples were valuable as military allies, attitudes could show an emphasis on the 'nobility' of 'savagery' seen in Aboriginal peoples. In the absence of a military threat to the British colonies however, attitudes could reflect an emphasis on their 'savagery' without discounting their 'nobility'. Murray's argument for assimilation also shows how Western thought on 'others', especially evolutionary theory, could have an ideological effect through the attitudes of colonial authorities. Beliefs in the need to assimilate Aboriginal peoples may have led to an emphasis Aboriginal 'savagery', but images of the 'noble savage' were an ever-present backdrop as demonstrated by the overall lack of overt hostility to Aboriginal peoples in Murray's justification for 'civilizing' the 'savage'. The ambivalence of 'noble savagism' was thus incorporated into racial discourses on Aboriginality, while being adapted to reflect the historical context.

Attitudes that expressed a desire to protect Aboriginal peoples were no less apparent in the era of assimilation than had been the case in early colonialism, suggesting a concern for the well being of Aboriginal peoples that had been nurtured through past experiences with their 'noble savagery'. The ambivalence that had existed in early colonial discourses on '*noble savagery*' came to be far more apparent in the assimilative policies based on images of '*noble savagery*'. The tension within 'noble savagism' was thus replicated in attitudes that expressed a need to assimilate Aboriginal peoples, showing a paternalistic desire to protect Aboriginal peoples from incursions by Euro-Canadians and also promoting the contradictory goal of eliminating Aboriginal culture from the Canadian landscape. For example, Tobias argues that a consistent assumption of colonial policies was the necessity of protecting Aboriginal peoples

from exploitation: "...the government of Canada had to protect the person and property of the Indian from exploitation by the European, which meant that the Indian was to have a special status in the political and social structure of Canada", a desire that ran contrary to the Crown's ultimate goal of eliminating this special status and its financial obligations through assimilation (1991: 127). Despite the obvious emphasis on Aboriginal 'savagery' in the era of assimilation, images of the 'noble savage' were a significant backdrop to even the most openly intrusive actions against Aboriginal peoples. Experiences with Aboriginal peoples were thus mediated through an ideology that saw the assimilation of Aboriginal peoples as beneficial, but also manifested a desire to protect Aboriginal peoples from harm. While attitudes derived from an emphasis on 'savagery' could lead to the discursive promotion of assimilation, 'noble savagism' still played a role, albeit a limited one, in mediating encounters between Aboriginal peoples and colonial authorities, especially in modifying references to 'savagery' by referring to a need to protect Aboriginal peoples.

Assimilation was largely premised on the belief that Aboriginal peoples were a vanishing race, an assumption that rendered the image of Aboriginal 'noble savagery' a less significant strategy by which Aboriginal peoples could resist the imposition of colonial policies. Following the War of 1812, attitudes reflected a belief that Aboriginal the 'nobility' of 'noble savagery', formerly seen as the predominant feature of Aboriginal culture, was gradually being replaced with the more 'savage' than 'noble' Aboriginal, in which the loss of 'nobility' was seen as the inevitable consequence of the onslaught of Western 'civilization'. Chapter three will show that, although current judicial attitudes reflecting the presence of 'noble savagism' are to a certain extent a sign of a return to early colonial imagery that emphasized the 'nobility' over the

'savagism' of Aboriginal culture, a few important distinctions exist as a result of this era of assimilation.

We have established in this chapter that in the racial discourses as deployed through the ideological trope of 'noble savagism', Aboriginal culture was construed as primitive, consisting of living in the state of nature. So while 'savagery' assumed the absence of a Western form of government in Aboriginal societies created the conditions for violence, 'nobility' suggested Aboriginality involved engaging in a peaceful, subsistence-based way of life. We saw the ideological effect of 'noble savagism' through a consideration of attitudes as expressed by colonial authorities, how differing historical contexts affected the discursive formulation of 'noble savagism' without altering the assumptions that have formed the basis of Western thought on Aboriginal 'otherness'. The ambivalence of 'noble savagism' was shown to have led to the expression of attitudes that could admire while simultaneously denigrating Aboriginal peoples. 'Noble savagery' was linked to attitudes that that reflected a paternalistic concern for protecting Aboriginal peoples from the excesses of colonial society, while 'savagery' was attributed to a belief in the need to introduce Aboriginal peoples to Western forms of government. A contemporary manifestation of these assumptions will be explored in the next chapter through an analysis of some judicial attitudes as expressed in sentencing Aboriginal sex offenders.

Chapter Three

'Noble Savagism' and Juridical Discourses in Sentencing Aboriginal Sex Offenders

In the previous chapter, I introduced the idea that 'noble savagism' was significantly altered by an awareness of the effects of contact with non-Aboriginal society, leading some colonial authorities to express concerns for protecting Aboriginal peoples while at the same time seeing the introduction of Western political structures to Aboriginal societies as beneficial. As the harmful effects of contact with Euro-Canadian society became an increasing concern for colonial authorities, images of the essential Aboriginal were gradually refined. Although one could discern the continued existence of the early colonial assumption that 'savagery' originated in pre-contact Aboriginal culture, the dwindling number of Aboriginal nations who maintained pre-contact cultural practices resulted in a shift of the locale of 'savagery' from pre-contact to post-contact Aboriginal communities. The belief that 'savagery' was an attribute introduced to Aboriginal communities by white society coincided with the emergence of the portrait of the 'noble savage' as a vanishing race.

Through the notion of the vanishing race, an image formulated and redefined through experiences with Aboriginal peoples in the era of assimilation, Aboriginal culture became mythologized, transformed into a symbol of Canada's 'noble' past. This change signalled a modification of the 'noble savage' stereotype, an adaptation that, this chapter will show, we are still in the process of developing. Images of Aboriginal culture were coming to reflect a contrast of the more 'noble' than 'savage' state of pre-contact existence with the more 'savage' than 'noble' attributes of post-contact Aboriginal communities. The essential Aboriginal came to be

construed as a formerly '*noble savage*' man¹⁹ in the state of nature, transformed into a '*noble savage*' by contact with and victimization by colonial society. Some contemporary racial discourses will thus be revealed to have built upon Western thought on Aboriginal '*otherness*' as '*noble savagism*', though adapted to explain post-assimilation era experiences with Aboriginal peoples. We will see how the period of assimilation has itself come to be deemed by some juridical discourses to be the source of Aboriginal '*savagery*'. This chapter will provide a more thoroughly developed assessment of how '*noble savagism*' has offered a filter through which Aboriginal peoples have been comprehended, establishing some potential ideological effects of these racial discourses.

This chapter will show that some of the assumptions that emerged in chapter two's assessment of the ideological trope of '*noble savagism*' continue to inform some judicial approaches to Aboriginal culture in the sentencing process, leading some judges to express an ambivalent attitude towards the Aboriginal peoples who appear before the courts. As a result, speaking of cultural differences may be a double-edged sword, for while the courts are taking Aboriginal culture into account, in doing so the judiciary are sometimes reproducing the ambivalence seen in chapter two in their assessments of Aboriginal sex offenders. This chapter will show that the continued presence of an ambivalent attitude towards Aboriginal peoples in some judicial discussions on Aboriginal culture raises numerous questions that suggest a need to carefully consider the assumptions that some judges are bringing to the sentencing process. My analysis of '*noble savagism*' within some contemporary judicial attitudes will suggest that the essential Aboriginal in contemporary juridical discourses is a victim of colonialism, one whose

¹⁹ I consciously use the term man here, as the '*noble savage*' stereotype is largely premised on an image of man in the state of nature. The place of women in this conception of Aboriginality is an area for future research, but beyond

'traditional' or 'noble savage', pre-contact way of life has been threatened by colonial practices that have fostered the conditions for the proliferation of unrestrained 'savage' alcohol-driven violent behaviours one currently sees in Aboriginal communities. In contemporary images of 'savagery', it is not necessarily the absence of a Western form of government that has fostered the conditions for 'savagery' as was the assumption in earlier discourses, but simply the absence of sufficient restraints on Aboriginal behaviours due to cultural and socio-economic devastation.

