The Erasure of Ms. G.: The Cultural Specificity of Substance Abuse and Adjudication Without Imagination

Vera J. Roy

Canadian Journal of Law and Society, Volume 20, Number 1, 2005, pp. 107-138 (Article)

Published by Cambridge University Press
DOI: https://doi.org/10.1353/jls.2006.0018

The Erasure of Ms. G. : The Cultural Specificity of Substance Abuse and Adjudication Without Imagination

Vera J. Roy

Summary: ***Winnipeg Child and Family Services v. G.*** **(D.F.)**[1]

In 1996, Ms. G., a twenty-two-year-old Aboriginal woman, became pregnant for the fourth time. She had a history of suicide attempts and had been addicted to solvents for at least six years, with an equally long history of dealings with Winnipeg Child and Family Services (the Agency), the provincial child welfare agency in her area. All three of her children were permanent wards of the state and two of them had been diagnosed with developmental problems due to her use of inhalants. In early 1996, Ms. G. was not in regular contact with the Agency and her caseworkers were not aware that she was pregnant again. In May (her thirteenth week of pregnancy), Ms. G. went to a hospital complaining of difficulty walking, loss of balance, and nausea. Doctors diagnosed her with "solvent abuse with cerebellum disease and probable cognitive impairment."[2] During her stay in the hospital, she tried to gain admittance to a facility to treat her addiction, but was told that the waiting list was several months long and she should try again later. A few weeks later, the Agency learned she was pregnant and re-opened her file. They met with her on July 18th, when she agreed to enter residential treatment for her addiction. Five days later, the worker returned to her home to accompany her to the centre. Ms. G., however, was intoxicated. She said that she would get treatment, but "not right now."[3]

The Agency reacted quickly. Over the next week, it gathered statements and sworn affidavits from doctors on the fetal effects of substance use by pregnant women and brought a motion to request an order allowing them to commit Ms. G. to a residential treatment centre against her will in order to prevent damage to the fetus. The motion was heard three days later. Schulman J. of the Manitoba Queen's Bench declared Ms. G. to be "mentally disordered" under section 53 of the *Mental Health Act.*[4] He did so despite psychiatric reports to the contrary, noting that the reports were not binding on the court. He also stated that the court's *parens patriae*

1 [1996] 10 W.W.R. 95, M.J. No. 386 (QL) [*Winnipeg (QB)*]; [1996] 10 W.W.R. 111, M.J. No. 398 (QL) [*Winnipeg (CA)*]; [1997] 3 S.C.R. 925, S.C.J. No. 96 (QL) [*Winnipeg (SCC)*].

2 *Winnipeg (QB)*, *ibid*. at para. 12.

3 *Winnipeg (SCC)*, *supra* note 1, (Factum of the Intervenors, Women's Health Clinic, Métis Women of Manitoba, Native Women's Transition Centre, Manitoba Association of Rights and Liberties at para. 16), online: Women's Health Clinic <http://www.womenshealthclinic.org/resources/pwamto/g_brief.html>.

4 *Mental Health Act*, R.S.M. 1987, c. M110.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2005, Volume 20, no. 1, pp. 107-138

jurisdiction—the power to act in the stead of a parent for the protection of a child or a mentally incompetent person—could also be used in this case. He therefore issued an interim order placing Ms. G. in the custody of the Agency and compelling her to enter residential treatment, the order terminating when the child was delivered. In obiter, Schulman J. also said that he believed the *parens patriae* power could be extended to include the fetus, in order "(…) to protect the child to be born."[5]

Ms. G. entered treatment. Although the order was quickly stayed, she decided to remain at the facility until she was dismissed by her doctor. The appeal continued nevertheless, and the Manitoba Court of Appeal determined that the trial court's focus on Ms. G.'s mental health was "(…) suspect from the start (…)"[6] because the order was obviously issued to protect the welfare of the fetus and not the mother. The appeal judge ruled that the court did not have the jurisdiction to interfere with Ms. G.'s rights for this purpose, because under Canadian law, the fetus did not have the status of a person. He also stated that the finding of mental incompetence under the *Mental Health Act*, or for the purposes of the *parens patriae* jurisdiction, was not supported by the evidence. A few months after the appeal, Ms. G. gave birth to a healthy baby. When the case reached the Supreme Court of Canada, Ms. G. was still free of solvents and raising the child on her own.

The Supreme Court of Canada upheld the Court of Appeal ruling. The majority decision examined whether the law of tort or, alternatively, the *parens patriae* jurisdiction, may be extended to protect the fetus from harm by the conduct of the pregnant woman. McLachlin J., writing for the majority, determined that the court cannot place a pregnant woman in mandatory treatment without her consent. The fetus has no rights under the law and no action can be taken on its behalf. There is no *parens patriae* power extending to the protection of the fetus. The court asserted that the pregnant woman and the fetus are one, and that protecting the rights of the fetus over the woman's would radically impinge on the woman's fundamental liberties in terms of lifestyle choices, and freedom of movement. McLachlin J. stated that extending *parens patriae* or the law of tort to include the protection of the fetus represented too sweeping a change to the common law for the court to undertake, although she repeatedly referred the matter to the legislature. There was a strong dissent from Major J., who believed that the *parens patriae* power should extend to the fetus when the woman has chosen to bring the child to term.

Introduction

The Supreme Court decision in the *Winnipeg* case marked a victory for supporters of women's rights, affirming and protecting the autonomy rights of pregnant women under Canadian law. In this sense it is an important

5 *Winnipeg (QB)*, *supra* note 1 at para. 43.
6 *Winnipeg (CA)*, *supra* note 1 at para. 4.

ruling that combats a number of patriarchal assumptions about the nature of women's role in society, and helps reinforce substantive equality for women. However, from a number of other perspectives, the decision is frustrating, incomplete, and, as this paper will argue, even disturbing. Certainly, those who would protect the welfare of fetuses through juridical interference with pregnancy in such cases were thwarted. From their point of view, defending the liberty rights of pregnant women is tantamount to defending their right to sniff solvents and harm the fetus.[7] They point to the widely publicized dangers and far-reaching social consequences of ingesting toxic substances during pregnancy, relying primarily on statistics regarding fetal alcohol syndrome (FAS) and fetal alcohol effect (FAE) since not much data on the effects of solvent abuse are available. They perceive the most effective solution to the problem is to regulate the activities of pregnant women if these activities are believed to harm the fetus she is carrying.

Those on the other side of the ideological fence—that is, those who resist imposing behavioural requirements on pregnant women—are also not insensible to the dangers of substance abuse during pregnancy. Although they greeted the final decision with a certain amount of relief, they also recognized that the ruling was deficient because it did nothing to address the very real and immediate problem of substance abuse itself. The Women's Health Clinic, for example, one of the interveners in the case, stated, "[t]his ruling didn't provide a remedy; it merely stopped CFS [Child Family Services] from doing the wrong thing for the right reasons."[8] Many commentators and advocates have pointed out that this is primarily because the discourse of fetal rights raised by the child welfare agency creates an artificial opposition between the woman and the fetus that can be resolved only by choosing to protect either one or the other. Ultimately, this is an unsatisfying resolution, even for those who "won," since protecting the liberty interests of women should not preclude helping them to have healthy babies.

The decision is also troubling on a deeper level. From the Queen's Bench to the Supreme Court, the judgments make it clear that the liberal philosophical foundation of Anglo-Canadian law, personified in the atomistic and autonomous rights-holding subject, prevents the legal system from meaningfully addressing the complex issues at the root of the case. The discourse abstracts Ms. G. from her social context and ignores her experience of substance abuse as an Aboriginal woman, an experience informed by the historical effects of colonial policies, as well as law and

---

7 As illustration, see a newsletter entry on the case on the Campaign for Life Coalition web site, online: CLC http://www.campaignlifecoalition.com/national_news/news_1297.html. See also Thelma McCormack, "Fetal Syndromes and the Charter: The Winnipeg Glue-Sniffing Case" (2000) 14:2 Can. J.L. & Soc. 77 at 80, quoting a spokesperson for the Child and Family Services, who asked, "[h]ow many badly damaged children does a person have the right to bring into the world?"

8 Women's Health Clinic, "A Legal Victory is Not Enough: the G. Case Ruling", online: WHC http://www.womenshealthclinic.org/resources/pwamto/gcase_ruling.html.

racism in Canadian society in general. This ultimately allows the Queen's Bench and minority Supreme Court opinions to place sole responsibility for the fetus on Ms. G. as the "mother." Still, culture and race are not absent from the judgments; as a close analysis reveals, they underlie many of the justifications raised by Schulman J. and Major J. for placing Ms. G. in mandatory treatment.

The Court of Appeal and Supreme Court majority judgments, for their part, do recognize the oppressive weight of fetal rights discourse on pregnant women, although, they too are constrained by their analytical tools. This is particularly apparent in the fact that neither of these judgments overtly acknowledges Ms. G.'s Aboriginal background. It is likely that the absence of culture and race represents, at least in part, an effort by the courts to avoid reinforcing negative stereotypes of Aboriginal people as substance abusers. Cultural sensitivity, however, is not the only explanation for erasing her culture. In law, facts are chosen according to their relevance to a legal point and how "winnable" they make the case, and one may speculate that Ms. G.'s counsel in appeal knew that raising the fact of her Aboriginal identity would do nothing to bolster her case. It was much more legally appropriate and, as it turns out, more astute to sketch her as an abstract rights-holding subject with very few identifying characteristics. Ultimately, however, the silence is deafening. By not allowing the cultural specificity of Ms. G's experience to inform the judgments, the Court of Appeal and Supreme Court sabotaged their own attempts to do the right thing. Certainly their calls for legislative intervention can be understood as a way to break the deadlock between fetus and woman created by the liberal rights discourse, but they can also be situated in a broader social and legal context. As such they represent appeals to a law-making power that has been consistently and profoundly insensitive to Aboriginal interests. And ultimately, if Ms. G.'s substance abuse is not understood in her cultural context, then the consequences of the law on her, and other women like her, are also ignored. These judgments failed to recognize that any law enacted by the legislature would have to be implemented through policy-enforcement agencies and the courts, which are embedded within the racism and ethnocentrism that generally informs the social and legal discourse surrounding Aboriginal people. As a result, they also failed to see that it is highly unlikely that such a law, no matter how carefully drafted and "neutral" it appeared on the surface, could be a benefit to Aboriginal women suffering from addiction.

