SPEECH

History vs. The Law: Processing Indians in the American Legal System

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I. INTRODUCTION

In March 1998, the University of Detroit Mercy Law School held a conference on the landmark case, United States v. Michigan,¹ to honor those involved in the litigation and to dedicate the Law School’s new Indian Law Center. It was a great honor to have Dr. Tanner speak at the dedication and share with others the very important history of the case, to which she significantly contributed her research efforts. The University of Detroit Mercy is very proud of the Indian Law Center and its focus in helping students to understand the complexities of present-day American Indians, the Indian judicial system, and the legal and political rights of Indians. Students working with the Indian Law Center participate in a wide variety of legal research and writing projects in response to the requests of area Tribal courts.

What follows is a transcript of Dr. Tanner’s speech given at the Indian Law Center dedication, in which she gives an account of the

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* Senior Research Fellow, The Newberry Library, Chicago. Dr. Helen Hornbeck Tanner is a highly esteemed historical expert witness, researcher, author, and lecturer. She received her Ph.D. in History from the University of Michigan in 1961. Dr. Tanner has prepared historical reports and testified as an expert historian in over twenty Indian law cases. She is the author of several books and articles about the history of Michigan and other mid-western Indian tribes, including The Ojibwa and The Atlas of Great Lakes Indian History. Dr. Tanner lived in the Ann Arbor area for most of her life but currently resides in Beulah, Michigan but maintains a workspace in Chicago.

Dr. Tanner has been the recipient of many grants, awards and fellowships resulting from her research work. She has served as a consultant for several mid-west museum exhibits including “Tribute to Survival” at the Milwaukee Public Museum in 1993, and “We the People” in 1987 for the Chicago Historical Society. Dr. Tanner has been a visiting lecturer for the University of Michigan’s History Department, specializing in the history of Latin America. Additionally, she has taught courses for the Extension Service on Indian-White Relations and Historical Themes in American Culture: the Indian Experience.

experiences, frustrations, and observations occurring throughout her work as a historical expert witness. Through her work, Dr. Tanner has left an indelible mark on the legal system, and we are all fortunate to benefit from her insight and knowledge.  

II. COMMENTS FROM DR. TANNER

I am rather surprised, but very pleased, to be here on the occasion of the dedication of the new Indian Law Center at the University of Detroit Mercy School of Law. I will begin by recalling a day late in the fall of 1962 when I took that first fateful step that would entangle my life with lawyers, the courtroom scene, and with an increasing number of Indian people. It was in Ann Arbor, at the end of a meeting of the Women’s Research Club of the University of Michigan. The noted anthropologist, Nancy O. Lurie, told me that I really ought to help out some lawyers who needed a historian to do research on Indian tribes who had lived in the Southeast Michigan area. She ended our conversation with a warning: “You should understand that if you become involved with lawyers and Indians, your life will never be the same.” I did not pay much attention to this remark at the time, but surely more prophetic words were never spoken to me. Life soon began to change, just as she had predicted.

So that you may understand the frustrations, joys, and battles that I have encountered through my work as an expert witness, I will share with you some of the landmark events that have occurred in my thirty-five years of experience as an expert witness in legal cases involving Indian treaties. I would also like to impress upon law students who wish to work in Indian law, that the role of the historian expert witness in such cases calls for serious examination. This is so because Indian law is one branch of the law that will always have to contend with history, and although I have been working as an historian and expert witness for thirty-five years, I cannot say that I have as yet learned how to do it. The problem is that every single court of law in which I have appeared as a historian has presented a different type of legal challenge.

My experience has taught me that the law is opposed to history; that history and the law are in a state of perpetual warfare in the courts of law. As a historian, I feel that every time I have gone into a courtroom, I have been flung into an arena where I might be chewed up by the legal lions before I can get out alive. It is my hope that this situation can be modified in some way, and that those of you who

2. For more information, see the University of Detroit Mercy School of Law American Indian Law Center website: <http://www.law.udmercy.edu/indianLaw.htm>.

3. At that time, Nancy O. Lurie was on the faculty at the School of Public Health at the University of Michigan. She soon became Curator of the Milwaukee Public Museum, a position from which she has recently retired.
take on this field in the future will exert the necessary influence to make these changes.

