

Common Sense and Plain Language

BRUCE G. MILLER

The *Delgamuukw* decision rendered by Judge McEachern has as distinctive attributes (1) the employment of simple language, or "plain language" and (2) an appeal to common sense. Both of these attributes are important. They are directly connected to the nature of argumentation employed in the decision and establish a sort of epistemology. Secondly, they create an environment which appeals to pre-existing notions of racially linked social and cultural characteristics. Ultimately, I will argue, this style of argumentation facilitates, first, the depicting as a conclusion the assumption (made in the absence of any real evidence) that life for Native people of the Northwest Coast was "nasty, brutish, and short" and, second, the arguing of the proposition that the testimony of anthropologists and historians can be supplanted by the common sense of a layperson. For these reasons, the *Delgamuukw* decision can be said to rest on faulty grounds and on an inadequate version of anthropology and history.

Bourdieu (1990:52) explains the political implications of "clear and simple language" as follows:

I consider the strategy of abandoning the rigour of technical vocabulary in favour of an easy and readable style to be dangerous. This is first and foremost because false clarity is often part and parcel of the dominant discourse, the discourse of those who think everything goes without saying, because everything is fine as it is. Conservative language always falls back on the authority of common sense ... And common sense speaks the clear and simple language of what is plain for all to see. A second reason is that producing an over-simplified and over-simplifying document about the social world means inevitably that you are producing dangerous weapons that can be used to manipulate the world in dangerous ways.

The appeal to common sense employed in the *Delgamuukw* decision creates a form of misrepresentation. This is particularly important in this case — indeed, in all cases involving Native issues — as special problems obtain because of the differences between Western documents and Native

oral traditions. Judge McEachern's use of a Western notion of common sense facilitates the dismissal of Native oral testimony without a close examination of its epistemological status: it is simply argued, or rather asserted, that it does not conform to the canons of Western common sense and so need not be taken seriously. This is a tautology: Native oral traditions are not Western and cannot conform to Western constructions of common sense and therefore cannot be viewed objectively or usefully. Western common-sense constructions are closed arguments which do not admit extraneous variables. Common-sense arguments are not formal arguments in the western sense of logic, either. Rather, they are "folk" arguments whose very nature requires that they be unexamined: they are, in Bourdieu's terms, conservative and over-simplifying. Applying criteria consistent with them to Native argument virtually ensures rejection of that argument. This is incapacitating, for the ability to represent their culture and history is crucial for groups with limited access to wealth and power. The denial of these self-representations (particularly those in the form of unique oral narratives which represent the collective experience of social groups, at least as constituted at one moment) makes the lives of Native people especially vulnerable to misrepresentation and simplification.

Common-sense representations of history also carry embedded in them unexamined historiographic notions. Of particular moment in the analysis of the *Delgamuukw* case is the common-sense view that history is composed of discrete events, a folk view that mirrors a now dated, but formerly dominant, positivist historiography. Ricoeur (1980:9, in Fogelson 1989:135) isolates the major characteristics of positivist history, including the assumption that historical fact exists preformed in the documents and merely has to be extracted or excavated . . . explanation consists of relating particular events, or "accidents," to each other along a linear time line imposed by the documents, and . . . the individual is taken to be the ultimate locus and transmitter of historical change.

As Fogelson notes (*ibid.*, 137, following Ricoeur), this view of history has been challenged by French scholars (and others) associated with *l'École des Annales*, who "adopted broader, more complex conceptions of time derived from sociology, economics, and demography. Ideas of structure, trends, cycles, and growth permeate their histories." This viewpoint requires the consideration of change over a long period, and a reanalysis of the role of individuals in the historical process that is free of traditional concepts of the individual, individuality, and personhood. It therefore invites inclusion of collectivist traditions, such as those that characterize Native societies, in the work of historical analysis.

The *Delgamuukw* decision, then, comes directly from a nineteenth century version of positivism and applies the canons of common sense as constructed in the English-speaking world. Indeed, Judge McEachern defines time as relevant only in the historical period: the period before contact becomes by default a time-less, event-less, static period. Western — or more strictly, British — common sense thus functions to assert that this pre-contact period is non-civilized. That assertion is, of course, critical, for Judge McEachern claims that ownership in a Western sense cannot apply to a non-civilized people.