In "The Uses of Diversity,"[9] the anthropologist Clifford Geertz recounts a parable he calls "The Case of the Drunken Indian and The Kidney Machine," a simple narrative with a certain resonance in the context of the present discussion. It involves a government-run public medical program in the United States, which, because of a shortage of dialysis machines, created

[9] Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, N.J.: Princeton University Press, 2000) c.4 at 68 [Geertz]; (originally published as Clifford Geertz, "The Uses of Diversity" (1985) 25:1 Mich. Q. Rev. 105).

a waiting list (or queue) for patients, organizing priority of access according to need and order of application (rather than ability to pay). After an alcoholic Indian man was accepted for treatment with a dialysis machine, the doctors running the program were perplexed, since strict diet and a disciplined lifestyle were necessary for the treatment to have long-term beneficial effects. The Indian man unapologetically refused to control his drinking, however, and continued to claim his right to receive treatment**,** creating a situation which endured for some years. The doctors reacted with anger, because they felt that the Indian man was blocking access to the machine by others who would, in their view, derive more benefit from the treatment - since they did not drink excessively and were more likely to live productive, middle-class lives (much like the doctors themselves). The man was not prevented from receiving treatment, however, possibly due to the moral considerations underlying the very existence of the program (providing medial assistance to those in need). As Geertz suggests, the doctors probably would have found a way to exclude him had they foreseen such a situation when they established the ostensibly neutral criterion of the patient's position in the queue as the condition for gaining access to the dialysis machine.

The story illustrates Geertz's main point. To him, the world today offers a multitude of alternative ways of being and, in order to resolve the resulting "moral asymmetry,"[10] those confronted with such dissimilarities are required to make an imaginative leap from their own culture to another, fundamentally different one, and back again. (It bears underlining that such imaginative forays are the stock-in-trade of "interpretive anthropology," as envisioned by Geertz).[11] This "utterly depressing"[12] parable, however, illustrates a failure of imagination, on both sides. Surely, the doctors have a point: it is never good to drink excessively, especially in the circumstances. And it does seem that the Indian man failed to appreciate the full meaning of his position and that he was arguably acting selfishly. However, the failure of the imagination on the part of the doctors is more worrying, especially since, as representatives of the dominant culture, their attitudes are more typical of the mainstream. In addition, because of their position of power, their perspective can be much more readily translated into oppressive action (although this was not the outcome in this case). Their bitterness is perhaps the most disturbing aspect of their reaction: it appears to indicate that they believed the Indian man's continued drinking should be determinative of his fate—that is, because he chose to drink, his right to the machine was less robust than that of others, who would, it was presumed, enjoy the right more responsibly. In this sense, their perspective overlooks more profoundly determinative elements in the Indian man's life, in particular the social and cultural context constraining the freedom of his choices, the fact of his

---

10 *Ibid*. at 82**.**

11 See Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

12 Geertz, *supra* note 9 at 82**.**

addiction, and the probable lack of emotional, social, or therapeutic support in his immediate environment. The doctors are not open to a deeper understanding that could temper their anger; consequently, it never occurs to them that there may be a way for them to provide some form of support and thereby, perhaps, empower the Indian man to change his situation.

In this way, the story exemplifies a tragic "(…) failure to grasp, on either side, what it was to be on the other, and thus what it was to be on one's own. No one, at least so it seems, learned very much in this episode about either themselves or about anyone else, and nothing at all, beyond the banalities of disgust and bitterness, about the character of their encounter."[13] For Geertz, imagination is crucial to "understanding"—"(…) in the sense of comprehension, perception and insight (…)"[14] (which he distinguishes from "(…) agreement of opinion, union of sentiment or commonality of commitment (…)"[15]—and it is this kind of understanding that is sorely lacking in "The Case of the Drunken Indian and the Kidney Machine" as in the judgments in the *Winnipeg* case. The discussion in these pages will attempt to illustrate a parallel between the doctors in Geertz's fable and the decisions of the courts in the *Winnipeg* case, and show that, regardless of where they are situated on the spectrum of the fetal rights issue, the judges, like the big city doctors, are unable—or perhaps refuse—to grasp the context of Ms. G.'s actions and therefore to fully understand the context and impact of their own. Some of the cultural background to Ms. G's substance abuse will be briefly sketched in an attempt to provide a context and more expansive perspective from which the mainstream community can better understand—in the sense of *comprehend*, *perceive* and *see into*—the impact of the law on Aboriginal people.

The paper will begin with a brief historical overview in order to illustrate two important points: 1) the ways in which colonial laws and policies have contributed to creating social circumstances that give rise to social problems such as substance abuse in Aboriginal communities in the first place, and 2) the particular cultural, stereotypical or racist notions embedded in these laws and policies that continue to find their expression today. This will be followed by a discussion of the social construction of the substance abusing woman as Aboriginal. Finally, a brief analysis of the judgments will reveal how this image is perpetuated in legal discourse, and how the use of the law in cases of substance abuse during pregnancy—whether through legislation or the courts—is motivated not only by concern for the welfare of future children, but by cultural and racial biases that permeate both Canadian society and the legal system.

---

[13] *Ibid.* Geertz continues: "It is not the inability of those involved to abandon their convictions and adopt the views of others that makes this little tale seem so utterly depressing. (...) It is their inability even to conceive, amid the mystery of difference, how one might get around an all-too-genuine moral asymmetry. The whole thing took place in the dark."

[14] *Ibid.* at 87.

[15] *Ibid.*

Protection, Dependency, Infantilization: Ms. G.'s Substance Abuse in Historical Context

Substance abuse is an extremely complex problem with roots in the personal and the social. Individuals with so-called "addictive personalities" may share character traits such as alienation (including feelings of powerlessness, meaninglessness, normlessness, isolation and self-estrangement) and sensation-seeking.[16] Social circumstances also play an important role, and certain common risk factors such as poverty, family breakdown and the resulting low self-esteem and poor social integration have been identified.[17] Although the *Winnipeg* judgments do not discuss Ms. G.'s personal or social history, this information is absolutely vital to understanding her addiction. Further insight may be gleaned from understanding how her identity as an Aboriginal may have informed her experience of substance abuse.

Substance abuse exists in all countries and among all ethnic groups. Addiction experts have, however, recognized that the experience among First Nations people is distinct from other ethnic or cultural groups in Canada. They describe a "chicken and egg" phenomenon, whereby "(…) substance abuse not only contributes to the social problems in Aboriginal communities, but is also the result of the conditions it creates."[18] It is, however, more than a self-perpetuating circle of despair and self-destruction. On a deeper level, substance abuse among Aboriginal people can be understood as part of a profound pattern of poverty, disempowerment and cultural dislocation that has been imposed on Aboriginal cultures by the imperialism and racism of the colonizing power. As Melanie Randall has expressed it, "[a]lcohol and drug addictions are arguably best understood as socially patterned responses to the North American white colonizing peoples' attacks on the traditional cultures of Native communities."[19]

These attacks and their devastating effects on Aboriginal society—of which substance abuse is only one—are of course far too complex to be fully addressed in this paper. The following very brief history will simply try to outline, in very general ways, the disempowerment of Aboriginal people and their infantilization in the eyes of the law, and society in general, as a result of certain British colonial and Canadian state policies and laws.

---

[16] Surendra K Mattoo, *et al*., "Alienation, Sensation Seeking and Multiphasic Personality Questionnaire Profile in Men Being Treated For Alcohol and/or Opioid Dependence" (2001) 43:4 *Indian Journal of Psychiatry*, online: IJP http://www.ijponline.org/oct2001/indIJPOrgArt2.html.

[17] United Nations, *UN Office for Drug Control and Crime Prevention* (New York: Oxford University Press, 2000) at 100, 106.

[18] Jacques LeCavalier & Diane McKenzie, *Aboriginal substance abuse: a blueprint for action: a submission to the Royal Commission on Aboriginal Issues by the Canadian Centre on Substance Abuse* (Ottawa: Canadian Centre on Substance Abuse, 1993) at 2 [LeCavalier & McKenzie].

[19] Melanie Randall, "Pregnant Embodiment and Women's Autonomy Rights in Law: An Analysis of the Language and Politics of *Winnipeg Child and Family Services v. D.F.G.*" (1999) 62 Sask. L. Rev. 515 at 539.

The *Royal Proclamation of 1763*,[20] (*Proclamation*) issued the same year that New France was ceded to the British, expressed the Crown's vision of its relations with Aboriginal nations at the time. Reflecting the previous relationship of alliance, the document acknowledges Aboriginal nations as autonomous political bodies. Paradoxically, however, these sovereign nations were living on land that was now considered to be under the Crown's dominion. Consequently, the Crown took upon itself a duty to protect First Nations peoples, and this notion of the benign sovereign Crown as protector of Native peoples living on its lands has continued to play an important role in Canadian Aboriginal policy up to the present day. For instance, one of the requirements laid out in the *Proclamation* was that in order to protect Aboriginal peoples from exploitation, it was forbidden for them to alienate their lands to anyone but the Crown through mutual agreement (treaty). Restricted alienability is still a characteristic of Aboriginal title lands today, and the notion of the protection of Aboriginal interests in lands, embodied in the fiduciary duty, is a key aspect of Crown relations with Aboriginal peoples as articulated by contemporary Canadian courts.[21]

Historical circumstances, including the industrial revolution in England and the reduced American threat after the War of 1812, diminished the importance of Aboriginal nations as trading partners or strategic military allies. The balance of power shifted accordingly, and as an increasing number of settlers arrived in the colony, the dispossession of Aboriginal lands accelerated. The resulting dislocation of Aboriginal communities and the severing of their relationship with the lands disrupted traditional economies and cultures, escalating poverty among these groups and increasing their dependency on the Crown. Just as Aboriginal peoples were in need of some benign protection, however, British and colonial government policy began to shift towards the more pernicious notion of "civilization." Indeed, from the ethnocentric European perspective, protection and civilization were one and the same; the European ideal of progress, embodied and exemplified by the Europeans themselves, required the cultural "development" of Aboriginal societies—on the European model, of course—if they were to survive domination by the Euro-Canadian mainstream. It was also perceived as a way to wean Aboriginal peoples from their position of dependence on the Crown.[22]

By the time of Confederation, the discourse surrounding Aboriginal policy was unabashedly assimilationist, expressing long-held notions of European cultural and racial superiority with a new-found vigour. The duty of protection was reconceived as the "white man's burden":

---

20 R.S.C. 1985, App. II, no. 1.

21 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

22 Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,* vol.1 (Ottawa: Supply and Services Canada, 1996) c. 9, s. 3 [*RCAP Report*], online: Indian and Northern Affairs Canada http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html>.

