April 1989

Telling Them What They Want to Hear: Involvement with the Indigenous Populations as a Lawyer-Legal Anthropologist in Alaska and Canada

Stephen Conn

Summary

For some purposes — most notably when the legal question of tribal sovereignty is pursued — Alaska has held firm to the principle that all Alaskans are subject to a single law and that village tribes lack legal authority. Yet in practice the history of Alaska bush justice has been to employ informal, extralegal approaches until formal law could muster sufficient resources to intervene and displace informal law. This paper describes the tension between official and unofficial approaches to solving problems such as alcohol, gasoline sniffing, and substance abuse and the attendant social disorder in rural Alaska villages where the structures of formal law and law enforcement are largely absent, and explores the role lawyers can play to improve the legal system within villages.

Telling Them What They Want to Hear:
Involvement with the Indigenous Populations as a Lawyer-Legal Anthropologist in Alaska and Canada

by

Stephen Conn
Justice Center
University of Alaska Anchorage
3211 Providence Drive
Anchorage, Alaska 99508

Collaborative Applied Anthropology in the North: Alaska and Canada. Society for Applied Anthropology 1989 Annual Meeting. Santa Fe, New Mexico, April 8, 1989.

At their March 1989 convention, social workers from all over Alaska heard a panel of journalists and Alaska Native representatives discuss anew a newspaper series on an Alaska Native village epidemic of alcohol, suicide and violence which the newspaper had published about a year before (*Anchorage Daily News,* 1988). John Schaeffer, the head of the National Guard in Alaska and a prime mover in a growing sobriety movement in rural Alaska, told the audience that he had advised one small Eskimo village that it should continue searching incoming luggage for liquor. This was something that would not be tolerated in urban Alaska, he noted, as it clearly violated the Constitution. His advice had made him popular in the village, however.

John Schaeffer is not an attorney. But he is recognized as an important Native leader with clear authority in matters of the National Guard, an activity which affects most young Native men. He was also the president of a regional Native corporation formed to receive land and money under the Alaska Native Claims Settlement Act of 1971.

The village in question was until recent years isolated by weak communication and transportation lines from its regional hub in Southwestern Alaska. This physical isolation reinforced a very strong level of internal social control. Throughout the seventies, it was able to keep itself dry. Its police even searched trash cans for empty liquor bottles. Its ordinances were mailed to the Juneau office of the Bureau of Indian Affairs but never reviewed by an attorney. Therefore, its own internal prohibition, a prohibition which was not authorized by state or federal law, was unchallenged.

The prohibition in this village worked. When accident rates, including alcohol-related violence by one person to another, were examined by the author (1982) in all of the 57 southwestern villages during times when the regional hub experimented

with different alcohol policies – wet with bars, and dry and damp (allowing importation of liquor), the village's own rates did not rise and fall with regional policy, but remained lower than all but a few similarly isolated and cohesive villages.

By the late 1970s, the environment had changed. Transportation and communication patterns had drawn the village into the network of places affected by relatively easy access to liquor.

The village council took advantage of new Alaska law which allowed it to ban importation of liquor into the village. Yet these laws did not overcome the problem of discovering liquor being smuggled into town. Thus it resorted to searches of all bags.[1] The village lacked (as do a hundred plus others) a magistrate before whom a search warrant could be sworn. The searches were illegal[2]. The village corporation had quietly transferred its land estate to its tribal organization. However, it remained unclear whether it could draw upon federal authority to ban the introduction of liquor into its domain since both its tribal authority and federal delegation of authority to control liquor remained in dispute.

That the village was conducting unauthorized search and seizures was a matter of public record. It had been reported in the same newspaper series on alcohol and social breakdown in the villages (Bernton, 1988, E-7). Other villages in the region had been sued when they attempted the same practice.

So by Adjutant General Schaeffer's visit, it was fair to say that village officials had asked every visitor with apparent legal knowledge and authority whether they could search or not. It was also fair to say that every social worker, every trooper and every attorney and government official who visited would be asked the same question.