How and where does Judge McEachern embed “common sense” and “plain language” in the *Delgamuukw* decision, and how does he create his own anthropology and history? Let us look first at history. Judge McEachern’s clearest statement of what he approves of as historical method is as follows:

Lastly, I wish to mention the historians. Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections spoke for themselves. (52)

In this passage the judge reveals that in his view historians are mere collectors and that the writing of historians is mere “editorial comment.” Most importantly, he sees documents as “speaking for themselves.” What the documents are presumed to say must thereby logically be common-sensical and amenable to apprehension by anyone, or at least by lawyers and judges.

Elsewhere, the judge describes history as a “narrative” which can be “complete” (99), a perspective which mirrors the now discarded nineteenth century positivistic view succinctly articulated by Lord Acton: “now that all information is within reach . . . every problem has become capable of solution” (Acton 1907, quoted and explicitly rejected by Carr 1961: 3). This is followed by the assertion that he will

allow the participants — those who were actually on the scene dealing with the problems — to be judged by their own words, rather than by the reconstruction of writers. I shall, however, interject myself into the narrative to offer comments as I think necessary. (99)

All of these epistemological claims allow the judge to create the impression that “history” exists independent of human action (except the collecting of documents) and needs merely be apprehended: it emerges, in his view, as something which is far from a product of interpretation and is not at all the creation of the historian.

It is, therefore, of more than passing interest that the text of the judge's own decision shows how difficult it is to uphold this sense of things. He chooses among documents and arbitrarily selects some and rejects others in the process of creating his account, doing all this in a manner which creates serious problems for his work. Three examples stand out among the judge's selections of documentation. Joseph Trutch, holder of various colonial and federal offices, is a key figure in the history of land claims because of the role he played in the colony's negotiations with the Dominion over the terms of entry of British Columbia into Canada. Serious scholarly allegations have been made suggesting that he withheld and distorted information (see Fisher, this volume) which may have bearing on the present land claims. In discussing Trutch, the judge shifts from his policy of using primary documents to the use of secondary documents and historical interpretations. He argues that

one's understanding is often conditioned by what he thinks others mean rather than by what the speaker actually says or means. There is no profit in attributing blame or bad intentions on anyone from this great distance. (138).

This is a curious reversal of his earlier position that documents "speak for themselves." It is also notable that the judge regards events from the late nineteenth century as standing at a "great distance," while he sees the motives and intentions of eighteenth century actors (mainly those responsible for the Royal Proclamation of 1763) as intelligible from documents.

Second, the judge writes that the reports of an Indian Agent, R. E. Loring, have greater weight than those of other officials because "in many cases, his reports present a far more realistic picture of what was happening on the ground than the careful language of government reports and diplomatic exchanges" (168). The judge holds this position despite Loring's obvious biases, manifest in his sense that the Indians of the Upper Skeena were heathen who ate dogs and potlatched. Loring has several other limitations as an observer: he did not speak the native languages, although his wife did; the areas he travelled were enormous and without facilities for transportation during the bulk of his career; he visited some areas only infrequently. Loring's work cannot be regarded as all of a piece, a point Judge McEachern has not grasped; rather, each part of it must be evaluated in its own right.

The third important indication of the way Judge McEachern approaches documentary evidence arises out of his use of the reports of "trader Brown," as the judge refers to him, a Hudson's Bay Company officer assigned to Fort Kilmaurs in Babine territory in 1822. The judge writes:

As required by his employer, trader Brown filed numerous reports which are a rich source of historical information about the people he encountered both at his fort and on his travels. I have no hesitation accepting the information contained in them. (73)

The judge assigns Brown a double role in the *Delgamuukw* case. He is held to be the first European to make direct contact with Natives in the region, thereby ending the prehistoric period, beginning the "historic" period, and being in a position to establish just what the aboriginal social practices actually were. He is also "one of our most useful historians" (24). Although Brown's record-keeping fits the judge's concept of the practice of history as properly conducted by amateurs (leaving "collecting documents" to the professionals), it is important to note that Brown was not an historian at all. Rather, he was a trader who commented on events and people around him from a particular perspective. Brown's objectives were to promote trade and perhaps his own career within the Hudson's Bay Company.

