

ANTHROPOLOGY, ARCHEOLOGY AND LITIGATION—ALASKA STYLE: A NOTE ON SOME OF THE ISSUES

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The mid 1990s Alaska Native court cases discussed in this symposium raise a number of important broad issues, a few of which I will comment on here, noting that in a number of works, Vine Deloria has expounded upon them very well, and at greater length.¹ These issues are interrelated and concern the changing nature of culture, while maintaining continuity; the greater weight that courts usually give to anthropologists testifying about a tribal culture than to tribal elders testifying about their own culture; and the unwillingness of many judges to give much, if any weight, to oral tradition.

The issue of continuity and change in culture as dealt with in the courts, other institutions, and wider society is raised in the call to papers for this special issue in saying, “In the mid-1990s, witnesses testifying for Exxon successfully ‘proved’ that Alutiiq culture could not have been damaged by the spill, because by 1989 it had ceased to exist. One Exxon consultant remarked in his deposition that the residents of the Alutiiq communities were no different from any other typical middle class Americans, because he had observed them using Betty Crocker cake mix.” As stated, this is an excellent example of a Nineteenth Century (and perhaps older) European colonial ethnocentrism, that while now less prevalent, remains a too common misnomer in U.S. culture, courts and other institutions. It fits with the faulty, colonial social-cultural evolutionary theory that became part of early anthropology (Tyler, and others), but has long since been abandoned, essentially since Boas. The underlying view is that Indigenous and peasant cultures were static and dying out, being replaced by progressive western culture.

A rudimentary review of what is known of Indigenous cultures, both among members of those cultures and by western anthropologists and related academics, shows this to be patently false. It is well known that traditional Indigenous cultures changed, and indeed a core of their culture was and is adaptability. Major rituals, such as the Sun Dance were initiated, spread and evolved. Yet no one knowledgeable of the Lakotas or the Utes says that they stopped being Lakotas and Utes when they received it. The arrival of the horse brought major changes in many North American Native societies and cultures. Hoebel, for example, reports, from interviews, how the Cheyenne legislated changes in their ways because of, and relating to, the horse.² Yet no respectable tribal member, anthropologist, historian... has suggested that these cultures ended when they were changed by the horse. Why should the incorporation of pancake mix, and television sets be evidence that a culture no longer exists? For that matter, no one has suggested that Americans stopped being Americans or Canadians being Canadians because of the adoption of the automobile, telephones, television, or commercial pancake mix. It should be clear that culture, while impacted by changes in technology and material items, is not the items themselves, but the values, world view of the people, which is always changing, and, at anytime, usually is subject to very wide variation. Change and adaptation are key elements of traditional Indigenous cultures. The traditional way for Native societies to meet new circumstances is

by applying traditional values appropriately for the ever changing present moment, with an eye for future development.³ While it may be convenient for certain economic interests to assert the fiction that traditional Native peoples are extinct, it is clear that they are still here.

It should be noted that the erroneous static view of culture has been applied to traditional, usually peasant and Indigenous, peoples in Europe, as well as in the “New World” and elsewhere outside of Europe, more often as class-centrism, than ethnocentrism. Though this view was no longer accepted in academia, including fields such as folklore, by the 1960s, it still cropped up in the wider public, including among non-academic people in folklore at least until the 1960s. For example, in the mid-1960s, Michael and Mary Ann Herman, who directed Folk Dance House in New York City, beginning in 1940, insisted that the Russian folk dance Korubushka was done incorrectly if the dancers turned as they moved away from each other (which was not the older way), even though the members of the Russian Orthodox Church in Chicago had adopted the newer movement, as well as other variations not considered correct in the static view of Folk Dance House.⁴ While there is a virtue in the application of the static approach in making clear what the cultural practice was in a particular past period – providing those concerned know that this is a historical reenactment – to use it in discussing and deciding about current living and developing peoples and cultures results in wrong, usually injurious, and often unjust results for those concerned – and since everything is interconnected, ultimately for most everyone (though in the short run some interests may benefit).⁵

Prior to considering the details of the two Alaska cases which are the focus of this symposium (with which, at this writing, this writer is not yet thoroughly familiar), it seems appropriate to ask, if the static approach is wrong, and one accepts that cultures are dynamic and changing, whether a different set of questions should have been considered than the preliminary symposium announcement suggests were argued in the case. While admittedly a culture can cease to exist, or become so transformed that it is no longer the same culture, in dealing with long established peoples and social groups, such as the Alutiiq, would it not be better to accept their existence, and ask instead what the current relevant aspects of their culture were, including their roots and continuations from the past, in determining if cultural damage had occurred? This would involve a deeper analysis of the current culture than what material objects or contemporary styles were in vogue amongst the people, as these are always changing. What is important for this analysis is not the objects and particulars themselves, but their meaning in the developing cultural context of the community.⁶ Similarly, is it any more relevant for the decision of these cases – as was part of the testimony in one of them – whether cross community Alutiiq identity is a relatively recent, rather than ancient, phenomena, than is the fact that Alaska was not always owned by the United States, or even a state?