> Let us have Christianity and civilization among the Indian tribes (...) let us have a wise and paternal government (…) doing its utmost to help and elevate the Indian population, who have been cast upon our care (...) and Canada will be enabled to feel, that in a truly patriotic spirit, our country has done its duty to the red men.[23]

The "wise and paternal" government now explicitly infantilized Aboriginal people, portraying them as "(…) wards or children of the State."[24] There was no longer any pretension of protecting the communities; the only duty the colonial government felt it owed was to protect individual Aboriginal persons in their status as legal incompetents and, "(…) through education and every other means, to prepare [them] for a higher civilization by encouraging [them] to assume the privileges and responsibilities of full citizenship."[25]

The goal of assimilation now clearly established, the Dominion government used one of the most effective and insidious tools in its colonial arsenal and enacted legislation under s. 91 (24) of the *British North America Act,*[26] which gives Parliament jurisdiction over "Indians, and Lands reserved for the Indians." The first piece of legislation, the 1869 *Gradual Enfranchisement Act,*[27] was replaced in 1876 by the *Indian Act,*[28] which remains in force today, in pretty much the same form as its first incarnation. This Act caused severe social and cultural dislocation by forcing traditional modes of governance to be abandoned in favour of a western model. It also contained a number of constraining and paternalistic provisions. To cite a relevant example, liquor offence provisions were a significant tool through which the government exerted control over Aboriginal people. Because it was seen as the "scourge of their communities,"[29] the consumption of alcohol was prohibited to Indians both on and off reserve, ostensibly in order to protect them from themselves and what had been perceived for centuries as their lack of ability to control their drinking on their own.[30] While some communities called for such legislation out of concern for their people, it is telling that the government's response to these appeals was not to crack down on trafficking, but rather to expand the scope of punishment; now, in addition to the vendor being fined, the Aboriginal person who was found drunk was also subject to punishment (jail time).[31] Another provision, known as the poolroom prohibition (first enacted in 1927), was even more arbitrary, limiting the amount of time an Indian could spend in a poolroom or other

---

23 *Ibid*. c. 6, s. 8.
24 *Ibid*. c. 9, s. 8.
25 *Ibid.*
26 Now known as *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
27 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria,* c. 42, S.C. 1869, c. 6.
28 R.S.C. 1985, c. I-5.
29 *RCAP Report*, *supra* note 22, part 2, c. 9, s. 8.
30 Christie Jefferson, *Conquest by Law* (Ottawa: Supply and Services Canada, 1994) [Jefferson].
31 This provision was repealed in the early 1970s after the Supreme Court of Canada found it to be contrary to the *Canadian Bill of Rights* in *The Queen v. Drybones*, [1970] S.C.R. 282.

similar establishment. It was enacted to discourage the Indian that "(…) misspends or wastes his time or means to the detriment of himself, his family or household"[32] from engaging in such idle pursuits. Although these legislative lessons in morality, industriousness and self-control were eventually repealed, the Act still imposes a number of less overtly paternalistic but equally controlling requirements. To cite one important example, bands (artificial legislative creations in no way based on traditional modes of governance) are delegated a limited power to enact by-laws in a restricted number of areas, and whatever by-laws they do enact are ultimately circumscribed by the authority of the Minister of Indian Affairs. For instance, section 81 of the *Indian Act* confers general powers on the council subject to the requirement of compatibility of their bylaws with any regulations made by the Minister of Indian Affairs, and section 82 grants powers regarding more specific bylaws relating to finances, subject to Ministerial approval.

The regulation of Aboriginal life through the *Indian Act* illustrates just one way in which the government's policies of protection and "civilization" (both imperatives of its higher project of imperialism) led to severe cultural dislocation in Aboriginal communities. An even more pernicious expression of the colonialist drive, however, was embodied in the residential school system, a blatant exercise in oppression that has been frequently described as cultural genocide.[33] In the late nineteenth century, to those in power, "[t]he need for government intervention to liberate these savage people from the retrograde influence of a culture that could not cope with rapidly changing circumstances was pressing and obvious."[34] The government followed observers' recommendations that Aboriginal children were the appropriate target to bring about a "complete change in condition."[35] Because of their youth, they were able to achieve the "(…) transformation from the natural condition to that of civilization."[36] Therefore, they must be removed from their communities and wholly immersed in a re-educational process that would erase their original cultures. Separation from their parents was necessary to rid them of an impediment to civilization, since Aboriginal adults were considered irremediably savage and sure to poison their children

---

32 *RCAP Report, supra* note 22, vol. 2, part. 2, c. 9, s. 9.7.

33 See *e.g.* Chrisjohn, S. Young, & M. Maraun, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton, B.C.: Theytus Books, 1997) at 240-245; Vic Satzewich & Li Zong, "Social Control and the Historical Construction of Race" in Bernard Schissel & Linda Mahood, eds., *Social Control in Canada: A Reader on the Social Construction of Deviance* (Toronto: Oxford University Press, 1996), who state that although genocide per se was not the intention of the government, the effect produced can still be described as a kind of "cultural genocide." See also Ronald Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islanders' Children from their Families* (Canberra: AGPS, 1997), an Australian study of a similar system, which more forcefully argues that the policy and effects were genocidal in nature.

34 *RCAP Report*, *supra* note 22, c. 10.

35 *Ibid.*

36 *Ibid.*

with the "influence of the wigwam."[37] For approximately one century, the government forcibly and systematically removed children from their parents' care and brought them to residential schools, total institutions that were run jointly by the government and various Christian churches.

The chilling stories of what occurred at the schools are being told only now. Conditions of disconnection, degradation and powerlessness were imposed on children. Traces of their homes were eradicated or prohibited; siblings were separated or forbidden to interact, and the children were forbidden to speak their own languages, on pain of severe corporal punishment.[38] They were taught European religion and morals and repeatedly told that the values they had learned from their parents and other loved ones were evil or "savage superstition."[39] Almost all suffered malnourishment and systematic neglect. Many underwent severe psychological, physical and sexual abuse at the hands of school authority figures.

Government estimates place the number of people alive today who attended residential schools at 90,600.[40] The estimated 2005 population of registered Indians is 755,200.[41] These figures mean that a significant minority of the current status Indian population—approximately 12%—directly experienced this "(…) concerted attack on the ontology, on the basic cultural patterning of the children and on their world view."[42] The consequences have been devastating for both individuals and communities. The children and young adults who returned home were often culturally disconnected from their roots, having lost traditional skills, ways of thinking, and ways of being on the land. Many had forgotten their languages. However, most did not feel any connection with the mainstream culture either, since their experience of neglect and abuse did not provide them with coherent cultural values.[43]

The after-effects of the residential school system have manifested in a variety of ways, and one of the most notable is substance abuse. Indeed, anomie, or a pervasive sense of cultural disconnection, has been cited as one of the primary causes of substance abuse in Aboriginal communities. Using alcohol and drugs can be understood as part of the process of "(…) mourning the loss of a historical tradition and reacting to the stresses of acculturation, including the demand to integrate and identify with

---

37 *Ibid.*

38 *Ibid.* c. 10, s. 1.1; *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991) at 514 [*Manitoba Justice Inquiry*].

39 *RCAP Report*, *supra* note 22, c. 10, s. 1.1.

40 Canada, *The Residential School System Historical Overview*, online: Indian Residential Schools Resolution Canada http://www.irsr-rqpi.gc.ca/ english/history.html.

41 Indian and Northern Affairs Canada, *Basic Departmental Data 1995* (Ottawa: Supply and Services Canada, 1996), online: INAC http://www.ainc-inac.gc.ca/pr/sts/bdd95/Bdd95_e.pdf.

42 *RCAP Report*, *supra* note 22, c. 10.

43 *Ibid.*

mainstream society."[44] Extreme lack of self-esteem is another element frequently plaguing substance abusers, and for Aboriginal people, it can frequently be traced to lessons of self-loathing taught in the schools. In addition, family breakdown, also closely linked with substance abuse, is one of the primary and most devastating consequences of the residential school system.[45] The schools have also had profound intergenerational effects, as the violence learned there has frequently been perpetuated on the children of survivors, creating a cycle of abuse and an environment conducive to substance abuse, which only worsens the problems.

As Grand Chief Edward John said in 1992, "[w]e are hurt, devastated and outraged. The effect of the Indian residential school system is like a disease ripping through our communities."[46] The schools were "part of the contagion of colonization"[47] and produced individuals infected with self-hatred and without cultural guidelines. The communities they returned to were limited in the support they could offer because they themselves were disempowered and dependent. The depth of the harm done to Aboriginal society has been described as a manifesting in individuals as a "(…) soul wound (…) at the core of much of the suffering that indigenous peoples have undergone for several centuries."[48] Substance abuse is only one of the consequences, and it must be understood in its context.

Racism, Substance Abuse, and the Social Construction of the Substance-Abusing Woman

The paternalism and racism at the root of the political and legislative actions outlined above are evident. These attitudes have not existed only amongst high-ranking government officials and policy-makers, however. It would also be a mistake to say that the more recent discourse of tolerance at the policy level and the modest improvements in the relationship between the Canadian government and First Nations prove that racism has been eradicated from the lives of Aboriginal peoples. Racism is still a factor for most people of Aboriginal background, particularly for those in an urban environment, like Ms. G.[49] Among its many effects, it is one of the reasons the Aboriginal people are overrepresented in the criminal justice system. Visible racial features sometimes make them more identifiable, and law enforcement agents are more likely to consider people they identify as Aboriginals as "criminal types." They are therefore "(…) given much less latitude in their behaviour before the police take action."[50] Accounts of abuse by police officers in Saskatoon, Saskatchewan, for example, also provide

---

44 Thomas J. Young, "Native American Drinking: A Neglected Subject of Study and Research" (1991) 21 J. Drug Educ. 65 at 69.
45 *RCAP Report, supra* note 22, vol. 3, c. 2, *passim.*
46 *Ibid.* vol. 1, c. 10, s. 4.
47 *Ibid*.
48 Eduardo Duran & Bonnie Duran, *Native American Postcolonial Psychology* (Albany: State University of New York, 1995) at 24.
49 *RCAP Report, supra* note 22, vol. 4, c. 7, s. 1.2.
50 *Manitoba Justice Inquiry, supra* note 38 at 107.

disturbing evidence of a strong current of racism that is a concern in the lives of many Aboriginal people.

