

## Oral History and Perceptions of Subjectivity

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Robert Alan Hersey, Jennifer McCormack, & Gillian E. Newell, *Mapping Intergenerational Memories (Part I): Proving the Contemporary Truth of the Indigenous Past*, Ariz. Legal Stud. Discussion Paper 14-01 (2014), available at [SSRN](#).

I strongly recommend this paper not only for its immediate subject—the struggles that indigenous peoples face in proving land claims due to colonial governments' distrust of evidence on oral history—but also because it helped me understand the limitations of my own perspective.

[Robert Alan Hershey](#), [Jennifer McCormack](#), and Gillian E. Newell describe the disconnect between Western notions of cartography and spatial theory and those of indigenous peoples, particularly indigenous peoples located in North America, Australia, and New Zealand. They then explain that some of these groups, such as the Ngurrara in Australia have had success in getting their rights recognized by creating maps that incorporate oral history, thus adopting a hybrid form of evidence that is both documentary and respectful of indigenous ways of knowing such as through oral history.

In order to illustrate the differences between Western, colonial notions of space and time and those of many indigenous cultures, the authors begin by describing some conceptions of space and time among indigenous peoples. For example, Hershey *et al.* tell us that there are no separate words for space and time in the Maori language, whereas, for the Tohono O'odham, "the past exists alongside the present, and people interact with spaces . . . ." This contrast helps to illuminate one of the main points of the authors: namely that the linear notions of space and time that dominate in Western cultures are not neutral and objective. Rather, these notions, like the oral histories that courts distinguish them from, have a "particular perspective and history in mind." It's just that Western assumptions are so ubiquitous and familiar as to be taken for granted by members of the dominant culture.

The authors then go on to explain the common phenomenon that, even when indigenous peoples are successful in gaining the admission of oral history in litigation, usually through an exception to the hearsay rule, judges tend to discount or undervalue the evidence if it is not supported by other corroborating evidence. This practice poses a huge problem for Native peoples, who, given their historical reliance on oral history, tend to lack such corroborating evidence.

One of the things that I love about this article is that it helped me to see biases in the rules of evidence and in the way I, myself, evaluate information that I hadn't been conscious of before. For example, I tended to assume, without even noticing that I was doing so, that basic Western conceptions of time and space were neutral and that it was not too much to ask indigenous peoples must adapt to Western-style legal systems in order to have any hope of securing justice. It may be because I spent several years practicing law before entering academia or it just may be part of my general outlook, but I've noticed that I tend to accept parts of the status quo without realizing it, and I view scholarship that unpacks and reveals these underlying assumptions—and the harm they are causing—as very important.

Another aspect of the article that I really appreciated was its interdisciplinary perspective. The authors include a lawyer/ professor, a geographer, and an archaeologist/professor, and a significant portion of the article is focused on mapping and the potential and challenges of using mapping to support

indigenous land-rights claims. In part, I think, because of the article's interdisciplinary character, it achieves insights that go beyond elucidating the shortcomings of colonial legal systems in justly addressing indigenous claims to revealing the limitations of the law itself as a mechanism of justice.

I wished that the article addressed in more depth the reasons (and possible solutions) for Western courts' distrust of oral history. It seems to me, especially from reading U.S. Free Exercise cases rejecting Native religious rights, that this distrust is not only about the rules of evidence and Western history's deceptive appearance of neutrality, but that it is also about judges' fears that they will be unable to tell real oral history from evidence developed for litigation that masquerades as oral history. The authors interestingly point out that oral history is subject to similar validation techniques within indigenous societies as those established for Western history. I agree that that information is important and should add credibility to evidence of oral history, but I also would like to know more about how it might be possible to assure courts that they are getting real oral history without requiring largely unavailable archaeological and anthropological evidence. I think that this fear among judges of not being able to evaluate the credibility of particular showings of oral history is related to the often-voiced fear of the slippery slope that we see in cases like *Lyng v. Northwest Indian Protective Ass'n*, 485 U.S. 439, 452-53 (1988), and more implicitly in cases like *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

I appreciated the article's focus on judicial treatment of oral history in the British colonies broadly, rather than focusing solely on the United States. I felt that this approach, like the article's interdisciplinary perspective, provided a richness of context that is often absent from American legal scholarship.

Finally, the article provides a valuable overview of the cases in which evidence of oral history has been admitted and of the statutory contexts, such as the Native American Graves Protection and Repatriation Act, that specifically contemplate it. It would be interesting if the authors expanded this section to also examine the administrative guidance for the National Historic Preservation Act, which contemplates admission of oral evidence, and how that guidance has been applied in courts.<sup>1</sup>

This article is designated as Part I, and, in Part II, the authors plan to explain how technological innovations can be used to preserve and present oral histories. Because Part I was such a worthwhile read, I look forward to reading Part II.

1. See 1-20 **Cohen's Handbook of Federal Indian Law** § 20.02(3)(b) (citing National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990)).

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