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COMMENTARY

"Ethnicity, Not Culture? . . ." A Reply

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I have no issue and took no issue in these pages with the case law on which Federal District Judge H. Russel Holland based his grant of Exxon's motion for summary judgment on native claims for noneconomic injury in relation to the infamous oil spill of the *Exxon Valdez* (Order No. 190 in the U.S. District Court of Alaska, 23 March 1994) [henceforth #190]. Whereas I take exception with some minor issues in the judge's response, here and in the original article in these pages I focus on his egregious mistakes.

As minor issues go, a casual reading of my article demonstrates that I did not identify the precise amount that attorneys for commercial fishermen or the claimants shall collect from judgments against Exxon, nor did I identify the precise amount that native claimants or their attorneys shall receive from their settlement with Exxon. The more serious mistakes are his unwarranted assertions about differences between natives and nonnatives. I take the judge at his word that he arrived at his misconceptions independently of Bohannon's similar errors.

Let me once again assess Judge Holland's bent for generalizing in the absence of evidence. To be courteous, his generalizations might be framed as hypotheses. To be accurate, his generaliza-

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tions are unwarranted assertions. It was the unwarranted nature of his assertions, rich throughout his decision and consonant with similar assertions made by Exxon's anthropological expert, that drew comment from me in "Ethnicity, Not Culture? . . ."

For example, Judge Holland (#190, p. 5) writes,

> The court takes notice of the fact that hunting and fishing for the family table is traditional throughout all of rural America. For great numbers of those who reside in the Lower 48 states and many urban Alaskans, hunting and fishing has no doubt become more social and recreational in nature; but the hunt and the need to put food on one's table is very much a part of American culture.

The "fact," rather, the "facts" that Holland observes are not facts; they are assertions presented as generalizations, indeed, as argument clinchers. Judge Holland is more careful in citing case law than in citing evidence from social science, natural resource science, or wildlife management science to support his generalizations. He cites no evidence to support his allegations that "hunting and fishing for the family table is traditional throughout *all* of rural America," or to support his inference about changes in those activities from, presumably, a task necessary to subsistence, to social and recreational pursuits for "*great* numbers," or to support his impression that the need to put food on the table bagged from hunting is "very much a part of American culture." Holland's freewheeling use of *culture* and *traditional,* his presumption about intensity and amounts of hunting in which farmers, ranchers, miners, railroaders, shopkeepers, harlots, lawyers, physicians, and sundry entrepreneurs engaged, and his assertions about change are precisely at issue here, as they are in the arguments of experts for both sides in the case.

Judge Holland misunderstands his limits. On page 6 (#190) he writes,

> Neither the length of time in which Alaska Natives have practiced a subsistence lifestyle nor the manner in which it is practiced makes the Alaska Native lifestyle unique. These attributes only make it different in degree from the same subsistence lifestyle available to all Alaskans.

Unwarranted claims similar to the foregoing are proved to be "not even wrong" in "Ethnicity, Not Culture?. . ." Before making

such assertions, a competent social scientist would ask whether length of residence, variety of subsistence-related practices, length of practices, relations among practices, distribution and consumption of the products of those practices distinguish among populations. The populations in question would be defined and sampled, as would the length of residence and all other topics referred to above. Only following the collection and analysis of such data would the social scientist present generalizations, empirically warranted, about differences between or among the populations under investigation. When questions are multivariate and temporal in nature, such as those in the instant case, reference to "degree" of difference is a non sequitur (unless, of course, the researcher is not competent and employs linear methods, i.e., methods that are inappropriate for mixes of the kinds of data of which "subsistence lifestyles" are composed—nominal, ordinal, and nonlinear interval).

Judge Holland asks not a single question that would be asked by a social scientist, nor does he marshall any evidence to support his own claims. Instead, he asserts that native lifestyles are "different in degree from the same subsistence lifestyle available to all Alaskans." Emboldened, Holland might have written "*not different at all* from the same subsistence lifestyle available to all Alaskans." Holland, after all, is not addressing "what is" (an empirical question); he is asserting what natives are (sans evidence), and what nonnatives can become (through availability).

Inasmuch as Judge Holland never addresses culture as a logical construct with empirical referents, nothing of significance turns on his statement (#190, p. 9):

> The court does not reject the notion that there are many cultural differences between Alaska Natives and many non-Native Alaskans. The existence of two cultures is not inconsistent with a conclusion that both have suffered injury of the same kind as a consequence of the *Exxon Valdez* oil spill, and that it is for the public to demand satisfaction on behalf of all of those injured.

Thus, Holland conflates cultural differences, the existence of two cultures (his penchant for assertion and reification is disconcerting throughout #190), and Alaska natives and many nonnative Alaskans while claiming that "both suffered injury of the same kind. . . ." I must remind the judge that culture is a concept, not a thing, and ask whether two cultures or whether native and

nonnative peoples suffered injuries of the same kind. People suffered (in several ways), and the abiological and biological environment sustained injuries. Judge Holland's meanings, then, are unclear. We will benefit if he, or someone in his behalf, defines the two cultures and the two populations and measures the differences between them—by degree or otherwise. Until he does so, there is no reason to accept his claim that two cultures (or is it two populations?) "suffered injuries of the same kind" as a result of the spill?

Judge Holland's confusion about culture, native and nonnative, is no less than his confusion about the differences between native and nonnative populations. The judge's willingness to generalize is a trait not restricted to judges, deconstructionists, pundits, and social scientists. Judge Holland's obligation to base his decisions on empirically warranted generalizations is greater than the obligations of pundits and deconstructionists to do likewise when offering their impressions to their audiences. I reiterate that I did not take exception with the case law on which Judge Holland based his grant of Exxon's motion for summary judgment. Culture, as a thing rather than an abstraction, has no standing in the court, and there is no reason why it should.

Let me conclude with some of Judge Holland's assertions. These and others are put to rest in the original article to which he responded.

> [T]he court would observe that the entry of oil companies into Alaska in the late 1950s and thereafter was not the first (and likely not the last) challenge to Native culture. Who moved in on whom as between Alutik, Indian, and Yupik/Inupiat[1] peoples is lost in the anthropological fog of ten to fifty thousand years ago. . . . All of these incursions have impacted and, to a lesser or greater degree affected, Native culture. . . . [O]ne's culture—a person's way of life—is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life. If (and we think this is not the case) that Native was in such distress that the *Exxon Valdez* oil spill sapped the will of the Native peoples to carry on their way of life, then a Native subsistence lifestyle was already lost before March 24, 1996. (#190, pp. 11–12)

Judge Holland might restrict himself to case law in his next decision bearing upon native and nonnative culture, including the subsistence lifestyles of natives and nonnatives.

NOTE

1. Judge Holland appears to be confused about languages and the people who speak them: Aluutiq, Cupik, Siberian Yupik, Inupiaq, Western Aleut, and Eastern Aleut comprise seven mutually unintelligible daughter languages of the Eskimo-Aleut family; "Indian" presumably, includes the several Eyak-Athapaskan languages spoken in Alaska, and Tlingit, Tsimshian, and Haida.