A number of racist myths still find currency in mainstream society. Indeed, one of the most notorious, that of the "drunken Indian," still exerts a surprising amount of power. Even those who tend to be culturally sensitive and dismiss this image as a racist stereotype often hold the widely-held perception that all or most Aboriginal communities suffer from much higher levels of alcohol and other substance abuse than the white mainstream. This springs from historical accounts—going back as far as the fur trade—of the devastation that alcohol caused in many communities.[51] Alcohol was imported to the Americas from Europe, and,

> [t]he effects were somewhat similar to those of introducing smallpox and other infectious diseases: Aboriginal people had no "immunity" to alcohol, in the sense that social norms and personal experience can "protect" against over-consumption.[52]

Current testimonials have also reinforced the notion that alcohol remains a serious problem. It has been linked to higher rates of accidental injury and death, violence, suicide and social breakdown in the communities. Beyond anecdotal evidence, however, there is not a very clear picture of the role of alcohol in contemporary Aboriginal society. First, it must be remembered that there is tremendous diversity between Aboriginal groups, and generalizations are bound to miss important differences. Furthermore, there is actually very little empirical data on substance abuse, with respect to either the Canadian population as a whole or Aboriginal people in particular,[53] and the data that does exist is somewhat contradictory. The Canadian Centre on Substance Abuse reports that "[a]boriginal populations are overall younger and have higher rates of alcohol-related mortality and morbidity than their counterparts in the general population."[54] In the same breath, however, they also admit that, because there is very little clear information on prevalence, they have based their conclusions on the rate of violent death in Aboriginal communities.[55] A 1997 regional study of seventeen different Aboriginal communities in Manitoba showed that 25% of the population reported a drinking problem,[56] while national statistics in 1993 showed that 9.2% of the total Canadian population represented by the

---

51 See Jefferson, *supra* note 30, for an overview of the devastating effects of alcohol and the legislative reaction of the colonizing power.

52 *RCAP Report*, *supra* note 22, vol. 3 at 157.

53 Canada, Special Parliamentary Committee on Non-Medical Use of Drugs, Policy For the New Millennium: Working Together to Redefined Canada's Drug Strategy: Report of the Special Committee on Non-Medical Use of Drugs (Ottawa: Supply and Services Canada, 2002) (Chair: Paddy Torsney, M.P.).

54 LeCavalier & McKenzie, *supra* note 18 at 2.

55 Canadian Centre on Substance Abuse, *Aboriginal Peoples Overview*, online: CCSA http://www.ccsa.ca/CCSA/EN/Topics/Populations/AboriginalPeoplesOverview.htm.

56 University of Manitoba, *Manitoba First Nations Regional Health Survey Final Report* (Winnipeg: Centre for Aboriginal Health Research, 1998) at 42.

study reported the same.[57] However, two other regional studies suggest that overall consumption rates are lower amongst Aboriginals than Canadians generally, although those who do drink tend to drink more heavily than the national average.[58] Clearly, the statistics are incomplete. What they do suggest, however, is that mainstream preconceptions are generally misinformed. Put simply, "(…) the widely held belief that most Aboriginal people consume excessive amounts of alcohol on a regular basis appears to be incorrect."[59]

The stereotype may also extend to the perception of the prevalence of FAS/FAE, about which there is also a dearth of information. Health Canada estimates approximately one to two children with FAS/FAE per 1000 nationally, while a regional study of the province of Saskatchewan found a rate of .59 per 1000 between 1988 and 1992.[60] Aboriginal communities, on the other hand, are considered to be high risk.[61] In the *Winnipeg (SCC)* case, for example, we are told that they are in a "crisis situation," and elsewhere we learn that the problem is "epidemic."[62] One very focussed study in a small British Columbia community found a distressingly high prevalence of FAS/FAE (190 per 1000 children),[63] and another on a First Nation reserve in Manitoba determined the incidence there to be one in ten.[64] However, as the former president of the Canadian Medical Association points out, the prevalence of FAS/FAE may be quite a bit higher in the white population than studies reveal: "[w]e whites don't like to discuss our problems with alcohol and tend to sweep them under the rug."[65]

The problem of solvent abuse has also been strongly linked to Aboriginal communities. Again, the assumption is based on suggestive but incomplete data, personal testimonials and some highly visible incidents. Like alcohol, solvent abuse is known to occur all over the world and in almost all cultural and ethnic groups. U.S. studies of high school students by the National Institute on Drug Abuse show a lifetime incidence of inhalant abuse of 15% to 20%, although these figures are thought to be considerably lower than the

---

57 *1993 General Social Survey*, in *Canada Profile 1999* (Ottawa: Canadian Centre for Substance Abuse, 1999).

58 For an overview of the statistics available, see *RCAP Report*, *supra* note 22, vol. 3 at 158-160.

59 *Ibid*.

60 Canadian Perinatal Surveillance System, online: Public Health Agency of Canada http://www.hc-sc.gc.ca/pphb-dgspsp/rhs-ssg/factshts/alcprg_e.html.

61 J.M. Aase, "The Fetal Alcohol Syndrome in American Indians: A High Risk Group" (1981) 3 Neurobehav. Toxicol. Teratol. 153-6.

62 See *Winnipeg (SCC)*, *supra* note 1 at para. 88; see also a quote from Dr. Chudley, one of the Agency's expert witnesses, cited in David Square, "Fetal Alcohol Syndrome Epidemic in Manitoba Reserve" (1997) Can. Med. Assoc. J. 157, online: Canadian Medical Association Journal http://www.cmaj.ca/cgi/reprint/157/1/59.pdf [Square].

63 Geoffrey C. Robinson, *et al.*, "Clinical Profile and Prevalence of Fetal Alcohol Syndrome in an Isolated Community in British Columbia" (1987) 137 Can. Med. Assoc. J. 203 at 206.

64 Square, *supra* note 52.

65 *Ibid*.

actual incidence.[66] Statistics for the general Canadian population are not available, but chronic solvent users are generally characterized as having poor socio-economic backgrounds, low education levels, and troubled family circumstances,[67] elements that are, as noted above, present in many Aboriginal communities. The 1993 *First Nations and Inuit Community Youth Solvent Abuse Survey*[68] showed that 48.81% of the Aboriginal population surveyed regarded solvent abuse as a problem affecting their community.[69] It is more common in remote settlements,[70] although, while epidemic in some (such as the infamous Davis Inlet), it is virtually absent in others.[71] The effects of solvent abuse by pregnant women have not been widely studied; while it is generally assumed to be damaging, there is no scientifically accepted empirical data that establishes a direct relationship between solvent abuse during pregnancy and fetal harm.[72] Furthermore, reliable statistics on the prevalence of children born with birth defects due to *in utero* exposure are not available. Nevertheless, its prevalence and fetal effects in Aboriginal communities have been neatly analogized or even equated with those of alcohol. Indeed, both the majority and minority reasons of the Supreme Court judgment in the *Winnipeg* case unquestioningly accept this equation.[73]

In the context of fetal effects induced by alcohol, solvents or other drugs, the traditional racist image of the "drunken Indian" in popular and legal discourse intersects with certain powerful societal notions of women's reproductive role. The naming of fetal alcohol syndrome in the early 1970s[74] and further research on teratogens (substances causing developmental malformations) led scientists and the public to recognize the vulnerability of the fetus to substances ingested by the woman during pregnancy. Scientists urged pregnant women to abstain from alcohol, and the popular media followed suit. However, warnings quickly turned to blame, as popular discourse began to personify the fetus as an innocent victim and transform the pregnant woman into the wrongdoer, who must be punished or at the

---

66 Canadian Pediatric Society, "Indian and Inuit Health Committee, 'Position Statement'" (1998) 3:2 Paediatrics & Child Health 123 (reaffirmed Nov. 2003) [Canadian Pediatric Society].

67 Political and Social Affairs Division, Parliamentary Research Branch, *Substance Abuse and Public Policy* by Nancy Miller Chenier (Ottawa: Library of Parliament, 2001), online: Library of Parliament http://www.parl.gc.ca/information/library/PRBpubs/942-e.htm.

68 *First Nations and Inuit Community Youth Solvent Abuse Survey1993*, quoted in Canadian Criminal Justice Association, "Aboriginal Peoples and the Justice System" (2000) Can. Crim. J. Assoc. Bull. c. 3, online: CCJA http://www.ccja-acjp.ca/en/abori3.html.

69 *Ibid.*

70 R. J. Flanagan & R. J. Ives, "Volatile Substance Abuse" (1994) 2 Bulletin on Narcotics 49 (UN, Office on Drugs and Crime).

71 Canadian Pediatric Society, *supra* note 56.

72 Françoise Baylis, "Dissenting with the Dissent: *Winnipeg Child and Family Services (Northwest Area) v. G. (D. F.)*" (1998) 36 Alberta L. Rev. 785 at 792 [Baylis].

73 *Winnipeg (SCC)*, *supra* note 1 at para. 5 (majority) & 88 (dissent).

