

ORAL HISTORY AS TRUTH: VALIDITY IN RECENT
COURT CASES INVOLVING NATIVE AMERICANS

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The focus of this paper is upon the use and acceptance of oral traditions in law cases dealing with Native American protest and consequences based upon treaties. The admission of oral history as statements of veracity removes such utterances above the level of "hear-say" evidence which often clouds testimony in cases being tried in the American judicial system.

In the murky area of definitional discussions surrounding the field of "ethno-history," this aspect fits one of the three categories suggested by William C. Sturtevant in Introduction to Cultural Anthropology.¹ The use of traditions, either oral or written, as a primary source for data is important to this presentation. It is obvious that the Native American tribal bands involved in this litigation were non-literate at the time of treaty-making. The reliance and evaluation of oral tradition assumes great significance and the utilization of "folk" viewpoints regarding history is salient.

Moreover, a plea for Indian history from a native viewpoint is recognized by Eleanor Leacock in North American Indians in Historical Perspective when she states that faddist counter-culture groups often obscure "the relevant historical fact that out of their particular experience, Indians (as well as other so-called backward people of the heretofore colonial world) would have an important statement to make."² It is from the unique perspective of Indian tribes involved in law cases which allows a reassessment of statements made by Native Americans.

Presenting history from the "Indian point of view" was a directive in the Oral History Projects which were handsomely funded by the Doris Duke Foundation in several institutions (i.e., the Universities of California, Los Angeles; Illinois, Champaign-Urbana; New Mexico; South Dakota; Utah; among others). Besides allowing for a number of theses and dissertations, this funding led to the emergence of White "experts" on Indians like Joseph Cash and the production of books such as To Be An Indian in 1971.³

Most importantly, the validity of Indians writing their own historical experiences may be seen in the following histories: Noon Nee Me Poo ("We, the Nez Perces," Culture and History of the Nez Perce People), 1972;⁴ Nu Mee Poom Tit Wah Tit (Nez Perce Legends), 1973;⁵ The Southern Utes, A Tribal History, 1972;⁶ Ute People, An Historical Study, 1969.⁷ These publications have raised the concern and critical appraisal of certain non-native historians who are obviously tied to the use of documents and thus, question the methodology of native writings and interpretations.⁸ This stance might be expected in a literate society and the aforementioned tribal histories are courageous and much-needed attempts to provide alternative analyses of events which have direct influences on the life styles and life chances of natives in North America.

The fact is that indigenous cultures of North America, and elsewhere, have had as part of their heritages, strong emphases on oral history and traditions. These have persisted despite strong efforts directed toward acculturation to the dominant society via educational endeavors and language and religious suppression.

A newer interpretation of this emphasis is seen in Nancy Lurie's writing:

Without denying the contributory influences of the reservation system, racism, and educational and material deprivation, I believe that the fundamental reasons for articulation lie in the essential differences in white and Indian traditions and in the historical conditions of contact.⁹

Although Lurie is undoubtedly coalescing certain tendencies of articulation which might lead to action, there is no denying that oratory and oral history have always been factors in the traditions of the Native American tribes. Both Lurie in North American Indians in Historical Perspective and Sturtevant in Introduction to Cultural Anthropology appear anticipatory in their analyses of the use of historical tradition in the adaptive strategies of Native Americans.

The use of oral history seems to have assumed a new directive in its utilization in the years since the beginning of the Indian land claims.

Anthropologists have had a long and continued involvement in legal cases centering upon the Indian Claims Commission Act of 1946. In response to a paper regarding this issue, Ken Martin (Assiniboine) makes a strong statement regarding oral history:

. . . There are many, many qualified and literate Indian people and why do we have a discipline (Anthropology) in our educational system in this country defining what we mean as Indian people? Why can't the government understand that we can talk? We can tell them how it was, based on our oral history, based on our traditions. We can tell where we were. Our people know where we came from. We should not have to depend on another segment of Society to tell us where we lived.¹⁰

Many such statements, as the above, are often dismissed as subjective, ethnocentric, and non-scientific. Therefore, it is refreshing to read this excerpt from Leopold Pospisil, for the reference is to Plains tribes where chieftainships were critical:

. . . In the anthropological literature, the formal tribal authority is usually called chief. Because of the publicity and explicitness of his decision-making activity, his role and function are well remembered and may be accurately resurrected by a skilled anthropologist from old informants' memories. The quality of formality is the reason that the accounts of Cheyenne and Comanche Indians are so accurate and specific and therefore so valuable. In contrast, the

accounts of the informal and later "pacified" and supposedly leaderless and lawless tribal bands are frustratingly inadequate and disappointing.¹¹

Pospisil is commenting on The Cheyenne Way by Karl Llewellyn and Adamson Hoebel which is a landmark study of "primitive" law.¹² Further, Pospisil comments that these persons--a lawyer and an anthropologist--formulated law ways by examining explicit rules that pertained to the content of legal codes. In the case of the Cheyenne, these were well remembered. Thus, a model for casuistic discussions of non-literate societies was well established in anthropology.

It is, therefore, in the arena of action that the historical precedents mentioned have relevance. More specifically, the "take-over" and occupancy of Wounded Knee hamlet on the Pine Ridge (Oglala Sioux) Reservation, South Dakota, by members of the American Indian Movement (AIM) in Spring 1973 precipitated the court action now under consideration.