I will start my story at the beginning of my career as an expert witness so that you can understand the apprehensions that I felt, as well as the prejudices and misconceptions that I had accumulated by the time I started working on United States v. Michigan, 4 in 1973. My very first case began with an innocuous question during an initial interview with James R. Fitzharris in December 1962. 5 Mr. Fitzharris, a fine lawyer from Escanaba, 6 asked whether I could find out which Indian tribes existed near Ann Arbor at the time of the American Revolution. I replied that with the facilities at the University of Michigan’s main library and the William L. Clements Library, where I had already worked in the rare books and manuscript collections, at my disposal, I could find an answer. If that was what he wanted, I would do it for him.

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4. 471 F. Supp. 192 (W.D. Mich. 1979). In this case, the United States brought an action on behalf of the Bay Mills Indian Community to protect the tribe’s right to fish in certain Great Lakes’ waters. Id. This fishing right stemmed from the tribe’s aboriginal occupation and use of the land and water and participation in the Treaty with the Ottawa and Chippewa Nation of 1836. Id. The United States asked that the State of Michigan “be enjoined from interfering with the Indians’ treaty-confirmed rights to fish in the Great Lakes.” Id. at 203. Ultimately, the court held that the Indian tribes had exercised aboriginal rights to fish in the Great Lakes, when land had been ceded to the United States in the Treaty of 1836. Additionally, the court held that neither the 1836 treaty nor the 1855 treaty abrogated or diminished those fishing rights and that Michigan laws that regulated tribal fishing did not preempt the Indian rights to fish. The result was that the Indians retained their claimed right to fish in the Great Lakes by virtue of their historical claims and by treaty. Id. at 271-81.

With the Treaty of 1836, “[t]he U.S. government acquired ownership of and political jurisdiction over the Ottawa’s core territory and with it the control of many natural resources that had provided the Ottawas’ economic base.” Robert H. Berry III, Note, Indigenous Nations and International Trade, 24 BROOK. J. INT’L L. 239, 294 (1998). With the Treaty of Ghent in 1814, the United States sought to do the following between the itself, the British, and the Indian tribes:

Engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification, and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed, or been entitled to, . . . provided always, that such tribes or nations shall agree to desist from all hostilities against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly . . . .


5. Both Dr. Tanner and Mr. Fitzharris were appointed by Governor George Romney to the Michigan Commission on Indian Affairs when it was established in 1967.

6. James R. Fitzharris was also a judge in Escanaba.
Well, I soon found out that lawyers always ask for something simple in the beginning, then gradually slip in requests that are more difficult, if not virtually impossible, to handle. As it turned out, Mr. Fitzharris' law firm was not interested in just Michigan and the Ann Arbor area. They were really concerned with land to the southeast toward Toledo, and further south to Cincinnati and east to Cleveland.7

It took me a while to uncover the whole story surrounding the litigation in which I had rather naively become involved. I thought that this sort of inquiry was the type of research that was done for a history seminar. I planned to write up a historical narrative to present a clear picture and believed that was all that would be required. Then, I became aware of docket numbers and learned that the law firm and the additional lawyers who entered the picture were working on behalf of specific tribes to see whether they could establish claims to Indian lands in southeastern Michigan and Ohio.

After several months of research, I gradually came to understand that this litigation focused on several early nineteenth century cession treaties in Michigan and Ohio following the Treaty of Greenville in 1795, that had surrendered two thirds of Indian country in Ohio to the federal government.8 The contenders in this complex litigation were the twelve Indian tribes who had signed the Treaty of Greenville and these consolidated cases focused on treaties signed in 1805, 1807, and 1817. All of these rival plaintiffs in the case were opposed by the Department of Justice. The cases were being brought before a special court, the Indian Claims Commission, in Washington, D.C.9 My team of lawyers represented the Saginaw Chippewa,

7. Jay Hoag, of Hoag and Edwards in Duluth, Minnesota took the lead in handling the cases covering southeastern Michigan and northern Ohio.
8. As stated, the purposes of this treaty were:

To put an end to a destructive war, to settle all controversies, and to restore harmony and friendly intercourse between the said United States and Indian tribes, Anthony Wayne, major general commanding the army of the United States, and sole commissioner for the good purposes above mentioned, and the said tribes of Indians, by their sachems, chiefs, and warriors, met together at Greenville, the head quarters of the said army, have agreed on the following articles, which, when ratified by the President, with the advise and consent of the Senate of the United States, shall be binding on them and said Indian tribes.


9. The Indian Claims Commission was established by federal law in 1946. Raymond Cross, Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century, 40 Ariz. L. Rev. 425, 427 (1998). The ICC was to hear and determine all those jurisdictionally defined claims for relief that the Indian people may have had against the United States. Id. The expectation was that all
Wyandot, Shawnee, and Great Lakes Potawatomi who had not been removed to reservations west of the Mississippi. I was supposed to locate the old villages and hunting grounds of these tribes in the ceded areas and explain the results of my research to the judges in Washington. Just before going to Washington in the fall of 1964, I learned that the opposing parties had a whole crew of people working at Indiana University for several years on a half million dollar grant from the Department of Justice to try to disprove or counteract anything I had been trying to figure out during the previous year.