74 Kenneth L. Jones & David W. Smith, "Recognition of the Fetal Alcohol Syndrome in Early Infancy" (1973) 2 Lancet 999.

very least controlled.[75] This framing of the problem operates on the dominant ideology of motherhood and its binary model, the "good/bad" mother, according to which the "good" mother always acts in caring and self-sacrificing ways toward her children, while the "bad" mother is either too weak or too rebellious to control her selfish impulses.[76] The elision of pregnant women and mothers in the discourse of fetal protection is achieved smoothly, since in this context, women are cast as either mothers or potential mothers. The choices that a pregnant woman/mother makes, therefore, are up for review, since her role restricts her freedom to act selfishly:

> Our anxiety over the violence these women thus do to motherhood—equated as it is with moral, emotional and physical caretaking—can then be resolved by invoking either the assistance or the coercion of the properly interventionist agency.[77]

One noteworthy consequence of this discourse is the fact that FAS and other alleged substance-induced fetal malformations are cast as entirely "preventable" problems with a direct and single cause.[78] The issue is narrowed down to a simple cause and effect equation, with variables determined by the individual choices of the pregnant woman. The perspective conveniently ignores the fact that studies have been unable to rule out the influence of other factors known to affect fetal development; in fact, these issues are not considered because they have no clear or direct solutions. In practical terms, it is simpler and more efficient to make pregnant women solely responsible for the pregnancy and child, and to impose moral and legal culpability if anything goes wrong. "It is easier to punish one pregnant woman that to alleviate the lethal conditions of many."[79]

It is also significant that the shift toward punishing or restricting freedom coincided with the increasing association of FAS with Aboriginals. Scientific surveys of Aboriginal populations filtered through the popular media began to attach racial characteristics to the pregnant substance abuser, allowing the white mainstream to objectify and distance itself from the problem. Unspoken undercurrents of racism combined with the discourse of individual responsibility to formulate substance abuse during pregnancy as "(…) a social deformity that expressed the moral failings of mothers and

---

75 Janet Golden, "'An Argument that Goes Back to the Womb': The Demedicalization of Fetal Alcohol Syndrome, 1973-1992" (1999) 33:2 J. Soc. History 269 at 275 [Golden].

76 Alison Diduck, "Conceiving the Bad Mother: 'The Focus Should be on the Child to be Born'" (1998) 32 U.B.C.L. Rev. 199 at 209 [Diduck].

77 *Ibid*.

78 Health Canada publications, for example, repeat that FAS and FAE are "preventable" conditions. See *e.g*. Canada: Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, *Foetal Alcohol Syndrome: A Preventable Tragedy* (Ottawa: Health Canada, 1992). See also Claire E. Dineen, "Fetal Alcohol Syndrome: The Legal and Social Responses to its Impact on Native Americans" (1994) 70 North Dak. L. Rev. 1 at 2 ("a condition with only one cause") and 11 ("completely preventable condition").

79 Michelle Harrison, "Drug Addiction in Pregnancy: The Interface of Science, Emotion, and Social Policy" (1991) 8 J. Subs. Abuse Treatment 261 at 267 [Harrison].

marked their children as politically marginal and potentially dangerous."[80] Framing it as an "Indian problem" simply places it on a continuum with the other substance abuse problems these communities have faced. From the outside, everything else falls away. Even an obvious issue like poverty, which is known to have a strong association with both birth defects and substance abuse, is generally ignored. If considered at all, it is seen as an external factor, a sad fact of life in these communities, or perhaps as a way to condemn the role of the state as enabler. It has been pointed out that:

> The clear undercurrent of much of the public rhetoric on coerced treatment of pregnant women revolves around notions of appropriate and inappropriate public expenditure. Such concerns are exacerbated where the communities which are seen as generating the expense to the state and the tax payers are those who are marginalized, impoverished, and perceived as non-productive units.[81]

According to this construction, the addicted Aboriginal woman is part of a deadly cycle of poverty, living on a reserve or on social assistance. If the state does not intervene, she will give birth to an addicted child who will, in turn, grow up to be damaged, perhaps addicted as well, unemployable, and possibly a threat to the social peace. This perspective of course ignores that the dependency of many Aboriginal people on the government was forced upon them by historical circumstance and colonization and has been perpetuated by loss of social cohesion and lack of educational and employment opportunity. Their reliance on money from the government, either in the form of band allocations (which are in fact payments owed by the government under treaties) or welfare for some who live off reserve (something to which all Canadians are entitled) is also frequently misunderstood by the mainstream as "special treatment" and recast as an advantage they are selfishly wasting. The "bad" mother has been identified. Instead of her actions being understood within their social context, they are, like the actions of Geertz's "Drunken Indian," interpreted as harmful choices and coloured with negative images drawn from the history of racism that have tainted mainstream interaction with Aboriginals for centuries.

Finally, it is important to note the role of enforcer that chid welfare protection agencies have played in the lives of Aboriginal people. In 1989, Patricia Monture provided statistics regarding the number of Aboriginal children in state care: at the time, the First Nations population of Canada represented approximately 3.5% of the total population, while 20% of the total number of children in care in the entire country was First Nations.[82] The placement of Aboriginal children in state care began in earnest in the 1960s; for child welfare agencies, alarmed by the poverty and social breakdown on

---

80 Golden, *supra* note 75 at 271.

81 Sanda Rodgers, "Winnipeg Child and Family Service v. D.F.G.: Juridical Interference with Pregnant Women in the Alleged Interest of the Fetus" (1998) 36 Alberta L. Rev. 711 at 720 [Sanda Rodgers].

82 Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 Can. J.W.L. 1 at 2 [Monture].

many reserves and misinterpreting or dismissing the importance of extended families in child-raising in Aboriginal societies,[83] apprehension of Aboriginal children became the norm. Thousands of children remained permanently in state care or were adopted, the majority by non-Aboriginal families, in the name of "protecting" the children. Many have accused the child welfare system of taking over where the residential schools left off.[84] Monture, for example, has explicitly condemned the child welfare system as a primary tool in undermining the integrity of Aboriginal societies. Its ethnocentric and racist foundations, its effects of dislocation and removal and the overrepresentation of Aboriginals within the system place child welfare "on a continuum" with the criminal justice system.[85]

State interference in pregnancy can also be situated on this continuum. In the United States, a number of states have enacted legislation criminalizing substance use during pregnancy. Although the level of interference in Canada is significantly lower than the U.S., because the criminal law has not been invoked, the issues are the same. In the U.S., studies have shown that poor women and women of colour have been disproportionately charged under such laws. Similarly, although on a smaller scale, the majority of the cases of legal intervention on behalf of fetal health have involved Aboriginal women, and all have involved poor and marginalized women. According to Sanda Rodgers,

> In both Canada and the United States, the women who are the subject of interference with gestation and birth are those who are subject to state scrutiny because of their economic vulnerability and previous engagement with the state in order to obtain needed services.[86]

Thus, the child welfare and criminal law systems are performing a similar function, although the Canadian arm of the law is thankfully a little less muscular than the American. There is also a difference in terms of discourse: since the child welfare system is the enforcer in Canada, intervention here is more likely to be framed in terms of protection than in the United States. This description, however, is misleading, at least with respect to the practical effect of the intervention. It is certainly not unreasonable to expect that, if a law explicitly controlling substance abuse during pregnancy were in force, child welfare agencies would be more likely to watch their clients more carefully, particularly those considered to be at risk, a group that includes Aboriginal women. As the Women's Legal Education and Action Fund (LEAF), an intervener in the Supreme Court hearing, pointed out in its factum, this would:

---

83 Diduck, *supra* note 76 at 213.

84 *RCAP report*, *supra* note 22, vol. 3, c. 2, s. 2.2; *Manitoba Justice Inquiry*, *supra* note 38 at 519.

85 *Ibid*. at 5.

86 Sanda Rodgers, "Juridical Interference with Gestation and Birth" in Royal Commission on New Reproductive Technologies, *Proceed With Care: Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) at 89.

> (…) further devalue the rights of already marginalized people (…). If pregnant women have been historically and socially devalued, an Aboriginal woman who is solvent addicted and poor has been marginalized to the point where some people redefine coercion and force as help and care.[87]

The following analysis of the judgments will outline the ways in which the discourses of protection, rights and choice have also been informed by many of the racial and cultural assumptions embedded in Euro-Canadian attitudes about Aboriginal people. Although implicit, evocations of race play an important role in the portrayal of Ms. G. as a subject before the court, and demonstrate once again the inability of the law to properly address the fundamental issues at the root of this case.

The Judgments

Queen's Bench[88]

The reasons of Schulman J. explain his order to confine Ms. G. under the *Mental Health Act*, and the *parens patriae* jurisdiction. The evidence considered for both claims was the same, but the former issue was abandoned on appeal and will therefore not figure in this discussion.

Parens patriae is a long-standing common law principle that gives the court the authority to act in the interest of children or of adults who have been found incompetent; according to the court, it is the power to "(…) act for the protection of those who cannot care for themselves."[89] Interestingly, this standard description reveals that the power is related in principle to the Crown policy of protection of Aboriginals, the terms evoking the historical legal position of Aboriginal people as "wards" of the state (and perhaps even an aspect of the present fiduciary relationship). Fittingly, then, Schulman J. finds a number of ways to infantilize and disempower Ms. G.—in legal terms, provide "sufficient proof of incompetence"[90]—in order to justify using this power.

The first way this is achieved is by identifying Ms. G. as Aboriginal.[91] The reference is almost an aside, apparently inserted to emphasize the appropriateness of the treatment centre recommended by the Agency. However, because of the historical association of Aboriginal people with a state of dependence or wardship, her cultural/racial identification implicitly reinforces his arguments in favour of her incarceration. Schulman J. subsequently paints an image of her as silent, passive, and weak. He is quick to point out that she is silent in the legal sense, since she never testified and her counsel adduced no evidence at trial.[92] In addition, he details her loss of

---

87 *Winnipeg (SCC)*, *supra* note 1(Factum of the Women's Legal Education and Action Fund at para. 50).
88 *Winnipeg (Q.B.)*, *supra* note 1.
89 *Ibid*. at para. 25.
90 *Ibid*. at para. 26.
91 *Ibid*. at para. 6.
92 *Ibid*. at para. 3.

the physical powers of speech and movement. He relies on expert testimony describing the effects of solvent abuse as a "decrease in intellectual capacity" and "(…) damage to the cerebellum, the part of the brain which controls motor co-ordination,"[93] after having cited testimony stating that when she was high, she "could hardly walk or talk"[94] and recounting another incident where she was found helpless on a sidewalk, unable to walk or go to the bathroom.[95] Later, he quotes a doctor who describes her as "(…) very unstable in her gait, using walls and furniture for support when walking."[96] Schulman J. completes this portrait by noting his own personal observation, using language that evokes a child struggling to walk:

> During the course of the hearing before me, Ms. G. walked across the court room several times on her own initiative. I observed her clinging to desks, chairs and railings to keep her balance throughout each of her trips.[97]

There is an immediacy and authority to this image, originating as it does from direct physical observation by the presiding judge. Indeed, he himself assigns it a great deal of weight, relying on it as evidence to dismiss the testimony of the psychiatrist who performed the court-ordered assessment and attested to Ms. G.'s mental competence, stating categorically, "I would discount his opinion on that ground alone, because the evidence is very clear that her brain damage is causing her to lose her balance."[98] This neatly illustrates the supremacy of the judge and the law over those who come before it, as the mere gaze of the judge is shown to be enough to diminish Ms. G. to the status of an incompetent, regardless of expert testimony to the contrary. The most striking feature of this image, however, is its evocative power. In combination with the other images Schulman J. has selected to portray Ms. G, the staggering, speech-impaired woman he has described bears a disturbing resemblance to the stereotypical "drunken Indian."