We saw in the previous chapter how images of 'nobility' are premised on a belief that Canada's Aboriginal peoples lived a simple or 'primitive' existence before contact with Europeans²⁰, representing a counter-image to all that is negative and corrupting in non-Aboriginal, or for our purposes Euro-Canadian, society. This chapter will demonstrate that in place of the term 'primitive', contemporary images of 'nobility' are expressed through the assumption that Aboriginal culture involves engaging in a 'traditional' hunting and gathering way of life, desiring 'healing' rather than retribution for wrongdoers, or, in a few cases, inhabiting a community that is isolated from mainstream Canadian society. Such euphemisms reflect a continued belief in the 'noble savagery' of Aboriginal peoples that maintain pre-contact cultural practices. In addition, a reflection on discursive references to the good character of Aboriginal sex offenders will reveal that images of 'noble savagery' underlie judicial accolades of Aboriginal peoples who appear to be visibly struggling to overcome past victimization.

the scope of this thesis.

²⁰ See comments of Justice MacIntyre of BC Supreme Court in *Delgamuukw v. B.C.* for a contemporary example of the assumption of the primitiveness of pre-contact Aboriginal nations: "It would not be accurate to assume that...[the] pre-contact existence [of the Gitskan and Wet'suwet'en] in the territories was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was [sic] not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, "nasty, brutish and short" (Tennant 1994: 9).

Judicial admiration for the Aboriginal sex offender who has maintained a job, served as a respected member of the community, or who is a healer or elder can constitute a modern image of the more 'noble' than 'savage' Aboriginal. The ideological effect of these racial discourses can be seen in judicial interpretations of why Aboriginal men engage in sexually violent behaviour and the role of the courts in addressing sexual violence in Aboriginal communities.

Throughout this chapter we will see how, much like many of their colonial predecessors, contemporary judges can hold ambivalent attitudes towards Aboriginal peoples who come before the courts: in sentencing Aboriginal sex offenders, the judiciary can express respect or even admiration for the 'nobility' of Aboriginal peoples and their community's resiliency and emphasis on 'healing' in the face of marginalization and colonial-related difficulties, yet many of these same judges will simultaneously suggest, explicitly or implicitly, that 'savage' impulse-driven behaviours such as alcoholism and violence can be construed in a fundamentally different manner when they occur in Aboriginal communities. One of the most worrisome and, in fact, frightening propositions that will emerge from this discussion, is how violence against Aboriginal women can at times be portrayed as if it were an unfortunate but somehow natural response to Aboriginal male hardships. Juridical discourses that highlight the 'nobility' of the Aboriginal sex offender's struggle against negative colonial influences can promote the assumption that Aboriginal men always possess the potential to engage in violence against women when colonial burdens become too debilitating and they have not received 'healing' of their colonial pain. In accounting for culture in the sentencing process, the judiciary may be highly attentive to Aboriginal cultural differences and the devastating effect of colonialism, but this attentiveness can obscure the complexities of sexual violence in Aboriginal communities and even trivialize the inherently heinous nature of all acts of sexual violence.

This chapter will suggest that although the judiciary are making a concerted effort to understand Aboriginal cultural differences, and are struggling to ensure the distinct needs of Aboriginal offenders are taken into account in sentencing, they are not always able to see Aboriginal men as autonomous, responsible adults, but instead may view Aboriginal sex offenders through the stereotype of the 'noble savage' as one who must, through the courts, be guided away from the colonial legacy and evils such as alcohol and sexual violence that were introduced to Aboriginal communities through colonial practices. The ideological effect of 'noble savagism' in contemporary juridical discourses then, can be seen in the assumption that ultimate jurisdiction over addressing sexual violence in Aboriginal communities must remain with the courts -- coinciding with assumptions underlying 'savagism' -- while simultaneously acknowledging that communities must play a more substantial role in addressing sexual violence -- suggesting references to 'nobility'. For the specific Aboriginal offender, the ideological effect can be reflected in the belief that while he has committed a 'savage' behaviour, his overall 'nobility' must be protected from the harmful effects of incarceration. Thus, this chapter will reveal the ambivalence within some juridical discourses in sentencing Aboriginal sex offenders, demonstrating the ideological effect of these racial discourses and, in doing so, point to the 'noble savagism' that can underlie judicial attitudes towards Aboriginal sex offenders.

A concern that this analysis will raise is that the terms of community involvement in the administration of justice are dictated by the courts, whose primary contact with Aboriginal communities is in dealing with the criminal behaviour of its inhabitants, suggesting a significant avenue through which a colonial ideology can influence the legal process. Some judges may rely on stereotypes that have been formulated in experiences with Aboriginal offenders to understand cultural differences, leading to a highly skewed view of Aboriginal culture drawn from

experiences with those in conflict with the law. This chapter will explore possible ideological effects that can result from interpreting cultural differences by references to experiences with Aboriginal offenders. Through 'noble savagism', I will reveal the tension within juridical discourses, in which each Aboriginal offender appearing before the court for expressing his rage and despair over colonial-related deprivations can be seen to demonstrate both the necessity of bringing Aboriginal communities into the sentencing process, yet also provides further evidence of the 'savagery' inherent to Aboriginal communities and thus the necessity of court intervention to ensure communities can respond appropriately to sexual violence.

Statement of Method

In order to establish the nature of 'noble savagism' in contemporary juridical discourses, I analyzed 60 sexual assault cases in which the Aboriginality of the accused was discussed. These cases emerged out of a keyword search of the Aboriginal law database on Quick Law. The keywords I used in my first search were sexual assault and culture/cultural. After reading through the cases that emerged from this initial keyword search, I went back to Quick Law to explore some of the noteworthy themes that were found in my analysis of this case law, expanding my data set to include what seemed to me in the context of these cases to involve less explicit references to attributes that have been associated with Aboriginality, using such terms as healing, circle, community, traditional, remote, isolated, alcohol and dysfunction/dysfunctional. If the specific case at hand did not involve a conviction for sexual assault it was excluded with the exception of two domestic violence cases, *R.v. Hunter*²¹ and *R.v. Naappaluk*²². These cases

²¹ [1997] A.J. No. 1215

²² [1994] 2 C.N.L.R. 143

were included due to their jurisprudential importance in assessing how Aboriginality should affect the sentencing process for cases involving violence against women.

Since I intended only to examine themes in judicial discussions on Aboriginality, I will be presenting only my findings related to 'noble savagism'. These findings do not provide a thorough analysis of all the data so that, for example, judicial attitudes that did not show signs of 'noble savagism' will not be presented here. While I recognize that resistance to these themes can be found within juridical discourses, it was beyond the scope of this thesis to explore discourses that challenged 'noble savagism'. Future research should be directed at exploring how juridical discourses and Aboriginal peoples are resisting the narrow interpretation of Aboriginal culture as occurs through 'noble savagism'. Further, my analysis of the case law is not representative of sentencing practices for Aboriginal sex offenders in general due to an unrepresentative data set. This analysis also does not compare Aboriginal and non-Aboriginal cases, nor does it take into account unreported case law. Only cases reported on the Aboriginal law database of Quick Law were examined. The main task of this chapter is to explore how the ambivalence found within 'noble savagism' can be present in some judicial attitudes, suggesting that historical understandings of Aboriginality can influence the way judges relate to the Aboriginal peoples that appear before them. This thesis will raise some important questions concerning the way judges comprehend Aboriginal culture in order to suggest some areas for future research, but cannot provide any conclusive findings on judicial attitudes due to an insufficient data sample.

Some of the major questions that emerged from this analysis include: how are judicial assumptions regarding attributes of Aboriginal communities influencing the sentencing process? How has the judiciary incorporated Aboriginal cultural values into the sentencing process and

what are some of the difficulties that emerge in doing so? Are judges more attentive to the Aboriginality of some Aboriginal offenders, such as those who fulfil stereotypes, than others? The following analysis will provide some ideas on avenues in which one can begin to commence a more thorough examination of these questions while raising some other more specific concerns along the way.

