Arguing with Tradition

The Language of Law in Hopi Tribal Court

JUSTIN B. RICHLAND

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THE CHICAGO SERIES IN LAW AND SOCIETY

Edited by John M. Conley *and* Lynn Mather

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The University of Chicago Press
Chicago and London

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The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Printed in the United States of America

17 16 15 14 13 12 11 10 09 08 1 2 3 4 5

ISBN-13: 978-0-226-71293-2 (cloth)
ISBN-13: 978-0-226-71295-6 (paper)
ISBN-10: 0-226-71293-1 (cloth)
ISBN-10: 0-226-71295-8 (paper)

Library of Congress Cataloging-in-Publication Data

Richland, Justin B. (Justin Blake), 1970–
Arguing with tradition : the language of law in Hopi Tribal court / Justin B. Richland.
p. cm. — (The Chicago series in law and society)
Includes bibliographical references and index.
ISBN-13: 978-0-226-71293-2 (cloth : alk. paper)
ISBN-10: 0-226-71293-1 (cloth : alk. paper)
ISBN-13: 978-0-226-71295-6 (pbk. : alk. paper)
ISBN-10: 0-226-71295-8 (pbk. : alk. paper) 1. Hopi Indians—Legal status, laws, etc. 2. Hopi law—Arizona. 3. Hopi Tribe of Arizona. 4. Indian courts—United States. 5. Indians of North America—Arizona. I. Title.
KF8228.H67R53 2008
346.7301′3—dc22

2007043031

♾ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

For Lindsey and Silas

And in honor of E. S., with the hope that
this approaches his idea of what a study of
his people should be.

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Acknowledgments

The various wellsprings of support that, over the years, I have had the good fortune to draw from while conducting this study are far too numerous to mention here. All of course, are equally deserving of my gratitude and thanks and are in my thoughts, even though my memory may fail me at the moment of this writing.

The bulk of the research that went into this study was funded by a National Science Foundation Pre-doctoral Fellowship and a grant to the Hopi Tribal Court by the U.S. Department of Justice, Bureau of Justice Assistance, which allowed me to work and study on the Hopi reservation from November 1999 to January 2001. Gathering the data and writing up this research were made possible with the assistance of two grants from the University of California–Los Angeles Institute of American Cultures, a Dissertation Year Fellowship Award from the UCLA Graduate Division, and support from the University of California–Irvine School of Social Ecology and Department of Criminology, Law, and Society.

I must thank the many people at UCLA and UC–Irvine who have supported me in innumerable ways during my work on this project. First, to my advisors and friends, Paul Kroskrity and Alessandro Duranti, I really cannot think of a better team to have had as guides in my graduate career. I look forward to turning to them in my future as a scholar as well. It would be difficult

to overstate the benefits of both the challenges and encouragement they have offered. They not only have taught me excellence in scholarship but have helped me to be a better teacher, advisor, and colleague as well. I hope to have the opportunity to share with my own students what I have learned from them. I must also thank Elinor Ochs and Carole Goldberg for their time and expertise in both reviewing and commenting on this manuscript and in all the other projects that led up to it. Thanks to Sally Merry, who intervened at a critical moment, for making sure this manuscript actually made it off my desk. To my newest colleagues and quick confidants, Susan Coutin, Bill Maurer, and Tom Boellstorf, thanks for all the sage advice, penetrating perspectives, and hearty laughs that we have enjoyed in my first two years at UC–Irvine. I look forward to much more of the same.

I owe a debt of gratitude that I can never fully repay to my friends and colleagues of the Hopi Tribe. Pat, Emory, Marlene, and Bobby, your support and encouragement of my work is what convinces me that it is all worth it. I cherish our friendship and opportunities to work together, and I hope we have many more in the future. Thanks to John Conley, John Tryneski, and Rodney Powell at the University of Chicago Press for so deftly shepherding this manuscript through the publication process. Two anonymous reviewers for the Press offered insights that improved my work. Special thanks to Ruth Goring for her careful editing.

To Keith Murphy, Jason Throop, and David Kamper, thank you all for your stimulating insights, for your willingness to work with me, and for reviewing drafts of work that went into this study.

I must of course thank my family, Mom, Dad, Sara, Rob, Marianne, and Jordan, who have heard so much about Hopi life and law that they probably could have written much of this manuscript themselves. I must especially thank my father, Kent, who has lent his time, intelligence, enthusiasm, and knowledge of legal theory and practice to the thinking through and writing of this book. In both his patience with ignorance and his passion for knowledge, he stands as my ideal of what a scholar should be. Thanks, Dad, for everything.

Finally, I must thank Lindsey, my wonderful wife, who has shown me how serious scholarship and a gracious, generous spirit can go hand in hand. I thank her too for bringing me the brightest gifts in my life—her love and friendship, and our beautiful child, Silas Frye. I have so much to learn, but I look forward to every lesson and to the wonder of our growing up together.

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Introduction: Arguing with Tradition in Native America

The Ironies of Indigeneity

In a 2001 property-dispute hearing before the Hopi Indian Tribal Court in northeastern Arizona, a Hopi witness testified to the actions of her opponent, a male clan relative, against whom she had asked the court to issue an injunction. Specifically, she was asking the court to order him to cease entering a plot of land next to her home in one of the Hopis' twelve mesa-top villages, which she claimed belonged to her. On that cold, bright, December day in the high desert, the drafty mobile home that housed Hopi Courtroom 2 had nonetheless become close from the fifteen or so Hopi family members, judges, and attorneys who filled the courtroom for the injunction hearing. The woman sat in a small padded chair set before the judge's desk in the otherwise unmarked space designated as the "witness stand," and told of a particularly harrowing encounter she had had with her opponent (also present that day) a few months earlier. Speaking into a microphone that fed into the court's recording system, the witness's voice quavered as she recounted how she and her sister found the man on the disputed property in

the middle of night, dressed in black, with his long hair brushed over his face. When they confronted him, he refused to identify himself or speak at all.

"And I said, 'Who is it?' " the witness said in English. "And he was still standing there. He was standing there." My Hopi consultant at the hearing explained that the woman was describing his attempts to intimidate them: "He's trying to indicate to them he has the power to call these supernaturals to help him." As my consultant elaborated, "If he was really trying to get at them, you know, in this—mentally in that way, you know—he wouldn't speak to them. You know, because none of our—when we hear—when we hear these scary stories, the scary person never talks. They don't say anything. . . . Not talking is the key to this whole scary business."

As the testimony suggests, the refusal to speak, a failure to communicate, announces a certain limit of Hopi community. Interaction marks this horizon of belonging for Hopi people and locates the powers "out there" that threaten its dissolution. Interaction grounds community, instantiates it, (re)creates it in the course of life on the Hopi reservation.

Of course, there are certain ironies here that always characterize the semiotic border between "inside" and "out" and acts of sociocultural affiliation and differencing. Even in his silence, this man is understood as making himself known to his interlocutors. His refusal to speak announces his desire to be "outside" their community, to claim the power attributed to this "outsideness" over those "inside," but also reveals that he has enough "insideness" to know that this is how his silence will be interpreted. In all these ways his "outside" is also very much "inside" the Hopi epistemologies and interpretive practices that serve to make sense of his actions.

My consultant's reflections suggest the manifold ways in which language and ideologies about language are explicitly understood by Hopis as mediating the constitution of their community in multiple and contradictory ways—simultaneously articulating and confounding the borders of cultural commonality and difference. Moreover, by making such claims in court, the Hopi witness reveals her expectations that these practices and the inside/outside dialectics they index should have significance in the courtroom and consequence in Hopi jurisprudence. This is true in this instance even though she recounts the events in English, a channel of talk that, through other metadiscursive and metapragmatic maneuverings, becomes another regularly contested site marking the

ironic inside/outside "border politics" of cultural difference that shape Hopi jurisprudence.

This study argues that these complex imbrications of language, culture, and law constitute the emergent "edge" of contemporary Hopi tribal jurisprudence and the social meanings and effects generated there. I support this claim by analyzing how legal actors work up contradictory formulations regarding the kinds of talk that are the proper modes and objects of Hopi courtroom proceedings; how they call for or challenge courtroom uses of tradition by invoking notions of Hopi cultural difference, tradition, and claims to tribal sovereignty.

We thus gain a fresh look into the politics of indigenous tradition and culture, suggesting that prevailing anthropological theories that treat claims to cultural distinctiveness as either libratory *or* reifying, autochthonous *or* other-determined, each tell only part of the story of tradition and culture's enduring political and juridical significance. Though each of these perspectives is accurate to some extent, we gain a more nuanced view when we pay attention to the discursive "microdetails" of actual social practice where talk of tradition and cultural difference is deployed in ways that appear at once identical and opposed but together constitute the dialectic edge of a political economy of cultural difference that emerges in the course of particular sociocultural events. Thus I focus on the ways in which the ideologies, metadiscourses, and metapragmatics that constitute the "courtroom talk *about* courtroom talk" that Hopi legal actors regularly rely upon constitute notions of tradition and cultural difference in ways that reveal multiple, contradictiory, even paradoxical meanings and consequences as the sequence of Hopi trial proceedings unfolds. This yields a more complex image of the politics of indigenous culture—one that sees it as participating in unstable legal narratives through which the everyday practices of indigenous governance and the social institutions constituted by those practices are negotiated, challenged, effectuated, and ultimately best understood.

Native American Tribal Law and Tradition

From outside the spaces and places that constitute "Indian Country" within U.S. borders—those geographical and discursive loci where people of American Indian nations engage each other as tribal members (see e.g., Biolsi 2001, 2004, 2005; Nesper 2002, 2004, in press; Miller 2001; Pommersheim 1995a)—the fortunes of tribal nations, like those of indigenous

peoples everywhere (e.g., Dean and Levi 2003; Jung 2003; Povinelli 2002; Muehlebach 2001; Anaya 1996; Kymlicka 1995), seem forever susceptible to the complex and contradictory ebbs and flows of nonindigenous legal regimes and the non-Indian public sentiments that inform them. As evident in the earliest articulations in U.S. law of American Indian tribal sovereignties as "domestic dependent nations," tribes in the United States have been paradoxically understood as still bearing an authority that existed prior to the U.S. Constitution, yet is subject today to the actions of a federal government that claims "sovereignty and dominion" over them as colonized peoples. As "wards to their guardian,"[1] tribal nations have been subject to dramatic territorial, socioeconomic, and demographic transformations (Biolsi 2005; Wilkins 2002; Thornton 1987, 2004; Debo 1970)—mainly losses, but also some recent gains. These are at least partly due to the shifting trends during the last 220 years in Federal Indian policies and laws, which have sometimes favored tribal assimilation and termination, sometimes increased self-governance, and most often done both.

Thus, during the late nineteenth and early twentieth centuries, with the passage and enforcement of the General Allotment Act of 1887,[2] tribal nations faced some of their darkest days, as federal agents interpreted the federal-Indian trust relationship as mandating the division and allotment of tribal territories to individual landholders, while other assimilationist policies and legislation called for the removal of Indian children to Euro-American-run boarding schools (Meriam 1928; Deloria and Lytle 1984; Prucha 1984; Nabokov 1991). Then in 1934, with passage of the Indian Reorganization Act (IRA),[3] the efforts of Commissioner John Collier of the Bureau of Indian Affairs (BIA) partially reversed these trends, calling for a reinvestment in the possibility of tribal self-government, with the stipulation that tribes be run according to the governance norms of Anglo-American representative democracy (Debo 1970; Deloria and Lytle 1984; Wilkins 2002). The effects of these periods are still felt today, insofar as many tribes no longer have anywhere near the unified territories they possessed prior to allotment, and many tribal governments today still operate on a vision of electoral politics and law and order first initiated under the IRA (Pommersheim 1995a; Porter 1997a; Wilkins 2002). This is true despite several more policy shifts in the intervening years, as the 1950s saw efforts to terminate the special status of tribes in several states, followed by repeals of those efforts in

the late 1960s and 1970s and the renewed call for support of Indian nationhood and self-determination.[4]

From a certain perspective then, American Indian nations appear caught in the ever-shifting seas of Federal Indian Law—a body of norms "characterized by doctrinal incoherence . . . [m]ore than any other field of law" (Frickey 1997:1754). As Thomas Biolsi explains, "Indian law . . . is fundamentally laden with contradiction . . . best summarized as a tension between the *uniqueness* and *uniformity*" discourses with which it frames the rights of Indian peoples in the United States as oscillating between laws protecting the alterity of tribes as nations and those promoting the assimilation of Indians into the U.S. nation-state (2002:14).

But tribal members express a different set of concerns regarding the fortunes of Indian nations. While the practical interests of improving economic opportunity, abating crime, and otherwise improving their communities' health and welfare are of primary importance to tribal peoples as much as anyone else, what is distinctive is the degree to which Native Americans view such improvements as hinging on the maintenance and furtherance of their cultural heritage. Leading tribal jurists have argued for the last two decades that if real and lasting tribal sovereignty is to be meaningfully achieved, indigenous leaders must dedicate "themselves to conducting their affairs in reliance upon their own traditions" (Porter 1997b:299). Arguing for what they call the "cultural sovereignty" of tribal nations, Wallace Coffey and Rebecca Tsosie suggest that the right of tribal peoples to make their own laws and live by them is originary in them, sui generis, and that U.S. federal and state actions limiting or expanding that right merely affect its outermost edges (2001:191; see also Tsosie 2002). For these scholars, the discourses of culture, tradition, and custom best express this impulse. Citing Vine Deloria, Coffey and Tsosie write, "[T]radition provides 'the critical constructive material upon which a community rebuilds itself.' Thus, only by delving into the inquiry of how our Ancestors saw the world can we truly understand the significance of our communities as they are currently constituted, appreciating both the strengths and the continuities that exist, as well as the pathologies that destroy community" (2001:199). What emerges from this notion is a conceptualization of tribal nationhood that, while "governed by 'Federal Indian Law' . . . is not *defined* by Federal Indian Law, but by the moral vision that has always guided Indian nations in their collective existence as distinctive peoples" (191).

For many of these scholars, the drive for cultural sovereignty must be led by the operations of tribal courts and their jurisprudence. According to Carey N. Vincenti, former chief justice of the Jicarilla Apache Tribe, "The real battle for the preservation of traditional ways of life will be fought . . . on the bold promontory of guiding human values. It is in that battle that tribal courts will become indispensable" (Vincenti 1995:137). This call represents in many respects a radical shift and reclamation of tribal juridical practices, insofar as many of the legal institutions operating in tribal communities were created either by or in response to federal efforts to impose a style of Anglo-American law and order in Indian Country (Pommersheim 1995b; Deloria and Lytle 1983). From the late nineteenth century through the 1960s, Courts of Indian Offenses presided over by agents of the BIA or their chosen representatives constituted the official law and order fora with primary jurisdiction to resolve disputes and impose punishments on tribal members residing in many regions of Indian Country (Deloria and Lytle 1983). These courts usually relied on rules and procedures of adversarial jurisprudence to suppress rather than encourage the customs, traditions, and cultures of the tribal communities they controlled. While such courts still operate in some tribal communities, today they are more firmly under the control of the tribal nations themselves (Cooter and Fikentscher 1998a, 1998b; Pommersheim 1995a). Many tribes have abolished these courts and passed tribal legislation creating their own legal systems. And though contemporary tribal courts are no longer in the business of repressing local customs, traditions, and cultural practices, the vast majority still rely heavily on rules and procedures informed by the adversarial practices of Anglo-American jurisprudence (Pommersheim 1995a, 1995b; Porter 1997a; Barsh 1999).

Despite this radical reversal and the importance that many now claim for tribal legal systems in articulating tribal sovereignty and its relation to U.S. domination, little scholarly attention has focused on the actual structures, practices, and ideologies that characterize contemporary tribal courts and their jurisprudence (but see Nesper, 2007; Richland and Deer 2004; Miller 2001; Cooter and Fikenstcher 1998; Pommersheim 1995a). Though many are calling for an increased infusion of tribal customs and traditions into the Anglo-style procedures of tribal courts, or challenging such claims, few efforts have yet been made to explore precisely how notions of tribal custom, tradition, and culture, are invoked

by tribal legal actors in tribal courtroom proceedings (see Richland 2005, 2007; Nesper 2007).

In this study, I endeavor to fill this gap by following and elaborating upon the provocative analyses of tribal sovereignty and tribal court operations offered by Thomas Biolsi (2005) and Larry Nesper (in press), suggesting how the "concrete reality" of tribal sovereignty as a mode of American Indian political consciousness and action resides only partly in the "official" actions of an imagined tribal nation-state along the lines of the "modular, epistemic, universal" Euro-American model (Biolsi 2005: 241). Biolsi and Nesper allow us to see how tribal sovereignty emerges as a "lived reality of graduated, 'quasi' or 'permeated sovereignty' " in which the tensions between native and nonnative political-economic forces shape the everyday details that constitute the emergent, often unstable, edge of contemporary American Indian law and politics (245).

Relying on the fundamental premise of legal discourse analysis that "language *is* legal power" (Conley and O'Barr 1998:14), the central argument of this study is that we can only reach a proper understanding of notions of custom and tradition in contemporary tribal jurisprudence by exploring them in the circumstances of their use, as they both shape and are shaped by the courtroom talk that forms the center of contemporary tribal law.

In an effort to offer a larger historical and contemporary context within which to understand the specific claims I make in the core of this study, I first offer an account of the history of Anglo-American-style courts in Indian Country, officially introduced in the late 1800s with the creation and operation of federally run Courts of Indian Offenses. Created and controlled by the Bureau of Indian Affairs, and enforcing federal law, these courts significantly diminished tribal sovereignty and suppressed tribal rights to self-determination, as well as the customs, traditions, and practices through which that self-determination was pursued. Remarkably, some of these courts continue to operate today, though in much smaller numbers than in their heyday around the turn of the twentieth century. Starting in the late 1960s, the creation of contemporary tribal courts was hailed as an effort to return control of tribal legal affairs to tribal nations themselves, often by replacing the Courts of Indian Offenses that operated in their jurisdiction. However, the fact that many of today's tribal courts continue to operate under Anglo-American laws and notions of adversarial jurisprudence has led many

tribal jurists to argue that they do nothing more than further colonial policies of assimilation initiated by the Courts of Indian Offenses.

After reviewing this history, I turn to a fuller discussion of debates surrounding the calls for increased reliance on notions of tribal tradition and custom in contemporary tribal court praxis. Despite the rather strong claims made on both sides of this debate, few efforts have been made to explore how such notions emerge in the actual discourses and interactions that constitute contemporary tribal court proceedings. I conclude by outlining the remaining chapters of the study, and how they attempt to respond to this gap in the ethnographic record. I offer three related but independent forays into the details of Hopi courtroom interactions that invoke notions of custom and tradition, with an eye toward exploring the critical sociolegal and political economic effects that such notions have for the Hopi legal actors who construct them.

"Anglo" Law in Indian Country: Courts of Indian Offenses

The very origins and introduction in the late nineteenth century of Anglo-American legal systems in Indian country are deeply informed by an explicit orientation to and concern with tribal cultural practices and traditions and their relation to the values and practices of the encroaching Euro-American society. When the Office of Indian Affairs (OIA; later the Bureau of Indian Affairs) moved in 1849 from the Department of War to the Department of the Interior, the civilian federal agents who administered the tribes called for the institution of legal regimes that could serve the two basic goals of federal Indian governance at the time—control and assimilation—that were believed to be suffering in the absence of martial rule (Deloria and Lytle 1983). Because military outposts were often far away from OIA field offices, agents argued that law enforcement and adjudicatory powers were necessary to fulfill even their most basic administrative duties, particularly in those vast regions of Indian territory and tribal reservations west of the Mississippi, where open and violent conflict among and between tribes, federal and state authorities, and other non-Indian neighbors was common. Pursuant to reformist ideals of the time that called for the eventual assimilation of tribal members into the socioeconomic norms, structures, and practices of Anglo-American society, agents believed that such policies would be best furthered by the imposition of a legal system on tribal peoples that would simultaneously encourage such "Anglo"norms and practices

and discourage the continued reliance on tribal customs and traditions (Hagan 1966).

Before creating any official courts to preside over tribal reservations and Indian territories, OIA field agents had recourse to a variety of ad hoc strategies for enforcing law and order, as they were charged to do by the commissioner of Indian affairs and secretary of the interior (Pommersheim 1995a). In some instances alleged criminals arrested by agency police were sent to nearby federal courts for prosecution. In rare instances, tribal members were allowed to choose other tribal members to sit as judges on informal courts held under the aegis of agency offices. But by far the most common practice was for federal agents themselves, or their chosen tribal or Anglo subordinates, to sit as judges over disputes and criminal prosecutions that arose within their jurisdiction. This became even more practicable after 1878, when the Commissioner of Indian Affairs instructed field agents to organize local police forces made up of Anglo and Indian officers, because agents would regularly pick judge from these officers (Hagan 1966).

This latter practice was eventually formalized in a set of rules promulgated by Commissioner of Indian Affairs Hiram Price and approved by Secretary of the Interior H. M. Teller in 1883. Significantly, the authority to create these courts appears to have had no formal legal basis, flowing instead from the "random reform impulse" of Secretary Teller (Pommersheim 1995b:61). In a letter to Commissioner Price, Teller expressed a concern that among many tribes there persisted "certain of the old heathenish dances" and other ceremonial and traditional practices that he felt were both "intended . . . to stimulate the warlike passions" and contribute to the general "demoralization of the young" (Annual Report of Secretary Teller, 1883: ser. 2190, xi, cited in Hagan 1966:108). The letter concluded with a request to Price to prepare a set of rules to assist in the control of these activities. On March 30, Price wrote back, suggesting that top officers in each tribal police force be officially made judges of Courts of Indian Offenses under the immediate authority of the agent in the field, whose organization and rules, if followed, would "accomplish the ultimate abolishment of the evil practices" (letter from Hiram Price to Secretary Teller, March 30, 1883). Teller must have responded positively, for in the subsequent weeks, Price produced the Rules for Courts of Indian Offenses, which Teller approved on April 10, 1883 (Pommersheim 1995a).

Thus Courts of Indian Offenses were created, and the rules were circulated to field agents. These rules, which were later codified in Title 25 of

the Code of Federal Regulations (hence the common reference to these courts as "CFR" courts), provided guidelines for court organization and procedure, and included a short criminal and civil code. Agents were directed to select judges from among any men in the tribal population who were "intelligent, honest, and upright" and not polygamists.[5] Several problems arose in the selection and retention of judges. One was the lack of adequate pay, as Congress regularly failed to appropriate additional funds for the payment of Indian jurists, only initiating such funding in 1888, and even then at one-tenth the sum requested by the commissioner (Hagan 1966:109, 112).

Another problem was the common emergence of factions within most tribal populations at the time. Agents could not be certain that someone who was willing to act as judge would have the respect of other tribal members over whom he was to preside. Indeed, his very willingness to work so closely with the field agent was often a tacit signal of his marginal status among many in his community. On the other hand, many field agents felt that selecting a judge from the recognized leaders of the tribe would thwart the assimilative goals of the institution. As the agent for the Sac and Foxes of Iowa explained, "This band of Indians is controlled by about 10 persons who have all the say. . . . To select judges from among them would accomplish nothing . . . [but] to select judges from outside the chieftainship would be an impossibility" (Annual Report of R. Lesser, 1890, ser. 2841, 105, cited in Hagan 1966:113). All of this suggests, as Deloria and Lytle (1983) succinctly point out, that these Indian judges "served at the pleasure of the agent, not the community" (114).

The courts and their judges were granted general jurisdiction to rule "upon all such questions as may be presented to [them] for consideration by the agent." Prostitution, intoxication and liquor trafficking, theft, and all "misdemeanors . . . to which Indians were party" were made punishable offenses (Hagan 1966:110). And though the courts were recognized as having civil jurisdiction "the same as that of a Justice of the Peace in the State or Territory where such a court is located" (Rules for the Courts of Indian Offenses, 1892), criminal jurisdiction was much more limited. Indeed, because of concurrent developments in Congress and the passage of the Major Crimes Act in 1885, the courts did not have jurisdiction over crimes like murder, kidnapping, and rape.[6]

Significantly, among the offenses named in the rules were participation in ceremonial dances, polygamy, and other traditional practices that "had originally aroused Teller's ire" (Hagan 1966:110). Revisions

to the rules in 1892 further provided punishment for any Indian who "refuse[d] or neglect[ed] to adopt habits of industry, or to engage in civilized pursuits or employments" (120), revealing the extent to which CFR courts were explicitly designed to promote the assimilation goals of the federal government.

In their operation, CFR courts seemed to rely on relatively informal procedures. Though instructed to recruit clerks to maintain a docket and otherwise conform to standard practices of Anglo-American trial practice, these courts "continued to resemble only in broad outline court procedures of white communities." Few trained attorneys either worked for or appeared in these courts, and official written records were rarely kept. Some heralded the virtues of such processes as forms of simple justice ("no lawyers perplex the judges"), though others expressed concern at the lack of formalities and the failure to attend to precedent (Hagan 1966:119).

Though congressional appropriations were always stingy for the courts, and the legal foundations of their creation and operation were always suspect,[7] by their peak in 1900, Courts of Indian Offenses were operating on roughly two-thirds of the reservations and territories constituting Indian Country at the time (Deloria and Lytle 1983). However, during the twentieth century the number of CFR courts significantly diminished, and today only twenty-one such courts are still in operation.

The reasons for this decline are manifold. Ironically, some courts were undone shortly after their creation by the very assimilative policies that spurred some agents to see the need for a specific Indian legal system in the first place. By the time those policies were codified in the Allotment Act of 1887, they provided that once a tribal reservation was allotted and its territory divided among individual landholders, those lands and their owners (who were also to be made U.S. citizens by the process) would be subject to the civil and criminal jurisdiction of the state or territory in which they resided. The result was the dissolution of CFR courts in several regions of Indian country (Hagan 1966).

Others were dissolved not because of allotment but by its repudiation. As reports came in of the detriments caused to Indians by the policies of the Allotment Act (Meriam 1928), another wave of reform arose in the Bureau of Indian Affairs. Headed at the time by Commissioner John Collier, the bureau reversed the dismantling of tribal lands and, through the Indian Reorganization Act of 1934, called for a return to tribal self-governance that would, in time, include a resumption of tribal authority

over Indian legal matters.[8] The result was the death knell for many more CFR courts, as tribal councils formed under the IRA passed legislation creating tribal courts that replaced them, either taking over the administration of the rules and procedures outlined in the Code of Federal Regulations or operating pursuant to principles and codes of law and order passed by the tribes themselves (Newton 1998).