As the cases developed, I realized there was nothing fearsome about the massive volume of research presented by the team at Indiana University. In the very first case, I found out that the head of the Indiana project, Dr. Erminie Wheeler-Voegelin, and I had independently decided to stress the importance of three particular Indian captivity accounts. We became firm friends, although we were kept from associating when we were in Washington for the same litigation. I think it would be a mark of progress if historians working on opposite sides of the same legal case were allowed to have discussions and come to agreements on the basic facts of a case.

Well, with considerable initial trepidation, I went to Washington and solemnly swore to tell the whole truth and all that sort of thing. I got through the first fifteen or twenty minutes worth of my first experience with "testifying," before the lawyer for the Department of Justice stood up and shocked me completely by saying: "I move that all this testimony be stricken from the record as being incompetent, irrelevant, and immaterial." Well, I didn’t hear past the word "incompetent." Almost automatically, I stood up and pounded the table in front of me and burst out "I have never been called incompetent in all my life and I am not about to take it here!" The presiding judges were thrown into confusion, called a recess; and I was surrounded by a phalanx of lawyers and escorted into an outer room. I was terribly embarrassed; I felt like someone who had behaved badly in school. But the lawyers explained to me the very different set of rules that govern statements in the court. They said that I should be pleased that the government lawyer wanted my testimony eradicated, because if what I said made no difference, it could just as well stay on the record. But because I had said something important that might make a real difference in the outcome of the case, the opposing lawyer wanted it taken out. Instantly, I realized that this kind of game had never been played in graduate school and I had to rethink my

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10. Robert C. Bell, Jr. was a New York lawyer on the team whose father had been a judge in Detroit Lakes, Minnesota. The entire group with whom Dr. Tanner initially worked came from the upper Midwest.
method of operation to try to learn to be an effective historical expert witness. It has become an endless challenge to try to arrange historical information so it can be processed by the legal system. The courts seem predisposed to reject history. The data and conclusions are often too subtle to be processed by a rigid “right or wrong” system of decision-making.

After that initial blow up, the judges treated me with great care. The judge on the end near the witness stand fed me peppermints to keep me cool. Though the bouts of cross-examination were a trying experience (I declared that some of the opposing lawyers were “slow learners”), we managed to get through the first session. It ended abruptly on November 22, when a messenger came into the room to announce that President John Kennedy had been shot. It was also my wedding anniversary, and as I rode to the airport, I watched the flags being lowered to half-mast.

The case continued the following summer. My son, who is here today, probably does not remember that fateful summer when my very first legal case finally ended. It went on for seven weeks. My husband, who was taking care of our four children in Ann Arbor, was disturbed by the mention of “subpoenas” and disapproved of any system that could tell his wife where she had to be and she had no influence whatsoever. Well, in the midst of this long session, he unexpectedly appeared in the back of the courtroom in Washington. He was a very large person with steel blue eyes and he quietly sat with his hand on his chin and stared at the people up front very intently. The judges called a recess. I learned later that they were nervous about the unidentified man in the back. They thought it was somebody from Congress that had come down to observe the proceedings and find out what on earth was taking so long.

I became amazed at what I considered absolutely irrational rules of evidence for using historical information. I found out that one rule said that one could not introduce as evidence any printed material by a living author without calling in the author for questioning and cross-examination. On the other hand, if the author suddenly dropped dead, the very next day anything he or she had written could be introduced as valid evidence. Because I had gone to considerable trouble to get the most up-to-date source material, a great many of the articles and even books were thrown out by the objections of rival plaintiffs in the case. Lawyers were really proud to eliminate contemporary research and preserve nineteenth century writing; and of course, that made me angry. The whole process was very anti-historical and showed no respect for my profession. I hope that rule has been changed by now; but that is an example of the kind of problem that I think a good Indian Law Center can change. There should be sensible guidelines for handling historical information. Right now, the preference is for government documents, and I
know many of these are written to conceal rather than reveal what happened with regard to Indian land transfers.