Major Findings

It became clear from an analysis of this case law that the culture of Aboriginal offenders was being taken into account in sentencing practices. However, the courts have left to judicial discretion the task of interpreting the relevance of Aboriginality to the sentencing process. Thus, it is unclear at this time if the comments that emerge from this case law are based on the attitudes of individual judges, which are significant in and of themselves, or are representative of juridical discourses in general. In 33 of the 60 cases analyzed, the Aboriginal status of the accused was highlighted, meaning that either the Aboriginality of the accused was mentioned from the outset, such as in *R.v. H.K.C.*²³: “The accused aboriginal pleaded guilty to sexual assault and assault”; or the context of the judgement suggested a great deal of emphasis on the Aboriginality of the accused, such as in *R.v. P.(J.A.)*²⁴ in which the judge provided a detailed discussion of the community of the accused and Tlingit cultural values. The accused was given a ‘non-conventional’ sentence, in other words, a conditional sentence, suspended sentence or a period of incarceration less than 2 years followed by a probation order, in 28 of these cases. Of these 28 cases, 18 involved returning the offender to the community for culturally appropriate treatment. A sentencing circle was held in 7 cases.

²³ [1997] S.J. No. 577

²⁴ [1991] Y.J. No. 180

The characteristics of the community of the accused were examined in 19 cases. 16 of these communities were labelled dysfunctional or suffering from high rates of alcoholism and violence. The fact that the community was remote or small was noted in 7 cases. Cultural differences were clearly demarcated in a way that supported Larrain's concerns on the essentialization of cultural differences in 12 cases, in other words, Aboriginal culture was portrayed as fundamentally different from Euro-Canadian culture. Of these 12 cases, in 5 cases the community's rejection of incarceration as an appropriate disposition for crimes committed by community members was noted. Terms such as 'healing', used in 16 cases, or references to a circle process, as occurred in 7 cases, were offered to suggest references to concepts often associated with Aboriginal judicial philosophies. The background of the accused, especially past victimization or feelings of despair at a life of hardship, was discussed in 11 cases. Attributes of the offender that can be linked with 'nobility' could be seen in references to the 'traditional', hunting and gathering lifestyle of the accused, as occurred in 13 cases. 15 cases involved references to the good character of the offender which, through 'noble savagism', took the form of accolades for the capacity of the accused to maintain employment despite hardships, and/or for his contributions to the community. An analysis of the ambivalence found within some judicial attitudes will provide examples of contemporary racial discourses in the sentencing process and will suggest some ideological effects of the continued presence of 'noble savagism' in judicial attitudes towards Aboriginal peoples.

'Noble Savagism' in Juridical Discourses

The decision of Justice Johnstone in *R.v. A.G.A.*²⁵ expresses a desire to provide a sentence that respects the wishes of the community of the accused. However, in doing so, he addressed the wishes of some community members while ignoring the concerns of others. Nevertheless he portrayed the sentencing outcome as one that reflected the wishes of the community. In giving the accused a 23 month conditional sentence, he accepted the position of the defence as articulated here, while ignoring the concerns of some Elders as presented by the Crown, suggesting he held an ambivalent attitude towards community input:

The defence argues that this is a unique situation that warrants special consideration. The Accused is not a youth, he is an active, viable member of the community. A sentence served in the community would embrace the aboriginal healing philosophy. Further, the Accused is ready, willing and able to comply with the conditions and has the support of his community in doing so. In contrast, Crown argues that the community requires incarceration to satisfy the principle of deterrence and provided the Court with four statements secured from Elders on the A. Reserve to this effect (at paragraph 60).

Justice Johnstone's comments provide an example of an ideological effect of 'noble savagism' in contemporary juridical discourses, in that while he sought to recognize Aboriginal culture and the needs of the community, he seemed to assume that he could be an appropriate arbiter in determining who speaks for the community.

The attitude of Justice Johnstone in *A.G.A.* can be linked with the ideological effect of 'noble savagism' as established in chapter two, for while he suggested a need to respect the wishes of the community, he has assumed the courts can accurately and neutrally promote the aspirations of the community to deal with sexual violence, a similar attitude to that of some colonial authorities who presumed the Crown could protect Aboriginal interests while

²⁵ [1998] A.J. No. 282

encouraging the introduction of Western political structures to Aboriginal societies. Justice Johnstone noted the submission of Chief A. that “The process his community wishes adopted and which he recommends to the Court is one, not of ostracization, but rather one that finds a solution through the intervention of the elders of the community” (at paragraph 54). An image of Aboriginality as ‘otherness’ underlies Justice Johnstone’s decision that the community members who offered to provide a radically different form of justice from that proposed by the ‘conventional’ criminal justice system were representative of the community. An analysis of the judicial attitude seen in *A.G.A.* through ‘noble savagism’ suggests that the input of those community members who articulated a desire to administer a substantially different form of justice from that of the Canadian criminal justice system was recognized. However, his comments also served to obscure the voices of those Elders who requested incarceration, suggesting the potential for ‘noble savagism’ to render invisible those who did not provide a presentation that coincides with images of the ‘noble savagery’ of Aboriginal culture. The ideological effect of ‘noble savagism’ in this case is to interpret the community as represented by those members who spoke of a desire to ‘heal’ and a rejection of incarceration, thus imposing his conception of Aboriginal communities onto the Aboriginal peoples who appeared before him in *A.G.A.* Thus, Larrain’s concerns that attentiveness to culture can entail ‘othering’ are supported by *A.G.A.*, in which Aboriginal voices were filtered through the ideological trope of ‘noble savagism’ and as a result, the voices of community members who did not offer a radically different perspective on how to deal with sexual violence were ignored.

Justice Laycraft's rejection of the disposition proposed involving the Inumarit Committee in *R.v. Naqitarvik*²⁶ demonstrates an ideological effect of 'noble savagism'. While he expresses a desire to promote Aboriginal cultural values in the sentencing process, he assumes the courts can legitimately define which structures reflect Aboriginal cultural values:

The modern reincarnation in Arctic Bay of the traditional Inumarit Committee resembles the usual community counselling service rather than the traditional governing and counselling body of earlier times. I am unable to see, given its recent origin, the community which it serves, its methods of operation, and the absence of the traditional ultimate sanction on the offender, that it is a remnant of ancient culture (at paragraph 9, assigned by author).

We can link Justice Laycraft's attitudes to the ideological effect seen in the previous chapter, for he seems to accept that Aboriginal peoples should be given a voice in the sentencing process, and yet he sees himself as holding the final word in establishing when those voices should be taken into account. Justice Laycraft's racial discourse transmits a belief that Aboriginal culture is static, while the possibility that the Inumarit Committee is a once 'traditional' structure that has adapted to societal changes was not considered. He pointed out the modernity of the community as demonstrating that the community's submissions were not relevant, showing references to images of the 'noble savage' as seen in chapter two:

The witnesses in this case do not describe a culture markedly different than that in the rest of Canada. Rather the incident itself arose as the victim and her sister played music on a modern player for which there was an electric cord. The complainant of sexual assault was conveyed to the police by telephone and the victim was taken to a modern nursing station for examination and treatment. Both victim and accused have at least grade school education. A large and modern mine is in the vicinity and several of the witnesses, including the accused, had worked there at some time (at paragraph 5, assigned by author).

²⁶ [1986] N.W.T.J. No.4

Naqitarvik suggests that judicial efforts to bring Aboriginal culture into the sentencing process may be a double-edged sword in some instances, for speaking of culture may, through racial discourses, also be a means by which the judiciary can impose their image of Aboriginal culture onto the Aboriginal peoples that appear before them.

Justice Laycraft's assumption that Aboriginal culture is 'ancient' can also be found in *R.v. P. (J.A.)*²⁷, in which the accused received a suspended sentence: "In recent years, due largely to the efforts of the elders, the traditional community structure has been revived. The authority and position of the five clan leaders have been restored" (at paragraph 10, assigned by author²⁸). We can see the ideological effect of 'noble savagism' here, in that Aboriginal culture was interpreted as involving pre-contact social structures, a discursive reference to the 'noble savage', while the judge's belief that he/she could accurately depict Aboriginal structures as involving a "restoration" of pre-contact structures bears the markings of the assumptions of Crown sovereignty that is one manifestation of 'savagism'. The juridical discourses seen in *A.G.A., Naqitarvik and P. (J.A.)* suggest a need for research to establish if judicial interpretations of Aboriginal culture and communities are preventing some communities from participating in the administration of justice: in other words, are some communities being barred from accessing the right to deal with offenders because their presentations do not appear to coincide with images of the 'noble savage'?²⁹.

²⁷ *supra* note 24.

²⁸ Where Quick Law did not assign paragraphs to the case, I assigned a paragraph number.