Tribal Courts Today: At the Edge of Tribal Sovereignty

Today, of the 562 federally recognized tribes, the majority have passed tribal constitutions pursuant to the IRA. Approximately 270 of these tribes have working tribal courts. To reach that point, tribes and their governments weathered the storms of yet another reversal of federal policy in 1953, when Public Law 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360, 25 U.S.C. §1321-26) announced the return of efforts to terminate the sovereign status and federal recognition of tribal nations, eradicating courts in Indian Country and subjecting tribes entirely to state criminal and civil jurisdiction. Tribes in several states named in this legislation were terminated before the policy ended in the late 1960s (Goldberg 1997). Many tribes, however, were still intact, and some that were terminated have since reversed their termination and become federally recognized again. With the passage of the Indian Civil Rights Act of 1968 and the Indian Self-Determination and Educational Assistance Act of 1975,[9] Congress announced its current policy of support (though again, as with the IRA, under certain assimilationist conditions) for tribes and their rights to self-governance, including the establishment of tribal courts.

As might be expected, the effects of these shifts and the unique history and cultural identity of each tribal nation have resulted in contemporary courts across Indian Country that exhibit a breathtaking diversity in their structure, process, scope of jurisdiction, and the kinds of norms they enact and maintain. At one end of the spectrum is the large and well-known Navajo judicial system, in which seventeen Navajo trial judges appointed by the Tribal Council preside in trial courts scattered across the various districts of the vast Navajo reservation. The decisions of these judges are subject to appellate review by three Supreme Court justices who sit in Window Rock, the Navajo Nation's seat of tribal government. Procedure in these Navajo courts is quite similar to the Anglo-American adversarial procedures of state and federal courts, albeit pursuant to

tribal legislation, and they enjoy a quite general jurisdiction (still subject to federal restrictions) over a variety of criminal and civil matters that emerge on the reservation, as outlined in Navajo legal codes. These courts are courts of record and precedent, and the Navajo Supreme Court has produced a formidable body of case law that is available in written and digital formats, and thus readily accessible (and relied upon) by tribal legal professionals and scholars (Cooter and Fikentscher 1998a, 1998b).

Other tribes have courts that are rather limited in scope, concerned primarily with matters related to particular aspects of tribal operations, such as disputes emerging from tribally owned gaming enterprises or other administrative matters (Newton 1998: e.g., see the Gaming Enterprise Division of the Mashantucket Pequot Court and the Colville Tribal Court review of tribal employment disciplinary proceedings). Still other tribal courts employ primarily nonadversarial dispute resolution, relying less on legal codes, case law precedent, and legal professionals trained in Anglo-American style jurisprudence than on local notions of authority and relational values in addressing conflicts that arise among tribal members (Cooter and Fikenstcher 1998a, 1998b). Finally, many contemporary tribal legal systems incorporate more than one of these types of courts, relying on adversarial courts to address certain elements of their docket, such as criminal matters or civil disputes involving non-Indians, and relying on more local, mediative-style dispute resolution for conflicts between tribal members. For example, the Navajo have a well-known "Peacemaker court" where certain matters, such as disputes between family members or issues of property inheritance among tribal members, are resolved following nonadversarial procedures informed by Navajo notions of justice.

Despite such diversity, jurists involved with tribal issues share common concerns. Perhaps chief among them are questions regarding the role of tribal courts in navigating the relationship between federal oversight of tribal sovereignty and the demands of self-governance (Goldberg 2003; Rosen 2000; Newton 1998; Frietag 1997; Miller 1997; Pommersheim 1995a). Frank Pommersheim, chief justice of the Rosebud Sioux appellate court, captures this concern well when he writes that tribal legal professionals and their institutions walk "the very edge of tribal sovereignty" caught between "the yoked objectives of federal deference and tribal legitimacy" (Pommersheim 1997a:97). Tribal courts must meet Anglo-American norms of justice to assuage federal concerns regarding the "legitimacy" of tribal justice systems (Barsh 1999) yet still generate

a tribal jurisprudence that "must not lose touch with the people and traditions that nourish them from below" (Pommersheim 1995a:97).

On the one hand, the threat of further federal encroachment into what remains of tribal sovereignty seems constant. Officially, federal court review of tribal court authority remains rather limited, and generally there is no appeal to federal courts from decisions made by tribal courts. Yet there are other ways in which the looming presence of federal authority is strongly felt in the everyday operations of tribal courts. Legislation like the Indian Civil Rights Act of 1968, which provides federal review of tribal actions only in the limited arena of habeas corpus proceedings (when individuals are detained by tribal authorities), nonetheless exerts other influences, mandating that tribal governments respect certain individual rights of tribal members (including due process requirements in tribal court that closely mirror notions from the U.S. Bill of Rights), and limiting criminal punishment to fines of no more than five thousand dollars and no more than one year of incarceration per violation. A comprehensive analysis of published tribal court opinions concerning the due process rights of tribal members found that the majority of these decisions, despite the diversity of tribal cultures and communities represented, shared a rather similar application of Anglo-style due process concerns (Frietag 1997).

Furthermore, recent decisions by the U.S. Supreme Court have significantly narrowed tribal court jurisdiction, primarily over non-Indians engaged in activities within Indian country. Cases like *Oliphant v. Suquamish Indian Tribe*, holding that tribal courts have no criminal jurisdiction over non-Indians on tribal lands, and a line of cases including *Strate v. A-1 Contractors*, *Shirley v. Atkinson Trading Post*, and *Nevada v. Hicks*, which curtail the civil jurisdiction of tribal courts over non-Indians on reservation lands, all establish dramatic inroads into the sovereign powers of tribes to maintain law and order on their lands.[10]

The seemingly unfettered plenary power of Congress to abrogate treaty rights, the Federal Indian trust relationship, and other elements of Federal Indian law that work to secure tribal sovereignty, make the immediate future of the right of tribal self-governance seem rather dim to some. At least one tribal chairman, a former tribal judge, has suggested that these recent lines of Supreme Court case law may signal the end of the self-determination era of federal Indian policy (Clifford Marshall, personal communication).

Many scholars believe that this threat may be compelling many tribal jurists to rely on legal principles and practices that mirror Anglo-American notions of jurisprudence (Goldberg 2003; Porter 1997a; Pommersheim 1995b). As Nell Newton writes, "In conscious or unconscious anticipation to the possibility of federal interference with tribal authority, many tribal courts operate as nearly exact replicas of state courts. . . . this strategy is understandable . . . [for] tribal judges adjudicate with a kind of Sword of Damocles over their heads" (1998:294). This is akin to what Laura Nader has called the "harmony ideology" or "coerced harmony" (1990) that pervades the local justice systems of peoples caught in colonial regimes. Newton thus suggests that the use of Anglo-American procedural and substantive law in the legal systems of tribes like the Oneida and Mashantucket Pequot arises from an effort to stave off further federal encroachment by displaying their ability to ensure the application of due process, the rule of law, and other fundamental principles of Anglo-American jurisprudence (Newton 1998).

While scholars and jurists concerned with federal-tribal relations fret over these inroads, a second concern emerges, mostly (though not exclusively) among tribal legal actors and scholars who are also tribal members, regarding the extent to which tribal courts should rely on tribal notions of custom, tradition, and culture in the production of their contemporary jurisprudence (Tsosie 2002; Coffey and Tsosie 2001; Porter 1997b; Cruz 1997; Vincenti 1995). The concern is largely that to neglect the unique cultural and legal heritage of tribal communities today would be to accomplish the federal goal of assimilating tribes and hammer the final nail in the coffin of tribal sovereignty. As Seneca legal scholar Robert Porter writes, "The longer that native people deviate from organic notions of tribal justice . . . the closer they will be to losing their distinct identities. Without a persuasive justification to distinguish Indians from other Americans, it seems inevitable that extinction—as perceived by American society and maybe even by the Indians themselves—will occur" (1997b:238–39).

Yet at the same time that they value the use of custom and tradition, many tribal jurists recognize that introducing local notions of custom and tradition into a contemporary tribal jurisprudence that bears the heavy mark of Anglo-American influence is neither simple nor straightforward (Tso 1989; Zion 1987, 2000). Pommersheim warns that "tribal legal cultures . . . do not reflect pre-Columbian tribal standards and

norms. . . . The process of decolonization can *never* lead back to a precolonized society" (Pommersheim 1995a:99).

For some, the problems are pragmatic. Jim Zion, reflecting on his work in Cree, Pima, Navajo, and Blackfeet courts, explains that the difficulties of "finding Indian Common Law" are "sometimes due to language problems, sometimes to that fact that many Indians do not speak of their common law in articulated legal norms, and sometimes to constraints created by non-Indian thinking patterns" (Zion 1987:125; see also Zion 2000; Hunter 1999).

Others however, are less quick to presume that notions of custom and tradition are automatically valuable to contemporary tribal legal processes. These scholars see problems in the degree to which misrecognition of local customs and traditions—either as some body of timeless principles that must be adhered to despite social and political change (Miller 2001; Barsh 1999) or as legal representations not faithful *enough* to "actual tribal pasts"—is about political power plays, constituting a "mode of resistance to all that Western legal culture represents" (Joh 2000:125; see also Miller 2001) rather than any real articulation of local values and practices. As such, custom, tradition, and culture are notions "too problematic" to constitute a foundation for tribal jurisprudence insofar as they seem to invoke troubling "questions of authenticity, legitimacy, and essentialism," more suitable to the arenas of politics than law (Joh 2000:120).

Whatever the perspective on the place of customs and tradition in their tribal law, even a cursory review of the contemporary literature on tribal courts reveals that, for today's tribal jurists, the question concerning the relationship between norms of Anglo-American legal procedure and their unique tribal legal heritage is their fundamental jurisprudential concern. At first glance, we might seem to be back where we started, insofar as this question sounds rather familiar in relation to the issues informing the development and operation of Courts of Indian Offenses at the end of the nineteenth century.

But this would be mistaken. The fact that tribal members and employees rather than federal agents are posing these questions suggests that they are now pursuing these issues in ways that call for a radical reclamation by tribal nations of the legal instrumentalities and institutions originally used to dominate them. And though some worry aloud about the lasting detriments of having drifted too close to the Scylla of Anglo-style adversarial jurisprudence (Cruz 1997; Porter 1997b; Melton 1995)

or the Charybdis of custom and tradition (Miller 2001; Joh 2000), others view the horizon of tribal courts in much more positive terms. Pommersheim is again eloquent on this point: "The riprap created by these forces provides an opportunity for tribal courts to forge a unique jurisprudence from the varied materials created by the ravages of colonialism and the persistence of a tribal commitment to traditional cultural values" (Pommersheim 1995b:99).

The Dearth of Ethnographies of Tribal Courts

Despite the centrality of these concerns, very little scholarship has explored how the relationship between Anglo-American and tribal legal structures, norms, and practices emerges in the actual operations of contemporary tribal court jurisprudence. In general, tribal law remains a rather overlooked arena in contemporary U.S. legal scholarship. Even the study of what is often called Indian law focuses predominantly on the shifting trends of federal law and policy regarding tribal nations, and the consideration of the norms and practices of tribal justice that appear there are most often viewed through the lens of U.S. executive, congressional, and Supreme Court action.

Within the nascent field of tribal legal scholarship, which has only enjoyed some visibility since the early 1990s, the approach to tribal jurisprudence has been largely doctrinal or anecdotal. Studies covering tribal jurisprudence either follow the traditional mode of legal scholarship that analyzes published court opinions and tribal legislation (e.g., Barsh 1999; Atwood 1999; Newton 1998; McCarthy 1998; Valencia-Webber 1994) or make more theoretical contributions (e.g., Tsosie 2002; Coffey and Tsosie 2001; Cruz 1997, 2001; Porter 1997a; Pommersheim 1995a; Melton 1995).

Only a handful of published works have attempted any ethnographic study of tribal courts (Nesper 2007; Miller 2001; Cooter and Fikenstcher 1998a, 1998b). All deal expressly with the role of notions of custom and tradition in contemporary tribal court jurisprudence, suggesting again the centrality of this issue to tribal legal scholarship. Significantly, only Nesper's analysis of disputes over natural resources before the Lac Du Flambeau Ojibwe tribal court deals in any concrete way with the actual details of courtroom interaction. Nesper's work is compelling, particularly his analyses of the ways in which tribal lay advocates—tribal members with training acquired off-reservation in semiprofessional

legal advocacy who remain committed to their Ojibwe identities—constitute a "mediating class of legal practitioners" (Nesper 2007:681) whose efforts to navigate the tensions between native and nonnative discourses of law and tradition exemplify how the "quasi," "permeated" tribal sovereignty for which Biolsi (2005) argues elsewhere also emerges in the everyday practices of contemporary Ojibwe jurisprudence. This is provocative research, which initiates a line of analysis in contemporary tribal law that this study shares.

In other ethnographic research on tribal courts, including the more comprehensive studies of Miller (2001) and Cooter and Fikenstcher (1998a, 1998b), it is interesting to note the sides that their authors take in the "authenticity" debates surrounding the role of tradition and custom in contemporary tribal jurisprudence. And while they offer valuable insights into the operations of American Indian tribal law and the roles of custom and tradition there, we can extend and perhaps reconcile their lessons by an analytic approach that considers how tribal legal and other community actors actively co-construct notions of tradition in the face-to-face interactions that constitute tribal courtroom activity.

Bruce G. Miller's *The Problem of Justice* (2001) is a comparative ethnographic and historic analysis of what he calls the "justice practices" of three Coast Salish communities in the United States and Canada, including the tribal court of the Upper Skagit tribe of Washington State. A central theme of his study is that " there are significant problems concerning the degree to which what is called *traditional practice* can be brought into the present" and that such efforts are beleaguered by a misrecognition of "what traditional law and practice might have been" (5, emphasis in original). As such, they lack a "due regard for the relations of power" (6) that inform their expression in contemporary juridico-political practice today. He further argues that the inclusion of these notions in the contemporary tribal legal system of Coast Salish peoples reveals the extent to which they are "largely outward looking," focusing less on the actual values and practices of contemporary tribal members than on "managing relations with the dominant society that focus conservatively on a purported period of harmony prior to contact and the establishment of treaties and reservations" (11). As Miller explains, reliance on such notions, "undermine[s] the capacity of tribal governance to recognize diversity and community members' sense of fair, just participation in their own governance" (6).

Significantly, Miller's study offers important contributions by both locating and historicizing the flows of sociopolitical power and authority as they move through the discourses of tradition in contemporary tribal court praxis. Thus, one of the main sources he cites for the articulation of notions of custom and tradition in contemporary Upper Skagit tribal jurisprudence is an intertribal report on traditional justice practices among the Upper Skagit and other tribes in the area. The study, which includes historical research, interviews with elders, and observations of disputes, is interesting, claims Miller, "not just for its effort to record justice ideology, but because it itself became part of the current discourse about justice" in the Upper Skagit and other Coast Salish tribes (Miller 2001:110). Miller argues that "current politics of justice . . . are both reflected and altered by the . . . study" (111).

Miller goes into detail concerning how the study misrecognizes the historical and ethnographic record of past justice practices among the Coast Salish, revealing the extent to which doctrinal representations of tradition among the Upper Skagit represent a "conservative view of tribal life" as a "harmony society" that elides a contentious past of oppression, violence, and social conflict. Furthermore, he suggests how efforts to forward these images of custom and tradition contribute to an ideology of justice among the Upper Skagit that naturalizes the power of certain factions in the community, namely, those that claim certain "traditional" positions of authority while ignoring the contemporary needs and issues facing other tribal members.

Where Miller might go further is in revealing the implications of such representations of tradition for the practices that constitute the everyday operations of the contemporary Upper Skagit legal system. Thus, for example, he says little about how this study or other representations and discourses of traditional Upper Skagit justice practices generally emerge in tribal court proceedings—either in the written or oral arguments of parties before the court, or in the statements, rulings, and decisions made by Upper Skagit justices, or in the tacitly accepted, unspoken operations of the Upper Skagit court process. Miller might be correct about the misrecognition that occurs in the idealized representations of Upper Skagit legal traditions in the study he analyzes. But his analyses of the legal effects of these representations could benefit from additional attention to the talk and interaction through which tribal members negotiate the construction of tradition in the actual practices of their contemporary tribal law.

The other semi-ethnographic study of contemporary American Indian tribal courts, "Indian Common Law: The Role of Custom in American Indian Tribal Courts (Parts 1 and 2)," by legal scholars Robert D. Cooter and Wolfgang Fikentscher (1998a, 1998b), is valuable for its comprehensive collection of commentary from tribal jurists all across Indian Country concerning the value of custom and tradition in their contemporary jurisprudence. The study, which relies largely on interviews with tribal judges and doctrinal research on thirty-seven different tribal nations in the United States, is also important as a survey of the structures and ideologies that shape and contribute to tribal legal systems today, including the influence of notions of Anglo-style adversarial and traditional dispute resolution on contemporary tribal court procedures.

The authors reveal how some tribal judges rely primarily on the federal rules of civil procedure as a model for outlining courtroom procedure, including the examination and cross-examination of witnesses and other evidentiary procedures, while other judges explicitly follow different procedures, "in an effort to adapt procedure to local needs" (Cooter and Fikentscher 1998a:325). They describe how a judge from the Pojoaque Pueblo Tribal Court, while allowing the appearance of legal professionals to represent tribal clients, and affording some elements of an adversarial proceeding, nonetheless explicitly informs all parties to the hearing that he may choose to question parties and their witnesses and that he will allow the admission of hearsay evidence. Judges like this one explained that certain freedoms from formal Anglo-style procedural rules were necessary "to make the legal process congenial to Indians" (326). The authors explain that such informalities are necessary because they allow judges to follow more "traditional lines" of dispute resolution that focus, they claim, on "repairing a relationship" and require "going deeper into the dispute" than normally allowed by federal rules of procedure, which "narrow the dispute to the specific wrongdoing alleged by the plaintiff" (1998a:324).

But again, while the authors of this study conclude that "fairness and efficiency favor a closer alignment of law with custom in the tribes" (Cooter and Fikentscher 1998b:563), their understanding of what constitutes tribal customs and traditions in contemporary tribal legal operations is based primarily on the decontextualized representations of tribal traditions that come from their interviews with tribal judges or prior ethnographic studies. Thus, while they accurately capture the ide-

ologies that inform these jurists' understanding of tradition's place in their tribal legal praxis, their findings would have been more illuminating if they had been able to explore how such representations compare to, or even inform how, discourses of tradition are constructed in the flows of contemporary tribal legal practices. In this sense, the authors risk asserting reified and valorized notions of custom and tradition in precisely the ways that Miller finds so problematic. That is, they risk arguing for the primacy of notions of tradition in contemporary tribal law without considering how such notions are employed in actual tribal legal practices or the political economy that those practices inform and legitimize.

I would argue that while both of these studies offer important insights into the roles that notions of custom, tradition, and culture play in contemporary tribal legal systems, their perpetuation of the divide between a demonization and valorization of that role might be resolved by analytic techniques that capture how such notions are invoked in the interactional details of contemporary tribal jurisprudence.

Indeed, the field of tribal legal study generally is informed by a largely structuralist theoretical orientation to tribal jurisprudence. The notions of tribal law, politics, culture, and tradition in such an orientation are imagined as whole, homogenous systems that operate in and on the world in ways that impinge on but remain mostly unaffected by the actions of particular tribal members in particular juridical contexts.[11] The lessons of the ethnography of communication (Duranti 1994; Philips 1988, 1992, 1998; Hirsch 1998), conversation analysis (Atkinson and Drew 1979; Heritage and Drew 1992; Matoesian 2001), practice theory (Bourdieu 1977), and other discourse and practice-centered approaches (Danet 1980; Conley and O'Barr 1998; Falk-Moore 1978; Comaroff and Roberts 1981) that have informed other arenas of sociolegal and political study have been largely overlooked in the study of contemporary American Indian tribal law. Thus we lack knowledge of the interactions of those tribal peoples who are engaged with and contribute to the construction of these institutions at the moments of their making, as well as a proper consideration of the political implications of their contributions. Missing is the measure of human agency that, while necessarily shaped by the nature of preexisting material, political, and semiotic systems, nonetheless accrues to tribal social actors at particular moments of tribal social life when they confront each other in sociopolitical ways.

The Approach and Aims of This Study

Talk and interaction are social phenomena that straddle the structure/practice divide in ways that are crucial to inquiry into tribal court practices. As de Saussure (1985) and Chomsky (1965) long ago pointed out, all languages are regulated by a syntagmatic and paradigmatic structure—rules of grammar and syntax—that exists and persists beyond the cognition and action of any particular speakers and shapes how such speakers talk and act (and act through talk). At the same time, as other scholars have shown, speakers and interlocutors employ language in specific contexts of actual usage and discourse in multiple and complex ways that have sociopolitical force in and contribute to the constitution of their world and its social systems—including those of law, tradition, culture, and even language itself. Language, then—or, more precisely, talk, understood as communication and metacommunicative practices—constitutes an important site for exploring how social actors, including marginalized social groups like so many American Indian tribal peoples, both engage with the institutions and social systems that structure their lives and take them up at particular social moments, contributing to the (re)constitution of those systems in ways that have powerful social effects.

Consequently, this study analyzes tradition and culture as discourses in and of contemporary tribal law by considering the microdetails of face-to-face communication in one tribal legal context: that of property hearings held before the Hopi Tribal Court. The analyses that follow rely on theories and methodologies that draw from several arenas of legal scholarship and linguistic anthropological inquiry, including legal discourse analysis (Eades 1996, 2000; Conley and O'Barr 1998, 1990; Philips 1998; Hirsch 1998; Matoesian 1995, 1998; 2001; Mertz 1994; Drew 1992; Danet 1980), studies of language ideology and metadiscourse (Bauman and Briggs 2000; Kroskrity 2000; Schieffelin, Woolard, and Kroskrity 1998; Briggs 1993), studies of legal semiotics, pragmatics, and metapragmatics (Peirce 1956; Kevelson 1988, 1990; Silverstein 1993, 1998, 2003), legal narrativity (Amsterdam and Bruner 2000; Jackson 1988; Cover 1992; White 1985), and narrative interaction (Ochs and Capps 2001; Ochs, Smith, and Taylor 1996; Capps and Ochs 1995).

Applying insights gained from these literatures to my own ethnographic fieldwork and archival research on the Hopi Tribal Court, this study centers on three analyses that reveal how efforts among Hopi legal

actors to achieve adjudicatory legitimacy based on Anglo-American versus Hopi traditional notions of power and authority affect the microdetails of Hopi tribal courtroom interactions, contribute centrally to the meaning-making efforts that undergird those interactions, and become the sites of considerable contestation between differently situated tribal legal actors.

Thus, by considering the communicative resources and contexts by and through which Hopi social actors invoke, accept, or challenge notions of tradition and Anglo-American jurisprudence and their articulation in their contemporary legal processes, the analyses in this study subsume questions of what tradition "is" under the more general questions of what tradition "does" and "means" for the tribal actors who engage each other in these legal contexts. This study thus suggests that striking a balance between tribal notions of law and tradition—notably including moments where tradition is constructed by differently situated Hopi legal actors in multiple and even contradictory orientations to perceived Anglo-American legal practices—is an ongoing negotiation for Hopi legal actors that not only reaches the finest details of Hopi tribal court praxis but is central to the ways in which Hopi people constitute their tribal jurisprudence, its sociopolitical force, and the tribal lives that it affects. My hope is that this study will serve both as a call for increased attention to the microdetails of the sociolegal interactions that contribute to contemporary tribal legal contexts and as a model for other such endeavors.

An Outline of This Study

Three related approaches constitute the core of this study, each of which sheds different light on the forms, processes, and sociocultural force of notions of tradition and Anglo-American law in interactions before the Hopi Tribal Court.

Chapter 2 sets the stage for these analyses by providing some context concerning the history of Anglo-American-style jurisprudence among the Hopis, as well as describing the physical settings, legislation, and personnel that inform the institutional operation of contemporary Hopi Tribal Court proceedings. Chapter 2 also provides a description of my data; my methodologies for collecting it, including participant observation and audio recordings of property-dispute proceedings before the Hopi court; archival research; and interviews with Hopi court personnel, including the Hopi judges.

The first of three detailed analyses of Hopi hearing interactions begins in chapter 3, which builds on the emerging linguistic anthropological study of language ideologies, metadiscourses, and metapragmatics (Bauman and Briggs 2000; Kroskrity 2000; Schieffelin, Woolard, Kroskrity 1998; Briggs 1993; Silverstein 1993, 2003) in order to reveal the interactional practices by which legal actors participating in Hopi property disputes explicitly and implicitly construct notions of Hopi tradition and Anglo-American law, as well as the epistemological demands that they claim each makes on how dispute information "must" be told in court. I then argue that such ideologies and metadiscourses are central to the efforts of these tribal legal actors to authorize and challenge their claims to the contested material and symbolic resources that are the heart of these dispute proceedings.

In Chapter 4 I consider the confrontations of Hopi legal actors through discourses of Hopi tradition and Anglo-American law in a second hearing. I focus on the degree to which they reveal not just conflicts but outright paradoxes and ironies of language, cultural difference, and law in Hopi jurisprudence. I proceed to consider the centrality of paradox to legal semiosis (Kevelson 1990), pragmatics (Peirce 1955), and the metapragmatic (Silverstein 1993, 1998, 2003) "talk about talk" whereby actors frame court discourse in shifting relations to Hopi cultural distinctiveness and sovereignty, exemplifying how language mediates the cultural politics of Hopi law. I thus argue for a reconsideration of the usual binaries of indigenous identity—where claims to cultural distinctiveness are either libratory *or* reifying, autochthonous *or* other-determined—suggesting that a more complete picture of cultural politics emerges from taking these antinomies together as the ironic dialectics constituting the emergent edge of indigenous governance today.

Chapter 5 links up with and expands the analyses of chapters 3 and 4 in a unique way, joining considerations of the details of Hopi courtroom interaction with theories of legal narrativity (Amsterdam and Bruner 2000; Jackson 1988; Cover 1992; White 1985) via recent anthropological studies of narrative interaction (Ochs, Smith, and Taylor 1996; Ochs and Capps 2001; Mattingly 1998; Capps and Ochs 1995). I analyze a third Hopi hearing interaction, examining how the very operations of Hopi Tribal Court proceedings and the whole of tribal law instantiated therein are constituted by Hopi legal actors through narrative interactions that allow the articulation of both Anglo-style notions of legal process and Hopi notions of tradition. Despite the degree to which Hopi Tribal Court

procedures appear to be dominated by Anglo-American rules and are initiated pursuant to Anglo-American juridical norms that call for the adversarial pursuit of "rule-oriented" legal truths, the analyses in this chapter reveal how Hopi litigants work to co-narrate the settings of their dispute claims as informed by "truths" grounded in "relational" notions of Hopi tradition that are "outside" Anglo-style law. In doing so, they are also negotiating the very operations of the Hopi courtroom proceedings with which they are engaged. The result is the production of Hopi hearing narratives, and a macrosociological story of Hopi law they instantiate, that are informed to their core by a unique admixture of Anglo-style and Hopi traditional norms and processes of dispute.