Another problem I encountered was the truly impossible and unsuitable legal standards applied to the historical era that the various plaintiffs were advocating. The judges had the ridiculous idea that in deciding what part of these vast areas of land belonged to which tribe, the determinative standard should be one of “exclusive use and occupancy.” That may have been a proper guideline in a society devoted to the concept of private property, but it was entirely inappropriate for Indian societies that believed in communal property, hospitality, making room for Indian allies, and accommodating refugees from other tribes. The court did not realize that during the time frame that was at issue in this case, approximately 1750 through the War of 1812, frontier warfare was almost continuous. So, finally, I just said, “[h]ow on earth do you decide on the exclusive use and occupancy of a war zone?” It just made no sense because I could tell by their questions that some of the judges were trying to categorize the presence of allies as examples of “adverse occupancy.” In that case, you lose the status of “exclusive use and occupancy.” I think that maybe I badgered them enough so that finally in these cases, the decisions, for the first time, admitted that there could be joint tribal occupancy of a single territory, which was the only sensible decision after all.

Another legal-historical problem arose during a discussion of Indian rights to specific portages between rivers. By long custom, tribes controlling the portages charged travelers to cross the portage path, and supplied workers to help with the transfer of canoes and cargo. I was pointing out the importance of the portage from the headwaters of the Wabash River to the head of the Maumee River in what is now Fort Wayne, Indiana. It was a lucrative source of income for the Miami Indians within their ancestral territory. The image I had in my own mind was paying a toll for crossing the four or five miles of land. But since I had mentioned two river courses, one judge was soon off on the subject of “riparian rights,” a subject about which I was completely uninformed. But that is just an example of the way that incidents and descriptions brought out by an historian can trigger a completely unexpected set of legal concepts in the mind of a lawyer.

If lawyers and judges seemed like real sticklers on the rules in using historical evidence, they appeared to me to be remarkably lax concerning any rules for being an historical expert witness. The simple fact that I had recently obtained my Ph.D. from the University of Michigan seemed to qualify me to discuss and offer opinions about a broad range of history and about many Indian tribes. It did not seem to matter that my field of specialization was Latin American History or that I had never had a course in any branch of Anthropol-
ogy. In fact, the lack of exposure to formal training in Anthropology probably was a positive factor. The lawyers appearing at the Indian Claims Commission seemed ambivalent about anthropologists. One day, an anthropological expert witness with a full beard came to testify, and there was considerable muttering throughout the room. Not only was he an anthropologist, but the lawyers thought that the beard was virtually an affront to the judges. Though I have had to undergo a modest amount of questioning to be “qualified” as an expert witness, the questioning was always far from rigorous. Over a period of about seven years, I was qualified as an expert witness on the Wyandot, Shawnee, Chippewa (Ojibwe), Potawatomi, Miami, Sisseton and Wahpeton Sioux, Teton Sioux, and the Caddo Tribe of Oklahoma.

I actually testified in two state fishing rights cases before I became involved in United States v. Michigan.\(^1\) The most aggravating case was heard at the circuit court in Leland, Michigan in about 1975. It had to be completed in one long Friday marathon because the judge had already chartered a boat to go fishing on Saturday morning, so there was a great deal of pressure from the beginning at 8:30 a.m. I remember being acutely resentful at what I thought was the court’s less than courteous treatment of Waneta Dominick, a devoted leader of the Northern Michigan Ottawa Association, as she answered queries about the tribal licensing procedure and punishments for infractions of the tribal fishing code. By about 8 o’clock at night, the situation was clearly falling to pieces. I told the prosecuting attorney that they should have listened respectfully to every word that Mrs. Dominick said; that she was the expert on this subject, though that was apparently not recognized by the court. By that time, it was clear that the judge did not want to hear any historical background at all, either about fishing or the Treaty of 1836.\(^2\) He said that he had a copy of this treaty and anything he needed to know was “in the four corners of the document.” I had never heard such a stupid assertion in all my life. Treaties are very complex and often obscure documents, but it was clear that he was not going to hear any more testimony, and planned to just read the treaty and render a decision.

Then, apparently, he thought a little more and he turned and asked me a question. I wish I could remember what it was. I took a deep breath and started to answer, when he broke in and stated, “I order you not to answer that question.” I looked at him in utter amazement, and the prosecuting attorney looked rather confused and said “[w]ell, I’d like to hear the answer to that question.” Then the judge just roared, “[s]he can’t answer that question in my hearing.” So, I looked around to see what would happen next, and

\(^2\) See website address supra note 8: <http://www.law.ou.edu/Indian.html>.
somebody in the audience stood up and said, "[w]ell, we'd like to hear the answer to the question." Then the judge shouted, "I will charge you with contempt of court if you say another word!" After that explosion, everything quieted down, but the lawyers and prosecuting attorney were all talking at once, as I understand that the transcript at that point drifts off into incomprehensible fragments. I am not sure about the decision, but I believe it was appealed and the higher court found the transcript inadequate. Anyhow, the experience reinforced my belief that you can never tell from one court to the next exactly how historical information will be received.