²⁹ A similar difficulty can be seen in land claim cases, which require Aboriginal nations to demonstrate usage of the land under dispute before the Crown's assertion of sovereignty. Thus, Crown sovereignty over Aboriginal lands is presumed, placing on Aboriginal peoples the burden of proof to provide evidence of pre-contact usage of the land. See *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

Justice Vertes comments in *R.v. J.S.*³⁰ reflect the paternalistic attitudes that underlie 'noble savagism'. He expresses the belief that communities must be encouraged by the courts to take responsibility for addressing sexual violence and to recognize why sexual assaults must not be tolerated:

It seems to me that if the court can help the victims reconcile themselves with the accused, if the court can help the community understand that what the accused did was wrong and why it was wrong, and if the court can help the community understand that there are things that have to be done on a permanent basis to overcome any repetition of that type of conduct, then we will, in cases such as this, do a better service to the community than simply by sending someone to jail (at paragraph 16, assigned by author).

Justice Vertes expresses a desire to make the community a part of the criminal justice process, while he ambivalently conveys the belief that J.S.'s community is not yet prepared to properly deal with sexual violence and must be encouraged to do so by the courts. The potential that perhaps the education level or attitudes of the community towards sexual assault is not the reason for an inadequate response to sexual violence is not considered. An ideological effect of this racial discourse is to promote the assumption that Aboriginal peoples sometimes appear before the courts for sexual violence because the community is not properly educated on how to address sexual assault. Thus, while we can link to 'nobility' Justice Vertes' belief that communities must play a significant role in addressing sexual violence, he also assumes that the courts must hold jurisdiction over sexual violence in Aboriginal communities, handing over control to communities when judges have deemed communities to be adequately prepared, an attitude we have established to be drawn from 'savagism'. In speaking of cultural differences then, communities may risk being portrayed as uneducated or unconcerned about sexual violence.

³⁰[1992] N.W.T.J. No. 62

Justice Vertes stated that, “[J.S.] has also lived his life in the traditional way by hunting, fishing and trapping to provide for his family” (at paragraph 13, assigned by author) suggesting a reference to the ‘noble savage’ stereotype as established in chapter two. This racial discourse transmits a belief that recognition of Aboriginality entails an acknowledgement of the way of life of the accused, which coincided with the ‘noble savage’ stereotype. An ideological effect of this perspective on ‘noble savagism’ is that encounters with Aboriginal sex offenders who engage in a ‘traditional’ way of life can be mediated by an assumption that Aboriginality involves engaging in a particular lifestyle commonly associated with Aboriginal culture. Thus it may be observed that one attribute of contemporary images of the ‘noble savage’ is seeking to maintain a ‘traditional’ way of life. Sexual violence in Aboriginal communities, when examined through ‘noble savagism’ may be understood to be the ‘savage’ act of an otherwise ‘noble’ offender: or the act of the ‘noble savage’. This raises the question, are judges more attentive to the Aboriginality of those who fulfil the ‘noble savage’ stereotype, such as those engaging in a hunting and gathering way of life?

The ambivalence of ‘noble savagism’ is particularly apparent in Justice Vertes assessment of the accused:

I am also sure that being in front of his community, the people with whom he has lived all his life, and admitting his guilt before the people of this small and still very much traditional Inuit community, the accused has undoubtedly felt shame and it has made him realize how wrong his actions were (at paragraph 18, assigned by author).

While he has acknowledged the cultural distinctness of the accused through a reference to attributes associated with the ‘noble savage’, he also recognized the ‘savagery’ of his behaviour suggesting the ‘noble savage’ stereotype underlies Justice Vertes interpretation of the relevance of J.S.’s Aboriginality. Thus, attentiveness to cultural differences may be a double-edged sword,

for in speaking of culture there is the risk of stereotypical images influencing the judge's assessment of the Aboriginality of the accused.

The comments of Justice McGillivray in *R.v. Curley, Issigaitok and Nagmalik*³¹ illustrate this double-edged sword in speaking about culture. The trial judge argued that because "...the morality or values of the people here are that when a girl begins to menstruate, she is considered ready to engage in sexual relations" the offenders should be returned to the community as quickly as possible "...with this lesson tucked securely under their belts" (at paragraph 13, assigned by author). Justice McGillivray's attempts to articulate cultural differences in this case also involved the denigration of the culture of the offenders. A message of cultural inferiority seems to underlie Justice McGillivray's assertions that:

What [the trial judge] said was that the accused were ignorant of that law and that ignorance is relevant to sentencing as a mitigating factor just as deliberate flouting of the law is relevant as an aggravating factor. He recognized and we recognize that knowledge of the law is an evolving factor. This case will assist the community to better understand the law (at paragraph 11, assigned by author).

Justice McGillivray ambivalently desires to respect the cultural differences of the accused men, but in doing so he denigrates their culture as more accepting of sexual relations with young girls. His comments discursively transmit the assumption that Canadian law must teach the offenders' community appropriate sexual behaviour. An ideological effect of 'noble savagism' as seen in this case is the interpretation of Aboriginal culture as an appropriate consideration in establishing the culpability of the offenders for sexual violence. *J.S.* and *Curley* raise a concern regarding judicial interpretations of Aboriginal culture: how do attitudes towards Aboriginal peoples

³¹ [1984] 4 C.N.L.R. 72

nurtured in our colonial history influence contemporary judicial perceptions of the culture of Aboriginal offenders from more isolated communities?

Justice O'Regan's highly ambivalent comments in *R.v. S.R.*³² articulate a belief that the accused was driven to sexually violent behaviour by inhabiting a particular community: "When he and his family moved from the country to the community the path of alcohol abuse and violence commenced. Indeed Mr. R. said he was sexually abused by another Innu in the community after leaving the traditional lifestyle" (at paragraph 18). In Justice O'Regan's racial discourse, S.R.'s move to the community was portrayed as a catalyst for his alcoholism and violent behaviour, while imagery of 'noble savagery' lost to the influences of 'savagery' underlies his discursive connection between the loss of a 'traditional' lifestyle and the commencement of abuse. The ideological effect of Justice O'Regan's comments shows the ambivalence within 'noble savagism', for while a 'traditional', or 'noble savage' pre-contact lifestyle was interpreted as having protected the accused from harm, it was the 'savage' influences of life in a post-contact Aboriginal community that were construed to have ultimately been the source of this harm. A question that emerges from this case is are communities being blamed for the behaviour of their inhabitants?

Comments by Territorial Court Justice Lilles in *P.(J.A.)*³³ demonstrate how community conditions can be offered as a means of explaining the alcoholism and resulting sexually violent behaviour of Aboriginal offenders in a way that suggests the presence of 'noble savagism'. While colonialism is implicitly deemed to be the ultimate source of Aboriginal difficulties, it is the alcoholism of community residents that is offered as the cause of continued hardships as seen

³² [1994] N.J. No. 118

³³ *supra* note 24.

in this comment: “Alcohol was the catalyst – social deprivation was the consequence” (at paragraph 11, assigned by author). Justice Lilles’ decision shows ambivalence in that while he recognizes that the community has experienced hardships, he blames the symptom of deprivation, alcohol, for these difficulties. Margo Nightingale found that in sentencing Aboriginal sex offenders, judges tend to identify intoxication as “...a cultural attribute of Native society” (1991: 84) suggesting one ideological effect of this linkage in juridical discourses between Aboriginal hardships and alcoholism. An ideological effect of the comments seen here is to interpret alcohol as the cause of continued hardships in Aboriginal communities, obscuring the larger context in which sexual violence and alcoholism occurs.

Justice O’Regan’s linkage between alcohol and sexual violence in Aboriginal communities in *R.v. Green*³⁴ further illustrates this theme in juridical discourses:

The severity of this sexual assault once again brings forward the drastic affect [*sic*] of alcohol abuse on the Inuit community in Labrador. Counsel have provided me with authorities on sentence [*sic*] in Labrador for similar offences. Not surprisingly, all involve the use and abuse of alcohol by both the perpetrator and in some cases the victim (at paragraph 5).