What really complicates the judge's discussion of Brown is, however, the fact that in the course of that discussion he leaves aside his criteria of evaluating the documents in terms of historical context and returns to his other position that "documents speak for themselves." It is not, though, a canon of historical practice to assign a privileged position to "first observers." The limited information about Brown provided by the judge shows, in fact, that caution must be taken in using his accounts. He, too, was ethnocentric in his outlook, and this influenced his ability to understand the societies he was encountering. The judge writes that Brown regarded the Indians as "hardly amenable to obedience to anything but the most rudimentary form of custom. Brown held them in no high esteem, partly because of their addiction to gambling" (73).

Lastly, the judge finds it significant that although Brown does use the terms tribe, band, clan, and family interchangeably, he did not mention in his records Indian Houses (75) or the feast system (214). But Brown did in fact use the term "feast," referring in his entry of 24 October 1822 to the fact that "him and the most [*sic*] of his people were below at the Feast" (Hudson's Bay Company). The real point, however, is that the judge seems completely unaware that formal anthropological terminology regarding social organization was decades from being created (indeed, anthropology as a discipline was yet unborn) and that there is no particular reason why Brown would regularly employ the term "House" or even understand the rudiments of the system. Furthermore, one can easily see why a fur trader might not comprehend the feasts. Since the Natives he

encountered were no doubt aware of the low esteem in which he held their culture it is quite likely they did not reveal to him the nature of an important event with sacred elements.

In short, Judge McEachern's approach to history involves treating it as a game in which rules of evidence can be applied as one chooses and in which the work of professionals can be taken over by amateurs left free to conclude what they wish to. All of this leads to a situation in which Native society becomes something best understood by an untrained observer of the early nineteenth century as interpreted by a judge of the late twentieth century. Those people most suited by personal experience or professional training to comment on the nature of native society, the Natives themselves and anthropologists working in the region, are thus left with no voice at all.

If the "history" informing this decision is problematic, the "anthropology" of it is so littered with difficulties as to be almost impossible to disentangle. First, as is the case with his treatment of history, the judge does not distinguish between professionals and laypersons writing about Native society (17). Second, he conflates history and anthropology as disciplines, referring to anthropology as a "less precise class of history," and is apparently unaware that the findings of historians are often dependent on the work of anthropologists (and vice-versa), though the two groups generally employ different research methods and ask different questions. Third, he seems not to understand the nature of academic discourse, especially the fact that scholarly work is commonly, and appropriately, driven by theoretical interests and approaches, and is carried out through a process of argumentation. He attacks the work of Antonia Mills because she shifts her opinion over time (51), criticizes the discipline of anthropology as underdeveloped, and generally overlooks the point that a vibrant discipline grows through change. The work of Daly is rejected because it is theoretical and therefore detached from what is happening on the ground (50). Apparently, the judge's common-sense approach leads him to think that there ought to be an essentially positivist orthodoxy comprehensible inductively "evacuated," in Ricoeur's term.

More important even than these flaws in the judgment is its use of undefined and undeveloped concepts. Not only are these not acceptable to modern anthropology, they enable the judge to present an overtly racist picture of Native society at the time of contact and up to the present. Chief among them is the notion, explicitly rejected by modern anthropology, that societies can be divided into those which are organized and those which are not. Consequently a test which the judge adopts for finding