My other fishing rights case was a happier experience. It was actually an ideal case from a legal point of view because both sides felt victorious. This case was heard in a small courtroom in a rural area near Manistique, in the Upper Peninsula of Michigan. The building was actually a combined court and fire station. My husband and I arrived early one clear but chilly May morning and sat down all bundled up near the big fire engine to talk with the Indian men charged with illegal fishing, their lawyer, and the firemen on duty. We waited and waited for the attorney for the State to appear so we could get started and were really restless by the time he arrived, an hour and a half late. It was quite an entrance. We could hear the roar of the engine as the car sped up the driveway and screeched to a stop. It was a shiny bright red sports car. Out stepped a gentleman in a black and white checked suit, and black patent leather shoes. The rest of us just looked at each other, consciously feeling very "backwoods." The hearing proceeded rapidly and at the end the state attorney, the lawyer, and the defendants went into the judge's small office. They all emerged about twenty minutes later, and the dapper state attorney was smiling broadly as he shook hands, said good-bye, and zipped down the driveway. All this time, the fishermen were standing silently with inscrutable expressions, then they too broke into broad smiles and said quietly, "[l]et's go to dinner and celebrate." During a very festive meal, they explained that the state's attorney thought he had won a major victory because in viewing the bay where the contested fishing took place, he made a deal that required the fisherman to stay out of eighty percent of the bay. They were, however, allowed to fish in two small areas on the east and west sides of the bay. Well, those two small areas marked the location of the shoals that provided the only good fishing grounds in the entire bay. So the fishermen were extremely pleased with the verdict; maybe more pleased than the state's attorney. It would be marvelous if all fishing rights decisions could be made so all parties could feel like winners.

With all these varied experiences behind me, I was rather reluctant to agree to join the team working on the federal case concerning Indian fishing rights under the Treaty of 1836 with the Ottawa and
Chippewa, and the subsequent Treaty of 1855.\textsuperscript{13} This is the case that is the focus of attention today, \textit{United States v. Michigan}.\textsuperscript{14} When the United States District Attorney, John Milanowski, initially called me from Grand Rapids, my research assignment had a limited scope. He wanted me to find out all I could about the history of fishing and fishing practices of the Chippewa in the Upper Peninsula around Bay Mills and Sault Ste. Marie. I could not find much help in the printed books and articles, so I plowed through about seventeen thousand frames of the microfilmed correspondence of Indian agents in Michigan with the Bureau of Indian Affairs in Washington.\textsuperscript{15} There is a lot of unrevealed history in those letters, some of it just scandalous. But I tried to pick out what I thought would be pertinent to the fishing rights case. With the utmost care, I summarized the information with footnotes for every sentence, and supplied the documents for each footnote.

It was clear to me that the 1836 Treaty with the Ottawas and Chippewas in Michigan was one of a series of treaties that assured Indians that they could continue fishing and hunting. The subsequent 1855 Treaty dealt with sums of money that the government still owed the tribes, and further, aimed to provide them with permanent homes.\textsuperscript{16} I sent my report to Mr. Milanowski in Grand Rapids, then revised a couple of sections that were not absolutely clear to him. I thought that if I could make the story clear to an attorney who had no background in the field, it would be perfectly clear to everyone involved in the litigation. I was confident that I had produced a solid compilation of research. It even passed the critical review of Bruce

\textsuperscript{13} The Treaty of 1855 was similar to the Treaty of 1836 in that the Indian tribes signed it with the expectation that their fishing rights would continue unchanged.

A purpose of preserving Indian hunting, fishing, and gathering rights in treaties, statutes, and executive orders was to enable the Indians to continue utilizing game, fish, and plant resources in the lands and waters covered by the documents, as a means of assuring them self-sufficiency. Accordingly, courts interpret such rights expansively.... Where Indians engaged in commercial fishing prior to and at the time of their treaties, as was the case in the Northwest and the Great Lakes areas, the treaties will be read to entitle them to fish commercially today.

\textbf{FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 446-47} (Michie Bobs Merrill 1982 ed.) (footnote omitted).