According to Justice O’Regan, alcohol has caused the current problems in Aboriginal communities, failing to consider if alcohol is a cause of sexual violence or a symptom of more substantial problems. An ideological effect of this racial discourse is that, in connecting the behaviour of the accused and sexual violence in general with alcoholism in the community, he/she is confirming the “drunken Indian” stereotype, interpreting the offender as yet another “drunken Indian” turned sex offender. A second ideological effect is found in his ambivalent attitude towards the community of the accused, for he exhibits a desire to acknowledge the hardships of life in Aboriginal communities, while suggesting the problem ultimately lies with

the alcoholism of the residents of Aboriginal communities. This would seem to suggest an assumption that treating the symptom of hardships, alcoholism, may be considered an appropriate response to sexual violence. The juridical discourses in *S.R.*, *P.(J.A.)* and *Green* raise the question, how are judges establishing the relevance of community conditions in sentencing Aboriginal sex offenders?

Aboriginality, Alcohol and Sexual Violence

My experience with rape down south [Ontario] is different from the reality of rape up here [Northwest Territories]. In most cases down south there is violence apart from the rape that's involved. Up here you find many cases of sexual assault where the woman is drunk and the man's drunk (Territorial Court Judge Michel Bourassa as cited in Nightingale, 1991: 73).

This section will suggest that when intoxication is an element of the crime of the Aboriginal sex offender, the judiciary may place overwhelming focus on the experiences of the accused as an Aboriginal person, highlighting the connection between the sexually violent behaviour of Aboriginal peoples and the tendency of Aboriginal peoples to turn to alcohol to ease their colonial despair. Through 'noble savagism', alcohol abuse has apparently been accepted as one means by which Aboriginal men respond to the struggles of colonialism, portrayed in juridical discourses as if it were a cure to the hangover of colonial policies. The 'drunken Indian' stereotype will be shown here to be one derivative of imagery of the 'noble savage', for in the intoxicated Aboriginal sex offender, some judges ambivalently see both a portrait of lost 'noble savagery' and the cause of the proliferation of 'savagery' in Aboriginal communities. Thus, an analysis of some judicial assessments of Aboriginal sex offenders will suggest that, through 'noble savagism', removal of alcohol may be perceived as sufficient to turn

³⁴ [1998] N.J. No. 158

the Aboriginal sex offender into a valuable member of the community, essentially cured of colonial-related ills. In 33 of the 60 cases, the judge mentioned alcohol; either the offender's intoxication during the sexual assault as occurred in 28 cases, and/or his alcohol problem as was articulated in 8 cases. In 4 of these 33 cases, the absence of alcohol was considered noteworthy. Alcohol was deemed to be the explanation for, or a significant contributing factor, in 8 cases. The disposition emphasized treatment of the offender's alcohol problem as the primary goal in 5 cases. A community-based sentence was given in 16 cases, 10 of which were non-custodial.

We see references to 'noble savagism' in *R.v. Peter*³⁵, for while Justice Vertes acknowledges the damage caused by the violent behaviour of the accused, he ambivalently construes the accused as having been driven to such behaviour, suggesting underlying 'noble savagery'. 'Noble savagery' is more clearly seen in the judge's assertion that: "He comes from a well-respected local family, and continues in the traditional way by hunting and providing food for his extended family" (at paragraph 8). Justice Vertes asked the court to consider "How is he ever to replace all of this hurt that he caused just because he was drinking and could not control himself?" (at paragraph 7). Justice Vertes has assumed alcohol causes sexual violence, thus diminishing the capacity of Peter to exercise agency, while referring to Aboriginal culture as a means of justifying this highly problematic interpretation of the offender's culpability. This encounter with the stereotypical "drunken Indian" was mediated by an assumption that alcohol caused the accused to lose control and engage in sexually violent behaviour, suggesting the absence of restraints on the sexuality of the accused, thus demonstrating an ideological effect of 'noble savagism' in judicial interpretations of the culpability of Aboriginal sex offenders. The comments in *Peter* would suggest that through 'noble savagism' the essential Aboriginal is

discursively deemed to be one who has a tendency to abuse alcohol in order to soothe his colonial ills, and as a result is less capable of self-control. Through 'noble savagism', the responsibility of individual Aboriginal males for sexually violent behaviour may be diminished when the accused was intoxicated, and instead alcohol, and the conditions that have motivated him to drink, may be assigned blame.

An analysis of the judicial attitudes expressed in *R. v. Naappaluk*³⁵ illustrates a contemporary discursive manifestation of the 'noble savage' stereotype. Justice Dutil recognizes the 'noble savagery' of the accused and expresses a concern for protecting Naappaluk from the harmful effects of incarceration, an idea that resonates with attitudes seen in chapter two:

Like just about all the people of Nunavik, the only language he speaks fluently and with ease is Inuktitut. Where can we find the assistance he needs? There are not very many solutions to his problem. I could send him back to prison, in Amos or Waterloo, fifteen hundred (1500) kilometres south of his home town. He would waste away here until his prison term expired. He could not get the same help as that given to a person who speaks either French or English. Such help does not exist in Amos, or in Waterloo, where nobody speaks Inuktitut (at paragraph 11, assigned by author)

Justice Dutil appeared unsure of how to deal with the 'noble savage' accused before him for violent behaviour, but who was not the stereotypical "drunken Indian": "He loves his family, but does not understand his own behaviour. Yet he says he does not abuse alcohol or drugs" (at paragraph 8, assigned by author). His ambivalent attitude towards the accused can be seen in his acknowledgement of the harm of his behaviour: "The problem, apparently, is that he is unhappy. Because of this, he becomes violent and causes a great deal of trouble for his family, and consequently, for his community" (at paragraph 9, assigned by author).

³⁵ [1993] N.W.T.J. No. 53

³⁶ [1994] 2 C.N.L.R. 143.

Justice Dutil expresses a desire to ensure the culture and unique needs of the Aboriginal sex offender before him are taken into account, while also seeking to acknowledge the harm of his violent behaviour, suggesting an image of a 'savage' behaviour by a 'noble savage' offender. Through the colonial gaze, the inherently 'savage' nature of sexual violence is juxtaposed with the positive, admirable qualities of the sex offender in a way that reflects the ambivalence of 'noble savagism'. References to the violence of a sexual offence reflect 'savagery' in the presence of ambivalence. Justice Dutil's interpretation of the offender's Aboriginality promoted the assumption that unhappiness leads to violence in Aboriginal men, while failing to articulate why this unhappy accused engaged in violence while many do not. The ideological effect of Justice Dutil's interpretation of the Aboriginality of the accused reflects a desire to protect the 'noble savagery' of the accused from the harm of incarceration, while also acknowledging the 'savage' behaviour of an unhappy Aboriginal male.

Justice Goodridge's discourse in *R.v. G.A.*³⁷ also shows the ambivalence of 'noble savagism' for while he acknowledged that G.A. had a previous conviction for sexually assaulting the same victim, his step-daughter and "...had been sentenced twice to "supervised probation" but obviously has not profited by such sentences" (at paragraph 27), he ultimately accepted the conclusions of the sentencing judge that:

The healing process for G.A., for his family and whole community will be a long process but it must start when these matters come to court with a person being held accountable for the matter in which they have harmed children and I will reduce the sentence that should apply in a case like this because G.A. has demonstrated he is willing to receive healing. ...I have an understanding of Mr. A that he will become a good father and provider for his family (as cited at paragraph 32).

³⁷ [1994] N.J. No. 19

Justice Goodridge and the sentencing judge are discursively transmitting a belief that while the seriousness of the behaviour of the accused must be acknowledged by bringing the offender before the court, it must also be recognized that the accused desires to be 'healed' and thus, once 'healed', can become a good father and provider, suggesting an image of a 'savage' behaviour by a 'noble savage' offender. The ideological effect of the racial discourses seen here is to interpret the sexually violent behaviour of the accused as suggestive of a need for 'healing', while the 'healing' process is ambivalently construed as beginning with the courtroom process, assumptions that were shown in chapter two to be derived from 'noble savagism'. Thus, despite a recognition of the needs of the Aboriginal accused for 'healing', Justice Goodridge envisions the courts as the primary forum through which 'healing' must commence.