But who is to judge the current state of a culture and the meaning of its components? This brings us to that complaint by Vine Deloria and others, that more weight is very often given in judicial determinations concerning Native culture to outside experts such as anthropologists than to the knowledgeable members of the band or tribe itself. While anthropologists and other outside experts may have something to contribute in testifying in court, should not the primary emphasis be on what knowledgeable members of a culture have to say about it? While an outside view may shine some light on what insiders are saying, ought not outside experts be used primarily as facilitators for tribal

members testimony? And when anthropologists and other outsiders do testify as to the content of Native cultures, ought they not to be required to support their findings with the testimony, subject to cross examination, of leading members of that culture. One may object that members of a group may have interests in the case that could tend to bias their presentation, but so might outside experts and the people who hire them to testify.

Part of the bias on the part of judges against Native testimony seems to be related to the western preference for written over oral tradition, particularly in legal matters, which brings us to the third issue. With their emphasis on written documentation, North American courts have long given small weight to evidence based on oral tradition, though that situation has been changing, to at least a degree. Certainly, there are problems of authenticity and interpretation of oral tradition. But the same is true of written documentation. As the recent sub prime mortgage scandal in the United States has demonstrated, written documents may be fraudulent or misused, and may need to be investigated for authenticity and accuracy. Mistakes and lies can be frozen in paper, as well as truth, and even accurate documents may not tell the whole truth. Thus, the U.S. Supreme Court has recently given defendants and opponents the right to cross examine the researcher or technician who made a written report that has been introduced into evidence concerning DNA.

Oral tradition does change over time, and traditional tales are often recast to some degree in the telling according to the context in which they are told. This is a problem that needs care to address. But it is important to note that a similar problem exists in written traditions, which is very well illustrated by looking at the development and use of precedent in American courts over time.⁷ American Courts, working in a common law tradition of judicial evolution, in principle (and to a lesser degree in practice) proceed to decide cases, developing theory in one case (Precedent) that is then applied in future cases, with the courts finding exceptions to the general rule as they arise, and when a case arises where the existing theory does not work, creating new theory (in principle, but not always in practice) to make the law consistent over the whole line of cases. In practice the philosophy and understanding of the judges shifts over time, resulting in a situation where a court needs to be consistent both with past precedent and current philosophy, necessitating a transformation in the way precedents are viewed, in order to maintain such consistency. For example, in *United States v. Curtis-Wright Export Corporation*, 299 U.S. 304 (1936), a strict constructionist Justice Southerland, wishing not to expand the normal powers of government, especially in domestic affairs, but seeing the necessity of the national government to exercise broader powers in international affairs and extreme emergencies than in the majority's view the constitution would allow, stated that in such cases the government could act, not under the constitution, but on the basis of "inherent powers" stemming from the nature of sovereignty, that the constitution did not create, but merely shaped. But in later years when there was a broad constructionist majority on the supreme court, who believed that all powers must come from the constitution, and that those powers expanded and contracted in order to meet the circumstances at hand, the doctrine of inherent powers needed to be transformed from a source of extra constitutional power to a guide to constitutional interpretation (i.e. such power is constitutional because it is inherent to the nature of government, and thus the framers intended to include it governmental power).⁸ The written common law judicial process is, then, very similar to the unfolding of oral tradition, and with proper care courts

ought to be able to deal directly very well with it. Of course, whether dealing with written or oral testimony, working across cultures always presents some problems. But these can be bridged satisfactorily, with the facilitation of persons well grounded in both cultures, whether they be Native or non-native.

Finally, there is one issue that I find troubling in the case of *The Native Village of Eyak vs. Carlos Gutierrez*, as set out in Rita A. Miraglia's paper in this issue of *IPJ*, "Did I Hear That Right? One Anthropologist's Reaction to Colleague's Testimony in a Court Case Involving Alaska Native Aboriginal Hunting and Fishing Rights on the Outer Continental Shelf." It appears that an important issue in the case was whether the Chugach Region villages traditionally collectively constituted a single people. Frankly, this seems to be irrelevant to whether or not the villages now have hunting and fishing rights based on their traditional activity. If they were a single entity and previously enjoyed those rights, then those rights should remain theirs now. Similarly, if each village traditionally exercised those rights, then each village should retain them now, and if the previously independent villages had since become a single entity, then those rights should be passed on to the new collective. The issue ought to be entirely whether the rights in question were historically exercised by the people in question, and Miraglia's paper seems to indicate that they were.