Chapter 6 concludes the study by reviewing trends in sociolegal treatments of the politics of native tradition and cultural difference and the role of such politics in the representation of indigenous peoples and their status as sovereign nations. I suggest how the theories and methods employed in this study provide new ways for thinking about tradition and cultural difference, particularly as it informs contemporary indigenous law, politics, and society. Only through the continued pursuit of research into tradition and culture understood in this way, I argue, can we gain a practical understanding of the complex circumstances that confront tribal nations and their members today as they work to make, and make sense of, their laws and the human lives that are caught up with them.

Finally, I offer a brief note about the representations of courtroom discourse that appear in subsequent chapters. The portions of transcript provided in this and the remaining chapters employ several conventions typical of linguistic anthropological and other discourse analytic studies (see Duranti 1997). Thus, names of speakers occur in the left column, and Hopi utterances are represented first in Hopi, using an orthography from Bureau of Applied Research in Anthropology, *Hopìikwa Lavàytutuveni: A Hopi Dictionary of Third Mesa Dialect* (Tucson: University of Arizona Press, 1997). Utterances are represented one clause per line, with each clause then translated twice, first with a morpheme-by-morpheme translation and then with a looser English gloss, which appears in italics. Portions in bold mark the forms explicitly discussed in the chapter. Also note the following additional conventions:

001: Line numbers divide interactional discourses in a phrase-by-phrase progression, allowing for interlinear transcription.

HAB: Marks the Hopi habitual aspect suffix *-ngwu.*

SUBCL: Marks Hopi particles that are used in utterances to connect subordinate clauses to superordinate clauses.

Ints: Marks Hopi particles that are used as modifiers that intensify their object forms.

CntrFct: Marks a Hopi particle, *–as*, that is employed in counterfacutal statements.

—: A dash indicates that speech was suddenly cut off during or after the preceding word.

? : A question mark indicates a marked rising pitch.

. : A period indicates a marked falling pitch.

[ ]: Brackets mark the onset of portions of utterance that are spoken in overlap with other talk. The overlapping portions of talk are placed immediately above or below each other on the page.

( ): Parentheses that enclose utterances indicate doubt about the accuracy of the enclosed materials. Parentheses that enclose question marks (??) indicate that something was said at that point, but it is not clear enough to transcribe.

=: The equals sign indicates speech that is linked to subsequent talk by the same speaker that had to be split for transcript clarity.

CAPS: Full capitals indicate increased volume (as in "shouting" on the Internet).

italics: Italicized speech indicates emphasis of some sort, including slowed speech and pronunciation. It is also used, as noted above, for lines that give idiomatic, "loose" versions of English utterances translated literally from Hopi.

——: An extended dash indicates omission of a name for the purposes of protecting the identity of people or communities named in Hopi court proceedings or texts.

(h): This indicates an audible breath while speaking, as in the case of laughter or crying.

2 »

Making a Hopi Nation: "Anglo" Law Comes to Hopi Country

My Hopi friends tell a story about their origins in which their ancestors and those of the rest of humanity emerge from the Third World into this, the Fourth World, through a hole somewhere at the bottom of the Grand Canyon. When they come through, they are greeted by the deity Maasaw, the caretaker of this world, who asks them to pick from among four different ears of corn. Their choice, we are to understand, will dictate the ways of life each people would come to lead. The choices were from among several long, full, and beautiful ears and one rather short, plain, stubby ear. Some, including the ancestors of Euro-Americans, Navajos, and other tribes, choose the beautiful ears and head off in different directions to discover the fertile homelands and easy lifestyles that their ears represent. The Hopi ancestors choose the plain ear, and Maasaw tells them that, though they must go away, they will eventually migrate back to the arid high desert of the Southern Colorado Plateau and the three mesas on which they now reside, to carve out a plain and difficult agrarian way of life.

Like most origin stories, this story has as much to do with the present circumstances of the Hopis as with those of their

past. And among the many messages here, my consultants explained in some of their more optimistic moments, is a recognition and explanation of how Hopis have managed to stave off (or at least delay) the imposition of Euro-American society in ways not observable in the historical and contemporary circumstances of other Native North American tribal nations. To put it simply, my friends suggest that the isolation of their twelve villages on three fingers of the Black Mesa, where annual rainfall and sparse above-ground water sources barely support life,[1] has been the best defense against the ravages of colonization and other forms of domination from outsiders.

Today, of the approximately 12,000 Hopis and Tewas enrolled as members of the Hopi Tribe, just over half (approximately 6,950) continue to call the Hopi reservation their primary residence. Their reservation occupies 1.5 million acres of those aboriginal lands (*Hopìtutskwa*) promised them by Maasaw in northeastern Arizona (U.S. Census 2000; see figs. 1 and 2). Archaeological records place the Hopis in and around their current location since 500–700 CE, and one of the currently occupied villages, Orayvi, is described by some as the oldest continuously occupied community in North America, dating back to 1100 CE.

The original 2.5-million-acre Hopi reservation, established by the executive order of President Chester A. Arthur in 1882 just five years before the Allotment Act, survived that policy fully intact.[2] Thus nearly all of the remaining acreage of Hopi reservation lands is still held in trust today by the federal government for the benefit of the Hopi Tribe. Over the course of the twentieth century, however, considerable concessions of Hopi reservation lands would be made by the federal government to appease the demands of the larger Navajo Tribe, which surrounds them. The nadir for the Hopi Tribe and its rights to exclusively use its aboriginal territory came in 1962, when a federal court determined that all but 600,000 acres of the 1882 reservation immediately surrounding the Hopi villages was to be used jointly by the Hopi and Navajo tribes, despite recognition of the long history of intertribal conflict between the two.[3] Only twelve years later, after representatives of the Hopi Tribe successfully lobbied the U.S. Congress to pass legislation permanently dividing the joint-use lands between the two tribes, did the Hopis win back the right to exclusive use of an additional 900,000 acres, an area generally referred to as Hopi Partition Lands.[4] This brought the total acreage of the Hopi reservation to about 1.5 million acres, the size it is today, but that is still a million acres smaller than President Arthur's original 1882 set-aside (see fig. 2).

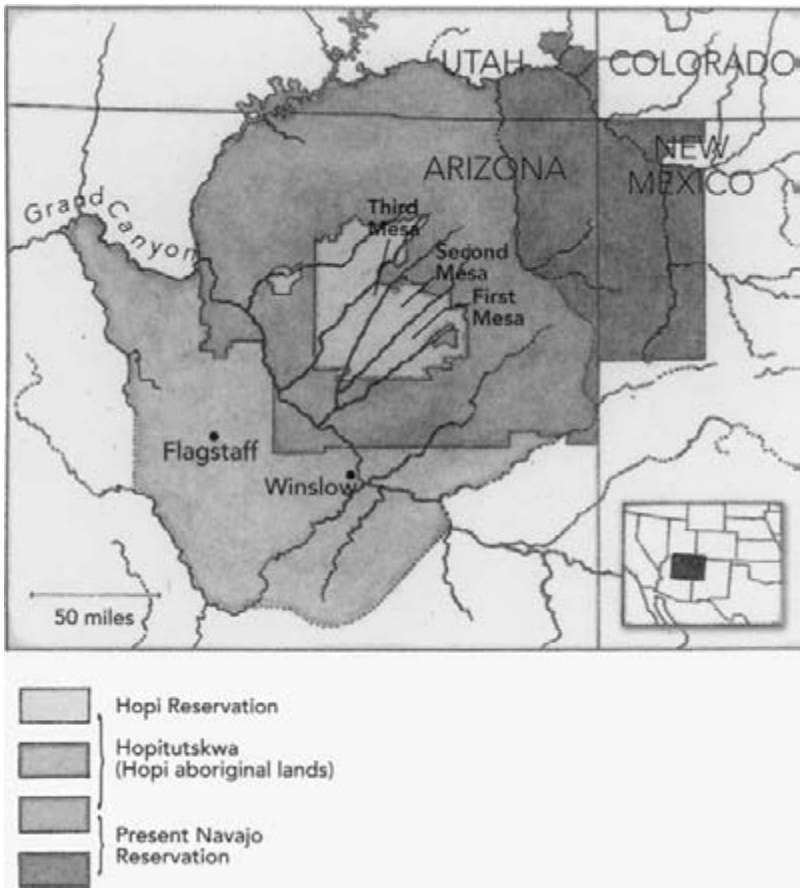


Figure 1. Map of Hopi Country. Illustration by Patricia J. Wynne, based on information from Peter M. Whiteley (Whiteley 2004). Courtesy of Patricia J. Wynne.

These and other concessions have contributed to the much-publicized land dispute between the two tribes, which continues to this day as Navajo holdouts residing on Hopi Partition Lands resist efforts and inducements by the Hopi Tribe and the federal government to relocate to the Navajo reservation (Clemmer 1995; Brugge 1994). Nonetheless, likely because there has been little non-Indian demand for access to their lands, it can still be said that the Hopi have avoided much of the suffering that has befallen other tribal nations across the United States who at one time or another were removed from their aboriginal lands.

Another sign that the more drastic effects of colonization have only recently emerged among the Hopis is the high level of fluency in the Hopi

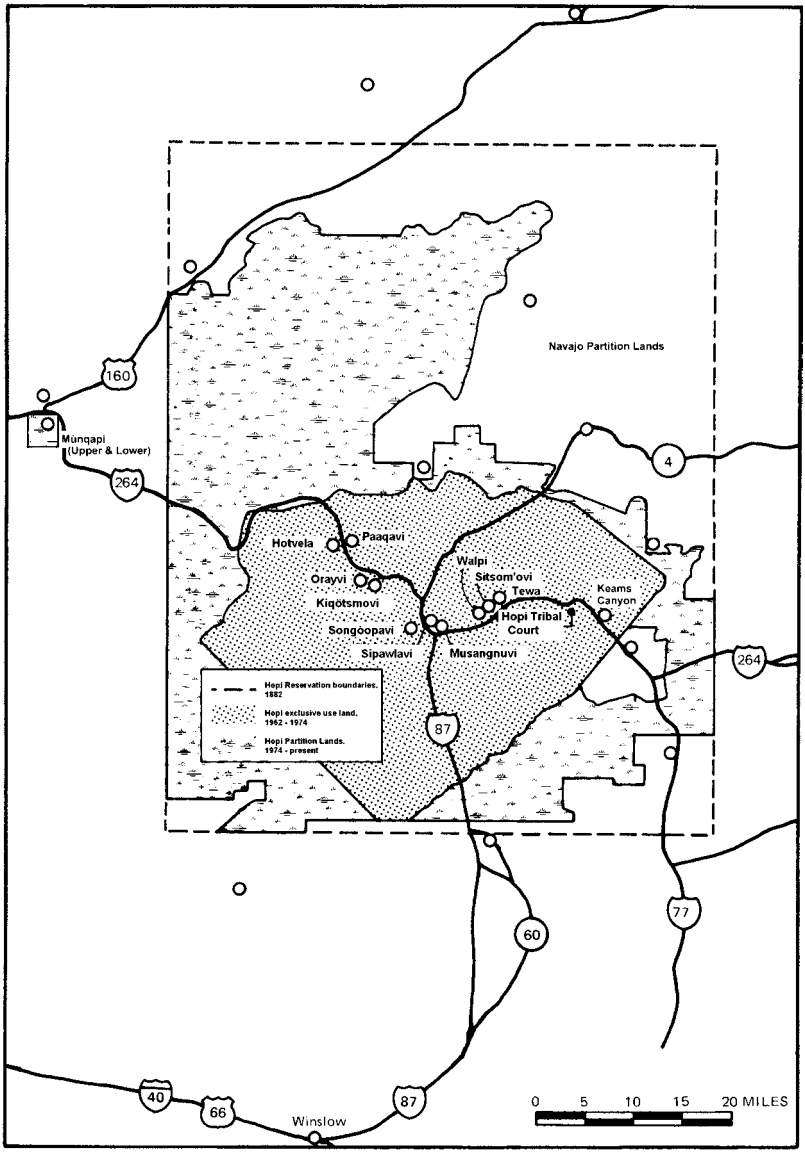


Figure 2. The Hopi reservation. Map courtesy of Northern Arizona University Cline Library, Colorado Plateau Digital Archives.

language among adults over the age of twenty. Of the thirteen languages constituting the northern branch of the Uto-Aztecan language family,[5] Hopi is the most widely spoken, with a recent tribal survey finding 49.3 percent of the Hopi population claiming to be conversant in their native language. As is the case in most language-shift contexts, the assessment found strong correlation between Hopi language proficiency and age: the largest group of nonspeakers were Hopi youth, ages 2–19, among whom only 7 percent reported an ability to converse in Hopi, and 79.6 percent claimed English as their primary language. By contrast, 54.9 percent of Hopis ages 20–39 claimed Hopi was their primary language, and nearly as high a percentage claimed to be conversant in Hopi. Of still older Hopis, between the ages of 40 and 59, 82.6 percent claimed Hopi to be their primary language, and of those 60 and older, 100 percent claimed an ability to converse in Hopi (Hopi Language Assessment Project 1997). Though virtually all but the eldest of Hopis today speak English, and children and young adults increasingly speak only English, the claim to continued use of Hopi among adults as young as 20 suggests that language loss among this community is relatively recent, and that at least the ideologies of language maintenance and preservation are vital among a substantial portion of Hopi people.

Of course, life today is not what it once was for the Hopis. Their economy has largely shifted from historic strategies of subsistence dry-farming of crops like corn, squash, watermelon, and beans to a market-based economy. The need for cash for food and material items like trucks, homes, televisions, and the latest fashions sends a portion of Hopi adults off-reservation for work in nearby metropolitan areas like Flagstaff, Phoenix, and Tucson. Others who stay on the reservation make ends meet either by producing arts and crafts for tourists or, if they have the skills and training, by taking positions with the Hopi Tribal Government, the largest employer on the Hopi reservation. Other on-reservation economic opportunities, including cattle ranching, construction, and mining, that were once viable options have recently been hit by considerable production downturns. In any event, all of these modes of reservation economy have a remarkably recent origin, well within the twentieth century, and many of my elderly Hopi consultants remembered a time when their families largely relied on nonmarket forms of production and trade to meet their daily needs (see Clemmer 1995; Whiteley 1988; Thompson 1973; Nagata 1970; Eggan 1950; Titlev 1944).

in accordance with section 16 of the Indian Reorganization Act."[8] Of course, a quick calculation reveals that the 755 votes cast actually fall just short of constituting 30 percent participation of Hopis eligible to vote at the time. Even more troubling is the fact that section 16 of the Indian Reorganization Act actually requires ratification "by a majority vote of the adult members of the tribe . . . at a special election authorized by the Secretary of the Interior."[9] Thus it was in the face of deeply questionable (or actually invalid) results that the Hopi Constitution was deemed to have been ratified by the Hopi people, and on December 19, 1936, was approved by the U.S. secretary of the interior.[10]

My impressions of Hopi governance today concur with Peter Whiteley's, however, when he writes that the tribal institutions established by the 1936 Hopi Constitution have nonetheless become "the de facto political form for the majority of Hopi people" (Whiteley 1988:230). The Hopi Tribal Council and other departments of tribal government possess much of the power and authority to address issues involving intervillage affairs, such as overseeing the management and disbursement of funds generated through tribally owned enterprises. They also manage affairs between the Hopi tribal nation and other federal, state, tribal, and private entities, including the running of federally funded programs such as Indian Health Services, the Hopi Tribal Housing Authority, and the management of contracts with a private coal-mining operation run on the Hopi reservation by the Peabody Coal Corporation.

This is not to say that Hopis ignore the legitimacy issues surrounding Hopi tribal governance or that they do not become sources of dispute. Though the Hopi Constitution that currently governs tribal politics is largely unchanged from its original form, the validity of federally imposed tribal governance and tribal organization remains "a dominant issue in Hopi politics" (Whiteley 1988:223). Most significantly, these debates over the legitimacy of Hopi tribal governance became refracted through a lens that divided so-called "traditionalist" from "progressive" Hopis (Geertz 1994; Clemmer 1990; Whiteley 1988). While the latter saw the current Hopi tribal government as the Hopis' "best option" for conducting tribal governance, the former opposed the Tribal Council and its actions on the grounds that they were complicit in the perpetuation of U.S. colonial oppression of Hopi people (Clemmer 1990). As is evident in their name, the "traditionalists" linked up their politics of resistance with a call for a return to what they saw as an increasingly threatened set of "traditional" Hopi cultural practices, most notably Hopi traditional modes of subsistence

farming and the ceremonial cycle that governs it. Some have gone so far as to block efforts to install plumbing and electrical systems in their villages (Walpi, Orayvi, and Hotvela) and refuse to send village representatives (Orayvi and Hotvela) to sit on the Tribal Council (Whiteley 1988, 1998).[11]

At the same time, and with an irony that is not lost on Hopis with whom I have spoken, many leading "traditionalists" have availed themselves of political platforms outside what most consider to be the Hopi community. Whether through trips to the United Nations, highly publicized meetings with celebrities, or alliances with counterculture and Pan-Indian activists, leaders of the traditionalist movement have managed to find a greater audience among non-Hopis than among tribal members (Geertz 1994). Thus several Hopi people with whom I spoke emphasized with considerable frustration that the so-called progressive-traditionalist distinction does not influence the Hopis' actual commitment to ceremonial activities or participation in village life. Indeed, many of the Hopis I met who had worked for years in their tribal government were also deeply involved in Hopi ritual societies and their practices and had important leadership positions in their clans.

Moreover, some Hopis speak with a measure of pity about those who hold themselves out as traditionalists because, they said, these people often marginalized themselves within the very village and ceremonial communities in which they claimed leadership. This is true, insofar as it is decidedly *qahopi* (morally wrong; literally, "not Hopi") to publicly claim a position of traditional authority, thereby displaying yourself as able and willing to share the esoteric knowledge of village and clan traditions and knowledge (*navoti*) that qualifies you for that position, which is not to be shared with noninitiates.

What thus emerges is a picture of the complex and often competing discourses of tradition, culture, and cultural identity that play a central role in contemporary Hopi tribal politics. As I explain later, very similar complexities resound within contemporary Hopi law and the details of tribal court praxis. However, before turning to the Hopi legal system, we must consider some of the elements of Hopi governance that operate within the several Hopi villages today.

Hopi Village Organization and Governance

Whatever questions persist about its legitimacy, the establishment of a Hopi tribal government has never meant the erasure of the authority

and at least semi-autonomy of the several Hopi villages. Indeed, written into the Hopi Constitution are explicit recognitions and reservations of authority to the leadership of each village over certain intravillage matters including family disputes, adoption, and the assignment and inheritance of farming land and property.[12]

Consequently, the sociopolitical organization that defines internal village politics also continues to play a major role in contemporary Hopi governance. However, accurate description of village social organization can be hard to capture, and efforts to do so have posed significant problems for many non-Hopi analysts over the years (Titiev 1944; Eggan 1950; Nagata 1970; Whiteley 1988; Levy 1992). Mischa Titiev, whose study of Third Mesa Hopis is perhaps the most informative account of Hopi social organization (Geertz and Lomatuway'ma 1987:10), wrote in 1944 that ethnologists "mired in the Hopi clan muddle" for nearly half a century had all but abandoned the delineation of Hopi clans and phratries (Titiev 1944:44). But, more recently, Titiev's own attempts to unravel for etic eyes the fundamental structure of Hopi society have come under reconsideration by scholars who both criticize and support his representations (Whiteley 1988; Levy 1992).

These analysts do seem to agree upon some generalities regarding Hopi ideals of village social organization that are consistent with my own observations. Thus several kin-based groupings exist within each Hopi village that can be called phratries, clans, lineages, and sublineages, and this ordering descends from broader to narrower markers of inclusivity in which each category tends to include one, two, or several instances of the categories that follow it. Additionally, analysts would agree that Hopi descent is reckoned matrilineally, that residence is ideally (though often not actually) matrilocal, and that marriage is exogamous to the phratry level (Titiev 1944; Eggan 1950; Whiteley 1985, 1986, 1988; Rushforth and Upham 1992; Levy 1992).

In addition all have recorded in significant detail the elaborate Hopi ceremonial cycle that is still a central feature of village social life throughout the Hopi year. All ceremonies are considered the sole purview of specific clans, constituted in light of secret, sacred, and efficacious traditional knowledge (*navoti*) concerning the world and its operations that each clan's ancestors acquired in their migrations before coming to the village and that stands as the basis on which the clan was originally admitted into village life. Hopis understand these ceremonies to be ranked according to their importance to the well-being of the village and bestow

upon the clans that own them a hierarchy of importance (Eggan 1950). This hierarchy carries over into nonceremonial dimensions of village life: clans that own more important ceremonies also own better farming lands, and their leaders are viewed as the more significant leaders in village life (Levy 1992).

My experience in the various Hopi villages also supports Whiteley's claim that "clanship continues to give the [Hopi] individual a primary identity that supersedes village or Mesa membership or more general 'Hopi' identity" (Whiteley 1988:177). Indeed, this very clan centrism is what led Titiev to characterize the Hopi village as something akin to an "amorphous state," recognizing that village leadership, as embodied in the Kikmongwi (often the leader of the clan whose ancestors are held to have founded the village), was primarily concerned with the running of ceremonies and only secondarily concerned with the resolution of a limited sphere of interclan disputes (Titiev 1944). The decentralized character of Hopi village life appeared so pervasive to Titiev that he observed, "There seems to be no machinery for the making of laws" (66).

Of course, upon a closer look, the picture of Hopi village life becomes more muddied. Among the most significant complications is the fact that, given the historic autonomy of the villages, much of the structure and praxis that we can identify today for one village does not hold for others. The reasons for this vary but may include the extinction of particular clans and their ceremonies and the different reactions of villages to recent historical events that dictate the relations of villages and village members to the traditional religio-political structure (Whiteley 1988). Thus, for example, the six villages generally associated with Third Mesa—Orayvi, Upper and Lower Mùnkapi, Hotvela, Paaqavi, and Kiqötsmovi—all emerged from the fracturing of the once much larger village of Orayvi in 1906, and as families and clans split to live in these different villages, no members of any of the new settlements would ever recreate the full ritual cycle that once operated at that "mother" village. At least three of these villages, Paaqavi, Upper Mùnkapi, and (to a lesser extent) Hotvela, recognize a secular board of directors and governor as their primary village leadership. Such fracturing may have occurred in the past on the other two mesas, but currently no similar dissolution of the ritual cycle is evident in the organization of those villages.

Court Comes to Hopi Country

Against this complex background and during the earliest stages of the imposed centralization of Hopi tribal government, Anglo-American-style jurisprudence was first officially introduced on the Hopi reservation. Tellingly, despite the fact that the Hopi Tribal Council had the power under the Hopi Constitution to adopt resolutions and ordinances, and to "set up courts for the settlement of claims and disputes,"[13] one of its earliest actions was to authorize the field agent of the BIA assigned to the Hopis (known as the Hopi superintendent) to act in an adjudicatory capacity to "punish any offenders of rules and/or regulations on the Hopi reservation."[14] And it appears from reports during those early years that it was the superintendent himself who presided in court over cases involving tribal members and other Indians arrested and charged by Hopi agency police with having committed crimes on the reservation (Black 2001).

The Hopi Court of Indian Offenses

In 1940, however, Superintendent Seth Wilson would oversee the creation of the Hopi Court of Indian Offenses. There is confusion among reports by Hopis alive at the time as to whether the first judges to man the new court were freely elected by Hopis or handpicked by the agent himself (Black 2001). What is clear is that the superintendent of the Hopi agency exerted a considerable influence over the creation and operation of the court, and that it would become a key vehicle for the introduction of Anglo-American jurisprudence among the Hopi people. The fact that the court was dubbed the Hopi Court of Indian Offenses does suggest that this, like other CFR courts around Indian Country, was largely an agency-run institution.

Various aspects of the court's creation reveal significant parallels between it and other Indian Offenses courts. First and foremost, the court was housed in the Keams Canyon location of the BIA's Hopi field office, some eighteen miles east of the First Mesa villages. Court personnel consisted primarily of a judge, a translator, and a clerk who would type records of the proceedings and final orders to be kept on file with the Hopi agency. Litigants represented themselves, and the procedures were generally informal. None of the court officials were legally trained, and almost all were tribal members who had established working relations

with the Hopi agency. The court's first judge, a Tewa man named Irving Pabanale, was a member of the Hopi agency police, a representative on the Hopi Tribal Council, and one of the advisors to Oliver La Farge during the drafting of the Hopi Constitution (Black 2001).

Perhaps even more significant than its location or the sympathetic ties of the court's personnel to the Hopi agency was the law that the court was charged to apply and enforce. In a series of statements made to anthropologist Bob Black in the 1970s, Pabanale recalled his first meeting with Superintendent Wilson after being told he was to be the judge of the Hopi court. He explains, "So he got out a book. It was about two inches thick—it was the Federal Code. Then he said to me, 'Here is the code. You read this code when you have your court and use your judgment in rendering decisions, as you are a judge of the Hopi tribe'" (Black 2001:51). In this sense, the Hopi court was as aptly described as a CFR court as any of its predecessors across Indian Country and seemed designed more to meet the administrative concerns and assimilative goals of the superintendent than to address the needs of the Hopi people themselves in resolving disputes. Pabanale's recollections of his installment as judge hint at his overarching desire to meet the superintendent's expectations that the court serve as a tool of assimilation. He said that he took the CFR code home, and

> after a week I went back to Keams Canyon, to the superintendent, and said to him, "I have read the book and I know it is going to be new to the people, and so I will try my best in rendering my judgment until they learn." This is what I said to Seth Wilson. "It might take about two or three years before they will learn what 'court' is. Is that all right?" "That's all right, but there's a provision how to render your judgment when you're just beginning." "Yes," I said. "It is provisioned. I read that." (Black 2001:51)

Over the years, the Hopi Court of Indian Offenses would work in this way to enforce, primarily with regard to the Indian residents (including Navajos) of the Hopi reservation, the Anglo-American laws enumerated in the federal register as well as other policies and programs promulgated by the Bureau of Indian Affairs. Pabanale describes how, in his nine years as judge, the court dealt mainly with the adjudication of criminal matters, including the fining and incarceration of individuals found guilty of intoxication, theft, assault, and battery, as well as those found in violation of the BIA stock-reduction programs—an effort by the

BIA in the 1940s, widely despised by tribal members, to limit the number of cattle and sheep that Hopi ranchers could graze on tribal lands (Black 2001).[15]

Pabanale makes little mention of addressing civil matters in the tribal court, though his recollections suggest that they did come before him. In fact, his lone statement regarding such disputes further supports the extent to which the court was seen primarily as a place for imposing criminal sanctions. He says, "In civil matters it was pretty hard to render a judgment that would be satisfactory. Where there were criminal cases, every offense had a penalty written, and so I rendered my judgment according to what had been written in the book" (Black 2001:67).