In *R.v. S.G.N.*³⁸, the trial judge stated that the difficulties faced by Aboriginal communities were relevant only where there is "...strong evidence that the accused was intoxicated or acting out of [a] sense of hopelessness" (at paragraph 17). In rejecting the relevance of the accused's Aboriginal status, the appellate judge stated that, "It was apparent that although the appellant's early life may have been marked by deprivation, the evidence does not suggest that he himself fell victim to alcohol or sexual abuse" (at paragraph 18). These comments show an ambivalent desire to recognize his early life of deprivation, while denying these hardships constituted victimization. The trial judge construed intoxication and despair as demonstrating the status of an Aboriginal offender as a victim, raising the question: does the accused need to appear as the "drunken Indian" or as a demoralized victim to have one's Aboriginality taken into account? S.G.N.'s Aboriginality was considered legally relevant only if

³⁸ [1999] B.C.J. No. 2840

his behaviour could be understood through an ideology that connected sexual violence and Aboriginality with alcohol use, victimization and unhappiness.

Justice Ryan asserts in *R.v. Augustine*³⁹ that: “I recognize the lifestyle of Mr. Augustine and the background of his way of life on the reservation, the abuse, the drinking, the taking of drugs but, in my view, these are not mitigating factors that should reduce any sentence to be imposed for manslaughter”⁴⁰ (at paragraph 32). Justice Ryan expresses feelings of ambivalence towards the accused, seeking to acknowledge the hardships of the life of the accused as an Aboriginal person, but establishing the ‘savagery’ of his behaviour to outweigh consideration of these factors. A potential ideological effect of ‘noble savagism’ is the interpretation of the behaviour of the accused as inextricably linked to his uniquely Aboriginal experiences of hardship, thus diminishing the individual responsibility of Aboriginal sex offenders.

Thus, the discursive references to alcohol and Aboriginality seen here signify the presence of a colonial ideology through which some judges are viewing Aboriginal sex offenders. The connection between Aboriginality and alcohol in juridical discourses is more than simply a reference to the pejorative ‘drunken Indian’ stereotype. Alcoholism and sexual violence become, through the colonial gaze, representative of both Aboriginal ‘savagery’ and their ‘noble savage’ potential. The sex offender who conveys an image of a ‘noble savage’ offender may be construed as requiring the restoration of his lost ‘noble savagery’ in order to prevent further ‘savagery’, leading some judges to ambivalently express condemnation of their ‘savage’ behaviour but admiration for their ‘noble savage’ potential. Thus another question

³⁹ [1999] N.B.J. No. 541.

⁴⁰ The case involved a manslaughter motivated by the victim’s attempt to stop the accused who was in the midst of sexually assaulting a woman.

raised by this analysis is how does alcohol affect judicial understandings of Aboriginal sex offenders?

Acknowledgement of the good character of Aboriginal sex offenders may involve an expression of admiration for the capacity of the accused to overcome past victimization, such as in *R. v. J.D.G.*⁴¹. The ideological effect of the comments here is seen in the assumption that many Aboriginal peoples who have endured abuse are doomed to a life of alcoholism, unemployment and irresponsibility:

He came from a very unfortunate background. Notwithstanding this, however, he is always gainfully employed and is described by some of the witnesses who were called at the trial as being very responsible. The accused comes from a very dysfunctional background and apparently suffered neglect, emotional and physical abuse at the hands of his birth parents and various foster placements as well as alleged abuse by two of his older brothers. Notwithstanding his dysfunctional background, he has, with the help of his wife, R.M., completely turned his life around. He has beaten his alcohol and drug problem; he has gainfully employed for the past six years; he has supported his two children on a regular basis (at paragraph 4).

The comments in *J.D.G.* show ambivalence, for while he seemed to promote a modern image of 'noble savagery' by acknowledging the difficult background of the accused and remarking on his success at overcoming these hardships to become a responsible person, he concluded that: "In my view however, circumstances in this case are so egregious that the sentence imposed on the accused for this offence should be greater than [sic] a sentence of two years less one day" (at paragraph 27).

The ambivalence of 'noble savagism' can be seen in Justice Wachowich's judgement in *R. v. S.A.*⁴², for while he condemns the horrific behaviour of the accused in the final sentence, he emphasizes 'noble savage' characteristics such as good character and a 'traditional' way of life

⁴¹ [1999] B.C.J. No. 1625

as justifying a conditional sentence for his sexual assault of his daughter. In Justice Wachowich's discussion of the Aboriginality of the accused, he refers to S.A.'s fight to overcome the consequences of past governmental practices, admiring S.A.'s 'noble savagery' at doing so, while portraying his sexually violent behaviour as a manifestation of past practices, showing an ideological effect of 'noble savagism' in his portrayal of S.A.'s 'savage' behaviour as the result of a lost fight to overcome past hardships:

Some of the reasons why I feel that this is fair and just are as follows: You came to this community not of your own free choice but you were forced by a government to settle here. You came to this land and accepted challenges of hardship. For 64 years you were an honourable man, you were the proud father of children and the proud grandfather of 12 grandchildren. You were a hunter in the tradition of your race, but also you were a leader in your community. You served on the council of the hamlet, you assisted National Parks Commission and you were the leader in the exiled group looking for compensation. All this time you remained with your wife and your children, you witnessed her sad death, you worked hard and learned how to operate heavy equipment, and you gained a reputation of being a generous honest and reputable man and for 64 years people could have looked up to you. Then you brought shame upon yourself and your family and you ruined your reputation for a shameful act that brings you here today (at paragraph 5).

An ideological effect seen here is an interpretation of the offender's sexually violent behaviour as an outgrowth of the forced relocation of his family in earlier times, and a suggestion that past victimization meant the accused had engaged in 'savage' violent behaviour because he had not been 'healed' of his pain. The sentence, offered as an apology for historical wrongdoings, was deemed necessary given the hardship endured by the accused. The saga of his fight to maintain his 'noble savagery' despite past injustices was highlighted in a way that suggested references to 'noble savagism'. Justice Wachowich's comments show ambivalence in seeking to condemn 'savage' behaviour while recognizing the offender's 'noble savagery'.

⁴² [1998] N.W.T.J. No. 32

Conclusions

The essential Aboriginal appears in some contemporary juridical discourses drawn from 'noble savagism' to be a 'noble savage' as a victim of colonialism, and as such is a potentially 'savage' aggressor if not 'healed' of his colonial pain. Treatment of an alcohol problem or other symptoms of colonial victimization then, may be seen as sufficient to transform the Aboriginal sex offender into a respectable member of the community, cured of his colonial-related ills and thus able to control his behaviour. Through the colonial gaze, his Aboriginality is legally relevant only when the judiciary can recognize his 'noble savagery', in which positive attributes outweigh the 'savagery' of his behaviour. The essential Aboriginal in 'noble savagism' must be stripped of his capacity to act as an agent of his own fate and ascertained to be just another out of control Aboriginal, driven to 'savage' acts by difficult living conditions. In having his Aboriginality recognized by the courts, he is also confirming judicial stereotypes and must accept the judiciary's interpretation of the relevance of his Aboriginality. The essential Aboriginal provides an image, not of Aboriginal self-identity, but a portrait of what he can tell us about ourselves: we are enlightened, culturally sensitive, concerned about rectifying past wrongdoings. When the judiciary strive to correct past injustices without self-reflexively assessing the assumptions that are guiding this attempt, even well-meaning judges may be repeating the mistakes of our colonial predecessors.

Concluding Remarks

We have found that the judiciary can unknowingly reproduce the ambivalence seen in 'noble savagism', suggesting some potential problems that emerge in judicial efforts to take Aboriginal culture into account in the sentencing process. This analysis has shown that some judges are unaware of the assumptions that are influencing their interpretations of the Aboriginal

peoples that appear before them. We saw how some judges have difficulty recognizing the Aboriginality of those who did not appear as a 'noble savage', suggesting that the Aboriginal status of some offenders is not being taken into account while for others, Aboriginality is being deemed legally relevant in a way that suggests references to stereotypical images of the essential Aboriginal. So while judges clearly are concerned about addressing the unique needs of Aboriginal offenders, sometimes it is judicial interpretations of the relevance of Aboriginality that guide the approach more than the Aboriginal peoples who appear before the courts.

Some tentative conclusions can be suggested by my findings. Experiences with Aboriginal offenders do appear to be influencing the way some judges relate to the Aboriginal peoples that appear before them, leading to a limited and problematic interpretation of Aboriginal culture. In particular, community conditions appear at times to be misconstrued as a cultural trait of Aboriginal peoples. Further, the agency of Aboriginal sex offenders can be diminished in the judicial emphasis on cultural and socio-economic devastation and the symptoms of community difficulties as the cause of sexual violence. In seeking to be culturally sensitive, judges often turn to stereotypes in assessing the Aboriginality of sex offenders, thus providing dispositions that reflect judicial perceptions of Aboriginal peoples more than Aboriginal peoples' articulation of their needs.