END NOTES

1. For example, see Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985), particularly Ch. 10, "Litigating Indian Claims;" and *Red Earth White Lies: Native Americans and the Myth of Scientific Fact* (Golden, CO: Fulcrum Publishing, 1997).
2. E. Adamson Hoebel, *The Law of Primitive Man* (New York: Atheneum, 1976), pp. 146-149.
3. See LaDonna Harris, Editor and Mentor; Stephen M. Sachs and Barbara Morris, General Authors; Deborah Esquibel Hunt, Gregory A. Cajete, Benjamin Broome, Phyllis M. Gagnier and Jonodev Chaudhuri, Contributing Authors, *Recreating the Circle: The Renewal of American Indian Self-Determination* (Albuquerque: University of New Mexico Press, 2011). This approach to change also is consistent with Aristotle discussing "the good", indicating what is best is not only in the moment, but for the future as well, in the Nicomachean Ethics.
4. On the Hermann's and Folk Dance House, visit: http://www.phantomranch.net/folkdanc/teachers/herman_mm.htm. The author, who has been involved in recreational international folk dance since 1959, and in ethnochoreography assisting his wife, anthropologist Nahoma Sachs, in field research among Slavic and other peoples in Chicago and in Yugoslavia from 1963-1976, was told this by Mary Anne Hermann, who noted that the way the Moiseyev Dance Company from Russia performed the dance on their visit to Folk Dance House, was the same way that it was taught and danced at Folk Dance House. The example cited here is more complex, as first, it is unknown how much Ms. Hermann knew about dance at the Russian Orthodox Church in Chicago (at which the author had attended dancing), and it is quite possible that the variation that Ms. Hermann objected to in the dance in question may have been the innovation of recreational (non-Russian) folk dancers. Culture, however, is regularly influenced by outside sources, and once a Russian community

adopted it, it became part of their culture. Whether Ms. Hermann knew this had occurred, her view in this case was consistent with her static general view that there was an unchanging way to do a dance, for which the author can give other examples.

5. This raises some problems of the adversarial process, that many critics argue could be avoided by a non-adversarial process aimed at finding the truth as used in continental Europe (for example, see “Benjamin Kaplan, Civil Procedure-Reflections on the Comparison of Systems,” 9 Buffalo L. Rev. (1960), quoted at length, with additional commentary, in Robert S. Summers, *Law: Its Nature, Functions, and Limits*, Second Edition (Englewood Cliffs, NJ, 1972), pp. 102-117), or traditional Indigenous peace making procedure aimed at returning the parties to harmony (this is discussed with a series of examples and references in Harris, Sachs and Morris, *Recreating the Circle*, Chapter 4, Section 2).
6. This leads to a whole set of issues, in themselves beyond the scope of this discussion, concerning cross cultural transfers, but which are relevant in understanding culture and cultural change. Such writings as Laura Bohananan, “Shakespeare in the Bush,” Richard Borshay Lee, “Eating Christmas in the Kalahari,” and Lauriston Sharp, “Steel Axes for Stone-Age Australians,” and others, in James P. Spradley and David W. McCurdy, *Conformity and Conflict: Readings in Cultural Anthropology*, Sixth Edition (Boston: Little, Brown and Company, 1987) may be helpful here. See also, Stephen M. Sachs and Deborah Esquibel Hunt, “Appropriate Consulting with Indian Nations: Facilitating Returning To the Wisdom of the People,” *Proceedings of the 2000 American Political Science Association* (Washington, DC: American Political Science Association, 2000); and Harris, Sachs and Morris, *Recreating the Circle*, Chapter 6, Section 2.
7. There is an extensive discussion of various aspects of this set of issues in civil liberties vs. national security cases in Stephen M. Sachs, *The Supreme Court and National Emergency* (Chicago, Ph.D. Dissertation, University of Chicago, 1968).
8. For example, see Justice Burton’s and Justice Clark’s opinions in *Youngstown Sheet and Tube vs. Sawyer*, 343 U.S. 579 (1952). This point is further developed in Sachs, *The Supreme Court and National Emergency*.