Indeed, there is evidence to suggest that Hopis generally avoided this court as much as possible, even when searching for ways to resolve their disputes. In his unpublished study concerning conflict management among Hopis during the mid-to-late 1960s, Bruce Cox finds a general aversion by tribal members to taking their disputes to the Indian Offenses Court. He reports, quoting one of his consultants, "There is considerable censure of people who call their neighbors into court. As a Second Mesa man put it, 'The Hopis don't like to put anybody in court, unless it's real serious, like divorce, murder, rape, and [the like].' . . . Accordingly, private quarrels are rarely tried in the court at Keams Canyon" (Cox 1968:35–36).

The Hopi Court of Indian Offenses was eventually abolished in 1972 by an act of Hopi Tribal Council that also created the current Hopi Tribal Court and promulgated rules for its operation.[16] But significantly, and in a manner similar to the drafting and passage of the Hopi Constution some thirty-six years earlier, it seems that the impetus for this move did not arise from the Hopi people. Rather, the promulgation and passage of Ordinance 21, and the subsequent creation of the Hopi Tribal Court, seem to have emerged as a response to external threats of federal review of Hopi tribal governance and from the legal analyses of a non-Hopi lawyer who advised the Tribal Council as to how to respond to those threats.

Making a Tribal Court: Hopi Ordinance 21

On July 10, 1972, an emergency meeting of the Tribal Council was called to discuss, among other issues, a lawsuit filed in federal court by a Navajo man who had been arrested by officers of the Hopi Tribe and charged with violating Hopi Tribal Ordinance 18 by allowing his livestock to

trespass on Hopi land. Twelve of the seventeen council members were present, along with a non-Hopi attorney named Robert Boyden whom the Tribal Council had retained as its in-house counsel (Minutes of the Hopi Tribal Council, July 10, 1972). The records of this proceeding are spotty, and they reveal a rather confusing number of motivations underlying the calling of the meeting, a confusion that may have existed among the council members themselves, over the best way to respond to the lawsuit.

It appears from the minutes of that meeting that the Navajo man claimed that the impounding and sale of his livestock by the Hopi Tribe violated his rights under the recently passed Indian Civil Rights Act of 1968 (ICRA).[17] The attorney retained by the Hopi Tribal Council apparently believed that neither the procedures of the Hopi Court of Indian Offenses nor the Hopi ordinance it was enforcing would survive federal scrutiny in this case. Thus he suggested that the council move proactively to address these complaints. The minutes read as follows:

> Brought into this case were the matters of Ordinance 18 and the present court system. In order to effectively meet the complaints filed in Federal Court, changes have to be made. These changes are to be ones which the Tribe would have to make on their own so the Federal Court will not make them for the Hopi Tribe. The things which had to be done that day were to make changes in the Law and Order Code and Ordinance 18, to make it comply with various requirements of due process. (Minutes of the Hopi Tribal Council, July 10, 1972)

Though the minutes are sketchy, they reveal that the lawsuit raises an even more fundamental conundrum faced by the Hopi Tribe, and any tribe really, relying on Courts of Indian Offenses. That is, if those courts are bound by federal law to apply the laws set out in the Code of Federal Regulations, produced and imposed by the BIA, how can tribal governments enforce the rules and ordinances they promulgate pursuant to their own law-making authority as provided in their tribal constitutions? It is this broader issue of sovereignty that gets most fully developed in the meeting. And it is with regard to that issue that the attorney ultimately recommends that the Hopi Tribe establish its own courts pursuant to an ordinance that he prepared and distributed at the meeting. The minutes paraphrase the attorney's explanations: "[He] felt that the main advantage of a Tribal Court would be that it would be

under the direct supervision of the Hopi Tribe. When this ordinance is passed and approved, the U.S. Government has nothing to do with the Tribal Courts. Then the Hopi Tribe would have its own judicial branch, giving us the opportunity of establishing a court system for the reservation needs" (Minutes of the Hopi Tribal Council, July 10, 1972).

The attorney appears to have reviewed the provisions of the proposed ordinance and then opened the floor for discussion on the matter by the council members. Among the issues discussed were how the tribe would fund the new court and whether or not the attorney believed the ordinance would gain federal approval, as required by the Hopi Constitution. Interestingly, at one point in the discussion it is brought out that the proposed ordinance was never brought before the Tribal Law and Order Committee, a subcommittee of Tribal Council members and advisors who regularly reported on tribal legal affairs to the larger legislative body. This failure may suggest the extent to which the proposed legislation was created largely by the non-Hopi attorney who had brought it before them, with little initial input from Hopi tribal leaders.

Despite this lack of input, the ordinance was unanimously accepted by the Tribal Council on that day, as several council members were reported to agree with the comments of one member who said that "times have changed and we need an ordinance which will cover everything which may occur" (Minutes of the Hopi Tribal Council, July 10, 1972). Ordinance 21 was approved by the superintendent of the Hopi agency on the same day and sent on to the office of the BIA area director for review. When no comment was forthcoming within the ninety-day review period provided under Section 2 of the Hopi Constitution, the acting area director of the Phoenix BIA office informed the tribal chairman in 1973 that "Ordinance 21 is in effect as of July 10, 1972" (Letter of John B. Bartley 1973). Hence the Hopi Tribal Court was created.

The Hopi Tribal Court Today

Today, the Hopi Tribal Court is located at the eastern edge of the Hopi reservation, at the mouth of Keams Canyon, some seven miles west of the location of the BIA Hopi agency offices, where the Hopi Court of Indian Offenses once met. The court sits on the south side of Arizona Highway 264, on a plot of land leased to the Hopi Tribe by a First Mesa clan. It shares this site with the separate buildings of the Hopi police headquarters, the Hopi jail, the Hopi prosecutor's office, and the new Hopi radio

Figure 3. Hopi courtroom 1, exterior. Photo by Ethan Elkind.

station. The court consists of two buildings: a permanent structure built in the late 1970s that houses the main courtroom, a holding cell, five court clerks, two bailiffs, and one of the two associate judges (see figs. 3 and 4) and a doublewide trailer that houses a second, smaller courtroom (see fig. 5), the offices of the chief judge, another associate judge, the administrators, probation officers, and a receptionist. There is also a small library containing hardbound copies of case reporter series of the U.S. Supreme court, federal, and Arizona state court opinions, federal and state statutes, and various legal research guides.

Upon entering either of the Hopi courtrooms, one is immediately aware of the influence that Anglo-American notions of adversarial justice have had on the space where Hopi legal proceedings transpire (see fig. 6). Courtroom 1, where criminal and appellate proceedings are held, is organized on a northeast to southwest axis, with several rows of chairs provided for an audience, separated from the main hearing space by a low wall (much like the "bar" in Anglo-American courts) and a step down.[18] Inside the main hearing space, just after the wall, long desks are located on either side of a central aisle. The one on the east side is for prosecutors, plaintiffs, and appellants (and their counsel), and the one on the west side is for defendants or respondents and their counsel. Opposite them is a raised bench behind which Hopi trial and appellate justices

Figure 4. Hopi courtroom 1, interior. Photo by Ethan Elkind.

Figure 5. Hopi courtroom 2, interior. Photo by Ethan Elkind.

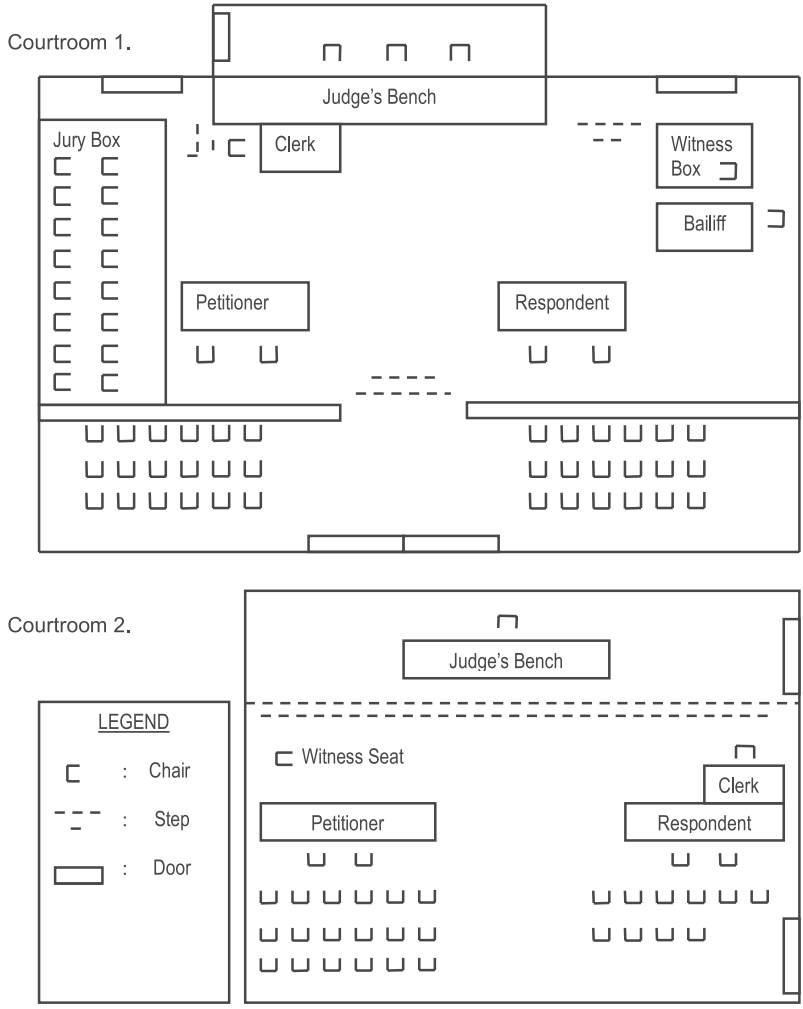


Figure 6. Adversarial layout of Hopi courtrooms.

sit. Just below the judges' bench, to the judges' left, is a witness stand and a seat and desk for the bailiff. To the judges' right are a desk, a chair, and audio recording equipment, all manned by the court clerk. A jury box with sixteen seats for jurors is also located along the wall to the judges' right. Even the smaller Courtroom 2, where all civil hearings are heard, is arranged so that its movable furniture mirrors that of a typical Anglo-style courtroom.[19] In both courtrooms, desks for all parties and the judges as well as the witness stands are supplied with microphones, as all court proceedings are recorded by Lanier tape decks monitored

by various court clerks. These audio recordings constitute the official public record of court proceedings and are kept on file by the court.

Given the origins of the court and the circumstances of its creation—namely, as a response to impending threats of federal review—and the fact that its terms appear to have been prepared largely by a non-Hopi attorney, it is not surprising that Ordinance 21 establishes a Hopi Tribal Court that shows the considerable influence of Anglo-American norms of jurisprudence. Thus, aside from the various inroads into tribal court jurisdiction caused by federal statutes and Supreme Court case law (see chapter 1), the effect of Anglo-style law on contemporary Hopi jurisprudence is evident in the very rules and procedures of Hopi court. Much of Ordinance 21 is borrowed wholesale from the provisions of U.S. federal and state law, and a visit to a Hopi court hearing today reveals many parallels of praxis.[20] This remains true even after a further elaboration of the rules in a second document, titled *The Hopi Indian Rules of Civil and Criminal Procedure*, adopted by Tribal Council resolution in 1974.

Generally speaking, Title I of Ordinance 21 provides for the establishment of the court, enumerates the qualifications of appointed judges, and outlines the duties and powers of the court and its personnel. Title II describes basic aspects of legal procedure, focusing, as might be expected, on the arrest and prosecution of criminals. Both largely provide for the creation of a court that fundamentally relies on adversarial judicial processes.

Hopi Court Composition and Personnel

The Hopi court has two branches, a trial court that has general jurisdiction to hear issues fact and law in criminal and civil matters that arise on the Hopi reservation (subject, again, to federal limitations), and an appellate court that has power to hear appeals from final orders and judgments of the trial court, issue special writs designed to prevent the trial court from acting outside its jurisdiction, and answer certified questions of law.[21]

All justices of the Hopi court are appointed by the tribal chairman with the consent of the Tribal Council, which also determines their salaries.[22] The qualifications for Hopi trial and appellate justices also imply a general preference, above all other criteria, for individuals who have knowledge of Anglo-American jurisprudence. Indeed, though there is no requirement that any of the three appellate court judges nor the

chief judge of the trial court be Hopi tribal members, all must be graduates of accredited schools of law, and the chief judge must also be a member of the U.S. Federal or some state bar.[23] The remaining two associate judges must be tribal members, and they are also required to complete training in adversarial justice practices before they can be appointed to a permanent associate judgeship.[24] There are also provisions for the selection of a judge pro tem, who need not be a tribal member but can be hired to fill a vacancy at the trial level. Significantly (not only for me, but also for some of the Hopi justices I spoke with), none of the judges are required to be fluent in the Hopi language.

Over the years since its creation, the Hopi court has been headed by chief judges and various associate judges whose qualifications have generally conformed to these requirements. My experiences with the court since 1996 lead me to believe that there has been, for some time, an unstated desire to seat an all-Hopi judiciary, but this has only recently been accomplished (in 2003).

During the main period of my field research, from 2000 to 2001, the trial court was composed of two Hopi associate judges, a man and woman of middle age, who were not trained legal professionals but had passed the required judicial training. Both, interestingly, were fluent Hopi speakers, and one, the man, had served the longest on the Hopi bench, having occupied his position since 1980. At the beginning of my stay, the chief judge position of the trial court had just been vacated by an Apache woman who had moved on to become a justice in Federal district court and filled by a Hopi man who had worked for many years as a litigation attorney in Federal court in Arizona and had been in-house counsel for the Hopi tribal government. He was not a Hopi speaker and had been raised off the reservation. Finally, there was an Anglo-American pro-tem judge, a former federal prosecutor, who was hired to assist during the transition between chief judges. He also served part time as a judge in the Southern Ute Tribal Court, traveling between the two courts and his home in New Mexico every week.

On the appellate court at the time were two Hopi men and an Anglo-American man. The chief justice of the appellate court, one of the first Hopis (and first American Indians) to graduate from law school in Arizona, is also a professor of anthropology who has taught for nearly four decades at the University of Arizona. He is a fluent Hopi speaker and teaches Hopi both around the Hopi reservation and at the university. He has served on the Hopi appellate bench since the mid-1980s. The other

Hopi appellate judge has a private family law practice in Tucson and has also served as the chief judge of the Tohono O'odam Tribe in southern Arizona. He is not a Hopi speaker. Finally, the Anglo-American appellate justice who served on the court during the main period of research for this study was a longtime resident of Holbrook, Arizona, near the Hopi reservation. Before joining the Hopi Appellate Bench in the late 1980s, he had served for several years as an Arizona Superior Court judge. He retired from the Hopi bench in 2003 and was replaced by a Hopi woman attorney who also works as a U.S. attorney in Arizona. She and the other two Hopi justices continue to serve as the regular justices of the Hopi Appellate Court. Two others—a Hopi woman and I—serve as justices pro tempore, filling in for the other justices when circumstances require it.

It is important to mention that the tribal court judges who are Hopi are also affiliated members of villages from across the reservation, representing all three mesas (though Third Mesa villages predominate). All are initiated members of various Hopi ceremonial societies in their respective villages. While this distribution and level of ceremonial participation may lend legitimacy to the court as a body that represents the perspectives of Hopis from all across its village populations, it seems to be less the product of conscious deliberation by the Tribal Council and more a result of fortuity. As we shall see in some of the later chapters, the fact that there are judges on the bench who represent all three of the mesas does not result in any effort to assign cases along such lines of affiliation.

In addition to judges, the court employs two bailiffs who oversee the transfer of criminal defendants between the court and the jail, five clerks, two probation officers, and several support staff, including three administrators and two secretaries. All of these positions are filled by Hopi tribal members, and, except for the two bailiffs, one of the probation officers, and the head administrator, all were women during the period of my research.

The Anglo-Style Procedures of the Hopi Court

In accord with both the physical space of the courts and the qualifications of judges, the official rules of court procedure as outlined both in Title II of Ordinance 21 and the Hopi Indian Rules of Criminal and Civil Procedure (HIRCCP) describe a thoroughly adversarial process in the style

of Anglo-American jurisprudence. Many of the HIRCCP, which were developed by non-Hopi legal scholars at an Arizona law school, borrow wholesale from U.S. state and federal rules of civil and criminal procedure.

Title II generally outlines the rules for criminal procedure, enumerating the timing of arraignment hearings and the entering of pleas of innocence or guilt, the rights of those accused to appear and defend themselves in court, the circumstances and procedures for seating juries of Hopi tribal members to hear and decide cases, and the entering of criminal judgments and sentences, which can include monetary fines or incarceration in tribal jail.[25]

The HIRCCP elaborate on the rules of criminal procedure established in Title II and also provide some rules of civil procedure. These rules provide for parties seeking to commence legal action to file written complaints with a clerk of the court and require that they then serve on the named defendant(s) a copy of the complaint along with a summons that requires the defendant to answer the complaint within a certain number of days.[26] Under the rules, the court is held to have jurisdiction over the matter once it receives a return of service. The rules go on to delimit various requirements as to how these documents (called "pleadings," borrowing jargon from Anglo-American jurisprudence) must be prepared, including the kinds of information they must contain—statements of the court's jurisdiction over the matter, the circumstances and events that have moved the complainant to seek relief and the kinds of relief sought, and in the case of defendants' statements, their defenses or denials to these claims and any counterclaims they might have.[27] The rules also establish strict deadlines for when such written petitions must be filed, the circumstances under which these deadlines can be changed, and the consequences of failing to meet these deadlines—consequences that include the entering of default judgment against the party who misses the deadline.

Once the filing is complete, parties are generally required to appear in court for oral arguments either for hearings on preliminary matters or for the full trial. The rules provide that at these proceedings, Hopi disputants or their legal representatives are expected to argue their petitions, submit evidence, and orally examine and cross-examine witnesses before a judge or jury whose judgment is binding. The rules hold that all civil judgments can be for a variety of remedies, including injunctions to stop certain kinds of offending activities, monetary compensation, or

some combination of both. These decisions carry the full coercive force of tribal law and thus are themselves enforceable through threats of monetary sanction and/or incarceration.[28]

Given the extent to which the rules mandate an Anglo-style legal process for the Hopi legal system, one might expect that Hopi litigants would regularly retain professionally trained lawyers when pressing their claims in court, but this is not the case. Because of the remoteness of the Hopi reservation and the relatively cash-poor population that resides there, tribal court litigants rarely appear with professional representation. Though more affluent clients (including the Hopi tribal and village governments) sometimes call upon non-Hopi lawyers from nearby metropolitan areas of Flagstaff, Gallup, and even Salt Lake City, more often than not, Hopis represent themselves in court or hire one of the lay advocates who specialize in tribal court litigation. In my research, I encountered four advocates who regularly practiced before the Hopi court: one Anglo man from the reservation border town of Winslow, Arizona; two Hopi tribal members, one man and one woman, from Second and Third Mesa villages, respectively; and one Navajo advocate who made occasional appearances. Though current Hopi court rules allow lay advocates to practice before the court with little more than a twenty-five-dollar "bar fee," recent concerns by the Hopi judiciary about ethical abuses and poor representation by these advocates have led to efforts by the appellate court to promulgate some model rules of professional responsibility (Sekaquaptewa, personal communication.). The promulgation of these rules has, however, generated new concerns that stricter standards of professional responsibility may either scare off or raise the cost of the few sources from whom Hopi tribal members can seek representation in court. These rules are still in the early stages of their development, so it remains to be seen whether they will become official tribal legislation or court rules and what kind of effect they will have on the economics of Hopi tribal court litigation.

Finally, it is important to mention that in criminal cases, prosecution is handled by the Hopi prosecutor's office, which houses two lawyers—one Hopi woman and one non-Hopi man—and one Hopi lay advocate. While criminal defendants do have a federally recognized right to representation under the ICRA, that right does not require such representation at tribal government expense, and no such right is promised them by the Hopi Constitution. There is one non-Hopi woman attorney who,

with two paralegals, heads the Hopi Legal Services office, which provides legal representation for indigent Hopi clients, including criminal defendants.

The Call for Tradition in Hopi Jurisprudence

At the same time that the Hopi Tribal Court employs these Anglo-American adversarial rules, procedures, and personnel, other tribal legislation and case law require the court to give a preferential place to Hopi customs, traditions, and culture. In Resolution H-12-76, passed just four years after the passage of Ordinance 21 and the creation of the court, the Hopi Tribal Council mandated that "in deciding matters of both substance and procedure," the Tribal Court should give more "weight as precedent to the . . . customs, traditions and culture of the Hopi Tribe" than to U.S. state and federal law.[29] The Hopi appellate court has reiterated this rule in an important line of opinions, all dealing with complex issues of intravillage property dispute, that have come to stand as some of the most influential opinions proffered by the court.[30]

As we might expect, custom and tradition have appeared most explicitly and prominently in the Hopi court's civil jurisdiction. This is true insofar as the Indian Civil Rights Act, the Major Crimes Act, and other federal laws afford more circumscription of the criminal adjudicatory power of tribal courts, providing for federal court review of writs of habeas corpus and other matters by which tribes restrict the freedoms of individuals in ways that are simply not at issue in civil conflicts. Thus in *Hopi Indian Credit Association v. Thomas*, which considers Hopi customary recognition of civil statutes of limitations, the court writes, "The customs, traditions and culture of the Hopi Tribe deserve great respect in tribal courts, for even as the Hopi Tribal Council has merged laws and regulations into a form familiar to American legal scholars, the essence of our Hopi law as practiced, remain distinctly Hopi. The Hopi Tribe has a constitution, ordinances, and resolutions, but these Western forms of law codify the customs, traditions and culture of the Hopi Tribe, which are essential sources of our jurisprudence."[31]

At the same time, the members of the Hopi appellate court, like tribal jurists across Indian Country, have recognized that introducing tradition into contemporary Hopi jurisprudence is a complex process. The court writes, "Hopi custom, traditions, and culture are often unwritten and this fact can make them more difficult to define and apply. While

they can and should be used in a court of law, it is much easier to use codified foreign laws. That ease of use may convince a trial court to forego the difficulty and time needed to properly apply our own unwritten customs, traditions, and culture. However, the trial court must apply this important source of law when it is relevant."[32]

Thus, in that case, while the appellate court found that the trial court had erred in applying federal law before considering the relevance of Hopi customs and traditions, the court went even further, enumerating new procedures for parties to follow when pleading and proving issues of Hopi custom and tradition in court. These procedures include requiring parties to argue issues of custom and tradition in their written pleadings, thereby notifying their opponents prior to courtroom hearings that such matters will be at issue and foreclosing the possibility that such "hard to find" principles of custom and tradition will not be sprung unfairly on unsuspecting parties during the trial. Additionally, the opinion requires that unless the principle of custom and tradition being argued is so "generally known and accepted within the Hopi Tribe" that a Hopi judge could take judicial notice of its existence, the proponent of arguments involving custom and tradition must also prove them to the court "with such sufficient evidence so as to establish" that the custom and tradition being argued does in fact exist as such.[33] In either situation the proponent of custom and tradition must not only prove the existence of the alleged custom but must also prove its relevance to the dispute at issue before the court (see also Sekaquaptewa 2000).

In addition to these procedures, in even more recent opinions that also involve underlying issues of intravillage property dispute, the Hopi appellate court has outlined procedures by which the trial court can take up matters of custom and tradition in ways that fundamentally diverge from both substantive and procedural elements of the legal system enumerated in Hopi codes and even the Hopi Constitution. With regard to procedural matters, the appellate court in *Smith v. James* sanctioned the use by the trial judge of a practice whereby he, and not the parties' attorneys, examined elders called to testify on village customs and traditions, insofar as "the non-adversarial nature of the hearing was . . . proper since many elders might be fearful of undergoing cross-examination."[34]

Of equal significance were the appellate court's decisions in *Nutongla-Sanchez v. Garcia* and *In re Matter of Estate of Neomi Komaquaptewa*, both of which mark substantial expansions of juridical authority over deciding matters of intravillage property disputes.[35] The opinion in *Nutongla-Sanchez*

Hopi Tribal Governance

It should not be surprising, then, that the most dramatic effects of colonization on Hopi governance, including the introduction of an Anglo-American style of jurisprudence, also arose relatively late in Hopi country. Ironically, the efforts of Bureau of Indian Affairs agents pursuant to the Indian Reorganization Act of 1934 (IRA) have brought the most profound changes in Hopi sociopolitical organization in the last century.[6] In fact, prior to the 1930s no entity called the Hopi Tribe even existed. Before that time, most of the twelve Hopi and Tewa villages that tribal members occupy today, all located on or around the three mesas (known, from east to west, as First, Second and Third Mesa, respectively), operated under a largely autonomous village leadership.[7]

Pursuant to the IRA, Bureau of Indian Affairs Commissioner John Collier sent his officer, Oliver La Farge, to the Hopi reservation in the summer of 1936 to develop a Hopi Constitution that would outline the organization and governance of the Hopi Tribe. With the assistance primarily of leaders from the more sympathetic villages at First Mesa, a Constitution and By-Laws of the Hopi Constitution were drafted that called for the federation of the several Hopi villages into a single Hopi Tribe, to be governed by a representative Tribal Council of officials elected by each village.

Despite the best efforts of La Farge and his First Mesa compatriots, many Hopis opposed the vision of tribal governance they created. Most of this opposition was expressed through low attendance at meetings called to discuss the proposed constitution. As La Farge reported, "It is very significant that even after the subject of the constitution had been discussed throughout the villages for two months, general meetings were very badly attended. In no case did ten percent of the voting population of a village attend one. . . . Opposition is expressed by abstention. Those [Hopis] who are against something stay away from meetings at which it is to be discussed and generally refuse to vote on it" (La Farge 1937:8).