In this instance the question was not only whether it was legal to search but, more than that, whether they could get away with it.

Village Alaskans have a right to be confused about the changing legal culture around them. For many years much of the working relationship between villages and officials has been marked by a tendency to improvise around the extant legal authority of villages and to wink at apparent violations of it when this approach was convenient to officials (Conn, 1985).

In the early 1960s presidents of the village councils from the Yukon-Kuskokwim Delta came to Bethel to complain about liquor problems and deaths then beginning to plague their villages. They explained that their councils were struggling to enforce bans on liquor without success. At the meeting were Bureau of Indian Affairs personnel and the district attorney for the judicial district. (See Conn and Moras, 1986.)

The presidents were warned that liquor possession was not in and of itself illegal. The trooper warned them that they could be sued for illegal violation of constitutional rights. Yet the upshot of the meeting was a set of demi-legal village rules, drafted by the district attorney and Yupik representatives, each of which could be transposed into a state law violation. The Councilmen were told to enforce the rules and to notify the Bethel trooper when persons refused to obey them.

While this working relationship broke down almost immediately because of limited capacity on the state's part to intervene when requested, it well illustrates the way law has been taught to rural Alaskans. Officials tell you what is legal, that is, what you can get away with.

For some purposes – most notably when the legal question of tribal sovereignty is pursued – Alaska has held firm to the principle that all Alaskans are subject to a

single law and that village tribes lack legal authority. Yet in practice the history of Alaska bush justice has been to employ informal approaches or a demi-law until formal law could muster sufficient resources to intervene and displace informal law.

All law systems have official and unofficial standards of practice. Unofficial patterns of action can be negative or can be beneficial. In general, Alaska's informal practice has allowed for short-term involvement of village Alaskans and control of the process which most affected them (Conn, 1985). However, to the extent that it lulled them into a false sense of complacency such that they did not challenge the formal process which ultimately blocked them, it did villages an ultimate disservice.

With this pattern as a backdrop, how then should professionals in the field respond to ubiquitous legal questions?

"Can we hunt? Can we grab the drunk? Can we deal with the kids sniffing gas?

"Can we do it? Is it legal? Can we get away with it?"

Although attorneys are often criticized by social scientists for their lack of a social conscience, their conduct in situations such as those found in the Alaska bush is governed by more than the moral dilemma which all confront in small and relatively isolated Alaska villages. As other professionals recognize, they can readily ascertain that the regime of law with attendant resources has been denied to small communities. The villages struggle to deal with problems which are typical of most communities and which if left unattended can quickly create a ripple effect of general disorder. Problems involving alcohol, gasoline sniffing and substance abuse create interpersonal conflicts. Left unresolved, these conflicts create an atmosphere of tension and danger. Only when blood is spilled and victims are transported to distant regional centers does official justice bestir itself to intervene and pluck out the offender for distant trial and punishment. Alternatively, entire teams of legal

officers, defense attorneys and prosecutors, along with corrections officers and the judge, fly into a village to hold temporary theaters of the law, only to leave as quickly as they arrived. Such experiences of "fly-in justice" only serve to add to the impression that, for village Alaska, official legal assistance is reactive and not preventative and a source of authority never to be left in the hands of Native villages.

Attorneys are held to a code of professional responsibility operationalized through the rules of court (American Bar Association, ND). Yet this code contains edicts which, if read carefully, add conflict to their assessment of village situations. Attorneys are prohibited from encouraging, aiding or abetting the commission of illegal acts by their clients. Attorney-client relationships are formed by the very act of giving even casual advice to villagers. Attorneys have a second ethical obligation to assist the public in recognizing legal problems and to provide *pro bono* legal services. Their professional mandate is to work to improve the legal system.

Lawyers can get into trouble for giving bad, specific advice, even casually, to those who ask for help. Trouble is less likely for them if they fail to meet their ethical obligations to help persons recognize their legal situation and work to improve the legal system. Yet it is through the latter process, that of articulating how the legal process might be manipulated to improve the village's relationship to legal power, that lawyers have made the most significant contribution to reform.