\textsuperscript{15} The Bureau of Indian Affairs was created in 1832 to carry out the federal government's responsibilities to the Indians. It continues to exist today and serves the same function. When the Bureau was created, the government’s responsibilities to the Indians were the result, in part, of treaties and were the United States' compensation to the tribes that had ceded their land to the government. \textit{COHEN, supra} note 12, at 673.

\textsuperscript{16} \textit{See} website address \textit{supra} note 8: <http://www.law.ou.edu/Indian.html>.
Greene, the Native American Rights Fund lawyer who had taken over the case, so I just put the matter out of my mind. I was finished, or so I thought.

Well, a few years later I received an official notice that the trial was scheduled in Grand Rapids. By that time, I was busy working at The Newberry Library in Chicago, directing a staff in the preparation of maps on Great Lakes Indian history with a grant from the National Endowment for the Humanities. I wrote Bruce Greene and told him that I was working under considerable pressure and that it was impossible to just take off and go to Grand Rapids to talk about a treaty and fishing rights when I had already written everything that I thought was important on the subject. The other day I came across Bruce’s response. He had made it clear to me that there was nothing on earth more important in my life than for me to come to Grand Rapids. He would talk to the library administration, the National Endowment, and anyone else to make sure that I appeared. I guess I realized then that I couldn’t just write “the whole truth” as I saw it and have other people accept it in court without a big fight of some kind.

So, I went up to Grand Rapids, and in the district court I sensed a distinctly hostile atmosphere. I felt totally intimidated when I was grilled about “peer review,” a term that I had never used or even thought about. My report was viewed with great suspicion. At the request of the state’s attorney, Judge Noel Fox ruled that the report was not admissible because it was a “clear case of hearsay evidence.” I am still mad about that pronouncement. This was a totally unfamiliar and unexpected roadblock to presenting history. It meant that everything that I had tried to put together in logical form had to be stored in my mind, so that when questioned I could present, as nearly as possible, direct quotations from correspondence written up to one hundred fifty years in the past. Under the circumstances, I was really surprised that my testimony had any affect on the decision.

Though the report was not admitted, it was photocopied and circulated around the courtroom. I wondered if the judge or his staff had secretly read the contents. What was he thinking about as he sat there in his tennis shoes, swinging his feet back and forth? I found out that as his guide to history, he was reading a textbook published

17. The Native American Rights Fund (NARF) is a non-profit organization located in Colorado. It defends and promotes the legal rights of Indians. Most of the NARF attorneys are Native Americans themselves, who provide legal services free of charge to Indian tribes who otherwise could not afford legal representation. One of NARF's major focuses is to restore to Indians the rights that were guaranteed to them through treaties and existing laws. NARF also works to influence federal Indian policy and works with social organizations to shape legislation that affects Indian tribes. Introduction: About the Native American Rights Fund (visited March 3, 1999)<http://www.narf.org/intro/intro.htm>.
in 1927. After securing a copy for myself, I read through it and found it woefully unreliable. On the map in the front I counted thirteen major errors alone, including wrong locations for Great Lakes Indian tribes. With that text and map as guides, he might decide that the Miami Indians really had fishing rights in Lake Michigan. So, I completed testifying and went back to Chicago, working intensely for a few weeks until I received a subpoena to appear in Ann Arbor to testify in a case involving Indian education rights. When the lawyers in Ann Arbor wanted to introduce my recent testimony from *United States v. Michigan* into the education case, I protested to the judge and begged him not to let these two cases become entangled. They involved different Indian parties and different treaties, and if they became entangled, I thought the confusion would have been more than any court system could handle.

That is why something needs to be done about history and "hearsay evidence." In fact, in my opinion, all the rules for the introduction of historical evidence need to be reviewed and revised. I am appealing to the new Indian Law Center to take steps to establish better guidelines and prevent what I have experienced as the "loose use" of the term "hearsay," which creates the impression that historical writing may be unreliable and of no use whatsoever. Furthermore, there should be some general understanding about the use of written reports. I find it remarkably inconsistent that the kind of report that was demanded in Indian Claims cases, and in the Court of Appeals in Washington, was deemed inadmissible in a district court in Michigan.

After my distressing experience with report writing for *United States v Michigan*, I worked on some other cases connected with the rights of the western Sioux tribes under the long disputed Treaty of Fort Laramie in 1868. One of the lawyers who drew me into this complex litigation was my friend, Arthur Lazarus, who has come from Washington to share this day, and I am very pleased to see him. In association with Marvin Sonosky, who first convinced me that I should embark on Sioux historical research, Mr. Lazarus called me to

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explain that they had a case that the federal government had not been able to settle, but they were in an important final stage. You have to realize that Indian Claims cases follow a very different procedure from litigation in the district courts. Indian Claims cases are tried three times: first, to decide whose land it is, i.e., who has title to what part of the land cession area; second, to decide how much the land was worth when it was sold, as well as the difference between that sum and the actual selling price; and third, whether any offsets were to be subtracted from a monetary award. Sometimes it indeed turns out, after a final accounting, that the federal government says it has been so absolutely benevolent to an Indian tribe that the Indians really owe money to the government. Thus, they don’t get any award at all after years of litigation. That is a very unfortunate reality.