Despite this widespread opposition, La Farge moved forward with the process. On October 24, 1936, after calling a referendum, from which a majority of the 2,538 adult members of the Hopi population eligible to vote continued to abstain from casting a ballot, La Farge declared the new Hopi Constitution ratified with a count of 651 "yes" to 104 "no" votes. La Farge and his superiors in the BIA took the position that approval by the majority of Hopis who *did* vote, could be counted as valid "in an election in which over 30 percent of those entitled to vote cast their ballots

recognizes the power of the court to certify and enforce decisions of clan leaders called upon by parties to resolve their disputes, even when these leaders are not the recognized leaders of the Hopi village from which the parties come. The *Komaquaptewa* decision gives the courts authority to take jurisdiction over intravillage property disputes when the village leaders have waived their constitutionally reserved authority to address these matters. Neither of these powers has any statutory source, nor do they appear in the Hopi Constitution. Matters of custom and tradition, primarily as they have arisen in property disputes between members of the same village, stand as perhaps the most fundamental issues around which the Hopi tribal legal system and its authority have been expanded through judge-made common law (Sekaquaptewa 2000). Property disputes that come before the court thus become ideal sites for exploring how notions of Hopi tradition and Anglo-style law are contributing both to contemporary Hopi jurisprudence and its effects on Hopi society generally.

Data and Methodologies: Talking Tradition in Hopi Property Disputes

As suggested by the line of Hopi appellate court cases just discussed, Hopis' concerns regarding property are deeply felt and play a central role in their conceptualization of law and its relation to Hopi custom and tradition in their contemporary jurisprudence. In fact, the research from which this study emerges is part of a larger project initiated after Hopi village leaders from across the Hopi reservation met with Hopi court officers and identified disputes involving property as the single greatest threat to the health and welfare of Hopi communities today (Sekaquaptewa, personal communication). My motivation and primary justification for this research into Hopi Tribal Court discourses concerning tradition and law in property conflicts is the fact that Hopi tribal members themselves have identified a need to investigate these issues.

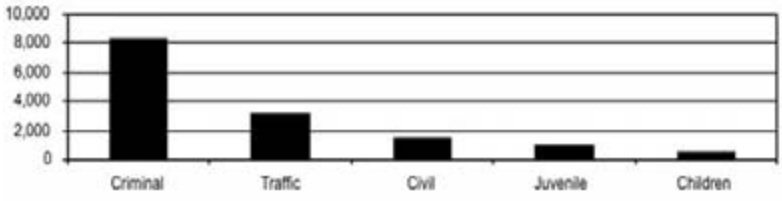
This is especially important because the long history of social science research among the Hopi is fraught with controversy. Efforts by ethnographers to represent Hopi life have been tainted by misappropriations of Hopi culture. The degree to which Hopis have felt exploited by such practices has led one anthropologist to ponder whether anthropological work among the Hopis should cease altogether unless future work can respond to the specific concerns of the Hopis themselves (Whiteley

1993). Because of my work as a clerk for the Hopi appellate court since 1996, however, and my background in law and linguistic anthropology, Hopi village and tribal leaders asked me to explore issues of Hopi culture, tradition, and contemporary Hopi tribal law as they relate to the problems villages are facing in addressing property issues among their community members. This request has led not only to the research and analysis presented here, but also to the creation of programs designed to inform tribal members about their tribal legal system and to aid village leaders in processing property conflicts.

Of course, my affiliation with the Hopi court is not an unproblematic position from which to discuss issues of Hopi tradition and culture, and concerns went beyond the methodological difficulties of approaching parties still involved in ongoing litigation before the court. Certainly, the reason the court approached me, at least in part, derived from the host of (post)colonial epistemologies that conferred upon me a supposed "expertise" in matters of legal discourse by virtue of my training as a jurist, linguist, and anthropologist. Thus, even for Hopis, my efforts to work "for" them, nonetheless perpetuate certain distributions of symbolic capital that constitute my position as an authority from the metropolitan "center" with unique capacities for accessing the doings of a marginal people.

There were other concerns as well. Ideologies that many Hopis have of tradition as tied exclusively to villages (and even to clans within these villages) added to the extent to which my experience working with the court did not necessarily mean I could fully understand or appreciate Hopi custom, tradition, and culture as each particular Hopi community understood it. On more than one occasion, my "expertise" and "authority" to undertake this work were challenged by Hopis who were little swayed or impressed by any invitation or authorization I might have received from other Hopi leaders. Still, it seemed that, considering the pressing problems that confronted Hopi members regarding property disputes, many were willing to note and then set aside these limitations in an effort, as one Hopi person explained to me, "to see what good can be taken from the *Pahaana* ['white man's'] way of doing things."

Yet despite the centrality of property conflicts in Hopi people's sense of social conflict and the role of tradition in it, all of this might well escape the researcher who undertook only a quantitative analysis of the Hopi court docket since the early years of its operation. A review of Hopi case files reveals that since 1980 only forty-nine civil complaints



Fiscal Year	Criminal	Traffic	Civil	Juvenile	Children	Total
1998	1,512	859	323	192	129	3,015
1999	1,663	518	308	165	105	2,759
2000	1,802	556	29	156	111	2,923
2001	1,609	525	259	251	57	2,701
2002	1,716	685	246	269	48	2,964
Total	8,302	3,143	1,434	1,033	450	14,362

Figure 7. Hopi Tribal Court caseloads, 1998–2002. Data courtesy of the Hopi Tribal Court.

concerning property have been filed with the court. Property disputes thus make up a rather small portion of the court's docket of cases. Indeed, court statistics reveal that from 1998 to 2002, civil cases—which include family law, personal injury lawsuits, and commercial contract disputes, as well as property disputes—constituted a little more than 10 percent of the court's entire caseload, whereas criminal cases made up 58 percent of the court's docket during these five years (see fig. 7).

No doubt this reflects the history of Anglo-style jurisprudence on the Hopi reservation, and the degree to which "tribal law" is treated primarily as the criminal adjudicatory authority that was originally exercised by the Hopi Court of Indian Offenses run by the BIA (Cox 1968). It might also be explained as part of a dominant legal consciousness beyond Indian Country, that law is about crime control, particularly among those whose socioeconomic marginality echoes that of most Hopi people (Yngvesson 1990; Merry 1990; Ewick and Silbey 1998).

But it would be misleading to assume that these numbers reflect the prevailing dispute-resolution concerns of Hopi people. Indeed, one Hopi judge suggested that to take these numbers at face value would ignore the degree to which the criminal prosecution of Hopi defendants often arises from disputes that originally involve civil matters, including family and property conflicts, and then escalate into violence as individuals take matters into their own hands.

Moreover, the concern of Hopis for civil matters looms large in their legal consciousness in ways that are intensely localized and enmeshed with long-standing issues of Hopi cultural identity. This is reflected in the Hopi Constitution, which reserves issues regarding probate and the assignment of village land (along with family disputes and adoptions) to the exclusive jurisdiction of what is generally referred to as the "traditional" leadership of the nine separate Hopi villages.[36] This constitutional reservation of authority is still recognized today, and property disputes that come before the Hopi Tribal Court are heard there only because the village leaders responsible for addressing the matter have waived that original jurisdiction.

In light of this, it is not surprising that a primary problem Hopis identified with the resolution of their property conflicts in their Tribal Court was the difficulty they perceived in balancing claims to property based on notions of Hopi culture and tradition with the Anglo-American jurisprudence that characterizes contemporary Hopi tribal law. Discourses of culture and tradition are therefore a frequent and recurrent feature of both the written texts and oral arguments proffered by litigants, witnesses, lawyers, and judges in Hopi property disputes. A review of the forty-nine cases and approximately ninety hours of audio recordings of hearing interactions in the Hopi court reveals that thirty-three cases include comments by one or more legal actors regarding rights to the property at issue or requests for how the dispute should be resolved that invoke some aspect of Hopi cultural identity, customary practices, or traditions. These figures mirror trends in other tribal courts across Indian Country in the United States. In a recent study of 359 published tribal court decisions from 1992 to 1998 in fifty-six different tribal jurisdictions, opinions concerning property disputes included references to tribal customs and traditions more often than opinions concerning any other subject matter area (Barsh 1999).[37]

The courtroom interactions analyzed in this study thus come from approximately ninety hours of audio recordings of property-dispute hearings collected by the Hopi Tribal Court as part of its official record from 1994 to 2002. In addition, I conducted interviews of Hopi tribal members (including legal professionals and lay members),[38] as well as archival research in the Hopi Tribal Court and ethnographic observation of Hopi courtroom proceedings during three and one-half years of aggregate fieldwork on the Hopi reservation since 1996, a period that included a fourteen-month stay from October 2000 to December 2001.

Qualitatively, the instances of talk about cultural identity and tradition that emerge in Hopi courtroom interactions reveal a wide diversity of form, content, and distribution of speaking rights (who can say what, and how, about Hopi tradition). These notions are expressed by Hopis and non-Hopis, and by laypersons, advocates, and judges, in both English and Hopi. They also appear throughout the various genres of Hopi courtroom discourse, including opening arguments, direct and cross-examinations of witnesses, witness testimony, objections, and even in the rulings by judges. Speakers often make direct reference to tradition through terms and phrases like "tradition" or the "Hopi Way" if the speaker is using English, or, if the interlocutor is speaking in Hopi, as *navoti,* which translates as "knowledge/teachings/tradition." The following three examples offer samples of such direct references to tradition that exemplify the breadth of their usage by different parties to Hopi court proceedings across a variety of courtroom speech genres.

: : :

Direct References to Tradition by Parties to Hopi Court Proceedings

1. A Hopi litigant in opening arguments (August 10, 1998)

   It pay- I' pay mongwit aw yukuya. Pay puma son qa hin navoti' yungqea puma put epyakyang itamungem aw yukuya.

   This—this the leaders have taken care of this matter. Because they had certain knowledge they based it [their decision] on that [knowledge] to take care of this matter for us.

2. Hopi judge stating the authority of tradition in deciding the dispute (December 29, 1997)

   Right now I am—because I still have a very strong feeling that we're going to have to consider—because it's been brought out, that Hop—Hopi custom and tradition is going to be looked at by this court in deciding this case.

3. Anglo advocate during direct examinations (August 22, 1995)

   Now it's true, isn't it, that in Hopi tradition, orchards are generally considered to be the man's property?

: : :

At other times, however, speakers index notions of Hopi custom and tradition more indirectly, through talk about family and clan relations, ceremonial obligations, and other representations of Hopi social life that those listening—Hopi and sometimes non-Hopi—tacitly understand

as arguments made in light of Hopi tradition.[39] Such indirect indexes of Hopi tradition also occur in a broad range of contexts, as the following two examples show.

: : :

Indexing Hopi Tradition through Reference to Ceremonial Obligations and Family Relations

1. A Hopi litigant in closing arguments arguing that her opponent should not be awarded a home because as a man he cannot fulfill certain ceremonial responsibilities (April 29, 2000):

   Pi qa tiimaytongwu! Pam yaw yep sinmuy oo'oyni? Pam yaw yep sinmuy amungem noovalawni? Pangsosa sinom ökiwisngwu. I' yaw pantini ? Qa'e. I' pay son pantini, I' taaqa.

   He doesn't even come to see the dances! Will he be receiving the people? Will he come and prepare food for the people to eat? The people come only to that [house]. Can he do all that? No. He won't do that, he's a man.

2. A Hopi judge taking testimony from a witness regarding the clan relations between a party and the grandfather she claims bequeathed her orchard land, which imply questions concerning the traditional transfer of lands between clan members (December 29, 1997)

   01 JUDGE: And was she from the same clan as the grandfather that worked the orchard?

   02 WITNESS: No because you won't be the same clan as your grandpa, you'd have to be the—some others clan as you are aware at Hopi clanship.

: : :

While these examples offer interesting insights into the manner in which matters of custom and tradition are invoked by parties engaged in Hopi tribal court proceedings, it is a fundamental premise of this study that a proper understanding of what these notions "do" and "mean" for Hopi tribal members and legal actors themselves requires much more detailed investigation of their construction in the interactional contexts from which they emerge. I undertake such analyses in chapters 4, 5, and 6.

3 »

"What are you going to do with the village's knowledge?" Language Ideologies and Legal Power in Hopi Tribal Court

In 1998, the Hopi appellate court heard the appeal of a Hopi Tribal Court decision in a case involving an inheritance dispute between a woman and her sister's daughters over a plot of farming land in one of the villages on Third Mesa. Among the issues the appellate court was asked to address was whether or not the tribal judge acted properly in allowing witnesses to testify about their village's customs and traditions concerning property inheritance.

In coming to its decision, the court found itself in a difficult position. It wanted to recognize that the trial judge had acted admirably in the steps he took to allow testimony on issues of village tradition. This was especially important in light of the fact that, despite the terms of tribal resolution H-12-76 mandating that the court treat Hopi traditions as binding sources of law,[1] the court had no formal procedures for determining how to introduce such tradition discourses in court, and how to evaluate their relevance. Thus the appellate court noted how the trial judge in this case acted "wonderfully in the absence of guidelines for conducting such a hearing."[2]

At the same time, the court was deeply concerned that, because the hearing on the facts of the dispute was held *before* the hearing to determine the customs and traditions of the parties' village, the parties were not informed of the customary legal standards they would need to prove prior to the fact-finding hearing. Thus they did not know, at the time they presented evidence, what kinds of testimony and proof would adequately support their claim. In the end, the court found this procedural error fatal to the lower court's decision and remanded the case for a rehearing.

But before doing so, the court announced guidelines for future hearings on custom and tradition that, aside from reversing the order of its fact- and law-finding hearings, substantially followed the procedures created by the tribal judge in this case. Among the practices the appellate court incorporated into its guidelines was the tribal judge's decision to prohibit lawyers from examining witnesses called to testify on tradition, instead doing all the questioning himself. As the appellate court wrote, "The trial court properly held a hearing at the village level, and the manner in which it conducted the hearing should be commended. The nonadversarial nature facilitated testimony from witnesses and emphasized the purpose of finding the law, not facts."[3]

Embedded both in this commendation and in the tribal judge's original decision to prohibit the direct and cross-examination of tradition witnesses are certain beliefs about the nature of Anglo-American legal language and legal power, and how they jibe with Hopi interactional practices, particularly with regard to issues of custom and tradition.

Indeed, when we analyze the actual talk between the judge and witnesses called to testify on tradition at the hearing conducted in this case, we see that their interaction is rife with conflict and misunderstanding—discursive disruptions so tense that, at least at one point, they threaten to break down the entire proceeding. These disruptions arise from competing ideas about the proper ways to speak in Hopi court, including who can say what about Hopi tradition. Such interactions reveal significant diversity among differently situated Hopi legal actors in their ideas about Hopi legal language, the legal power it generates, and the role that tradition discourses should play in both.

In this chapter, I rely on linguistic, anthropological, and discourse-analytic theories and methodologies to analyze the face-to-face interactions through which Hopi legal actors engage each other in property disputes, employing multiple and competing discourses of tradition and

law in ways that both contribute to and are shaped by the operations of contemporary Hopi jurisprudence. I pay particular attention to a segment of conflict talk that emerged in the 1997 Hopi Tribal Court hearing described above during the Hopi judge's examination of elders called as expert witnesses to testify on their village customs and traditions. I show that the syntactic, grammatical, and discursive features of the judge's questions and his repeated rejection of elders' proposed responses constitute his efforts to work up discourses of tradition in ways that simultaneously accommodate and translate into Hopi juridical discourses the ideologies of objectivity that are central to Anglo-American notions of legal legitimacy.

But the judge's discursive moves frustrate the Hopi witnesses' own expectations of their roles in the resolution of the dispute. As a result, the witnesses resist these accommodations through explicit challenges to the judge's authority in terms informed by the ideologies of exclusivity that legitimize their competing notions of Hopi traditional knowledge and power. The elders interpret the judge's efforts to constrain their testimony as illegitimate attempts to appropriate their traditional power, authority, and the distinctly Hopi political legitimacy that they claim traditional knowledge affords.

By considering the communicative resources and contexts that Hopi social actors use to invoke, accept, or challenge notions of tradition and Anglo-American jurisprudence and their articulation in their contemporary legal processes, I subsume the question of what tradition and law "are" in this chapter under more fruitful inquires into what tradition and law "do" and "mean" for the tribal actors who engage each other in courtroom interactions. I thus suggest that Hopi legal actors are actively engaged in the negotiation of a balance between notions of law and tradition that reaches the finest details of Hopi tribal court praxis.

Legal Discourse Analysis and Legal Power

The emergence in the last three decades of language-oriented studies of Anglo-style adversarial law has added a social-scientific and critical-theoretical perspective that diverges dramatically from what once was primarily the domain of historians and technicians of legal text, argumentation, and rhetoric (see, e.g., Melinkoff 1963; Bailey and Rothblatt 1971; Probert 1959). Concomitant with the "linguistic turn" of social science and what might be called the "sociocultural turn" of linguistic

analyses (i.e., the rise of an ethnography of communication, conversation analysis, and performance studies), researchers with backgrounds in law, sociology, anthropology, and linguistics have converged around a host of issues concerning the structure and use of language and discourse in the expression and operation of the law (Matoesian 2001; Conley and O'Barr 1998, 1990; Philips 1983, 1984, 1988, 1998; Hirsch 1998; Mertz 1994; Atkinson and Drew 1979). Much of this work focuses on the various forms of face-to-face interaction that constitute courtroom proceedings, including the sequential development of discourses in direct- and cross-examination interactions, plea-bargaining processes, and interactions between judge and litigant in small claims court.

Beyond the (rather uncontroversial) claim for some significance of language and its use in legal institutions, operations, and products, most of these studies also concur on a basic vision of language as a medium not only for reference *to,* but fundamentally for construction *of* social realities and orders. Thus legal interaction is a critical tool for the exercise of sociolegal power (Conley and O'Barr 1998; Mertz 1994). As Elizabeth Mertz explains,

> There is an exciting convergence among a number of disciplines on the role of legal language as socially creative and constitutive in the struggle over power in and through law. Anthropological linguists have developed a framework that permits detailed consideration of the contextual structuring of language to be linked with analysis of wider social change and reproduction. Legal anthropologists and critical legal theorists have outlined the ways in which law serves as a site for struggle and imposition of hegemony. Legal theorists focusing sensitively on language from critical race theory, feminist, and deconstructionist perspectives add a dynamic, daring, and vivid understanding of the impact of legal language in those struggles. (Mertz 1994:447)

John M. Conley and William M. O'Barr 's twenty-five years of investigation stand at the center of this body of scholarship (see, e.g., Conley, O'Barr, and Lind 1978; Conley and O'Barr 1985, 1990, 1998; O'Barr 1982). Across the span of their research, what emerges as a common theme is a search for greater understanding of the constitution and operation of legal power, authority, and domination. As the authors write, "[L]anguage is the essential mechanism through which the power of the law is realized, exercised, reproduced, and occasionally challenged and subverted. . . . [I]f one wants to find particular, concrete manifestations

of the law's power, it makes sense to sift through the microdiscourse that is the law's defining element" (1998:129).

Conley and O'Barr thus use the concrete ground of actual legal discourse to explore the domination of politically marginalized groups such as women and racial and ethnic minorities. They build their argument by analyzing transcripts of victim cross-examinations in rape trials, mediation interactions in divorce proceedings, and what the authors call the "powerless speech" most often associated with women litigants in Anglo-American courts (Conley and O'Barr 1998). These inquiries, they argue, reveal how the discursive practices that constitute the everyday operation of the law perpetuate male domination of women in ways that legal researchers and reformers who only consider the rules and norms of law do not anticipate. Thus defense lawyers (who are usually male) (re)victimize women on the witness stand through discursive practices in cross-examination (e.g., silence and nonuptake of witness testimony, topic management, use of tag questions) that imply doubt about their credibility and even suggest their complicity in the alleged sexual assault. Their behavior persists in spite of rape shield reforms that prohibit examination of witnesses' prior sexual history. Thus the authors consider how the details of victim cross-examination in rape trials as well as other aspects of trial talk contribute to the manner in which Anglo-American legal practices perpetuate patriarchal domination of women (Conley and O'Barr 1998).

In large measure, Conley and O'Barr's analyses of the macrosociological forces operating within and upon these interactions are to be understood in light of their own native intuitions about language and legal practices, since they are members of the same society in which the courts they study operate. While I do not doubt their conclusions concerning the relationship between trial talk and legal power, it seems important to attend as well to the cultural schematics that courtroom participants themselves index and claim when they engage in legal discourse. Thus we might reasonably ask whether the lawyers Conley and O'Barr studied in these rape-litigation interactions were aware that their cross-examination tactics smacked of gender discrimination and violence? Or did they frame the project of their line of questioning in different terms and contexts? Likewise, we might ask whether the witnesses being interrogated experienced such cross-examination as a form of (re)victimization? And, if so, was it the product of some particularized form of gendered violence? Or was it more generally the "violence"

that seems always to attend the adversarial cant of cross-examination proceedings?

Such questions may not immediately present themselves in the U.S. courtroom contexts where Conley and O'Barr conducted their work. But intuition-based conclusions regarding the social force and meaning of particular speech activities cannot be so safely made in situations where cross-cultural influences are more explicitly at work. My effort to import the theories and methodologies of legal discourse analysis into the contexts of Hopi tribal courtroom interaction and expand upon them thus demands more attention to what the participants themselves seem to believe they are up to through their talk and how such beliefs affect that talk and the social force that flows through it. Recent scholarship that focuses on what are being called language ideologies, metadiscursive practices, and metapragmatics is concerned with just these kinds of beliefs.

Language Ideologies, Metadiscourse, and Metapragmatics

In the 1990s, linguistic anthropologists who had long investigated the details of actual language use and interaction began to rethink their own inquiries in order to account for the ties between actual instances of language use and local beliefs about language and the macrosociological forces of social order that might flow through them (Kroskrity 2000; Schiefflin, Woolard, and Kroskrity 1998; Philips 1998; Silverstein and Urban 1996; Bauman and Briggs 1990, 2003; Gal 1989). These scholars became interested in understanding the local schemas of interpretation and evaluation with which participants and their audiences make sense of their own communicative events. Focused inquiries into aspects of verbal art and oral performance, other patterns of language use (or pragmatics), and even textual production and literacy all evinced a recognition of the dialectical relationship between the beliefs that people had about language and the actual use of specific language forms.

Most recently, this research has proceeded under the related rubrics of language ideology, metadiscourse, and metapragmatics (Kroskrity 2000; Schieffelin, Woolard, and Kroskrity 1998; Briggs 1993; Silverstein 1993, 2003). Though the theoretical perspectives that incorporate these notions overlap considerably, particularly in their shared concern with the reflexive capacity of language to refer and point to itself, each foregrounds a slightly different component of what Silverstein calls "the

total linguistic fact" (Silverstein 1985:201). Thus, generally speaking, and for the purposes of the analyses in this study, we can distinguish among the following: (1) language ideology analyses, which tend to emphasize the cultural beliefs and schemas that underlie people's language practices and interpretations; (2) metadiscourse and metadiscursive analyses, which focus on the explicit ways in which the use of language is explicitly talked about in actual moments of language use; and (3) metapragmatic analyses, which deal with the microlinguistic practices that, though often employed with little or no awareness by those using them, nonetheless play a significant, albeit implicit role in shaping the meaning of the talk and interaction within which they occur.

Grouped together, analyses that take into account the reflexive capacities of language have all extended the study of the dialectical relationship between language practice and cultural beliefs further out into society and social forces. All three approaches do so by considering how ideas and talk *about talk* mediate, in complex and often conflicting ways, how social actors employ details of language use and practice to authorize, naturalize, and/or resist local, colonial, national, and even global social orders.

Sociolegal scholars have initiated their own inquiries into the reflexive qualities of the language practices of Anglo-American legal actors (Philips 1998; Mertz 1996, 1998; Matoesian 2001). In analyses of litigation contexts, scholars relying on some of Conley and O'Barr's work have expanded their theories and conclusions in just the ways alluded to above. Gregory Matoesian offers a detailed analysis of witness-examination interactions in the William Kennedy Smith rape trial, revealing the complex ways in which both lawyers and witnesses employ metadiscursive devices in the competition to influence how jurors frame and interpret their courtroom talk. These devices are rhetorically effective because they are attentive to the institutional constraints that Anglo-American procedural law places on courtroom interaction and simultaneously evoke a web of ideologies about gender, sex, violence, and language use that are relevant to the rape trial (Matoesian 2001).

Matoesian reveals how the defense attorney and one of the prosecution witnesses engage in an explicit contest over the implications of a statement made by the alleged rape victim's friend to the defendant, in which she reported having said she was "sorry" she and Smith "had met under the circumstances" of the evening of the alleged rape. Relying on

different metadiscursive practices of direct and indirect quotation, the defense attorney frames the reported statement in a way that suggests it constituted part of a discourse of "small talk" and friendly banter not commonly used by women in talking to their friends' alleged rapists. The witness proposes a different frame for the statement, attempting to explain it as more confrontational and challenging with regard to the defendant. Both sides of the metadiscursive contest, and the jury, Matoesian claims, are equally informed by what he calls a "layered logic of patriarchal domination," according to which women who are victims of rape or connected to victims are expected to act and talk in certain ways that do not include emotions other than fear, anger, or confusion (2001:38). By this logic, the interlocutors and their audience all orient to an idealized cultural scheme of rape incidents against which the alleged activity of the evening is evaluated. Through such a comparison, jurors make an institutionally sanctioned decision about "what happened" on the night in question and thus decide how the punitive power and authority of the state should respond (if at all).

Matoesian's conclusions echo the claims of Conley and O'Barr. However, his attention to the metadiscourses, metapragmatics, and language ideologies of courtroom interaction in the Smith case offers further insight into the patriarchal character of cross-examination discourses by providing compelling evidence that such notions inform the interlocutors' own experiences of the interaction and shape the flow of legal power through it.

With this background for the theories and methodologies of legal discourse analysis, and using more recent studies of language ideologies, metadiscourses, and metapragmatics, I proceed to an analysis of the discourses of tradition and law that emerge in Hopi Tribal Court interactions.

Talking Tradition, Talking Law in Hopi Courtroom Interactions

For the analysis in this chapter, perhaps the most significant characteristic of the ways tradition is talked about in Hopi property hearings is the manner in which it is constructed in relation to what are seen as the Anglo-American juridical practices of the court. Sometimes tradition is constructed in opposition to adversarial practices and norms of contemporary Hopi tribal law, while other times Hopi tradition is talked about in ways that are consistent (or at least not in inherent conflict) with that law and court procedures. Consider the three examples that follow.

:::

Constructions of Hopi Tradition in Relation to Anglo-Style Norms and Practices of Hopi Tribal Court

1. A Hopi litigant during witness examinations suggesting that oral wills are consistent with Hopi tradition (October 17, 1997)

   And it would be—I guess that, we've established that oral wills can be honored. And that this is part of all that tradition that is involved here.

2. A Hopi advocate on the cross-examination tactics of the opposing non-Hopi counsel (August 21, 1995)

   He hasn't sat up there once, and had any kind of devious answer to anything. = In fact, he—if I had to say that he was badgered by Mr. Keith. "Answer me! Yes or no! Yes or no!" Hopi Way, we don't practice like that. Not even in the *kiva*, and you men know that.