A substantial limitation of this thesis is an inability to consider the place of Aboriginal women in these juridical discourses. While it appeared many Aboriginal victims were invisible in these judicial discussions of Aboriginality, it was beyond the scope of this thesis to explore the issue of gender. However, there is clearly a substantial need to undertake research to explore how Aboriginal women's experiences are seen in 'noble savagism', and how this influences the sentencing process for sexual violence in Aboriginal communities. In addition, it would appear

that urban Aboriginals might be excluded from these juridical discussions of Aboriginal culture, suggesting a second area for future research. Further, research should be directed at the connection between judicial interpretation of sexual violence and the response to sexual assaults against Aboriginal women. The colonial ideology as explored here is only one filter through which Aboriginal sex offenders can be understood, suggesting a need to assess how other ideologies influence the sentencing outcome. Thus, this thesis only explores one particular aspect of sentencing Aboriginal sex offenders, the presence of 'noble savagism', in order to suggest a few of the issues that need to be addressed by future research.

List of Sources

Anderson, Chris. "Governing aboriginal justice in Canada: Constructing responsible individuals and communities through 'tradition'" (1999) 31 Crime Law and Social Change 4.

Aristotle. "Politics. Book One." (1993) Translated by B. Jowett [<http://classics.mit.edu/Aristotle/politics.html>] (26 Jun. 2000)

Berkhofer, Jr., Robert .F. The White Man's Indian: Images of the American Indian from Columbus to the Present (New York: Alfred A. Knopf, 1978).

Bhabha, Homi .K. The Location of Culture (London: Routledge, 1994).

Bumiller, Kristin. "Rape as a Legal Symbol: An Essay on Sexual Violence and Racism" (1987) 42 University of Miami Law Review 75.

Derrida, Jacques. Writing and Difference Translated by Alan Bass (Chicago: Chicago University Press, 1978).

Fleras, Augie. "Stereotypes" Communications in Canadian Society. (1995) [<http://www.media-awareness.ca/eng/issues/minrep/issues/stereotype.htm>] (25 Jun. 2000).

Foucault, Michel. The Archaeology of Knowledge Translated by A.M. Sheridan Smith (London: Routledge, 1972)

Foucault, Michel. The History of Sexuality Volume 1: An Introduction Translated by R. Hurley (Toronto: Random House, 1978).

Gilmen, Sander .L. Difference and Pathology: stereotypes of sexuality, race and madness (Ithaca: Cornell University Press, 1985).

Green, L.C. and Olive .P. Dickason. The Law of Nations and the New World. (Edmonton: University of Alberta Press, 1989)

Harris, Angela. "Race and Essentialism in Feminist Legal Theory" in R. Delgado (ed.), Critical Race Theory: The Cutting Edge, (Philadelphia: Temple University Press, 1995).

Hobbes, Thomas. "The Leviathan" (1998) [<http://www.library.adelaide.edu.au/etext/h/h68l/>] (26 Jun. 2000).

LaPrairie, Carol. and Julian V. Roberts, "Circle Sentencing, Restorative Justice and the Role of the Community" (1996) Submitted to Canadian Journal of Criminology.

LaPrairie, Carol. Seen But Not Heard: Native People in the Inner City, (Ottawa: Department of Justice, 1994).

LaRocque, Emma D. "Violence in Aboriginal Communities" Final Report of the Royal Commission on Aboriginal Peoples (Ottawa: National Clearinghouse on Family Violence, 1994).

Larrain, Jorge. Ideology & Cultural Identity: Modernity and the Third World Presence, (Cambridge: Polity Press, 1994).

Locke, John. "The Second Treatise of Civil Government" [<http://www.swan.ac.uk/poli/texts/locke/locke04.html>] and [<http://www.swan.ac.uk/poli/texts/locke/locke07.html>] (26 Jun. 2000).

Mason, John Hope. The Indispensible Rousseau, (London: Quartet Books Limited, 1979).

Miller, J.R. Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada, (Toronto: University of Toronto Press, 1989).

Morgan, Lewis Henry. Ancient Society, (Cambridge: Harvard University Press, 1964).

Nightingale, Margo L. "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa Law Review 1.

Ottawa Citizen Online. "Images on screen promote aboriginal cliches." Feb. 12, 1997. [<http://www.media-awareness.ca/eng/issues/resource/articles/cliche.htm>] (26 Jun. 2000).

Pearce, Roy Harvey. Savagism and Civilization: A Study of the Indian and the American Mind, (Baltimore: The John Hopkins Press, 1965).

Rousseau, Jean-Jacques. "A DISCOURSE ON A SUBJECT PROPOSED BY THE ACADEMY OF DIJON: WHAT IS THE ORIGIN OF INEQUALITY AMONG MEN, AND IS IT AUTHORISED BY NATURAL LAW?" Translated by G.D.H. Cole [http://www.constitution.org/jjr/ineq_03.htm] (21 Aug. 00).

Royal Commission on Aboriginal Peoples. "Volume 1 – Looking Forward, Looking Back" Royal Commission on Aboriginal Peoples – Final Report (1996) at [<http://www.indigenous.bc.ca/v1/Vol1Ch5s2to3.4.asp>] (25 Jun. 2000).

Said, Edward. Orientalism, (Harmondsworth: Penguin, 1978).

Smith, Derek G., Editor, Canadian Indians and the Law: Selected Documents, 1663-1972, (Toronto: McClelland and Stewart Limited, 1975).

Tennant, Chris, "Indigenous Peoples, International Institutions, and the International Legal Literature" (1994) Human Rights Quarterly 16.

Thompson, John B., "Language and Ideology: A Framework for Analysis" (1987) 35 Sociological Review 3: 516-536.

Tobias, John L., "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Sweet Promises: A Reader on Indian-White Relations in Canada, Edited by J.R. Miller. (Toronto: University of Toronto Press, 1991).

Trinh, Minh-ha T., Woman, Native, Other: Writing Postcoloniality and Feminism, (Bloomington: Indiana University Press, 1994).

Turpel, Mary Ellen. "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", in Canadian Human Rights Yearbook 1989-1990, (Ottawa: Les Presses de l'Universite d'Ottawa, 1990).

Williams, Jr., Robert A., The American Indian in Western Legal Thought: The Discourses of Conquest, (New York: Oxford University Press, 1990)

Williams, Jr., Robert A. (1987) "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color" in Law and Inequality, 5:pp.103-134.

Zellerer, Eveleyn. "Community-Based Justice and Violence Against Women: Issues of Gender and Race" (1996) 20 International Journal of Comparative and Applied Criminal Justice 2.

Case Law

Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010, Supreme Court of Canada.

R.v. A.(G.) [1994] 3 C.N.L.R. 77, Newfoundland Court of Appeal.

R.v. A.G.A. [1998] A.J. No. 282, DRS 98-09238, Action No. 9703 1482C5, Alberta Court of Queen's Bench.

R.v. A. (J.E.) [1989] N.B.J. No. 719, Action No. N/CR/7/89, New Brunswick Court of Queens Bench Trial.

R.v. J.E.A. [1999] B.C.J. No. 1661, 1999 BCCA448, Vancouver Registry No. CA024449, British Columbia Court of Appeal.

R.v. S.A. [1998] N.W.T.J. No. 32, DRS 99-00165, Docket No. CR03489, Northwest Territories Supreme Court.

R.v. Akkuardjuk [1997] N.W.T.J. No. 138 North West Territories Supreme Court.

R.v. Augustine [1999] N.B.J. No. 541, Appeal File No. 29, New Brunswick Court of Appeal.

R.v. Brown (Alberta, CA) [1992] A.J. No. 432, DRS 93-05133, Appeal Nos. 9103-0697-A, 9103-0603-A & 9103-0702-A also reported at 13 C.R. (4th 346) 14 W.A C150 73 C.C.C. (3d) 242 125 A.R. 150, Alberta Court of Appeal.

R.v. H.K.C. [1997] S.J. No. 577, DRS 98-18469, Appeal Docket 7257, Saskatchewan Court of Appeal.