This particular case, United States v. Sioux Nation, also known as “Sioux Docket 74”, supposedly was at the final stage of litigation and would be heard before the Court of Appeals because the Indian Claims Commission regime had ended. Mr. Lazarus and Mr. Sonosky appealed to me to write “just one more report” to bring to an end this long and acrimonious dispute. To do this, they very casually suggested that I should just summarize “The Entire Course of Dealings Between the Federal Government and the Sioux Nation,” covering roughly the period from 1850 to 1980. This was to be very succinct and clear, written for the benefit of a judge who had never heard an Indian case in all his life. I called up my friend Raymond DeMallie, who is a real expert on the Sioux after years of field research and publishing at Indiana University. He said this research task could certainly be handled, but it would take about ten years. When I mentioned the one year deadline, he said I would have to do it myself, but he would get me a good research assistant. We assembled 443 exhibits, some of them whole books. I then prepared a sixty-five page list and digest of these exhibits, calling attention to the pertinent parts. For this written report, I threw caution to the wind, and placed the emphasis on a series of human interest stories about the consequences of government policies on the eight Sioux reserva-

21. 518 F.2d 1298 (Ct. Cl. 1975). Mr. Sonosky and Mr. Lazarus argued that Congress’ claim to the Black Hills amounted to an unconstitutional taking under the Fifth Amendment. After almost thirty years of litigation, the Sioux Nation was awarded $105 million in 1980 as compensation for the federal government’s taking of the Black Hills. However, the Tribe refused to accept the settlement money and even attempted to obtain a restraining order that would prevent payment of the award to the Tribe. The Tribe’s position was that accepting the money foreclosed future opportunities to fight for tribal claims to the land through treaty rights. Tracy N. Zlock, Note, The Native American Tribe as a Client: An Ethical Analysis, 10 GEO. J. LEGAL ETHICS 159, 161-66 (1996). See also EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATIONS Versus THE UNITED STATES, 1775 TO THE PRESENT (1991).
tions along the upper Missouri River. These accounts described the kidnapping of children for incarceration in government boarding schools, the eviction of one hundred and twenty-five families from Pine Ridge on forty-eight hours notice so the army could use the area for an aerial gunnery range, the flooding of Cheyenne River's only good arable and grazing land in a Missouri River dam project, the allotment of Indian occupied land on Rosebud reservation to white people, and the injustice of the Wounded Knee confrontations in 1890 and the 1970s.

When I had written about one hundred and thirty-five pages, I decided I needed a brief and forceful conclusion to the report. That final paragraph became the most dramatic prose I ever created, but I did not care. The following was my grand finale:

During the span of one hundred and thirty years (1851-1981), the United States government has followed multiple courses in dealing with the western Sioux. Faced by a people with different beliefs and lifestyles, the government has tried to defeat, destroy, confine, starve, ration, subjugate, evangelize, educate, collect, disperse, remove, relocate, resettle, and finally devise some form of artificial economy for reservations reduced and ruined by previous projects. The Sioux Tribes occupying the reservations have been human casualties of this 'course of dealing.'

I let it go at that, and do you know that when the decision came out, that paragraph was quoted in full at the beginning of the "Factual Findings" section of the case. I thought, "[h]ow can you ever tell what is going to impress the legal mind at work?" It seems to be all up for grabs.

One thing these incidents indicate is that our legal system and its practitioners are flexible and unpredictable. But I think these incidents also indicate the real need, and the real opportunity, for an Indian Law Center. There is plenty of work to be done to show how to utilize historical materials effectively. Furthermore, I hope that a new center could put the "Indian" back into Indian law, because right now—with all respect to authors who have attempted to explain and describe federal Indian law as it exists today—the emphasis is on how to use Anglo law for processing Indians. The focus is on controversy and the adversarial roles of the people in the court. On the other hand, Indian people have had their own methods for achieving justice. They strive to restore harmony, to find a common ground, to make accommodations. These ideas can be found in some of the newer methods being used within the court system now; for example,

22. The reservations, created from part of the original Great Sioux Reservations, were: Santee, Crow Creek, Cheyenne River, Rosebud, Pine Ridge, Standing Rock, and Fort Peck. These included both Assiniboine and Sioux populations.
alternative dispute resolution and the use of intermediaries in resolving conflicts.