3. An Anglo advocate in preliminary arguments arguing for contemporary Hopi law as Hopi tradition (December 7, 2001)

   I mean the—the tribal court enacted ordinances, and part of those ordinances are the rules by which the court has to govern the conduct in this court and the court's bound by those rules. They are Hopi custom and tradition. These aren't White Man's rules that are some how imposed on this court. These are rules that the Tribal Council, adopted. These are Hopi custom and tradi—this is the Hopi law.

:::

In examples 1 and 3, tradition is constructed as a notion that can be equated with Anglo legal concepts and instruments, such as oral wills or ordinances and court rules. In example 2, a Hopi woman advocate constructs kiva speech practices—practices that are central to Hopi ceremonial life and model normative traditions of Hopi interaction in general (Kroskrity 1993)—as a genre of communication against which the cross-examination tactics of her opposing Anglo counsel are measured and found wanting. Though the Hopi advocate does invoke the Anglo-American juridical speech genre of witness "badgering" to characterize the questioning style of her opponent, it is significant that she also refers to Hopi genres of institutional talk in order to make her argument for the illegitimacy of her opponent's tactics.

Interestingly, all the examples suggest that what makes it possible to equate the Anglo-style legal instruments and practices with Hopi tradition is the degree to which they are recognized as legitimate exercises of Hopi-generated authority. Though example 1 is more obscure in this

regard—that is, it is not entirely clear that the Hopi litigant's claim that the will is "a part of tradition" arises from the Hopi court's capacity to "honor" them as Hopi, or vice versa—examples 2 and 3 are much more explicit on this point. In example 2, the cross-examination tactics of the Anglo attorney are constructed as maximally illegitimate when they are described as forms of talk that "not even" men in the kiva, in their powerful and authoritative dealings, would employ in talking to each other. In example 3, the central point in the Anglo attorney's argument for equating the rules and ordinances with tradition is precisely that they have been generated by Hopi governing institutions themselves, and explicitly are not "White Man's rules . . . imposed on the court."

These examples already reveal the extent to which even these emergent constructions of tradition turn centrally on issues of authority as they figure in articulations of sovereignty and the rights that Hopis claim they have for self-determination. Significantly, the analysis just provided gives preference to the referential content of tradition discourses in these property disputes. But the flows of power and authority in sociolegal interactions are constituted not just in *what* is said, but in *how* it is said (that is, what grammatical and syntactic forms are employed and where they are used in the sequential contexts of courtroom discourse) and by the metadiscourses, metapragmatics, and language ideologies that inform and shape that talk. Consequently, a proper understanding of the social force of discourses about law and tradition in Hopi tribal court interactions and of the multiple and even competing ways in which Hopi legal actors constitute those notions requires that we delve deeper into the microdetails of the ways these actors engage each other in those interactions as they unfold in conversation. To do this, I offer an analysis of an exemplary stretch of conflict interaction that arose in one particular property hearing that came before the Hopi Tribal Court in 1997.

A Dispute over Property Inheritance before the Hopi Tribal Court

As described above, the dispute considered here emanated from a conflict between a woman ("respondent") and her three nieces ("petitioners") over their competing claims to an orchard worked by the petitioners' grandfather (also the respondent's father). The petitioners, who still live in the village where the land is located, claimed to have inherited the property from their mother upon her death, because she was the primary caregiver of their grandfather at the time of his death. According to them,

Hopi custom and tradition dictate that property left intestate by a decedent should go to the person who showed the most commitment to its maintenance and to the support of its late owner. They claim that this person was their mother, the respondent's younger sister, and that upon their mother's death (also following custom), this property—like all women's property—should go to them, her daughters.[4]

The respondent, however, claimed that in 1954 her father took her and her husband, an Apache man (not a Hopi tribal member), to the field in question and told her that she was to inherit the property upon his death.[5] The respondent claims that because this land is an orchard, traditionally worked by the husband, it is not the kind of clan land that is inherited through the mother. Consequently, she contended that tradition required that her father's intent to pass the land to her must prevail.[6] The petitioners counter this, arguing that, regardless of the father's prior statements, tradition holds that the respondent lost her claim to this land when she married a non-Hopi man and left the reservation to live with him, and when she failed to return to show any commitment to its maintenance.[7]

The parties brought their claim before the trial court. The court accepted briefs from the parties and heard testimony regarding their competing claims to the orchard. However, the court refused to resolve the dispute on the basis of this hearing alone, explaining in a minute entry,

> The Court has invited parties to address . . . questions [of custom and tradition from the village of——; however, they have not been addressed; therefore it intends to call on it's [sic] own motion, individuals from the village of——; to testify as to the custom, tradition, rule, or law of that village as it relates to the ownership and relinquishment of land by female members of that village who marry non-Hopis and thereafter live outside the village for an extended period of time and maintain principal place of residence(s) or homes off the reservation.[8]

The court later amended the entry, deciding not to call its own witnesses and instead asking the parties to produce a list of witnesses that the court would call on their behalf. In addition, the court asked each party to submit a list of questions concerning the issues of custom and tradition to be investigated at the hearing, which the judge would then translate and present to the witnesses. Recognizing that many of the witnesses might be of a considerably advanced age, the judge ordered the hearing to be held in their village.[9]

Each party submitted its list of witnesses: the petitioners called six women, and the respondent called seven men.[10] Both parties also submitted lists of questions. After rescheduling several times, the hearing was eventually held at the village in question.[11]

The Hearing on Custom and Tradition

The stretch of talk analyzed below was taped by the court clerk in the winter of 1997; I did not observe it. The tribal judge presiding was a Hopi man with twenty-eight years' experience on the Hopi bench. A fluent Hopi speaker and deeply involved in the traditional practices of his village, the judge did not, however, come from the village where the dispute arose.

In some significant ways this hearing was highly unusual for a court based on a system of adversarial adjudication. Indeed, when this case was appealed to the Hopi appellate court, one of the appellate judges repeatedly remarked upon the form of this hearing as something that would be much more normal for a continental, inquisitorial court than for courts grounded in English adversarial legal traditions.

As mentioned earlier, the judge departed from the normal examination procedures of the Hopi Tribal Court when he took on a central role in questioning the elders. Though the parties were asked to prepare lists of questions to be asked of the witnesses, the judge took control of the actual questioning process, translating the parties' written English questions into Hopi and questioning the witnesses himself. This approach had two significant consequences. First, no opportunity was given for cross-examination. Indeed, early in the hearing, the judge informed the parties that they would not be able to speak in response to any issues raised by the testimonies. Thus no direct challenge to the credibility of any of the witnesses or their testimony was ever made by any of the litigants, even though the parties themselves provided the witnesses. Though invoked to protect the sensibilities of the Hopi elders and their lack of experience with hostile interrogation, disallowing cross-examination would seem to stymie the very purpose of the hearing—to determine which party produced the more credible understanding of custom and traditional practices. In effect, the judge put himself in the position of being arbiter over the knowledge and experience of others, basing his arbitration on implicit perceptions of witness credibility that never got a public airing. A decision based on such hidden

considerations risked accusations of arbitrariness and, given the small size of the Hopi population, undue influence (e.g., nepotism).

This plays directly into a second consequence that deserves emphasis. The judge has much greater control over the metadiscursive framing of witnesses' testimony in a such a hearing. In an unusual mixing of roles, the fact-finder and decision maker, being one and the same in this case, had the capacity to characterize the evidence just as it was being presented before him. In effect, the judge had the power to shape his decision even before the trial was finished. By controlling how the testimony was framed in response to a given set of questions, the judge both attempted to control what that evidence was and how it would support his final judgment. As we shall see, the conflict talk between the judge and the witnesses turns precisely around the issue of the framing of this testimony, and this issue remains a continuous source of trouble among the participants during the hearing.

The Judge-Witness Interaction and the Emergent Conflict

Judicial efforts to control the elders' testimony were initiated almost at the very outset of the proceedings. In his introduction, the judge commented explicitly about the issues to which the elders were to speak, specifically asking the witnesses to testify how often, according to tradition, someone no longer living in the village is required to return to her land if she is to maintain possession of it. Consider first lines 002–011:

: : :

1. Judicial efforts to frame the relevant issues for witness testimony

002 JUDGE: Pam hapi pay **yephaqam hak** ayo'
In that way truly now **somewhere here someone** to there
In that manner someone may go over

003 Yangqw ayo' sen noala hoyok-hoyokni
From here to there perhaps alone move- will move
S/he might move away from here alone

004 Niikyangw pi pay naat pi piptu**ngwu**
But truly now still truly return+HAB
But s/he continues to come back regularly

[Note: some lines omitted here.]

007 **Hìisakis** sen pam pas pew pìpte'
How often perhaps she much to here return
How often must s/he return

008 Put pay naat
It now still
And still—

010 Tutuyqaw**ngwu** put tuutskwat
maintain control over+HAB it land
Ah . . . have the right over others in that land

011 Himu'yta**ngwu**
Have as a possession+HAB
To have ownership of it

: : :

Of course, it is not unusual for a judge to make a statement concerning the issues to be considered by the witnesses as they provide their testimony. Indeed, the facts that are admitted as evidence in an Anglo-American trial are not simply reliable, but relevant, and the back-and-forth contestation that often arises among advocates during witness examination often turns on challenges by one attorney who objects to the relevance of witness testimony that another attorney is attempting to elicit. Judges in most Anglo-American adversarial proceedings are thus regularly involved in making determinations about whether information is sufficiently relevant to warrant its introduction by a witness testifying on the stand (see, e.g., Philips 1992).

But this is not all the Hopi judge was doing. Focusing on the grammar and syntax of this stretch of talk, notice the use of the terms ***yephaqam*** (somewhere here) and ***hak*** (someone) at line 2. These terms constitute two of the several Hopi language forms that fall into a class that linguists call *indefinites*, a class constituted in English by the lexical forms *somebody, anybody, somewhere, anywhere, someone,* and others. In Hopi, the class is constituted by several lexical and grammatical forms, which are employed by speakers to make claims without specifically referring to actual people, places or times.[12] Then in lines 7–11, the judge poses his question, employing at lines 10 and 11 verbs inflected with the habitual aspect marker ***-ngwu***. Habitual aspect is a grammatical category of forms that linguists understand as denoting a quality that is a general characteristic of the event described that remains stable over a period of time. In Hopi usage, the ***-ngwu*** habitual aspect inflects verbs to give the

sense that the event or state characterized is customary or "generally true" of the world (see *Hopìikwa Lavàytutuveni*, 1997).

In Hopi, indefinite forms can be combined with verbs inflected with the habitual aspect marker ***-ngwu*** to produce a linguistic construction that is, as one native speaker explained to me, used by persons of authority to "admonish" others to change some problematic behavior. A speaker invoking this construct "advises" a recipient by explaining what *one* (indefinite) should do because of what has *always been* done (habitual). The construction is thus employed by Hopi speakers to announce normative principles of behavior, often in contexts where the speaker is counseling someone to remember those principles in their own actions. Thus, these utterances project the character of what linguists call a *gnomic* or generalizable truth-value about the facts they reference.

When the judge repeatedly employs the indefinite + habitual construction in his questions, he is thus employing this metapragmatic construction to propose that the elders testify primarily about generalizable norms or "principles" of tradition. In line 14, we see that witness 3 produced just such an abstract principle, employing a similar grammatical construction.

: : :

2. Testimony of Witness 3: Part 1

014	WITNESS 3:	Pu'	**pam** angqw	**suushaqam pìtungwu**
		Then s/he	from there	**for once** return+HAB
		Then s/he should return once in a while.		

: : :

She uses the third-person pronoun ***pam*** (s/he) to refer back to the indefinite ***hak*** (someone) of the judges' preceding question. By then coupling that with the indefinite temporal particle **suushaqam** (for once) and the habitually inflected verb **pìtungwu** (return+HAB), the witness offers a statement about a generalizable principle of tradition; in this case, the witness offers the principle that "one" should return "once in a while" to his or her land if he or she hopes to retain a traditional claim to it.

But notice what happens in the next line. In a seemingly small but eventually significant grammatical shift, the witness moves away from the indefinite, and starts using the demonstrative ***i'*** (this). In so doing, she produces testimony that points directly to the woman disputant before

her, and to the actual facts surrounding her involvement in this dispute.

: : :

3. Testimony of Witness 3: Part 2

015 WITNESS 3: **I'** pay qa hìsat, sutsep papki
This now not sometime always return
This one [the woman disputant] never came back frequently

: : :

In the remainder of her utterance she continues to comment explicitly on what she knows about the respondent and her circumstances, testifying at lines 16–18 and at lines 21–35 to the fact that neither this woman, nor her husband, nor her sons ever returned to care for the land in question.

: : :

4. Testimony of Witness 3: Part 3

016 WITNESS 3: Itam pi navoti'yyungwa
We truly have knowledge
For we know that.

017 Pu' ansta **i'** pite'
Then indeed **this** arrive
And if she comes

018 Pi koongya'yta me
Truly have as a husband you see
You see she has a husband

019 **Hakìy** koongya'at **haqam** nöömate'
Someone husband somewhere take a wife
When one takes a wife somewhere

020 Pep **hakìy** propertyyat engem **tumala'ytangwu**
There someone property for have work+HAB
He works her property for her

021 Yang kur ansta as **hìimu**'yta
Along here perhaps CntrFct have somethings
Apparently they own things around here.

022 Pu' qa haqamwat ansta pam pite' put aw hìntingwu me
Then not anywhere indeed she arrive to happen+HAB you see
[But] when she comes here she does nothing in any of them, you see

023 Pam pi qa yangqw sìnonìiqe
He truly not from here person
He's a person not from here

024 Pam kya pay son yepehaq
She perhaps now not here somewhere
So he might not be willing

025 Put aw engem pas hìn hìntsakniqey
It to for much something will do
To do things on them for her

026 Pu' pìw taqatìmu'yta pi
Then also have as married male children
And as well they have sons

027 Pu' pumayani
Then will be them
They can be the ones (to come)

028 Niikyangw panis pam put ansta qa ang tumala'ytangwu
But always she it indeed not along there have work
But when s/he is not working them

029 Pu' yepehaq pitukyangw
Then over here somewhere arrives
And finally now comes back

030 Pu' pam put ang u'ùutativa.
Then she it along there begin to close
S/he has started to put fences around them.

031 Pasat pu' pam
At that time then she
At that time

032 Pam pi oovi
She truly therefore
So s/he

033 Pay nuyniqw
Well me
From my point of view

034 Pi antsa as pi put pi kyapi qe'niqe
Truly indeed CntrFct truly it truly I guess stop
Did not work them

035 Oovi qa aw tumala'yta
Therefore not to have work
Maybe because s/he did not want them.

: : :

Significantly, the type of grammar and the generalized principles of Hopi tradition that the judge claimed to want from the witnesses is evident in the above testimony. The use of the indefinite + habitual verb construction at lines 19–20, **"Hakìy . . . hakam . . . hakìy . . . tumalay'-tangngwu"** (someone . . . somewhere . . . has such work) follows precisely the framing that the judge proposed. Yet in response at lines 38–40, the judge rejected this testimony.

: : :

5. Rejecting Witness 3's testimony

038 JUDGE: Pay nu' ayanwat as umuy tuuvìngta
Well I that way CntrFct you ask
I asked you in a different way instead.

039 Pay qa hakìy pas itam aw suuk aw taykyahkyàngw
Well not someone Ints we to one to look
We are not to look at some one person

040 turta put yu'a'totani
Let it will talk
As we talk about this.

: : :

At this point the witness seems to realize that the judge's use of the indefinite + habitual construction was not intended simply to initiate a topic for her testimony, merely suggesting the possibly relevant information she could speak to, but was actually intended as a much more complete metadiscursive constraint on her talk, compelling her to speak *only* of "principles" of tradition, and, perhaps more important, expressly constraining her *not* to speak about the particularities of this dispute.

Then the witness challenges the judge and his efforts to control her talk in this way. At lines 59–61, she questions why the judge only wants her to speak about generalized principles.

: : :

6. Witness's resistance to metadiscursive constraints on her testimony: Part 1

058 WITNESS 3: Noqw my understanding is
But
But my understanding is

059 Sùupan as ima yep naamihìntsakqw
It seems as if CntrFct these here to oneself be doing
Because these [people] here are in dispute
060 Sùupan as itam pumuy- pay pumuysa engemyaqw
It seems as if CntrFct we them well those for the benefit of
I thought we were [doing this] only for them-
061 Kur hapi pay pas itam sòosokmuy amungemya.
Perhaps truly well Ints we all of them for the benefit of
But appears [to me] now we are doing this for all.

: : :

In response, the judge asserts at line 62 that he is asking for **umuhnavotìy** (your traditions).

: : :

7. Restating the constraints

062 JUDGE: Pay puy **umuhnavotìy** itam umumi tungla'yyungwa
Well your knowledge we from you be asking
We are asking you for your traditions.

: : :

He then explains in lines 67–69 that they cannot give more testimony on the facts of the dispute because that part of the hearing has already been completed.

: : :

8. Justifying the constraints

067 JUDGE: Hak pumuy put maqahqat
Someone them it give
As to who gave it [land] to them
068 Pu' hisatnihqat
Then at that time
And when that happened
069 Pam pì pay paas yukiwta
It truly well thoroughly finished
That has all been done

: : :

This final comment prompts another elder witness to question the very purpose of the hearing at lines 70 and 71.

: : :

9. Witness 4 questioning the purpose of the hearing

070 WITNESS 4: Noqw i' hìntiqw yep pay aw paas yukiwtaqw
But it for what purpose here well to thoroughly finished
Then why when this has all been done

071 Pas piw itam aw hintsatskya
Ints also we to being done
that we are even doing anything about it

: : :

Then, most significantly, he questions the judge in a thoroughly confrontational manner at line 74.

: : :

10. Questioning the judge's interest in village tradition

074 WITNESS 4: Um it kitsokit—um navotiyat uma hintsatsnaniqe oovi
You this village you knowledge your will do something to therefore
What are you.—What are you going to do with the village's knowledge?

: : :

This tense interaction continues, and after the judge reiterates his intention to search for clarity on principles of tradition, it ends with the announcement of Witness 4 at lines 87–90.

: : :

11. Thwarting the hearing

087 WITNESS 4: Nu' aw wuuwaqw
I toward think in that way
When I think of it,

088 it yep [Village name] navotiyat kitsokit navotiyat
this that [Village name] knowledge village knowledge
this village's traditional way

089 Put pay kya so'on hak pas hin
It now perhaps not someone very something
That is something that probably no one

090 pas navoti'ytani
very will have as knowledge
will know very much about.

: : :

What these spates of interaction reveal is the considerable difficulty posed by the judge's demand that the witnesses speak only to custom and tradition in the form of abstract, generalizable principles rather than in application to the particularities of the dispute. What motivates this conflict? Why does the judge remain so committed to his restrictions on witness testimony, even when they contribute to the breakdown of the hearing process? And why do the witnesses resist this constraint? One answer is that the language ideologies informing these actions suggest that this conflict talk is as much a struggle over questions of authority and the legitimate exercise of legal power as it is a debate about speaking rights.

The Language Ideologies of Anglo-American Law versus Hopi Traditional Authority

Analyses of Anglo-American legal discourse contend that the legitimate operation of legal power and authority turns on language practices whereby legal professionals apply abstract, "objective" legal principles to the facts of a particular dispute (Amsterdam and Bruner, 2000; Mertz 1998; Conley and O'Barr 1998; Mertz and Weissbourd 1985). Anglo-American legal processes, informed by Western notions of truth as transcending the particularities of any given context, operate by linking "cultural-legal types," embodied in statutes, rules, or principles of case law, to the facts of a particular disputed action or event that are to stand as tokens of those types. But as Mertz and Weissbourd explain, "[L]egal types never have 'automatic' tokens; . . . there is no automatic connection between a particular event and its characterization as a cultural-legal type. Rather, the similarity between the two must be culturally created or imputed in a process of judgments." By virtue of this process—primarily through discursive and metadiscursive shaping—the facts of a particular case "take on (symbolic)cultural-legal significance" by their presentation in legal arenas, and as such are transformed by and contribute to the ongoing praxis and maintenance of legal institutions and their power and

authority (1985:279). Thus, powerful legal outcomes achieve legitimacy because this metadiscursive shaping allows, as Elizabeth Mertz explains, for "the putative objectivity of the story once told in the apparently dispassionate language of the law" (Mertz 1998:158).

In most Anglo-American legal arenas, these processes are initiated by the presentation of events and activities in evidence discourses engaged in by the witnesses and advocates of two parties (Philips 1983, 1988). These presentations often contradict each other insofar as they are made by lawyers who have already significantly transformed the events of the dispute in order to highlight the facts most likely to fit a legal type that best supports their claims. Then, through cross-examination, evidence (including witness testimony) is examined for its credibility, allowing the finder of fact and the decision maker to consider which party's legal claims find the strongest support in light of the presentation of the events, relevant legal principle, and the relationship each advocate attempts to discursively forge between them.

Out of concern for the cultural (and communicative) expectations of the Hopi elders called to testify, however, the judge in the hearing under analysis excluded the opportunity for parties to question their own witnesses or cross-examine the witnesses produced by their opponents. As a result, processes of forging and legitimizing the relationships between legal norms and facts that attorneys usually perform in adversarial trials here had to be performed by the judge himself. This potentially put him in the position of contributing heavily to the construction of the competing arguments that he would have to decide between, because he was also the fact-finder and decision maker in this trial. Thus, in light of Anglo-American notions of juridical "objectivity," the legitimacy of the tribal court, its decisions, and its authority were threatened by the conflation of the various adjudicatory roles under the judges' sole capacity as adjudicator.

Consequently, the judge's repeated use of the metadiscursive indefinite + habitual Hopi construction and his rejection of elders' responses that speak to the particular facts of the case work to compel witnesses to speak of tradition in a manner that produces generalized principles like the "legal types" announced in Anglo-American law. By these discursive choices, the Hopi judge attempts to accommodate the ideologies of gnomic "objectivity" that ground Anglo-American legal legitimacy at the very interactional moment when he also invites discourses of Hopi custom and tradition into the court proceedings.

Excluding the opportunity for adversarial confrontation of testimony on custom and tradition forced the judge to impose this abstract, generalized, metadiscursive constraint on witness testimony so that they would produce "principles" of custom amenable to adjudication in an Anglo-style court. Without doing this, the judge would have to play the role of both advocate and decision maker in the same hearing—a position clearly in violation of established Anglo-American legal norms that would threaten to undermine any legitimacy the legal proceeding (and decisions flowing from it) could have according to such norms.

Implicit in the judge's moves is a construction of Hopi tradition not entirely incommensurable with the Anglo-American norms and practices of the Hopi court. There is certainly an acknowledgment of differences between the two notions reflected in the adjustments he makes (and attempts to make) to both the witness examination process and the way tradition is told there. Indeed, the metadiscursive decision to move the entire proceeding to the village both bodily and semiotically recentered the hearing at least in part away from the usual place of Hopi tribal law to a location closer to the community from where the notions of custom and tradition (and the parties and witnesses) relevant to this case emerge. Yet it was still a court proceeding, and the judge was still the presiding authority. Thus those moves display a fundamental significance that suggests that what matters about Hopi tradition—its substantive "principles"—can be sufficiently and effectively elicited through what are ultimately Hopi courtroom practices, and the Anglo-American law those courtroom practices are understood as embodying and enacting. And it is along these lines of metadiscursive negotiation that this Hopi judge has attempted to strike a discursive balance of the kind Frank Pommersheim speaks of—working to insure that tribal court proceedings in this case resonate both with the authority of Hopi tradition and the language of "objectivity" required in the legitimate exercise of Anglo-American jurisprudence (Pommersheim 1995a).[13]

While this may explain the judge's stalwart commitment to his use of the indefinite + habitual construction (and his other semiotic moves), despite the witnesses' relentless challenges to them, it does not reveal what the witnesses found so problematic in the first place. In order to understand this, we must inquire into some of the conceptions of authority, power, and knowledge that many of these Hopi elders may have held as they entered the hearing, and how these conceptions fit the judicial metadiscursive practices just reviewed.

It is a commonly expressed Hopi belief that authoritative knowledge of village traditions and the power that comes with it are not equally distributed to all Hopi people. Rather, tradition is often described as a body of "esoteric ritual knowledge" that is specific to each village (and each clan) and learned only by some Hopis via traditional narratives told during their secret initiation into their village's ceremonial societies (Whiteley 1998:94; see also Brandt 1954; Eggan 1950; Geertz 1994; Levy 1992; Rushforth and Upham 1992; Thompson 1973; Titiev 1944; Whiteley 1988, 1998). Whiteley's discussion of the general distinction made by Hopi between *pavansinom* ("important/ruling people") and *sukavungsinom* ("common/ordinary people") explores this most thoroughly: "*Pavansinom* are primarily those members of the core segments of matrilineages who hold principal offices in the ritual order. . . . Power accrues to them through the control of the specific ritual knowledge required to perform the ceremony effectively. Nonmembers of apical segments and members of clans which own no ceremonies, important offices, or highly valued ritual knowledge generally lack control over significant supernatural power and are thus *sukavungsinom*" (Whiteley 1998:87).

But the Hopi notion of *pavansinom* does not apply only to individuals who occupy institutionalized roles of clan and village ceremonial authority. Tellingly, at least some Hopi extend the term to those acting decidedly outside the socioritual order, people called *popqwat*, "witches/sorcerers." Gossip spreads about these people, whose lives appear to be so full of material and symbolic wealth and whose enemies seem so regularly downtrodden that they are said to have succeeded through their preternatural knowledge and manipulation of cosmic forces.

A picture thus emerges of the way in which Hopis understand a fundamental and inextricable link between knowledge and power. As Whiteley explains, valuable traditional knowledge (*navoti*), "concerns the ability to influence, create or transform events in the world. The Hopi universe . . . is filled with intentional forces of which mankind is a part. *Pavansinom* have the knowledge to tap into these intentional forces to affect the course of events. . . . The authority of *pavansinom*, then, is predicated on the collective belief that they can either benefit or destroy life" (Whiteley 1998:94–95).

At least in some ways, then, a knowledge of tradition is thus itself a form of coercive control for some Hopi, albeit one that should never manifest itself explicitly in some differential access to material resources.

Instead, and insofar as this knowledge is tightly guarded by those who possess it, it becomes a scare resource—property in its own right—that elicits fear and respect for those who have it from those who do not.