Aboriginal title to land involves determining whether the people on it “and their ancestors were members of an organized society . . .” (31). It is meaningless to suggest that human societies can lack social organization (indeed, even other primates have social organization), and therefore there is no meaningful test of such. In any event, while scholars point to important differences in the ways in which societies are organized, this is not the same as arguing that some are “much lower, even primitive” (*ibid.*). Such views characterized nineteenth century unilineal evolutionary schemes and positivism in anthropology, but have long since been rejected as ethnocentric and completely lacking in scientific relevance since they have no explanatory power. The judge’s statement that “I have no doubt that life in the territory was extremely difficult, and many of the badges of civilization, as we of European culture understand that term, were indeed absent” (31) provides some evidence of his efforts to rank societies on the basis of their conformity to European practice. Further evidence supports this view. For example, the judge notes that “there were also some aboriginal practices associated with feasting which some persons of different cultural background classified as barbaric” (34). This echoes the terminology (barbarism) employed by Morgan in his nineteenth century evolutionary scheme (1963:59). Later (35), the judge can only compare efforts to control these practices to the American prohibition of the use of alcohol, a particularly inept and misleading parallel.

One can make a virtual catalogue of the scientifically meaningless terms employed by the judge to bolster his case that the lives of Native people were “nasty, brutish, and short” (13). He writes that “they more likely acted as they did because of survival instincts which varied from village to village” (213) and so dismisses the idea that Native social institutions, and not simply instincts, were available to organize activity. The term “instincts” refers to unpremeditated, hereditary behaviours common to all of humanity, and which cannot vary from village to village. But the judge is clearly not referring to instincts in this scientific sense, and it is not obvious what he might have meant by this passage. If he means that local people adapted to local conditions, thereby creating some variation in social organization and technology, then this might make sense, but this does not imply that social institutions were absent.

Further, the judge dismisses the idea that policies for the management of the territory might have existed by noting that “common sense subsistence practices” were all that were to be found (213). He does not specify what the differences between “management” and “common sense subsistence practices” are. Beliefs and customs are distinguished in a similarly

unsatisfactory way. He specifies that there is no reason to believe that there was any widespread system of beliefs before contact; instead, he says, people merely followed "customs." "... customs," he argues, "were probably more widely followed" (213). But he does not clarify what he regards as the difference between beliefs and customs. There is, to be sure, a hint of what he might mean by the latter in his statement that "peer pressure in the form of customs may have governed the villages..." (221). It remains, nonetheless, unsatisfactory to categorize the religious practices of others as mere "custom" without providing a full definition of what this term is being taken to mean.

Even the use of Hobbes' famous phrase "nasty, brutish, and short" is misleading. No evidence about the life span of Native people is provided. The judge, too, has left out the crucial portion of the quotation: Hobbes' point was that life in a society lacking "a common power to keep [its members] all in awe," was "*solitary, poor, nasty, brutish, and short*" [emphasis mine] (Hobbes, 1651, in Brinton 1973: 141). And, quite apart from the question of its accuracy, no evidence is adduced in support of this proposition.

The judge is confused by ideal-type descriptions of Gitksan-Wet'su-wet'en society, and is apparently unaware of the long-established idiom of expression that characterizes much of the Native community, especially in formal settings. In his view, the Natives "have an unwritten history which they believe is literally true both in its origins and its details" (48). He rejects this as romanticized. Although on page 45 he notes that the plaintiffs' case "does not depend merely upon literal accuracy of these histories," he is unsure what to do with such testimony and so dismisses it entirely after building his own naive typology of oral histories. He claims that he had hoped to make a distinction between mythology and "real matters" (46), but ultimately rejected this as simplistic. Then, apparently unaware of scholarly methods of analysis of mythology (see Cruikshank, this volume), he concludes that scholars have erroneously built up descriptions of contact period society by including "supernatural" material. The judge's confusion may stem from his naive positivism which causes him to focus on discrete events while overlooking the emphasis on social relations built into such oral testimony. He is simply looking for the wrong thing, and, not finding what he wants, throws the baby out with the bathwater.