Lawyers often recognize that the issues of legal authority of villages which underlie most village requests for a legal opinion are by no means black and white. Fundamental issues of village authority under federal Indian law – the scope and territorial jurisdiction of village authority – lie at the heart of many different cases now proceeding through federal courts. They recognize that the more recent visceral response of state officials who previously allowed informal or extralegal use of legal power by village councils, problems boards, parents committees and the like to

adamantly deny that authority if it is clothed in tribal garb relates to these same law suits now pending which question tribal existence in Alaska.

Lawyers, then, are in a position to clothe their legal advice in two ways, both of which could be characterized as efforts to improve the legal system rather than to merely advocate illegal acts. Either they could instruct the villagers how to work within the extant rules and regulations governing courts and social agencies to find power sufficient to deal with small and local problems or they could advocate and construct institutions which lay the basis for challenges to the state's view of legal authority.

An example of the former is the construction of a parents committee in a village near Kotzebue by the author. The legal frame of reference constructed was a melange of court rules, youth services procedures and derivative authority from the Indian Child Welfare Act. A second example of the former is advocacy by the Department of Community and Regional Affairs of village judgment boards which might draw upon administrative authority granted communities by state statute. Yet another example is use of arbitration, or mediation processes employed by private as well as public entitites.

In all of these first examples, what the lawyer does is construct a buffer or legal frame of reference sufficient to explain and justify acts by village authorities which might otherwise be declared illegal.

The second examples are construction of tribal courts and codification of village codes to take advantage of explicit federal acknowledgment of Alaska village authority in the realm of child welfare and to extend that authority into other realms of civil law and regulation, apparently afforded to villages through federal Indian law doctrine.

Both of these approaches share common features with the earlier informal approach instituted by officials and villagers. The first approach very clearly requires carry-over work by the attorney and the village to establish a working relationship with the courts and agencies whose authority is being used and employed. This same process should also insure that the village can rely on intervention upon request when it determines that a matter is too large or too serious (or too demanding of special resources) for it to handle. Thus the first approach is conservative to the extent that it does not challenge or require challenges to state authority and is similar to earlier informal arrangements. However, it stands or falls upon the propensity of officials to live up to their end of the bargains they strike.

When Youth Services officers refuse to work with a parents committee and refuse to heed the requests of the committee, then more than the legal status of the committee is challenged. The credibility of the committee within the village is placed into question. For this reason and not for a legal reason, the committee is likely to fail.

The second examples of construction of counter institutions with no state law base make a more direct challenge to official law. Lawyers who advise the construction of tribal institutions must do so in anticipation of formal legal challenges to the institutions. Child welfare courts or other tribal institutions may offer, as parents committees, actual relief to regional officials overwhelmed with requests for village service which they cannot fill. Yet they represent more direct and formal challenges to state governmental control of people, land and resources.

Whether lawyers advise innovative reforms within the system or challenges to it, their advice has an implication which is important to other persons who also may be called upon to render opinions on legal questions of moment.

In nearly every case, there will be carry-over work to be accomplished ranging from negotiation to a response to formal court challenge. Who will undertake this work? Most villages cannot afford attorneys. Lawyers are as transient and issue-focused as other professionals who visit or reside for short periods in the village.

Does the advice-giver plan to deal with and chart the outward ramifications of his advice? Or does he plan to implant a change in the village with no regard for its outward implications as that village relates to the external governmental and legal world? The implications of telling people what they want to hear in the legal domain are ultimately quite congruent with products of applied anthropologists and their ethical implications.

Villagers are not ignorant of the ripple effect of advice taken. In fact, their request for legal advice is posited upon some anticipated calculation of the likely response of the outside legal world.

The purpose of this paper is to question whether lawyers or other professionals are as appreciative of the outward implications of the advice they give and the sandcastles of hope which they create with that advice as are villagers. Are they prepared to collaborate with villagers in anticipating and reacting to the response of the outside world?