R.v. Cappel (Saskatchewan, C.A.) [1993] S.J. No. 571, Appeal File No. 5952, Saskatchewan Court of Appeal.

R.v. Carratt [1999] S.J. No. 626 1999 SKQB116 QBNJ No. 25 of 1998 JCS Saskatchewan Court of Queens Bench.

R.v. Charlie [1993] Y.J. No. 16, DRS 93-10166, Action No. 91-12290A, Yukon Territory Supreme Court.

R.v. Childs [1990] N.W.T.J. No. 142, DRS 92-00145, No. CR01240 also reported at [1991] NWTR61, Northwest Territories Supreme Court.

R.v. Curley, Issigaitok and Nagmalik. (1984) 4 C.N.L.R. 72, Northwest Territories Court of Appeal.

R.v. Duffney [1986] N.J. No. 218, 1986 No. C.B. (D.C.) 214, Newfoundland Supreme Court – Trial Division.

R.v.D. (M.F.) (Man. C. A.) [1991] M.J. No. 479, Suit No. 171/91, Manitoba Court of Appeal.

R.v. A.F. [1994] O.J. No. 2865, DRS 95-07274, File NO 253/93, Ontario Court of Justice – General Division.

R.v. A.F. [1997] O.J. No.2521, DRS 97-13577, Docket No. C20274, Ontario Court of Appeal.

R.v. J.D.G. [1999] B.C.J. No. 1625, Chilliwak Registry No. X36573, British Columbia Supreme Court.

R.v. Gingell [1996] Y.J. No. 52, DRS 97-00265, Whitehorse Registry No. 95-01480A, Yukon Territory Court.

R.v. Gladue [1999] 1.S.C.R. 688 [1999] S.C.J. No. 19, File No. :26300, Supreme Court of Canada.

R. v.Green [1998] N.J. No.158 1998 HV-GB No.39, Newfoundland Supreme Court – Trial Division

***R.v. Hoyt.* [1992] Y.T.C.A., Y.J. No. 17, DRS 93-07568, Vancouver Registry No. YU0176191, Yukon Territory Court of Appeal.**

***R.v. Hunter* [1997] A.J. No. 1215, DRS 98-04441, Docket No. 70015995P10101, Alberta Provincial Court.**

***R.v. Hunter* [1998] A.J. No. 510, 1998 ABCA 141, DRS 98-10840, Docket 17467, Alberta Court of Appeal.**

***R.v. J. (C.)* [1995] 3 C.N.L.R. 142, Newfoundland Provincial Court.**

***R.v. J. (C.)* [1998] 4 C.N.L.R. 198, Newfoundland Court of Appeal.**

***R.v. L.L.J.* [1999] B.C.J. No. 2016, Duncan Registry No. X19883, British Columbia Supreme Court.**

***R.v. O.D.J.* [1993] Y.J. No. 40, DRS 93-11562, Action No. S.C. 9203234, 92-03234A, 92-03234B, Yukon Territory Supreme Court.**

***R.v. Jack* [1993] Y.J. No.52, DRS 93-12469, Action No. 92-02482, Yukon Territory Supreme Court.**

***R.v. Jacobish* [1994] N.J. No. 280, DRS 95-03536, Newfoundland Provincial Court.**

***R.v. A.K.* [1997] N.W.T.J. No. 138, DRS 98-08921, Northwest Territories Supreme Court.**

***R.v. D.M.* [1997] N.J. No 339, DRS 98-18764, Docket 97/151, Newfoundland Supreme Court – Court of Appeal.**

***R.v. W.M.* [1997] O.J. No. 2778, DRS 98-03773, Court File No. 1892/92, Ontario Court of Justice - General Division.**

***R.v. Naqitarvik.* (1986) N.W.T.C.A., N.W.T.J., No. 4, Appeal No. N.W.T. 565, Northwest Territories Court of Appeal.**

***R.v. D.N.* [1998] Y.J. No. 193, DRS 95-11340, Action No. 92-07015, Yukon Territorial Court.**

***R.v. Naappaluk* [1994] 2 C.N.L.R. 143, Court of Quebec, Criminal Penal Division.**

***R.v. Noseworthy* [1982] N.J. No. 67 1982 No. 83. Newfoundland Court of Appeal**

***R.v. O'Connor* [1996] B.C.J. No. 2784, DRS 97-09986, Vancouver Registry No. CC920617, British Columbia Supreme Court.**

R.v. Onalik [1987] N.J. No. 168, 1987 No. 28, Supreme Court of Newfoundland, Court of Appeal.

R.v. Osuitok [1998] N.W.T.J. No. 38, DRS 99-00169, Docket No. CR 03440, Northwest Territories Supreme Court.

R.v. Palluq [1998] N.W.T.J. No. 19, DRS 98-15328, Docket No. CR 03455, Northwest Territories Supreme Court.

R.v. P. (J.A.) [1991] Y.J. No.180, Vancouver Registry No. 90-04222 & 90-07328, Yukon Territorial Court.

R.v. Peter [1993] N.W.T.J. No. 53, DRS 93-12023, Northwest Territories Supreme Court.

R.v.H.R. [1997] A.J. No.816, DRS 98-05286, Docket No. 6105175 IP10102, Alberta Provincial Court – Criminal Division.

R.v. S.R. [1994] N.J. No 118, DRS 94-12967, 1992HV-GB, No. 71, Newfoundland Supreme Court - Trial Division.

R.v. Rabbit [1992] A.J. No. 257, DRS 92-04043, Appeal No. 9203-0014-AO. Also reported at 14 W.A.C. 43 125 A.R.43, Alberta Court of Appeal.

R.v. Ritchie [1998] B.C.J. No. 1247, British Columbia County Court.

R.v. Roach [1987] Y.J. No. 58, Yukon Registry No. S.C. 52387, Yukon Territory Supreme Court.

R.v. J.S. [1992] N.W.T.J. No. 62, DRS 93-05111, Northwest Territories Supreme Court.

R. v. Sandercock. (1985) A.C.A., 22 CCC (3d) 79, Alberta Court of Appeal.

R.v. Sofea [1998] O.J. No. 4450, DRS 99-06345, Ontario Court of Justice - Provincial Division.

R.v. S.G.N. [1999] B.C.J. No. 2840 1999 BCCA 728, Victoria Registry No. CA020203, British Columbia Court of Appeal.

R.v. S. (H.M.) [1989] M.J. No. 273, Manitoba Provincial Court Criminal Division.

R. v. S.R. [1994] N.J. No 108, DRS 94-12965 1992 HVGB No. 71, Newfoundland Supreme Court – Trial Division

R. v. S.R. [1994] N.J. No 118, DRS 94-12967, 1992HV-GB, No. 71, Newfoundland Supreme Court - Trial Division

R. v. S.R. (No. 2) [1994] 4 C.N.L.R. 174, Newfoundland Supreme Court Trial Division.

R.v. W.B.S; R.v. Powderface[1992] A.J. No. 601, DRS 93-03740, Appeal Nos 12694 & 12684 also reported at 127 A.R. 65, Alberta Court of Appeal.

R.v. Sam [1997] Y.J. No. 100 DRS 98-16323, Whitehorse Registry No. 95-0138A [9501038A], Yukon Territory Supreme Court.

R.v. Stonechild [1994] S.J. No. 356, DRS 95-01592, C.A. No. 5908, Saskatchewan Court of Appeal

R.v. Tatatoapik [1995] N.W.T.J. No.107, DRS 96-1039, No. CR02904. Northwest Territories Supreme Court.

R.v. Taylor [1995] 3 C.N.L.R. 167, Saskatchewan Court of Queen's Bench.

R.v. W.B.T [1998] 2 C.N.L.R. 140, Saskatchewan Court of Appeal.

R.v. Wells [2000] S.C.J. No. 11 2000 SCC 10, Supreme Court of Canada. File No. 26642

R.v. Whitecap [1989] S.J. No. 2, File Nos. 4309 & 4310, Saskatchewan Court of Appeal.

R.v. Williams [1998] M.J. No. 482, DRS 99-05890, Docket No. AR 98-30-03828. Manitoba Court of Appeal.

R.v. Wood [1999] M.J. No 544, Docket No. AR 99-30-04293, Manitoba Court of Appeal.