Another example of his confusion is his treatment of causal explanation within oral histories. He is confused by the attribution of geological events to the actions of mythological beings, noting for example that "it is difficult

to equate a land slide to a Grizzly bear" (65). In an especially notable passage he affirms that

the evidence does not disclose the beginnings of the Gitksan and Wet'suwet'en people. Many of them believe God gave this land to them at the beginning of time. While I have every respect for their beliefs, there is no evidence to support such a theory and much good evidence to doubt it. (17)

The judge is simply unable to understand this sort of testimony and can only approach it in a literal-minded fashion. He seems unable to see that these accounts are not in conflict with scientific views regarding Ice Ages and migrations to New Worlds, but rather deal with separate dimensions of human experience. He does not comprehend that the oral histories are about how people define their own identities and about what their relations to other people, to other beings, and to their territories ought to be. He does not, in short, see that they are histories of relationships rather than simply histories of events.

Specific statements about Native society appearing in the judgment must also be examined, for they recapitulate many of the common stereotypes of Native people and are self-serving in the extreme. The judge describes the natives as "reticent people" (128) who "lack in cultural preparation" (129). They are said, on the one hand, to be unindustrious. On the other they are described as "being from a culture where everyone looked after himself or perished, [and so] knew how to survive (in most years)" (129). These are not generalizations that withstand scholarly scrutiny. They seem intended to appeal to the public through their reinforcement of popular stereotypes.

A particularly prominent feature of Judge McEachern's decision is its general dismissal of anthropological work. "Anthropologists," he asserts, "add little to the important questions that must be decided in this case" (51). Their testimony, he says, is difficult to understand (*ibid.*). Linguistics is dismissed with the snide comment that it attempts to establish its results "by a mysterious process only properly understood by very learned persons . . ." (68). These are exactly the sort of deprecations of rigour that Bourdieu refers to in the observation cited at the beginning of this paper. Such appeals to simplicity have their political implications. As I have argued, one of the most important of them is that scholarly understandings are simply not necessary, that a layperson can interpret the behaviours and meanings of a radically different society, and that the status quo, as Bourdieu notes, is sufficient.

Judge McEachern also undertakes to dismiss anthropology through misguided attacks on research methods, particularly participant observation, and suggests that this method is not scientific. He writes:

This evidence was seriously attacked on various grounds, particularly that [participants] were too closely associated with the plaintiffs after the commencement of litigation, . . . and that they [Daly and Mills, anthropologists] did not conduct their investigation in accordance with accepted scientific practices. (50)

Concluding that these scholars had “honestly held biases” (ibid.), the judge holds that the effect of a non-binding Statement of Ethics of the American Anthropological Association (year not given but no longer the current statement) was to make anthropological researchers “more advocate than witness” (50). This section reads:

Section 1. *Relations with those studied.* In research, an anthropologist’s paramount responsibility is to those he studies. When there is a conflict of interest, these individuals must come first. The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honour their dignity and privacy.

Judge McEachern does not seem to see that acceptance of this statement does not oblige one to perjure oneself. The anthropologist can simply refuse to participate in processes held to be morally reprehensible or damaging in any of the ways listed. Nor does Judge McEachern recognize that the statement refers to the relationship between the anthropologist and subject, not to the relationship between anthropologist and courtroom. While it is true that some anthropologists describe themselves as “advocates,” even this does not necessarily imply that their work is non- or unscientific. Rather, advocacy has to do with what one *does* with one’s findings. If advocacy interferes with the process of research, then one’s findings are appropriately criticized by professional colleagues. Even if one’s concern for the welfare of the population under study leads one to carry out certain sorts of studies, this still does not make a body of research un- or non-scientific.

Conclusion

This paper does not attempt a criticism of the legal interpretations and rulings presented in the *Reasons for Judgment* regarding the *Delgamuukw* case. Nor does it draw systematic attention to the specifics of history and anthropology as they appear in that document, although there is much which should be said about these. It focuses rather on the ways in which

the document treats historical and anthropological testimony. The thesis here is that this treatment is not politically neutral. Despite the judge's contention that the process of anthropology is inherently political, it is rather his efforts to construct his own history and anthropology that are imperfect, inconsistent with professional practice in those disciplines, and supportive of a conservative construction of the issues before the court. I argue that this judgment is part of what Bourdieu calls the "dominant discourse" which, relying on the "common sense" of the layman, is by definition ethnocentric, over-simplified, and logically flawed.

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