Navoti can work in a more hegemonic way to legitimize the authority of those possessing it. Whiteley also explains that Hopis attribute "control over highly valued truth" to *pavansinom*:

> In everyday Hopi discourse, one of the most distinguished terms for a man is *navoti'ytaqa*, "a man of knowledge." Conversely, an oft-heard comment is that an opinion deserves no attention because its bearer is *pas qanavoti'ytaqa*, "really not a man of knowledge." *Navoti'ytaqa* is an informal designation of one with authoritative wisdom, whether it pertains to ritual, history, ecology, geography, or other valued domains of understanding. Typically, the age, status in his kin group, ceremonial position, and demonstrated facilities with oral tradition of such a person denote an unimpeachable control of truth. (Whiteley 1998:94)

For the Hopi, then, knowledge of tradition—whether sacred or secular—is often integrally tied to the legitimate authority of the possessor and is an essential element of that person's efficacy in the world. That is, in at least one predominant conceptualization, tradition is not merely some cohesive body of inert information, easily detachable from its source and transferred to new carriers and new contexts. Rather it is a highly charged, highly valued index of an individual's potential to effect change in the world, to control its events and activities (for a discussion of Hopi understandings of the relationship between knowledge and efficacy, see Whorf 1956:59–60). Knowledge is power in the truest sense. And it is also truth in the most powerful sense. As such it can constitute a Hopi individual's legitimate authority to affect the world through the planning and execution of sacred ritual and secular political acts, including, significantly, the resolution of disputes.

Insofar as the litigants asked the Hopi elders to appear at the hearing precisely because of their perceived "unimpeachable" access to truth and wisdom, it is also likely that at least some members of their village recognized them as *pavansinom*.[14] This understanding of Hopi conceptions of the knowledge, power, and authority of *pavansinom*, allow us to gain insight into the Hopi elder's difficulties with the judge's use of gnomic framing strategies in the judicial hearing analyzed earlier.

As explained above, the judge appears motivated to insist on this metadiscursive frame in an effort to get the elders to produce testimony concerning custom and tradition that is already transformed from particularized comment on a specific set of events to more abstract, generalized principles amenable to the Anglo-American adjudicatory processes of the court. But his use of this metadiscursive frame has another consequence. That is, where use of the gnomic allows for reflection on and analysis of hypothetical situations and abstract, "objective" principles—excellent for Anglo-American-style lawmaking—it does not allow the elders to conduct explicit discussion of the actual world or the taking of action in it. As we saw, they were specifically prohibited from discussing the particularities of the actual case or recommending steps to be taken in order to resolve the dispute. From the perspective of the Hopi elders testifying in this case, this seems to have the effect of separating the inseparable—splitting knowledge from the power and authority to act on it. These elders, these *pavansinom,* seem to object to being compelled by the judge to speak with legitimacy about their knowledge of custom and tradition (*navoti*) without having any control over the purposes to which it will be put. From their perspective, they are repeatedly told to speak about custom and tradition in the abstract, but not to resolve the very dispute for which they have been called and upon which they expect to take action. As one elder at the hearing attempts to establish early on:

> Noqw i' pay yan Hopivewat pay oovi itamùupe noqw pay, itam itam hak yanhaqam hìntaqat itam aw yukuyangwu, me. Itamumi posnayaqw pu' itam amungem put yukuyangwu, me. I' yangqw. Pahaana pay pew qa makiwa'yta, me. Pahaana. Pam pay qa pew makiwa'yta. Itam kìtsokit ang yesqam, momngwit, itam hapi öqalat hìmu'yyungwa, me. Pam pay ìipaqw pay qa . . . pay qa itamumi. . . . Noqw oovi i' pay yan Hopivewatnìiqe i' pi pay qa Pongsikmìq mongwit aqwni. Qa Chairman aqwni. Pam pay pew qa öqalat hìmu'yta, kitsokit aw. Itam hapi öqalat hìmu'yyungwa, yanta hapi i'i.
>
> *So this issue according to the Hopi way of doing is ours [up to us]. So we resolve things for one who is in this kind of situation. This white man has no authority here [in regards to what has been stated]. He has no authority here. We who live in the villages, the leaders, we are the ones who have the power. He that is from the outside does not. . . . So because this condition [the dispute] exists, according to the Hopi way, this is not something that should go to the Superintendent at Keams Canyon. Nor to the Chairman. He has no*

power extending to here to the village. We are the ones who have the power. That is the way it is.

The reference to "this white man" in the context of a courtroom proceeding where a Hopi judge is presiding may be best understood as a synecdochic critique of the tribal adjudicatory system within which these elders now find themselves. On its face, that system confronts them with the structures, practices, and discourses of a fundamentally Anglo-American jurisprudence—a system that wants their knowledge, and thus their power, but (at least from their perspective) not their authority.

In light of these beliefs, the elders' challenges to the judge's constraints on their testimony suggest a reading of the judge's talk as an illegitimate attempt to appropriate their traditional knowledge and the authority and power that come with it. When one elder suggests that the judge's refusal to let them speak to the facts of the case is asking them to "do this for all," she implies that the judge is compelling them to talk too freely about tradition, in reference to people and circumstances that are beyond their immediate knowledge, in a manner suggesting a direct conflict with at least some Hopi ideologies that call for Hopi people in positions of power and authority to avoid public and ostentatious displays of that authority. When another elder questions what the judge will do with the "village's knowledge," he foregrounds the fact that this judge himself is not from their village, and thus is precluded by the Hopi ideologies he indexes from legitimately knowing or even hearing the very information he seeks.

Significantly, through these expressions, the elders articulate a construction of tradition and its relation to the courts' Anglo-style law that comments upon and competes directly with the discursive moves employed by the Hopi judge to accommodate Anglo-American notions of legal legitimacy. As much as the judge's legal power trades on his capacity to combine metadiscursively the content of Hopi traditional knowledge with the generalizing discourses of Anglo-American legal praxis, the objections of these witnesses imply that legitimate exercise of their power and authority trades on expressions of tradition that must be construed as both restricted in application to particularized circumstances and spoken only to exclusive audiences. Where the metadiscursive constraints the judge uses to accommodate the demands of Anglo-American legal objectivity directly conflict with the ideologies

of exclusivity grounding the constructions of Hopi traditional authority that these elders propose, the elders can challenge the discursive imposition of Anglo-American legal principles on their testimony by challenging the judge's requirement that they tell tradition in improper ways. It is from these multiple and competing constructions of tradition and contemporary Hopi law that this discursive conflict emerges, and it is the high stakes of power, authority, and legitimacy that prohibit either side from backing down.

Conclusion

I have aimed in this chapter to argue for and demonstrate the importance of attending to the interactional details that emerge in the context of contemporary Hopi tribal court proceedings. Such attention reveals how differently situated Hopi actors take up the discourses of Hopi tradition and the Anglo-American law of the Hopi court in multiple, complex, and competing ways in order to secure the significant power, authority, and legitimacy that come with and through those discourses. Attending closely to the form and context of those interactions, and to the language ideologies that inform them, enables us to see a Hopi judge and Hopi witnesses actively engaging in the constitution of notions of tradition and law in the interactional moments of their tribal courtroom proceedings.

Thus, this analysis offers an important corrective to the work of scholars who criticize the role of tradition in contemporary indigenous law as being more a reflection of identity politics than of actual values and practices. What is revealed is the degree to which representations of tradition, like representations of law, are *always* political, all the way down. That is, no real division exists between the representations of traditional practices and beliefs and the articulations of power, authority, and legitimacy that go along with them. This is precisely the source of the elders' objections to the Hopi judge's metadiscursive constraints on their testimony. The Hopi judge and elders argue over the right to control the expression of Hopi tradition precisely because of the power that accrues to those who possess that right.

Scholars who criticize the political character of tradition discourse thus fundamentally miss the point, primarily because their accounts of tradition and law in tribal jurisprudence fail to consider in detail the kinds of sociopolitical interactions described here. Their arguments

either subscribe to notions of a depoliticized, essentialized body of practices and discourses that they imply constitute "real" tribal traditions that are beyond the reach of contemporary tribal actors, or, as Dirlik (1999) so rightly points out, they essentialize essentialism, not appreciating that tribal actors' arguments regarding tradition are important and powerful sociopolitical acts designed to challenge the hegemony of governance regimes that impinge on them. Either way, if they do not consider how tribal legal actors are actively talking with, to, and through the discourses of tradition and law that constitute tribal legal practices, sociolegal scholars in these arenas will continue to overlook the multiple, complex, and sometimes conflicting ways in which notions of tradition, law, and culture mediate the (post)colonial conditions that inform tribal members' lives and laws.

It is important to note that the politics of Hopi tradition, law, and legal power observed in the hearing interactions analyzed in this chapter are explicit and openly contested by the legal actors who engage each other. This is not always the case. Often the competing interpretations of Hopi tradition and culture among differently situated legal actors and the force and effect of this competition on Hopi law and legal power more generally are hidden by subtle discursive manipulations that unfold over the course of specific hearing interactions. Such manipulations may be so subtle that the parties may remain unaware of them even as they contribute centrally to the legal action taken by or against them. Analysts become aware of such subtleties only when we see how they emerge over the span of an entire hearing. Then we can consider how the pragmatics or use of tradition talk interfaces with the metapragmatic "talk about tradition talk" in ways that shift incrementally over the sequence of hearing interactions to generate truly paradoxical, even ironic, senses of the legal force and effect of Hopi tradition. An analysis of these paradoxes and ironies of Hopi tradition and culture as they emerge in another Hopi property dispute hearing is the subject of the next chapter.

4 »

"He could not speak Hopi. . . . That puzzle—puzzled me": The Pragmatic Paradoxes of Hopi Tradition in Court

In September 1997, the Hopi Tribal Court heard arguments on a case that the presiding judge would in the end describe as "gut wrenching." The case concerned charges brought by the governor of a Hopi village against a man from his village, claiming that the man was violating village and court orders when he moved his mobile home onto village land without a permit and then refused to move it away. At one particularly emotional moment, after the court decided that the man must remove the home from the village, the man asked to speak. The judge granted his request, and the man expressed his shock and indignation at his treatment by his fellow village members. Noticeably distraught, he speaks with long pauses, sighs, and sobs. Twice he breaks down in tears

> As a—[2 sec. pause] grands—[10 sec. pause] As a grandson to the fou(h)nder of Mùnka(h)pi, I feel deep in my heart that these people, people that I respected, people that I grew up with in the *kiva*, and that I res—respect—my father in-law, my dad—[crying]. I h(h)ave ne(h)ever witnessed so(h)mething like this hhhh . . . that I would be k(h)ick(h)ed off (4 sec. pause) my land. . . .

> It is time that we as Hopis look at each other and understand that we need to all stick together. . . . They've all known me for a long time, and how I was brought up. But I can feel deep in my heart that I am getting kicked off. . . . All I feel I'm guilty for is trying to provide for my family.

Then the governor, in a move that surprised even the attorney representing him, asked for time to respond. After being granted the floor, the governor said, "I know this is ah sticky situation. It's a sad situation. And ah, you know they talked about the Hopi Way all day yesterday. And I thought we were trying to accomplish that, initially when we met with the young man. And ah I don't think that was accomplished because he just didn't follow the rules that we tried to work out with him."

Consider the arguments invoked by each side here. The defendant begins by invoking the real and ceremonial kinship relations that bind him and his opponents, including the governor. Starting in this way, the man is not just pleading for a consideration of the value of these relationships (though he is certainly doing this too). He is in fact employing the traditional opening of ritual kiva interactions, in which men gathered around the underground smoke circle always start by naming their ancestors and the kin relations they share with others around the circle. In so doing the man is not just performing Hopi cultural distinctiveness, he is indexing the unique constellation of traditional duties and obligations that he and his opponent owe each other—duties to assist in maintaining the welfare of their families and community—which he suggests are violated by the decision to remove him from the village. The governor counters that the man himself has violated "the Hopi way" by failing to "follow the rules," including the village and court orders that required him to remove his home until he went through the permitting process for getting a proper land assignment.

Immediately obvious in this give-and-take is a "rules versus relationships" legal discourse dichotomy of a kind similar to what Conley and O'Barr describe as the fundamental feature of U.S. small claims court interactions. Many of the same basic features of small claims litigation processes and outcomes that Conley and O'Barr identify also appear in property-dispute interactions in Hopi Court. The extent to which litigants' success depends on how well they match their "rule" or "relationship" mode of argumentation to the orientation of the judge they come before could apply equally well as a predictor of success in Hopi court (Conley and O'Barr 1990).

But there remains a significant difference in the way in which Hopi legal actors produce and address the "rules versus relationships" dichotomy in their arguments in Hopi court. The parties taking up either the "rules" or the "relationship" orientation seem equally willing and able to frame those discourses as consistent with the demands and discourses of Hopi tradition and culture. What does it mean that tradition is susceptible to these seemingly opposed interpretations? How can Hopi tradition be invoked both as a normative discourse that demands adherence to duties that uniquely bind Hopi social relations and, simultaneously, as a way to justify the need to adhere to Anglo-style rules and court procedures that threaten to violate those bonds? Does it suggest that tradition is "merely" rhetoric for the Hopi people who invoke it? Perhaps it does for some. But if this were true generally, how could tradition be invoked here as a central theme of the first speaker's deeply distraught, gut-wrenching testimony? Indeed, the very idea that Hopis might understand tradition as mere rhetoric—that is, as an "invented" discourse with little claim on Hopis' contemporary life experience—would seem to undermine its efficacy for persuasive argumentation in the first place. What influence could it really have "on the heart" of Hopis, as my friends like to say, if in the end all Hopis agree that it is *just* skillful speech? On the other hand, how can this Hopi governor use a discourse of tradition to justify a rather bureaucratic application of and orientation to village rules and processes? Can Hopi tradition be capable of bearing both interpretations, without being minimized as "mere" rhetoric?

In this chapter, I argue that the indignation expressed by the defendant above arises, at least in part, from the ways in which his discourses of Hopi custom and tradition are ironically and paradoxically played against him, through subtle manipulations of the metapragmatics of Hopi tradition and local ideologies of cultural identity and difference during courtroom interactions. I pursue this claim by analyzing how the Hopi legal actors in this case work up contradictory formulations regarding the kinds of talk that are the modes of Hopi courtroom proceedings—how they call for or challenge courtroom uses of the English and Hopi languages by invoking notions of Hopi cultural identity and difference, tradition, and claims to tribal sovereignty. I thus offer a consideration of the politics of Hopi tradition and cultural difference that extends the arguments initiated in the last chapter, suggesting that anthropological theories that treat claims to cultural distinctiveness as binaries of resistance/hegemony—as either libratory *or* reifying, sincerely

autochthonous *or* "merely" other-determined—tell only part of the story of culture's political and juridical significance.

I suggest that an analysis of cultural difference that hews more closely to the sociopolitical realities and life experiences of American Indian peoples (and other groups invoking their own cultural politics) requires that we not reduce the claims to distinctiveness as either *always* constitutive of sincere modes of native cultural identity or *always* complicit in the elite hegemonies that marginalize them. Instead we should view these contradictions of cultural politics together as forming a site of potentiality that can and does unfold in complex iterations of native culture that constitute the emergent edge of indigenous governance practices.

This chapter pursues this more nuanced view of Hopi cultural difference by attending to the semiotic "microdetails" of Hopi legal practice in which "iterations" (Peirce 1955; Derrida 1976; Wirth 2003) of cultural difference, *always informed by but never identical to each other*, are deployed during the Hopi property hearing described above. Along the way, I develop a model of contemporary indigenous legal action, exploring the details of these ironies and paradoxes as they are discursively negotiated by indigenous social actors.

Paradox in the Pragmatics of Language and Law

As he lays it out in *Of Grammatology* (1976 [1967]) and later elsewhere (e.g., Derrida 1973, 1978), Jacques Derrida's deconstruction of Western metaphysics, especially as embodied in French structuralism, challenges what he sees as a fundamental fallacy of contemporary social theory and analytic philosophy: the presumption that semiotic forms convey a uniform meaning across different contexts of communicative action. Derrida does not deny that semiotic forms (or signs) work as signs because they are repeatable across different spaces and times of social action. Indeed, in asserting that "the possibility of repeating and thus identifying the marks [as signs] is implicit in every [semiotic] code," he goes so far as to suggest that semiotic forms and the tacit rules governing them, including all languages, are each, at bottom, "organon[s] of iterability" (Derrida 1988 [1977]:7).

What Derrida objects to is the presumption that this fundamental iterability of signs necessarily implies that every instance of a particular sign's use conveys the same meaning. He finds problematic the logical presupposition that what each sign signifies is a "transcendental" meaning

that is always "the same" (Derrida 1988 [1977]:7). Derrida's deconstructive approach to Western metaphysics reinvigorates an understanding of semiosis as a process of iteration in which the meaning of a sign at any instance of its use is *always informed by* but *never identical to* the meanings conveyed in prior instances of its use.

Derrida credits much of his understanding of the non-identical iterability of signs and the open-ended meaning-making process this implies to the semiotics of Charles Sanders Peirce. He writes, "Peirce goes very far in the direction that I have called the deconstruction of the transcendental signified. . . . Peirce considers the indefiniteness of reference as the criterion that allows us to recognize that we are indeed dealing with a system of signs" (Derrida 1976:59). At the heart of the "indefiniteness" that resides in Peirce's theories of signification and in Derrida's notions of iteration that I use herein is a conception of semiotic irony and paradox that reveals interesting parallels between the meaning-making accomplished through language and the practice and power of Anglo-style adversarial legal reasoning. Unpacking here some of the parallels between the pragmatics of language and legal reasoning will prepare us for the analysis in the remainder of the chapter, which employs pragmatic and metapragmatic analysis of Hopi courtroom discourses to suggest how Hopi tradition and cultural difference emerge in paradoxical and ironic ways during Hopi legal interactions.

Pragmatics and Metapragmatics

Legal semiotician Roberta Kevelson (1987, 1988, 1990) draws directly on the work of Charles S. Peirce to argue for the "centrality of paradox in the characteristic logic of reason in law" (Kevelson 1990:12). The paradoxes Kevelson describes in legal semiosis emerge from her view of Peirce's goal as developing a philosophy of reasoning grounded not in formal logic and syllogistic reasoning but in what he calls an "expanded logic" that incorporates the *abductive* processes of empirical inquiry. This "logic of discovery" is what, according to Peirce, characterizes the capacity of everyday cognition to accommodate new experiences not only by assimilating them to established interpretations, but also by producing new meanings as well. It is also the logic that undergirds Peirce's "semeiotic" or pragmatic theory of signs (Peirce 1955 [1897]:98), which describes that process as always mediated by social beings who "use" signs by interpreting them and acting on those interpretations. A

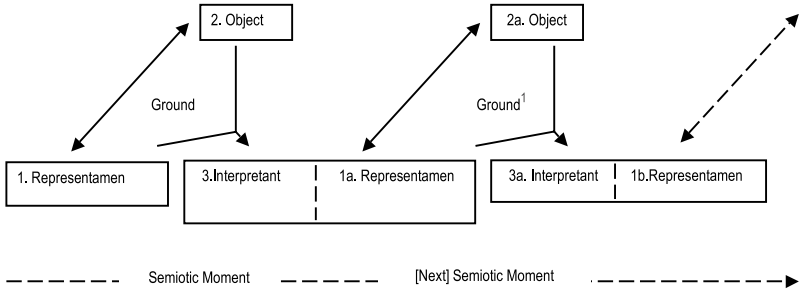


Figure 8. A model of Peirce's theory of signs.

much-simplified model of his theory of signs and their iterability appears in figure 8.

This model artificially arrests, dissects, and makes linear what is to Peirce an ever-unfolding, multidimensional, and multidirectional process. Within those limitations, this model nonetheless suggests how Peirce understood signs (what he calls "Representamen"; see label 1 in fig. 8) as instances of signification that "stand for" an object (label 2) in the experienced world of some thinking being. These beings then, by this process, come to have an interpretation (Interpretant, label 3) of that sign and its meaning, upon which they act (Peirce 1955 [1897]:100). Peirce adds that signs, as instances of meaning at these particular moments of use, "stand for that object, not in all respects, but in reference to a *sort of idea*" that he calls "Ground" (99; emphasis added).

As suggested earlier, what makes Peirce's pragmatic theory of signs unique is his understanding of their iterative character, whereby instances of meaning in the Representamen become understood in the Interpretant as an example of a particular type of meaning (Ground), but in subsequent moments (iterations) of semiosis, this type of meaning becomes part of the received meaning that *informs* (but is not *identical* to) how the sign now "stands for" an object in the context of that next semiotic moment for the thinking beings acting in that context. The iterative character of Peirce's pragmatics is reflected in the split box of label 3, where the Interpretant of the first semiotic moment, is a Representamen in the next moment (1a) that stands for its own object (2a) that yields the next Interpretant (3a) in reference to the next Ground[1].

What is significant is the extent to which these ensuing instances signify new iterations of a type or "sort" of idea in ways that are *always informed by* but *never identical to* the prior semiotic moments to which they

are linked. Peircian semiosis is thus understood as involving processes of continua, where at each moment there persist multiple (though not unlimited) ideological possibilities for the ways in which signs can stand for objects.

Moreover, the iterability of Peircian pragamtics allows for the emergence of paradox, says Kevelson, because not only the meanings actually captured in the Interpretant, but also the semiotic possibilities that are not pursued at one moment "leave a trace, an effect, and a consequence" (Kevelson 1990:15) for ensuing semiotic moments. Kevelson suggests that in these complexities of iterability—in which moments of meaning-making are always instances of semiotic continuity and discontinuity—paradox plays a crucial role in Peirce's semiotics and in the semiotics of legal reasoning. As she writes, "[P]aradox is not an aberration of ideal reason; rather, it is the basic structure of relationship of the minimal unit of meaning in a system of reason which *reason in law represents in paradigmatic fashion*" (11; emphasis in original).

This concern with semiotic paradox finds parallels in the linguistic anthropology of Michael Silverstein, and his abiding concern with the ways "metapragmatic function" (1993:33) reveal irony's role in the unfolding edge of meaning constituted by social actors via "penumbral signs-in-use" (Silverstein 2003:195). Specifically, because signs functioning metapragmatically mediate the movement of meaning not only from Representamen to Interpretant (as they do in Peirce's model) but also between language ideologies (Ground) and semiotic moments more generally, Silverstein argues that both of the latter are "always being made, remade, transformed, reformed, etc. in the realtime process of discursive interaction" (Silverstein 1993:38).

Silverstein thus understands that semiotic continuities are also, always, discontinuities, much as in Kevelson's understanding. In every moment of semiosis, or iteration, the coherences of meaning offered by the "metapragmatic function" impose constraints on the possible meanings of certain language practices—constraints that simultaneously make meaning possible but may also distort the ways such practices are later understood. The result in the unfolding sequences of social interaction are iterations that are (once again) informed by but never identical to each other, and that can lead to ironic interpretations and social actions by those who employ them. The fact "that irony is the essential trope lurking always in ideological informed contemplation of language," Silverstein explains, "is a consequence of the actual dialectic manner in

which ideology engages with pragmatic fact through metapragmatic function, in a kind of spiral figurement" of emergent, penumbral iterations of signification (Silverstein 1998:130–31).

Paradoxes in the Pragmatics and Metapragmatics of Law

The application of these Peircian and Silversteinian paradoxes to law builds upon the views of Kevelson and other analysts of Anglo-American jurisprudence who contend that the operation of legal power and authority turns on discursive practices whereby legal actors employ abstract legal categories to interpret, in complex and contradictory ways, the specific facts and norms guiding the resolution of a particular dispute (Matoesian 2001; Amsterdam and Bruner 2000; Mertz 1998; Conley and O'Barr 1998; Phillips 1998; Yngvesson 1993; Merry 1990; Mertz and Weissbourd 1985).

For these analysts, paradox and irony are central to the ascription of Anglo-American legal meaning insofar as adversarial legal reasoning involves the representation of a disputed event via signs (Representamen) that shape the legal significance of certain events (Objects) to decision-makers (Interpretants) by pointing (via metapragmatics) to multiple and competing legal theories (Grounds or Ideologies). These competing theories always exceed the theories taken up by the judge or jury rendering a decision in a particular case, and they may even, in some circumstances, move entirely outside or against what is generally understood as the purview of the law (Conley and O'Barr 1990; Yngvesson 1993). Nonetheless, the legal theories officially sanctioned in the final decision as well as those unsanctioned interpretations that only leave their "trace" are carried forward to future disputes, where they will shape the competing legal representations made in related, but never identical, legal semiotic iterations. This is true not only of those issues (sometimes called "substantive") in dispute whose disposition is understood to constitute a final judgment that ends litigation, but also of intermediate (often called "procedural") matters disputed by parties who raise "objections" and "rebuttals" as the litigation unfolds, each of which must be resolved by judicial decision-making processes.

In these processes, competing statements regarding historical events intended to constitute proof of the disputed "facts" are presented at a hearing via discourses metapragmatically marked as genres of Anglo-American legal talk called the "direct examination" and "cross-examination" of

witnesses. In this context, witnesses' competing allegations about past disputed events are understood as being put under the critical lens of the adversarial trial to test the credibility both of the testimony and the witness testifying, giving the judge or jury an opportunity to decide which of the parties' competing claims of fact and law are most persuasive (Philips 1992). Those persuasive claims are understood as being authorized only when the judge or jury announces a final judgment that "takes up" and authorizes one of the multiple legal meanings that might be forged between the facts of that particular case and the legal theories applied to them.

As such, in the continua of legal semiosis, legal signs and the ideologies they invoke remain open-ended and provisional as iterations that simultaneously bear the influence of the semiotic moments that preceded them, but also always (re)create them anew as legal actors use them in practicing law. Kevelson thus writes that "to assume a paradoxical structure for reason in law is merely to assume . . . a kind of 'holomovement' in which *possibles* emerge, act, and disappear . . . *so that implicate possibles may be understood as creating and transforming agents or signs*" (Kevelson 1990: 15; emphasis original).

Against this theoretical backdrop we can begin to see how the conflicting understandings of tradition and cultural identity—as juridico-political discourses that are sometimes libratory, autochthonous, and sincere and sometimes reifying, other-determined, and "merely" strategic—not only play out in the practices of contemporary indigenous law and politics, but also constitute that pragmatic means, those poles of "uniqueness and uniformity" (Biolsi 2001) by which legal actors constitute indigenous governance. My exploration of the pragmatics and metapragmatics of language, culture, and law in Hopi tribal jurisprudence is intended to demonstrate this in one such context.

Discourses of Cultural Difference in Hopi Court

It is not surprising that discourses of cultural identity and difference are a frequent feature of arguments in Hopi property disputes. Moreover, claims made regarding Hopi culture and tradition are often framed by explicitly metadiscursive "talk about talk" concerning Hopi courtroom interlocutors' abilities to make these arguments in the context of the Anglo-American legal procedures of the court. Hopi property proceedings commonly feature reflections by interlocutors on fundamental differences

between Hopi and English language practices and how these differences necessitate courtroom discourses that draw exclusively on one or the other language. Example 1 offers some representative statements.