Although implicit, this stereotype also strengthens the portrayal of Ms. G. as a "bad" mother who, despite her apparent incapacity and passivity, has made a number of selfish, irrational, even immoral choices. The first one he lists is evidence that Ms. G. has engaged in prostitution.[99] Like his original reference to Ms. G.'s Aboriginal heritage, this is, on the surface, a secondary point, included to magnify the extent of her problem with solvents. But it is also a very powerful image that evokes notions of female promiscuity and moral failure. Although we are not told whether or not Ms. G. was pregnant when she was observed engaging in this activity, the context in which it is invoked, that is, her pregnancy (the very reason she is before the court)

---

93 *Ibid*. at para. 7.
94 *Ibid*. at para. 5.
95 *Ibid*. at para. 4.
96 *Ibid*. at para. 16.
97 *Ibid*. at para. 20.
98 *Ibid*.
99 *Ibid*. at para. 10.

makes it particularly damning.[100] In addition, through this image, the text faintly echoes another invidious stereotype, that of the "(…) squaw (…) [who is] lustful, immoral, unfeeling and dirty."[101]

Schulman J. continues to build a case of Ms. G. as a bad mother by demonstrating her irrationality. He reports, for instance, that she has "consistently refused all offers of services or treatments."[102] This statement is problematic for a number of reasons, the first being that it is simply not true. Although the trial judgment does not mention it, Ms. G. in fact did try to get treatment on her own a few months earlier, but was turned away. She also agreed to enter treatment when she met with the Agency on July 18, two weeks before the hearing, but Schulman J. glosses over this fact as well. Her subsequent refusal five days later while intoxicated was the catalytic event that brought her before the court in the first place and is therefore mentioned in the judgment and used as evidence of her unreasonableness.[103] The event, however, is not placed in its context. Schulman J., implying that her refusal was an expression of her (misguided and perverse) free will, displays a complete refusal to acknowledge the nature of addiction. It is widely known that free will and self-control at all times are precisely what must not be assumed in an addicted person. This observation is not meant to further disempower Ms. G., or assert that she had no autonomous will of her own. However, it must be acknowledged that one of the problems of addiction is the impairment of the exercise of self-control, and that recovery requires the full and committed cooperation of the sufferer, as well as constant and steadfast support from others. A "window of opportunity" was apparent when Ms. G. agreed to the treatment, but following through required a swift and supportive response. Five days of unsupervised waiting before taking her to the centre was too long. Schulman J. neatly ignores the failure of the system, however, and places the entire responsibility for her continued addiction and refusal on Ms. G. alone.

The judge also links Ms. G.'s refusal to comply with treatment with the fact that she has lost custody of her first three children. Schulman J.'s language suggests a logical and causal link between her unsuccessful placement at Villa Rosa—the result, it is implied, of her unreasonableness—and the removal of her first child, using a naturalizing "and" to connect the two events: "Ms. G. did not comply with the conditions, and the Agency obtained a permanent order of guardianship."[104] A number of commentators have noted a tendency in legal discourse to construct the medically non-

---

100 A ruling in Ontario illustrates the power of this image: a young pregnant woman who had been working as a prostitute was sentenced to 60 days in prison, a greatly exaggerated sentence, precisely because she was pregnant. See Sanda Rodgers, *supra* note 81 at 45-46, for a description of the case and an excerpt from transcripts illustrating the moralistic tone used by the judge when addressing the woman.

101 *Manitoba Justice Inquiry*, *supra* note 38, citing Emma LaRocque at 479.

102 *Winnipeg (Q.B.), supra* note 1 at para. 10.

103 *Ibid*. at para. 21.

104 *Ibid*. at para. 11.

compliant woman as unreasonable,[105] and Schulman J. seems to be following suit, creating a parallel between her past and present resistance to treatment. However, if we recall that before the events at issue in this case, the Agency had been responsible for removing all three of Ms. G.'s children, it is possible to see the logical and causal relationships flowing in the opposite direction. In this light, Ms. G.'s actions can actually be understood as an objectively reasonable expression of mistrust. Indeed, as we have seen, it is perhaps not unreasonable at all for Aboriginal people in general to harbour a mistrust of the entire chid welfare system, when the historical role the system has played in the destruction of the communities is considered.[106] While Schulman J. sees the Agency operating in an unbiased way, Aboriginal people know that they are the subject of much greater surveillance than almost any other social group. Not all "bad" mothers are treated the same.

Court of Appeal[107]

The Court of Appeal does not mention the fact that Ms. G. is Aboriginal. In a certain way, this is not particularly surprising, since appeal courts generally deal with more abstract questions of law, findings of facts having already been established at first instance and the suitable ones selected for appeal. Ms. G.'s cultural background has been deemed irrelevant to the legal issue, and therefore omitted. Twaddle J.A., relieved, sets a clear boundary excluding messy social and moral questions from his field of legal inquiry: "Fortunately for the Court, the moral issues raised by the dilemma are not before us."[108]

Like the Queen's Bench, the Court of Appeal uses the language of choice and rights. However, unlike the lower court decision, which portrays Ms. G. as an irresponsible and destructive force threatening herself and the fetus, she is conceived here as a disembodied holder of rights seeking to exercise her free will. The first paragraph sets up the conflict between the fetus and the autonomous woman who may wish to make some unhealthy choices:

> Here is a classic dilemma. An expectant mother sniffs solvent to the probable detriment of her unborn child. If nothing is done, the child when born will surely suffer. Yet, anything which can be done necessarily involves restricting the mother's freedom of choice and, if she persists in the habit, her liberty.[109]

The language immediately sets the tone of abstract intellectual debate, in stark contrast to the more emotional approach of Schulman J. And importantly, by using the words "freedom of choice" and "liberty" to

---

105 See for example Diduck, *supra* note 76 at 214.
106 Monture, *supra* note 82 at 12: "First Nations distrust the child welfare system because it has effectively assisted in robbing us of our children and of our future."
107 *Winnipeg (C.A.)*, *supra* note 1.
108 *Ibid*. at para. 2.
109 *Ibid*. at para. 1.

describe the woman's actions, however unwholesome they may be, Twaddle J.A. has dictated the resolution of the dilemma.

In his brief recitation of the facts, Twaddle J.A. seems less willing to draw direct logical links between Ms. G.'s addiction and the removal of her children. He does include the information about their being wards of the state in the same sentence as her solvent abuse, but as parenthetical subsidiary information, without drawing any kind of causal link between the two. He is also much more prepared to attribute motives to the Agency and not view them as unbiased players. He harshly criticizes their action against Ms. G. because their concern was always with her fetus and never with Ms. G. herself.[110] As a result, he states that Schulman J.'s findings were "suspect from the start."[111]

The rest of the judgment discusses the inappropriateness of extending the *parens patriae* jurisdiction or the law of tort to include the fetus. Twaddle J.A. clearly articulates the Court's position, showing a sure hand as he lays out the parameters of the conflict between the woman and the fetus and identifies the inevitable victor. The clarity of the judgment, however, falters in one telling way. In his zeal to be abstract, Twaddle J.A. never refers to Ms. G. by name, repeatedly calling her "the mother" instead. The only other phrase he uses to designate her—or rather, the conceptual pregnant woman he has created for his argument—is "expectant mother," although much less frequently.

At first glance, employing the term "mother" for a pregnant woman seems out of place in this judgment, since this usage generally reflects more conservative notions of women's role in society and is often part and parcel of what Twaddle J. is ostensibly protecting women from, that is, the imposition of the moral imperative to be "good" according to externally-determined and inflexible standards. The slippage in terminology is enlightening, however, since it illustrates the power of traditional societal constructs, even in judgments that are considered generally progressive in terms of women's rights in society. Furthermore, the term he uses is not really incompatible with his position. It is, in the final analysis, not a particularly radical judgment: not only does it safeguard the "born alive rule," it also reinforces it with practical and legal arguments, including the apparently irresolvable conflict between the rights of women and the fetus,[112] thereby carefully preserving the traditional liberal principles of individual autonomy.

Twaddle J.A. also expresses some discomfort at the thought of protecting what his discourse compels him to frame as a pregnant woman's right to abuse substances. As he says, introducing the slippery slope argument later picked up in the Supreme Court majority: "The mother's right to sniff solvents may not seem of much importance, but I do not see how a court can

---

[110] *Ibid*. at paras. 3-4.
[111] *Ibid*. at para. 3.
[112] *Ibid*. at paras. 27-28.

select which conduct harmful to an unborn child should be restrained and which not."[113] Accordingly, after determining that the common law is unable to address the matter, he explicitly appeals to the legislature to strike the balance that he cannot achieve with the tools at his disposal.[114]

Supreme Court[115]

Minority

The Supreme Court minority opinion does not directly identify Ms. G. as Aboriginal until the twenty-first paragraph.[116] However, in the preceding paragraphs, Major J. provides pieces of information from which an attentive reader may infer her cultural background. In the first seven paragraphs of the section recounting the facts of the case,[117] he makes very frequent references to Ms. G.'s solvent addiction,[118] the actual smell of solvent,[119] and her unstable lifestyle.[120] As we have seen, solvent abuse is generally associated with children, the poor, and, accurately or not, Aboriginal groups in particular: in other words the most powerless in society. Thus, while not directly naming her, he is still able to identify her in general terms by invoking the reader's knowledge of the cultural script, implicitly racializing her problem, while simultaneously rendering her powerless through his description. The judgment frames Ms. G. as an issue to which the law, with its sturdy mainstream values of discipline and control, is compelled to respond.