Most recently, I have been involved in a case utilizing these principles. It is under the authority of a very sagacious and blunt-spoken judge who, in all frankness, told both parties just what she thought a decision might be if they proceeded through the court system for another estimated six years. On the other hand, if they would both make concessions and submit to alternative dispute resolution, she could recommend an immediate compromise. They submitted. This was a case involving the Potawatomi who fled from Wisconsin to Canada during the 1832-1850 period, although some returned to Wisconsin. They have been pressing claims for treaty payments their ancestors should have received before 1833 from the United States government. Actually, they have been pressing claims in various ways since 1903; and Congress in 1907 even had a census made of the Potawatomi in Canada and calculated what they were due — about one and a half million dollars. It is now a matter of principle more than money. Their claims have involved Indian Affairs, Canada in Ottawa, the Ontario Provincial government, the State Departments of both the United States and Canada, the Canadian legation in Washington, international courts, the Indian Claims Commission, and the U.S. Departments of Justice and Interior, as well as Congress. Senator Daniel Inouye finally succeeded in getting a bill through Congress that enabled the Canadian Potawatomi to present their case before the Court of Appeals in Washington, D.C.24

So, I began to work on the history of the case, thinking that maybe this could be settled within human time. I had known for over twenty years this question might surface. Robert Bell had once waved a sheaf of papers from his briefcase and declared, “[t]he Potawatomi in Canada will sometime have their day in court.” You might think this would be a straightforward case for an historical expert witness, but unexpected hurdles always seem to pop up. This time, the challenge was a form and letter from the Criminal Division of the Department of Justice directing me to register as a “foreign agent.”25 I hastily phoned James Kawahara, the Native American Rights Fund lawyer who had asked for my help, and learned to my dismay that he and other lawyers on the case had already submitted to the government request that they register as agents. Then I phoned the Department of Justice. There, the representative expressed surprise at

24. Senator Daniel Inouye, a Democrat from Hawaii, has served as both Chairman and Vice-Chairman of the Senate Committee on Indian Affairs.

my reluctance, explaining that most people think it is a novelty in their lives, an interesting item to put on their resumes, and are pleased to register as a foreign agent. I explained that any list maintained by the Criminal Division was one in which I didn’t really care to be included.

Finally, I had a return call from an understanding supervisor to whom I explained what I think is the key role of a historian who serves as an expert witness. A historian has to present sufficient facts with reliable interpretation so that the judge can render a good decision. There can be problems in fulfilling this properly. I can see that it is possible to manipulate the rules of evidence so that the judge is deprived of the information that he or she ought to have in order to make an acceptable decision. So, I feel that the historian should be in the “third corner.” The role of a historian in a legal case is significantly different from the role of a lawyer. Although a historian is hired by one of the two parties, the responsibility is to keep the integrity of the historical record from being warped and distorted by lawyers so that it will be possible for a judge to render a just and reasonable decision. Even with the best evidence, most decisions in Indian cases seem to me to be unsatisfactory. I really believe that Anglo-Saxon law, because of its embedded value system, is fundamentally incapable of reaching decisions that achieve justice in Indian terms.

I hope, as a result of my stories you all have a vision of what an Indian Law Center can become. Right now, I understand that United States v. Michigan is just about to enter a new phase. It is my sincere feeling that if more of the forthcoming dealings could be handled outside the courtroom setting, rather than hampered by the constraints of formal litigation, there could be a greater chance for justice for Indian people in Michigan.

26. 471 F.Supp. 192 (W.D. Mich. 1979). A case of this magnitude never really ends. In fact, at the time of publication, it is just entering a new phase. A consent decree was entered by the court in 1985 that allocated resources to each tribe involved in the litigation as well as the government. In 1985, three federally recognized tribes were parties to the proceedings. Since that time, two more area tribes have become federally recognized, thus increasing the confusion over the allocation of resources involved. The recently recognized tribes are the Little River Band of Ottawa Indians and the Little Traverse Bay Bands of Odawa Indians. The 1985 consent decree expires in 2000, and by that time, the parties must reach a new agreement as to an allocation plan. Once a proposal has been developed, it will be submitted to the State, which will respond accordingly. By order of the court, the parties must meet by April 21, 1999 to work on this plan. It is uncertain what will happen if or when the parties return to court.