The case is known as the "Consolidated Wounded Knee Cases." The legal action was to dismiss charges against those persons involved under the rubric of "non-leadership" categories. The motion to dismiss was based upon the lack of jurisdiction under the Sioux Nation-United States Treaty of 29 April 1868 (Fort Laramie Treaty). Evidence was presented before and heard by District Judge Warren K. Urbon of the Eighth Circuit Court of the United States in Lincoln, Nebraska from 16 December 1974 until 2 January 1975. Lawyers for the appellants were John E. Thorne and Vine Deloria, Jr.

The main interpretation was based upon the 1868 Treaty and what those Lakota (Western Teton division) who signed this treaty comprehended the context of that agreement to be at that time. It was in this context that the aspects of oral history and its verbal transmission assumed great importance. Approximately 38 Native Americans of Siouan heritage testified regarding their history which they had obtained via verbal communication in their socialization processes as Lakota people. Many of the Lakota had ancestors who actually had placed X's (their marks) on the treaty agreement. Many of the Lakota elders spoke in their native tongue for greater accuracy and ease of expression. At his request, the writer translated the statements made in Lakota by Paul High Bear into English.

Surprisingly, two of the 40 Native Americans who were of Siouan ancestry evolved as "expert witnesses."¹³ The four "expert witnesses" of Native American descent were Vine Deloria, Jr. (Sioux), Kirke Kickingbird (Kowa), Roxanne Dunbar (Cheyenne-Nez Perce) and Bea Medicine (Sioux).

A quotation from the legal brief indicates the significance of this law case:

As previously stated, this is the first time such evidence has ever been presented in a Court, and it stands undisputed, the single government witness agreeing with the evidence, and the government itself having stated in chambers that its own investigation revealed that the oral history as given was accurate.¹⁴

Thus, the oral testimony regarding their tribal history by these Native Americans was accepted and "stands undisputed and established that the Lakota who signed the 1868 Treaty understood the agreement to be that on their homeland, the Sioux retained full criminal jurisdiction over anyone committing any alleged crime within their homeland established under the Treaty."¹⁵

Further, Thorne and Deloria state:

No witnesses were produced by the government to dispute the aforementioned oral history. No witnesses who were members of any Indian Nation or tribe, let alone the Sioux, were called by the government, their one witness being an historian, Mr. Joseph Cash. He testified that if an oral history was passed down by the whites, he would expect the oral history of the Lakota to be more accurate . . . Interestingly, this witness also testified that he had seen and looked at a non-existent history book and author, and identified yet another non-existent history book and author, as one he had not read.¹⁶

Additionally, in the above legal brief, Dr. Wilbur Jacobs indicated that if both an oral and a written history existed centering on the 1868 Treaty, the oral history would be more precise if there was a variation between it and the written version. He writes, "Again and again the relevant Indian oral history added a new dimension to legal deliberations."¹⁷

Therefore, by presenting the above data, it must be concluded that oral historical accounts by Native Americans have set a precedent in legal cases.

NOTES

1. William C. Sturtevant, "Anthropology, History, and Ethnohistory," in Current Anthropology, ed. James C. Clifton (New York: Houghton Mifflin Co., 1968), p. 454.
2. Eleanor B. Leacock, "Introduction," in North American Indians in Historical Perspective, ed. Eleanor E. Burke and Nancy O. Lurie (New York: Random House, 1971), p. 14.
3. Joseph H. Cash and Herbert T. Hoover, eds., To Be An Indian (New York: Holt, Rinehart, and Winston, Inc., 1971).
4. Allen P. Slickpoo, Sr. and Deward E. Walker, Jr., Nu Mee Poom Tit Wah Tit /Nez Perce Legends/ (Published by the Nez Perce Tribe of Idaho, 1972).
5. Slickpoo and Walker, Noon Nee Me Poo /"We, the Nez Percés," Culture and History of the Nez Perce People/ (Published by the Nez Perce Tribe of Idaho, 1973).

6. James Jefferson, Robert W. Delaney and Gregory C. Tompson, The Southern Utes (Salt Lake City: University of Utah Printing Service, 1972).
7. Floyd A. O'Neil and John D. Sylvester, eds., Ute People (Salt Lake City: University of Utah Printing Service, 1970).
8. Wilcomb E. Washburn, The Indian in America (New York: Harper & Row, 1975), p. 288.
9. Nancy O. Lurie, "The Contemporary American Indian Scene," in North American Indians in Historical Perspective, p. 421.
10. Ken Martin, "Response," in Anthropology and the American Indian: A Symposium (San Francisco: The Indian Historian Press, Inc., 1973), p. 51.
11. Leopold Pospisil, The Ethnology of Law, A McCaleb Module in Anthropology, Module 12 (Addison-Wesley Modular Publications), p. 20
12. Karl N. Llewellyn and E. Adamson Hoebel, The Cheyenne Way (Norman: University of Oklahoma Press, 1941).
13. Wilbur R. Jacobs, "Native American History: How It Illuminates Our Past," American Historical Review 80 (1975): 598.
14. John E. Thorne and Vine Deloria, Jr., "Appellants' Opening Brief in the United States Court of Appeals for the Eighth Circuit" (n.d.), p. 3.
15. Ibid., p. 7.
16. Ibid., p. 8.
17. Jacobs, p. 596.