The sense of urgency is reinforced by Major J.'s inclusion of "Additional Facts,"[121] essentially a summary of data regarding the effects of substance abuse during pregnancy and the prevalence in Aboriginal communities, which is qualified as a "crisis situation."[122] As we have seen, this information is not absolutely conclusive, yet it is stated as fact. Indeed, we are given the impression that solvent abuse is almost preordained for Aboriginals, a train hurtling towards a wreck, when Major J. quotes a single unidentified front-line worker in Manitoba saying, "[t]here is no indication the rate will slow down."[123]

Major J.'s solution is to expand the court's *parens patriae* jurisdiction to include the fetus, and accordingly, he relies heavily on the notion of fetal rights. But it is clear that the fetus is not his only concern. Early in his reasons, he frames the analysis in the following terms:

---

113 *Ibid*. at para. 26.
114 *Ibid*. at para. 34.
115 *Winnipeg (SCC)*, *supra* note 1.
116 *Ibid*. at para. 81.
117 *Ibid*. at paras. 68-74.
118 *Ibid*. at paras. 68-71, 73-74.
119 *Ibid*. at paras. 69, 72-73.
120 *Ibid.* at paras. 68-69.
121 *Ibid*. at para. 88.
122 *Ibid.*
123 *Ibid.*

> There are three questions that arise in this appeal. What are the rights of the pregnant woman? Does the unborn foetus have independent rights? Does the state also have a separate right to intervene to prescribe proper medical treatment in the hope of achieving a healthy child as opposed to standing idly by and watching the birth of a permanently and seriously handicapped child who has no future other than as a permanent ward of the state?[124]

The third question presents the unusual image of the state as rights holder. This is probably best understood as a rhetorical flourish expressing Major J.'s concern with the social good or the interests of the state and, specifically, with the long-term social consequences of substance abuse during pregnancy. He also expresses this concern in his disposition, affirming that extending the court's protective jurisdiction will "(…) [prevent] unnecessary spending by Canadian governments to permanently care for the mentally disabled child born as a result of the mother's unrestricted drug addiction."[125] Plainly, Major J. believes that, left to her own devices, Ms. G. will produce a burden on the state that will sap its resources and waste its potential. Indeed, as an addicted Aboriginal woman, Ms. G. is already a burden herself. She has been relegated to the position of the "bad" mother, or, as Major J. prefers to call her, the "reckless and/or addicted mother."[126]

Major J. relies heavily on the notion of choice and free will to depict Ms. G. as vividly as he can as an irresponsible young woman making non-maternal choices. She is, for example, described as having "consented" to the removal of her second child,[127] depicting her apparent lack of motherly instinct, and ignoring the element of coercion by the child welfare agency. She is also portrayed as willful and selfish: "The respondent, on becoming pregnant for the fourth time, made the decision not to have an abortion. She chose to remain pregnant, deliver the child, and continue her substance abuse."[128] This shows clearly that the autonomous free-willed subject is fundamental to Major J.'s conception of the problem. According to him, a woman's decision to carry the child to term requires her to sacrifice a degree of her autonomy, and just as she "chose" substance abuse in the first place, she should be required by law to "choose" abstinence.

Major J.'s assertions are troubling. First, his comments appear to imply rather strongly that substance abuse is freely chosen. As we have seen in some detail, this is simply not true. He chooses to completely ignore the fact that, while personality and individual choices may play a role, there are an incalculable number of social and cultural risk factors that have placed Ms. G. in a situation conducive to substance abuse. Second, he assumes that being pregnant is, in every case, a manifestation of a woman's free will. In

---

124 *Ibid*. at para. 63.
125 *Ibid*. at para. 141.
126 *Ibid*. at para. 95.
127 *Ibid*. at para. 70.
128 *Ibid*. at para. 65.

fact, in most cases, it is anything but a choice: "Pregnancy is not a voluntary state. It happens more by default than by planning, and it happens to only one of the two people who allow conception to occur."[129] It is true that women have the right to have abortions in Canada. However, in many cases and for a variety of reasons, this is not a real option. For some, geographical distance is a barrier. For others, the "decision" to remain pregnant is predetermined by personal, social, or religious constraints. The right to abortion is, after all, a right to exercise choice as to whether or not to have one. Nevertheless, Major J. blithely sets it up as a viable, state-sanctioned alternative to incarceration if the mother is a substance user: "In any event, this interference is always subject to the mother's right to end it by deciding to have an abortion."[130] It is a bizarre twist indeed on the notion of choice when a woman is coerced into selecting a particular option.

Major J. attempts to circumscribe the power of the courts in the context of an extended *parens patriae* jurisdiction, stating that it could be exercised only in "(…) extreme cases where the conduct of the mother has a reasonable probability of causing serious irreparable harm to the unborn child."[131] However, careful consideration reveals that even in the present case where he determines the *parens patriae* jurisdiction is appropriate, the evidence does not meet this very high reasonable probability threshold.[132] If the opinion of Major J. were the law, the definition of "extreme cases" would probably greatly depend on who is under the microscope held by the child welfare system. Major J. claims his decision champions the fetus because "(…) someone must speak for those who cannot speak for themselves."[133] However, he seems to have forgotten entirely about Ms. G.

Majority

As noted above, the Supreme Court majority judgment, like the Court of Appeal, never acknowledges the fact that Ms. G. is Aboriginal. McLachlin J. outlines the facts very briefly, stating clearly that they are by and large irrelevant.[134] On several occasions, she recognizes the limitations of the perspective offered by liberal legal discourse. For example, early in her reasons, she states, "[t]his is not a story of heroes and villains. It is the more prosaic but all too common story of people struggling to do their best in the face of inadequate facilities and the ravages of addiction."[135] Quite obviously, McLachlin J. is not portraying an autonomous and rights-wielding subject making choices dictated only by her free will; rather, she is honestly acknowledging a failure of the social welfare system and the realities of substance abuse. However, she quickly pulls away from this brief

---

129 Harrison, *supra* note 79 at 267.
130 *Winnipeg (SCC),* s*upra* note 1 at para. 93.
131 *Ibid*. at para. 121.
132 Baylis, *supra* note 72 at 792.
133 *Winnipeg (SCC)*, *supra* note 1 at 140.
134 *Ibid*. at para. 5.
135 *Ibid*.

glimpse of reality, moving the discussion to "the legal question"[136] and, like Twaddle J. at the Court of Appeal, drawing a clear distinction between information that is sad, messy and socially relevant and ideas that are legally relevant. The facts of the case thus overwritten with the liberal template of competing fetal and maternal rights, and the judgment becomes, on the whole, an abstract discussion of legal principles. Ms. G. is not only disconnected from her social context, she is almost completely removed from the discussion of her own case.

That said, this judgment is much more sensitive than the minority opinion to some of the social issues underlying substance abuse during pregnancy, and the consequences of juridical intervention in pregnancy. For example, McLachlin J. explicitly notes the fact that a law prohibiting women from ingesting alcohol and drugs while pregnant would not be a deterrent because of the nature of addiction.[137] She mentions that a variety of other conditions "(…) such as limited quality pre-natal care, lack of food for impoverished women, and lack of treatment for substance abusers"[138] also contribute to fetal harm, and that these "(…) may be the products of circumstance and illness rather than free choice."[139] Furthermore, she argues that the law would also be ineffective because it would drive these women underground, rather than urge them to seek help.[140]

However, McLachlin J.'s reasons still betray a limited understanding of the issues affecting Ms. G., or rather, what can perhaps be more accurately described in Geertzian terms as a *failure of imagination* in its treatment of these issues. Other than the brief quote above, there is no discussion of the sources of substance abuse, the reality that culturally-appropriate treatment facilities are still very scarce, or the fact that government funding for Aboriginal centres is extremely limited. McLachlin J. also refused to respond to the request of the Women's Health Rights Coalition, an intervener in the case, which had invited the Court to "(…) remind governments of their obligations, both legal and political, to provide effective programs and to help restore damaged communities."[141] While such a statement would not necessarily have required the court to acknowledge the role of the government in creating the problems currently facing Aboriginal communities, it could at least have represented a positive gesture of recognition from the State of the moral responsibilities of the governments with respect to the rebuilding of Aboriginal life, both individually and collectively. McLachlin J. declined to go even this far.

In fact, the specificity of Aboriginal experience is never acknowledged in her judgment. In one short paragraph, she notes that certain classes of women—namely, "minority women, illiterate women, and women of limited

---

136 *Ibid.*
137 *Ibid*. at para. 41.
138 *Ibid*. at para. 41, citing J. E. Hanigsberg, "Power and Procreation: State Interference in Pregnancy" (1991) 23 Ottawa L. Rev. 35 at 53.
139 *Ibid*. at para. 41.
140 *Ibid*. at para. 43.
141 *Winnipeg (SCC), supra* note 1(Factum of the Women's Health Rights Coalition at para. 4).

education"—would be more likely to "fall afoul of the law"[142] because, in her view, they would not be able to keep up with developments in scientific research and the consequent adjustments to the standard of care. There are, however, much more probable and serious reasons that the women she mentions—among them, Aboriginal women, like Ms. G.—would "fall afoul of the law," including, of course, the social circumstances of so many Aboriginal women and the fact that they are over-scrutinized by child welfare agencies in comparison to other groups. Although McLachlin J. does note that a duty of care with respect to a pregnant woman's lifestyle would "increase the level of outside scrutiny"[143] that a pregnant woman would undergo, she does not seem to be thinking of Ms. G. "Partners, parents, friends, and neighbours are among the potential classes of people who might monitor the pregnant woman's actions (…)"[144] she states, omitting public agencies like child welfare or the police, both of whom have played an important and coercive role in the lives of Ms. G. in particular and Aboriginal people in general.

One of McLachlin J.'s most powerful arguments against incarceration also has the unfortunate effect of diminishing the experience of Ms. G. and women like her. She invokes the "slippery slope," stating that behaviour harmful to the fetus is too vast a category to be defined by anyone other than the mother. She questions where the law would draw the line, stating that a woman could be held liable for any one of her "lifestyle choices." The argument is effective; it raises the "spectre"[145] of women being closely scrutinized and possibly taken to court for not only substance abuse, but also, perhaps, for "(…) exposing herself to infectious disease or to workplace hazards, engaging in immoderate exercise or sexual intercourse, [or] residing at high altitudes for prolonged periods,"[146] among the innumerable other relatively benign choices women make regularly. However, by placing substance abuse within this category, McLachlin J. misconceives addiction, downplaying or even trivializing it. Being addicted to solvents cannot be compared to going to a dinner party where someone is smoking, having a glass of wine once in a while, or going to the gym. It cannot even be placed on a continuum with these activities. By relying so heavily on this argument, McLachlin J. keeps the discourse within the same framework as the minority despite herself. All of the social and cultural weight of substance abuse is made irrelevant, and it is but a short step beyond this point to perceiving that a woman's choice of lifestyle represents a failure that can then be blamed upon her directly. The only difference between the majority and minority judgments is that that the former, instead of blaming the addicted woman, absolves her of responsibility for policy reasons.