The lawyer-client relationship is based on an ethical proposition that the lawyer will stand up to negative reactions to his advice when that advice is followed by his client whether or not the client has funds to continue to retain him. Yet this rule is rarely operationalized in places where the law does not easily reach.

Persons who are asked for legal advice in matters with serious outward ramifications might do well to plead ignorance and lose some momentary face if they

are ignorant *or* if they are not prepared to work with the village on a strategy to implement and defend the advice given.

This is better than telling people what they want to hear.

So did John Schaeffer do the right thing when he advised the Yupik village to continue its searches? The answer is probably yes since Schaeffer was well positioned to both gauge and influence the official response to the acts he reinforced. The village could depend on him to assist if their activity generated a negative official response. Less useful, however, would be a similar response to the same question or another question related to child welfare by one of the social workers in the audience. If any took Schaeffer's statement as further reason to advise villagers that they could deal with young people on terms which were formally illegal because "they could get away with it," he or she was misadvised.

Social workers and other transitory representatives of state law no longer have autonomy sufficient to assure villagers that the law of the cities will not "happen" in Alaska's bush. Unless they are prepared to deal with more powerful higher-ups who could graft the policy change into official policy, they do a misservice to Natives when they miseducate them as to the probable consequences of illegal acts.

The two systems of law, formal and informal, long noted by scholars (Angell, 1979) in Alaska's bush have merged sufficiently that no one can base legal advice on a kind of simplistic geographical determinism. In fact, it is more likely that variance from official law will be monitored more closely in village Alaska than in urban Alaska (where official law is unchallenged) now that tribal sovereignty as a threat to state sovereignty has raised its head.

Implicit in Schaeffer's advice was the premise that villagers should challenge existing rules and not be shackled by them. So long as those who get this kind of

advice understand that they are initiating a struggle for political and legal control which will not be ignored, that advice is fair.

Perhaps, this was what the people of the Yupik village wanted to hear.

NOTES

1. "'We search everyone. White man, Negro, Eskimo whatever,' said James Anaver, a member of Kipnuk's community council. 'Even if he's rich. Even if he's poor. Man and woman.'" Bernton, "We Search Everyone." *A People in Peril*, E-7, reprint, Anchorage Daily News, 1988.

2. "Curda, the assistant district attorney, said the searches trample on constitutional rights. 'It's just not right,' he said. 'We bend over backwards to protect people's rights [in court], then we have common citizens going into a place and getting searched. . .' Curda predicts a civil suit will eventually define the limits of tribal power.

"Public safety officials have ordered the trooper-trained public safety officer not to participate in the searches, but, privately applaud the village's tough stand." Bernton, E-7, *Id.*

REFERENCES

American Bar Association
ND *Canons of Professional and Judicial Ethics*. Chicago: American Bar Association.

Anchorage Daily News.
1988 *A People in Peril*. Anchorage: Anchorage Daily News (special reprint).

Angell, John.
1979 *Alaska Village Justice: An Exploratory Study*. Anchorage: Justice Center, University of Alaska.

Bernton, Hal
1988 "We Search Everyone," *A People in Peril*, E-7, special reprint. Anchorage: Anchorage Daily News.

Conn, Stephen
1985 "The Interrelationship Between Alaska State Law and the Social Systems of Modern Eskimo Villages in Alaska: History, Present and Future Considerations." Unpublished research paper, presented at panel on Law and Social Systems, International Sociology of Law Conference.

_____
1982 "Town Law and Village Law: Satellite Villages, Bethel and Alcohol Control in the Modern Era – The Working Relationship and Its Demise." Presentation to the 1982 Meeting of the American Society of Criminology, Toronto, Canada.

Conn, Stephen and Antonia Moras.
1986 *No Need of Gold: Alcohol Control Laws and the Alaska Native Village Population*. Anchorage: Justice Center, University of Alaska, Anchorage.