---

142 *Winnipeg (SCC)*, *supra* note 1 at para. 40.
143 *Ibid*. at para. 42.
144 *Ibid.*
145 *Ibid*. at para. 34.
146 *Ibid*. at para. 39.

However, the reasons for not expanding the common law in this case are the very justification McLachlin J. offers for referring the matter to the legislature. Stating that "[d]ecisions based upon broad social, political, moral and economic choices"[147] are beyond the purview of the courts, she proceeds to call for legislative action no less than fourteen times in her judgment, which is only fifty-nine paragraphs long. Certainly, she has made it abundantly clear that the discourse most readily available to the courts is unable to effectively address the issue at bar. Her insistence may express her frustration with tort law and the *parens patriae* jurisdiction, which conceive of social problems only in individual terms. The ineffectiveness of rights discourse in this situation does not, however, mean that legislation is in order. What McLachlin J. apparently fails to apprehend is that relevant child welfare legislation and its implementation would be no different. It may be carefully drafted, and it may be praised as neutral and void of moral judgments. In practice, however, it would be enforced by the same individuals, agencies and State bodies (including, ultimately, the courts) involved in the *Winnipeg* case. It therefore seems quite probable that the application of the law to cases involving Aboriginal women would be influenced by the cultural scripts affecting State interaction with Aboriginal people and, of course, by the image of the good or bad mother.

Conclusion

This paper has been about the limits of the law, limits inherent in its overriding structure of rights and the abstract free-willed subject, and about the way in which these notions inform law enforcement and implementation. It has attempted to demonstrate that the law so conceived and implemented is inappropriate to a case involving substance abuse during pregnancy. The Supreme Court majority opinion notes reasons for its unsuitability, but fails to recognize the external cultural elements that help shape the law, whether in the form of a common law power or statute. More specifically, the judgments ignore the racist assumptions embedded in the law and the role the Canadian state has played in creating and perpetuating the social problems that bring people like Ms. G. into the courts or the child welfare system in the first place. In this way, this paper has also been about the limits of the law's imagination. It has shown how the law's practitioners—in this case, the Agency and the judges—are blind to the relationship between culture and law, no matter how conscious they are of the internal weaknesses of the law in certain cases. This, finally, is the real failure of imagination that Geertz spoke of. The importance of imagination, of grasping the inter-relationship of the two sides of difference, is at the heart of culturally-reflexive reasoning. And without this type of legal reasoning, the meaning and justice in adjudication can be severely undermined, particularly when the party before the court is marked in society and in the legal system by cultural difference.

---

147 *Ibid*. at para. 12.

And unfortunately, as we have seen, the absence of culturally-reflexive legal reasoning is a common thread throughout all of the judicial decisions in the *Winnipeg* case. In the Queen's Bench and minority Supreme Court opinions, rights discourse and traditional gender biases combine with harmful cultural images and stereotypes. Although evoked indirectly, these images fit seamlessly within the established cultural script that casts Aboriginal people as substance abusers, and thus strengthen the impact of the arguments for mandatory treatment while simultaneously reinforcing negative perceptions of Aboriginal people. Like Geertz's doctors, the judges fail to see the broader social context of Ms. G.'s problem and are therefore unable to temper their judgment with insight. Indeed, they go so far as to suggest measures tantamount to punishment, although clothed in the discourse of protection. As such, their recommendations repeat a pattern that has been present in Canadian law since the beginnings of the colonial relationship, a pattern which, as we have seen, has played a role in creating the very problem now seizing the court. Thus, while culture and race are present in the Queen's Bench and Supreme Court minority opinions, awareness of these issues is entirely other-directed. By focussing on the symptoms affecting Aboriginal communities, the judgments ignore the role that the imposition of mainstream cultural and legal values has had in creating the underlying problems.

The Court of Appeal and majority Supreme Court decisions, on the other hand, resist harmful stereotypes. Indeed, primarily concerned with the effects such a law would have on pregnant women in general, they omit all culturally-significant information altogether. Although this may be in part due to their unwillingness to racialize substance abuse and reinforce negative stereotypes, it is, first and foremost, a function of the liberal paradigm—in this case, the abstract, interchangeable rights-bearing unit (female). Necessarily, then, the person the court is ostensibly protecting is erased. Through the discourse, Ms. G.'s addiction is generalized into a "lifestyle choice," a problem that, in the eyes of the law, is not really a problem. She has become irrelevant to her own case, and to the law.

The Court of Appeal and Supreme Court majority are, however, aware of the insufficiency of their rulings. They therefore urge the legislature to intervene and enact a law specifically tailored to substance abuse during pregnancy, something which, presumably, would address Ms. G.'s situation more directly. However, this call to the legislature constitutes a rather disturbing contradiction. Ostensibly, their decision to refuse to expand the common law was made in order to protect the liberty rights of all women. However, if the legislature responded to their call, any law it enacted would, in practice, be far more likely to impinge on the liberty of marginalized Aboriginal women, marked in a very specific way by their race and their culture, than that of middle-class women, who are much less scrutinized by public agencies. Surely a culturally-reflexive approach, which would have compelled the judges to examine the nature of policy and law enforcement

with respect to Aboriginal people in general, would have opened their eyes to this potential injustice.

These criticisms are in no way meant to suggest that a Supreme Court ruling could have solved Ms. G.'s problem definitively. Indeed, the argument throughout has been that the law is entirely unsuitable to such a task. Nor is it possible for any court ruling to adequately address the problem of substance abuse in Aboriginal communities or mend the relationship between the mainstream Canadian state and Aboriginal people. However, the *Winnipeg* case did offer the courts an opportunity to render a judgment that was relevant to the problems at the root of such issues. Cultural reflexivity on the part of the judges would have compelled them to recognize that the laws and the bodies responsible for enforcing them have, in very profound and significant ways, played a hand in creating the very situation Ms. G. found herself in. For one, this would have prevented them from calling for legislative intervention. In addition, it could have encouraged them to make a simple statement acknowledging the specificity of the situation and the obligations of the Canadian state in helping to remedy the problem. This would at the very least have brought attention to the issue and possibly put pressure on the government to take more focussed action in this area. Such a statement would not have expanded the common law, nor would it have been binding on the governments. It would, however, have had cultural and personal meaning to Ms. G. and to the great number of women who find themselves in similar situations. Culturally-reflexive reasoning would at least have allowed the courts to address the issue that was actually brought before them.

Undoubtedly, the conscious motivation of the Agency and all of the judges in this case was the simple and very human urge to "do something" to ensure healthy women, births, babies, and ultimately, a healthy society. And given the weaknesses in health and social services, it is not surprising that a case like this was brought before the courts. However, like Geertz's doctors, the judges seized of the issue were unable to grasp what it really meant to be Ms. G. Limited by legal discourse or blinded by cultural bias, they were unable to truly perceive the cultural specificity of substance abuse for Aboriginal people, and remained oblivious to the role that they themselves played in Ms. G.'s situation. Thus, they were compelled to deliver judgments that were incomplete and possibly even counter-productive or repressive. As the case illustrates, lack of cultural reflexivity threatens the very meaning and potentially even the justice of judicial decisions from the perspective of those whose culture defines them before the law.

Résumé

Ce texte promeut l'approche de « l'imagination » tel que définie par Geertz dans le cadre du processus judiciaire, dans le but d'encourager la compréhension et le jugement réfléchi de cas marqués par la différence interculturelle. Cette approche réfléchie – c'est-à-dire, celle qui encourage une conscience du rôle de la culture dominante et de la loi elle-même dans les cas devant la cour – revêt une grande

importance dans les cas qui impliquent des personnes d'origine autochtone. L'analyse se fait en trois étapes. Dans un premier temps, un survol de l'historique des relations entre l'État canadien et les peuples autochtones souligne l'aspect culturel de la toxicomanie dans les cas de femmes autochtones. La deuxième étape consiste en une synthèse des statistiques disponibles pour nous donner une meilleure compréhension de l'image de la femme autochtone toxicomane qui prévaut dans le discours social et juridique. Enfin, une analyse du jugement *Winnipeg Child and Family Services c. D.F.G.* confirme que les idées préconçues jouent un rôle important dans l'appareil judiciaire et démontre les contraintes sur le processus décisionnel créées par le discours libéral de droits individuels. Par conséquent, la disparition de l'identité culturelle, les lacunes dans les arrêts, ainsi que l'incapacité de gérer convenablement les conséquences de ces lacunes, démontrent comment l'absence « d'imagination » peut mettre en péril le fondement même des jugements pour ceux qui sont définis par leur différence devant la société et la loi.

Abstract

The essay promotes an approach to legal decision-making informed by the Geertzian notion of the ethnographic imagination as a means of understanding and adjudicating issues marked by cultural difference. The reflexivity of this approach—i.e., the way it focuses judicial awareness on the role of mainstream culture and the law itself in the construction of matters before the courts—is most critical in cases involving Aboriginal persons. The discussion proceeds in three steps. First, an historical survey of the relationship between the Canadian state and Aboriginal people highlights the cultural aspects of substance abuse in the case of Aboriginal women. Next, statistical data is synthesized to gain insight into the construction of the substance-abusing Aboriginal woman in social and legal discourse. Finally, a close study of the decisions in *Winnipeg Child and Family Services v. D.F.G.* reveals the enduring role of unexamined assumptions about race in judicial decision-making and the constraints placed on adjudication by traditional liberal rights discourse. The resulting erasure of cultural identity, the deficiency of the final judgment, and the potentially harmful consequences of efforts to correct its shortcomings demonstrate how the absence of culturally-reflexive judicial imagination can threaten the very meaning of adjudication for parties who are defined by culture and/or race in the eyes of society and the law.

Vera J. Roy
4556 Hutchison
Montréal (Québec) Canada H2V 3Z9
veraroy@videotron.ca