: : :

Example 1. Metapragmatic Statements Relating Language, Legal Practices, and Hopi Traditions

1. A judge describing the need to translate questions prepared by Anglo lawyers concerning traditions of property inheritance to be posed to elder Hopi witnesses (March 27, 1997)

   Wuuhaq yep hihta umuy tuuvingtaniqw, pay nuy aw wuuwaniqw pay pi i' pay hihin piw Pahanvewat yang pe'yyunga, pay nu hapi pay pas Hopivewat pu' umuy tuuvingtani.

   Since I am going to ask you many questions, when I consider them, they are somewhat written in a "Anglo" way of questioning. So I am going to ask you according to the Hopi way.

2. A Hopi advocate prompting his witness to restate in Hopi the claims written in English in her affidavit concerning how property inherited "for her daughter" indexes traditional norms of Hopi matrilineal property inheritance (December 7, 2001)

   Okay. Would you—would it help to explain to the judge in Hopi what you meant by that. Because it doesn't clearly tell—doesn't clearly explain what you mean in there. So would it help to explain it to the judge in Hopi?

3. An Anglo lawyer (Lawyer 1) objecting to the testimony on tradition of a bilingual witness speaking in Hopi and the rebuttal of the opposing Anglo lawyer (Lawyer 2) suggesting her need and right to speak Hopi (March 22, 1995)

   LAWYER 1: I bel—believe there's ample evidence that she speaks English quite fluently and could testify in English. [Some lines omitted.]

   LAWYER 2: That's fine, but I think part of what she's saying has to be said the way she feels most comfortable, and this is the Hopi court, and maybe its the best way for her to communicate feelings and ah—that she remembers.

   HOPI JUDGE: I agree with you.

: : :

Implicit in all of these examples is a metadiscursive take on how the Hopi language and its uses by legal actors shape the force and significance

of statements made within the court in different ways than do legal language practices in English.

The statement in example 1.1 comes from the case analyzed in chapter 3, after the judge's efforts to get testimony concerning "principles" of Hopi tradition are continuously thwarted by the elder witnesses, who seem determined to speak to the factual details of the dispute. In this first effort to resolve what turns out to be a major metadiscursive conflict between the judge and the witnesses, the judge responds as if the problem can be located in comprehension gaps caused by differences in the English questions as written, and the questioning practices more familiar to the Hopi-speaking witnesses. Indeed, as noted earlier, the very fact that the judge is questioning the witnesses stemmed from his concern that the court's Anglo-style witness examinations would not be well received by the Hopi elders (*Smith v. James*, 98 A. P. 000011 [1999]).

In example 1.2 the Hopi advocate, questioning his witness after she has been cross-examined by a non-Hopi advocate, prompts her to "clarify" the claim made in English in her written affidavit that the property in dispute was meant "for the benefit" of her daughter. When this point is highlighted on cross-examination as evidence that the witness has no real interest in the property—that is, her statement suggests that the only "true" interest rests with the daughter—the Hopi advocate invites the witness to "clearly explain it . . . in Hopi." He thus suggests a belief that the proper sense of this claim is communicable only in Hopi—that this claim is an expression not of the daughter's sole possessory interests but of Hopi traditions of matrilineal inheritance.

The exchange in example 1.3 arises after the Hopi witness starts testifying in Hopi about instructions she received regarding the transfer of the disputed property from her *taha* (mother's brother), a figure of traditional authority in clan matters (Thompson 1973; Titiev 1944; Eggan 1950; Whiteley 1998). Significantly, the metadiscursive formulations in Lawyer 2's rebuttal signify ideologies that link the witness's right to use Hopi to the tribe's contemporary legal institutions and the self-governance it instantiates ("this is the Hopi court") and to the distinctive pragmatic and affective capacities that Hopi affords the witness, which an English translation might not adequately capture ("and maybe the best way for her to communicate feelings").

These examples reveal how notions of Hopi cultural identity and tribal legal praxis become deeply and dialectically entwined with the metadiscourses of courtroom interaction. However, to fully appreciate

how such notions shape ironic and paradoxical orders of Hopi tradition and cultural distinctiveness (at once potentially "sincerely" resistant to/"merely" hegemonizing of non-Indian state power) and the political-economic force of contemporary Hopi jurisprudence they afford, we need to analyze how they emerge sequentially over the course of Hopi tribal court proceedings. To do this, I focus on the unfolding sequence of discourse in a property dispute that came to the Hopi court in 1997.

Iterations of Indigeneity in a Hopi Court Hearing

The dispute described at the opening of this chapter concerned a Hopi man's attempt to move his mobile home onto lands in his village—lands he claimed were controlled and offered to him by his maternal clan grandmother—despite orders from the village government and the tribal court not to do so.

As mentioned in chapter 2, the Hopi Tribe recognizes Hopi village leaders, including popularly elected governors and boards of directors as well as (in some villages) traditionally ordained *mongwis* (ceremonial chiefs), as having the power to make land assignments to village members for the purpose of building new homes. Village directors and governors claim that these powers are necessary to regulate the distribution of rights to hook up to the village's electricity and plumbing networks. They claim that such assignments must be carefully and sparingly made because the electrical and sewage operations are already running at full capacity and are unable to meet Hopi public housing demands. Many Hopi complain, however, that such powers are not so much a regulatory necessity as a specific site of influence-peddling, afforded and elided by Euro-American notions of bureaucratic governance. As proof, these critics point to what they say are disproportionate numbers of land assignments to the friends and families of village leaders, regardless of any burdens on village infrastructure. They also argue that the real authority for assigning lands resides where it always has, with the clan mothers and matrilineal uncles (*tahas*) who ascertain whether a family member is both sufficiently in need and sufficiently committed to his or her clan duties to warrant an assignment of the right to use a parcel of land.

These perspectives are directly relevant in this case, insofar as the village governor had secured a tribal court order prohibiting the man from moving his trailer into the village. Despite this order, the man

moved his trailer onto the property, arguing that Hopi traditions of clan organization and matrilineal distribution of lands provide that the village governor (a man from a different clan) had no authority to determine how his grandmother (and clan leader) could choose to pass clan land. And, as we shall see, the advocate's requests to use Hopi are linked explicitly to ideologies of Hopi cultural difference and tribal sovereignty claims. The Hopi judge at first rejects these requests but later grants them after the advocate presses her demand in a manner that genuinely resists the Anglo-style procedures of the court. In the end, however, these gains are ironically turned back upon the advocate, but not before leaving a "trace" and effect on the final decision in ways that reveal how the paradoxical politics of cultural difference constitutes the discursive engine of Hopi legal praxis.

Given the bureaucratic operations and authority of the village leaders in this case, it is not entirely surprising that they are represented by a professionally trained, Anglo-American, male attorney from Salt Lake City, Utah. The Hopi defendant is represented by a Hopi woman with some training as a paralegal but no formal law degree. The judge in this case is a Hopi man with twenty-eight years experience on the Hopi bench. Though he has no law degree, he has extensive judicial training. He is also deeply involved in the traditional practices of his village, having been initiated into the highest ceremonial order that a man in his village can attain. Finally, while both the judge and the Hopi counselor speak both Hopi and English, the Anglo-American attorney does not speak or understand Hopi.

Consider the interaction at the opening of the hearing. After calling the court to order and introducing the case, the judge asks both parties if they have been able to work out any settlements. After the Anglo lawyer (designated "Lawyer") says that there have been "numerous" attempts at settlement, the judge turns to the Hopi counselor, "Ms. Smith" (designated "Advocate"), and the following interaction transpires.

: : :

Example 2. Choosing the Language of the Hearing, Part 1

1. The advocate requests Hopi

001 JUDGE: All right. Ms. Smith?
002
003 ADVOC: Your Honor there has been no numerous attempts to
004 try to solve this matter (which is)

unfortunately why we're here. **I do have a request**
before I (can) continue to address this court is
that, ahm **I would like to have some of this**
(defended) in ah Hopi, ah simply because there
are issues here that are land and tradition and
board of directors and lower village and—and
other people and things that are involved, **that I**
think can only be expressed in my own language
and **in order to adequately represent my**
client, and be able to express myself in my
language to you which you also understand.

JUDGE: I can understand English as—ah perfectly well
too.

ADVOC: Well exactly but what I'm saying is **there are**
issues that I feel I can only describe in Hopi
because w—just like now, you know
I' hapi yep—yep pu' himu [itam
This truly here—here now is something [*we*]
LAWYER: [Your
= Honor, I'm gonna object to ah—
JUDGE: Just a second. Go ahead.

: : :

In her very first turn to talk, we see that the advocate requests that she be allowed to "have some of this defended in ah Hopi" (lines 7–8). She then provides a metadiscursive justification for this, arguing that Hopi is pragmatically superior to English for expressing matters of Hopi culture. She claims (at lines 07–12) that the Hopi language bears a unique and nontranslatable capacity to contextualize controversies of "land and tradition and board of directors and lower village"—issues that she must discuss in Hopi to adequately "represent her client" (lines 13–14).

But when she appeals to the judge's own ability to "understand" Hopi (line 15), he responds to her justifications with indirection, countering that he understands English "perfectly well too" (lines 17–18). This prompts the advocate not only to reiterate her claims (lines 20–21: "there are issues that I feel I can only express in Hopi"), but also

to actually attempt to perform them (lines 22–23). She is interrupted by the lawyer, who employs a metadiscourse of Anglo-style courtroom interaction called "raising objections" to challenge her.

: : :

Example 3. Choosing the Language of the Hearing, Part 2

The Anglo lawyer objects to using Hopi

028 LAWYER: **I'm gonna object** to having any of this conducted
029 in Hopi. **Ms. Smith is perfectly capable to speak**
030 **English** and (**this whole) court and ah the rules**
031 **of this court are in English** and (.) unless there
032 is a need—a demonstrated need ahm where someone
033 does not speak or understand Hopi ah—or—er
034 English rather, where you need to have it done in
035 Hopi ah it would be ah I think inappropriate. =It
036 would also be **time-consuming** to have translation
037 and **lead to ah ah misunderstanding.**

: : :

He too backs this metadiscourse with ideologies about English—noting that the advocate is "perfectly capable to speak English" (line 30) and that it is the language of the court's written rules (lines 30–31). Thus, it would be "time-consuming . . . and lead to. . . . misunderstanding" to use Hopi (lines 36–37).

Each of the lawyer's claims is informed by a presumption of sufficient semantic equivalence, transparency, and translatability between Hopi and English. This "talk about talk" is informed by ideologies grounded in Euro-American models of language as a labeling system that is stable across contexts of use. Professional language ideologies of Anglo-American jurisprudence build on this theory, presupposing that language is a transparent medium for referring to prior events and acts that are the "facts" being contested (Philips 1992). This is implicit in a fundamental premise of adversarial jurisprudence: that litigation achieves justice because the truth about "what happened" can emerge from the zealous prosecution of the disputed claims, one against the other, as well as how the law is to be applied to those events (Metz 2007; Philips 1984, 1992).

It is just this set of pragmatic presuppositions that the lawyer relies on to argue that the advocate's request is objectionable, that using Hopi

here adds nothing to the litigation process. Indeed, he claims it would only delay the resolution of the dispute.

The advocate does not wait for the judge before making her reply. She interjects as follows.

: : :

Example 4. Choosing the Language of the Hearing, Part 3

The advocate's response, the judge's decision

039 ADVOC: Your Honor,=
040 JUDGE: Ms. [Smith
041 ADVOC: = [if we are going to reach any kind of
042 ah—(?), I think Mr. Keith is being ignorant to
043 the fact **we are Hopi and this is a Hopi court of**
044 **law the reasons why ahm things were developed the**
045 **Constitution, the Hopi Court, was for the benefit**
046 **of the Hopi people, not for the benefit of the**
047 **people who can't understand the English**, which is
048 why we're here. Because if we were—if if the
049 constitution says that we're able to resolve
050 certain issues at certain levels and when we
051 can't then it goes to court then **I think we**
052 **should be honoring that opportunity to express—**

[SOME LINES OMITTED]

060 **I think Mr. Keith needs to give us that respect**.
061 JUDGE: **We're gonna proceed with this hearing in**
062 **English** its—I'm gonna ask this question though
063 Ms. Smith, do you have any witnesses or any
064 persons that are here today that are—are
065 parties to this action, who you can certify,
066 that do **not speak or understand English language**?

: : :

The political-economic ideologies backing the advocate's request now become explicit as she links Hopi usage to notions of cultural identity (line 46, "we are Hopi") and tribal sovereignty (lines 44–47: "the reasons why things were developed . . . the Constitution and the Hopi Courts"). By then arguing that Hopi tribal governance was "developed . . . for the benefit of the Hopi people" (lines 44–46) and juxtaposing the Hopis to those "who can't understand the English" (line 47) the advocate equates

the sine qua non of Hopi self-governance with Hopis' entitlement to the distinct juridico-political uses of the Hopi language. Indeed, she argues that they have a moral imperative to use Hopi in the hearing (line 51–52: "we should be honoring that opportunity").

The advocate's claims here echo the arguments excerpted from other hearing interactions analyzed above. They also parallel comments I regularly heard across Hopi country from people who, despite the fact that Hopis today are bilingual in Hopi and English (if not monolingual in the latter), reported a preference for speaking in Hopi when they could. They explained that speaking in Hopi is "softer" and tends to come more "from the heart," engendering a sense of sincerity and community among Hopis in ways not available when speaking English.

When considerations of pragmatic distinction emerge in the discourses of the court's legal praxis, they are viewed as iconic of what makes those practices and institutions uniquely Hopi. Similar ideologies backed the comments of another Hopi judge who spoke of the need to use Hopi to make the court seem "more and more an institution of the Hopi people rather than . . . an institution that's coming in to take over." Thus Tribal Court interaction conducted in Hopi becomes a performance of tribal governance in which a distinctly Hopi cultural identity and its political efficacy as an expression of tribal sovereignty are instantiated by the social actors who engage each other in and through them.

But here the judge appears unmoved by the advocate's arguments. He baldly rejects her request, stating, "We're gonna proceed with this hearing in English" (line 61–62). And when he asks her if she represents anyone who does "not speak or understand the English language" (lines 64–67), he makes explicit that his decision is in metadiscursive alignment with her opponent's claim.

When the advocate does not produce anyone who is not proficient in English, it appears that the issue of the language to be used in the hearing is foreclosed. But, as examples 5 and 6 show, she continues throughout the hearing to express resistance to the judge's preclusion of Hopi.

: : :

Example 5. Ideologizing the Inseparability of Hopi Language and Courts

The advocate argues that use of the Hopi language is central to Hopi tribal sovereignty.

001 ADVOC: **You can't separate Hopi and religion and land**
002 **language, court, constitution. It's all tied up**

003 **into one**. That's why we need special courts, to he—
004 hear us in our language. **We have that right as a**
005 **people. To express ourselves. freedom of speech.**
: : :

: : :

Example 6. Ideologizing the Pragmatic "Difference" of Hopi versus English

The advocate argues that the Hopi language conveys different meanings from the equivalent statements made in English.

001 ADVOC: **It's said different in Hopi,**
002 it doesn't have as much
003 effect because I can't
004 use my language.
: : :

Through the persistent iteration of these metadiscourses, the advocate presses her claim that her client has a culturally unique right and duty to move his trailer onto the land in question, a right and duty that cannot be usurped by village or court order insofar as it was granted to her client by his clan elder. Attempting to regiment these claims via these metadiscourses is thus an effort by the advocate to shape a jural "legitimacy" (Swigart 2000:90) for her arguments and herself. She does this by marking her Hopi proficiency as iconic (Irvine and Gal 2000) of her authority in the Hopi cultural practices under dispute, the verity of the claims she is making about those practices, and the legitimacy problems that the Hopi court will face if it decides against her client. It is no coincidence that this "legitimacy" is generated in ideological opposition to and exclusion of English, insofar as this also works to exclude the Anglo attorney, resist his "Anglo" legal arguments concerning village bureaucracy, and undermine the adversarial metadiscourses he uses to frame them. We may also see it as an attempt to align with the Hopi judge through a shared sense of unique cultural identity.

Significantly, her persistence with these metadiscourses appears eventually to sway the judge. During witness examinations, the advocate has her client take the stand to testify about a public confrontation he had with the village governor and board of directors. During that confrontation, he claims, the governor told him in Hopi that he would drop the court order requiring that he remove his trailer. The advocate and her client suggest that this interpretation of the governor's state-

ment turns precisely on the fact that it was spoken in Hopi, conveying meanings not translatable in English. As a result, the advocate asks again to use Hopi "[b]ecause there's a big difference in the way that it's said." This time the judge concedes that "it's important for the court to hear it in Hopi" and allows the witness "to tell us in Hopi what the Governor said." This is a rather remarkable metadiscursive turnabout from the decision the judge made at the outset of the hearing and a dramatic, albeit microinteractional, victory for the advocate in her efforts to resist the lawyer and his Anglo-style objections.

But here is most keenly revealed the need to account for the pragmatic paradoxes of cultural difference over the unfolding of the *entire* legal proceeding. The semiotic and sociological ramifications of these metadiscourses continue to play out until the judge announces his final decision, where they are turned about again, entailing meanings that result in an ironic reversal of the socio-legal force of the advocate's arguments for using Hopi. What precipitates this is the interaction shown in example 7, which occurs soon after the advocate asks her witness to relate in Hopi what the governor said to him. The witness, however, is unable to respond.

: : :

Example 7. A "Breakdown in Performance" of Hopi Testimony

The advocate examines her client on the witness stand.

001	ADVOC:	I' pam um'i lavayi. How did he say to you?
002	WITNESS:	"Pay ansta itam oovi epeq—" ahm—
		"Well actually we therefore over there"
003		(3.0 sec pause)
004		hhoh.
005		[tapping podium]
006		hhh hhh.
007		(5.0 sec pause)
008		hhh hhoh.
009		**(15.7 sec pause)** [tapping podium]
010		"Itam epeq tsovàltini"—
		"We will meet over there—"
011		(6.3 sec pause)
012		**I'm sorry sir,**
013		**I'm not too familiar with Hopi.**
014		hhh hhhh. [tapping podium]
015		(7.7 sec pause)

016 But he did say that,
017 "Yes,"
018 you know,
019 "We need to sit down and talk."
020 And, you know—
021 LAWYER: There's no question pending, your honor.

: : :

Building on Dell Hymes's notion of "breakthrough into performance" (Hymes 1975, 1981), we might call what occurs here a full "breakdown" in performance, replete with false starts (lines 02, 10), repeated lengthy pauses, explicit admission of his pragmatic incompetence (lines 12–13), and, ultimately, abandonment of the effort (lines 16–20).

This "breakdown" becomes significant to the parties and the case outcome in the judge's final decision, when he invokes the witness's faltering to frame his final judgment in favor of the village government. He finds that the man's trailer was illegally placed on village lands, and does so, he says, because the governor's statement, which was the subject of the man's failed testimony, "was not an order setting aside the order directing him to cease and desist." He then explicitly refers to the witness's failed attempt to testify in Hopi in a way that reformulates the advocate's metadiscourses of cultural identity in a truly ironic way.

: : :

Example 8. Judicial Rationalizations for Code Choices and Decision

The judge announces her decision.

001 JUDGE: I basically said that we would conduct the hearing
002 in English, but I did allow Hopi to come in.
003 I did not totally bar the parties from not using Hopi.
[SOME LINES OMITTED]
011 When (the w)—when respondent was called to testify
012 and was asked to repeat
013 what the Governor said in Hopi,
014 he had problems.
015 Expressing himself in Hopi.
016 Which clearly showed to me
017 that **he could not speak Hopi.**
018 You know, **and that puzzle—puzzled me**

019 because all along **I was led to believe**
020 **that the parties or at least the respondent spoke Hopi too.**
021 And that's (why) he insisted (on some of)
022 the hearing be conducted in Hopi.

: : :

How did this happen? How did the man lose this case on the very grounds that his advocate had been arguing for throughout the hearing? We might blame a poorly calculated litigation strategy: the advocate insists on a metadiscursive need to argue in Hopi, but her client displays a considerable lack of fluency in Hopi precisely at the moment when she has won him the right to speak it.

Or, in a way perhaps more consistent with extant anthropological theory, we might argue that the advocate's claims to the pragmatic distinctiveness of Hopi and the ideologies of cultural distinctiveness and political sovereignty that back them are revealed as just another instance of the ways the politics of culture identity and difference inevitably work to demand performances that ultimately serve the hegemonic interests of indigenous and nonindigenous elites. Our binary formulation of "sincere" resistance/rhetorical hegemony require that I show how apparent acts of indigenous resistance are revealed to be "actual" opportunities for the (re)assertion of elitist hegemonies.

But is this entirely accurate? Note how the judge engages in some subtle metapragmatic distortion here when he states that he was "puzzled" (line 18) by the witness's pragmatic failures because he was "led to believe" by the advocate that he "at least . . . spoke Hopi too" (lines 19–20). But the advocate never made any claims regarding her client's fluency in Hopi and never based her request to use Hopi on her client's ability to *speak* Hopi. She claimed only that the governor's order was *comprehended* as carrying a meaning uniquely conveyed in Hopi. The judge's take here conflates the witness's comprehension *of* Hopi with fluency *in* Hopi, which most language scholars and many users (in our own metapragmatic moments) recognize as quite separate capacities.

It is precisely in this distortion that the paradoxical iterations of the politics of cultural identity and difference emerge in this Hopi courtroom interaction. I suggest that the semiotic ground upon which the judge undertakes this reformulation results from certain ironic orders of meaning that emerge dialectically from the advocate's original request to use

Hopi, the witness's failure to perform Hopi testimony, and the metapragmatics of Anglo-style witness examination that refract his failure in ways that have significant legal import.

On the basis of our discussion of Kevelson's and Silverstein's understandings of paradox and irony in pragmatics, we can account for the shifting meanings afforded by the discourses of cultural difference. When the advocate first makes her request to use Hopi in the hearing, she backs this request with metadiscursive arguments that point to the distinctiveness of Hopi when arguing in Hopi court about " issues of land and tradition and board of directors" (example 2, lines 009–010). In this iteration, the advocate argues for a "particular sort of idea" (Ground) by which the Representamen "Hopi language" can stand as an index of the proper channel for argumentation (Object) in the Interpretant (the meaning of Hopi language in use at this moment in the hearing) relied upon by her and her fellow interlocutors at the hearing's opening. When the opposing counsel challenges this particular iteration of the meaning of "speaking Hopi" at this semiotic moment, a subtle shift occurs. In the next iteration, "we are Hopi and this is the Hopi court" (example 4, lines 43–44) the advocate subtly changes her language ideology (Ground^{1} in fig. 8) in a way that is *informed by* but not *identical to* the earlier iterations, so that now she argues not only for the pragmatic distinctiveness of the Hopi language but also for its political significance to Hopi cultural sovereignty (refer to fig. 9 in relation to the following discussion). Thus in this next iteration she argues that the Representamen (1a in fig. 9) "Hopi court talk as pragmatically necessary" (note the accretion of meaning here) stands as a token of proper Hopi advocacy (2a [Object] in fig. 9) to the people in the hearing (via the Interpretant [3a] they rely upon) by asserting its political necessity, insofar as the very purpose of the Hopi court is "for the benefit of the Hopi people, not the people who can't understand the English." (example 4, lines 45–47).

But as we saw in the unfolding discourses of this hearing, iterations of Hopi cultural difference spin out beyond mere "adjustments" or "accretions" of meaning into moments of outright contradiction, paradox, and irony. Recall that at that crucial semiotic moment before the witness's testimony, the judge does accede to the advocate's request to use Hopi. But it is significant that he does so at the evidentiary stage in the hearing. Speech events in that context are regimented within tacit metapragmatic expectations of Anglo-style witness examinations, according to which witnesses have a performative responsibility to talk

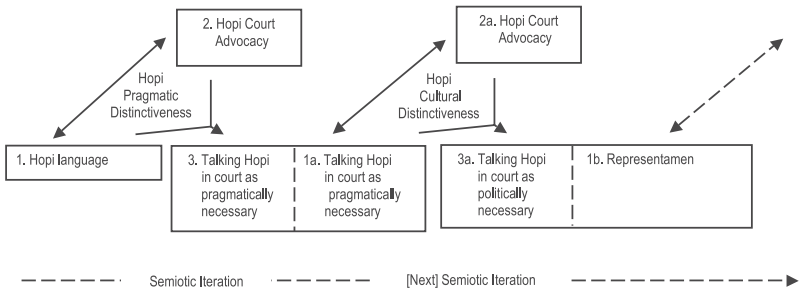


Figure 9. The metapragmatic iterations of Hopi cultural difference.

in ways that are evaluated for relevance and credibility (Philips 1992). In this hearing, such metapragmatics make possible new semiotic entailments attributable to the man's failed Hopi testimony, affording the judge's misrecognition of that failure as an index of the man's lack of credibility as a witness and the questionable credibility of his legal claims insofar as they turned on the arguments of Hopi cultural difference.

At least as the judge tells it in his final decision, it is precisely when he allows the witness to speak Hopi, as requested by his advocate, that the man reveals the "puzzling" (I might say "paradoxical" or "ironic") fact that he "was not too familiar with" (example 7, line 13) the Hopi language and the culturally grounded meanings it uniquely conveys. The result, as we saw, was a semiotic "reversal" with a significant socio-legal effect on the outcome of the hearing.

We must recognize that the judge in this case appears to enjoy a capacity to manipulate the metadiscourses of Hopi cultural difference in ways not available to the advocate, and that he does so to naturalize the Anglo-American adversarial forms and ideologies of legal argumentation. We might thus be inclined to see the advocate's efforts to resist these adversarial forms by invoking notions of Hopi cultural difference as fully appropriated and overcome by the judge's hegemonic maneuverings.

Yet at the same time (and again, ironically), the fact that the judge appears compelled to mention his effort to include Hopi in the hearing suggests that a libratory, "sincere," and deeply felt sense of Hopi cultural identity and difference does nonetheless leave its "trace" on the shape of this proceeding. This "trace" keeps open the possibility that future acts of Hopi legal praxis can revisit these prior legal semiotic moments and constitute new socio-legal effects that are informed by notions of

Hopi cultural difference that *do* resist the Anglo-American adversarial practices of the court.

Moreover, the very irony created by the multiple metadiscursive and metapragmatic reversals during this hearing affords Hopi legal actors the opportunity to make the crucial "legitimacy" balances that always face tribal courts. By rendering a decision that navigates between claims of tribal cultural distinctiveness (here the advocate's metadiscursive requests to use Hopi) and the demands of Anglo-style adversarial jurisprudence (captured in the retention of metapragmatics of credibility and relevance in witness examinations), the Hopi judge unifies the competing semiotic and material claims of the parties in an act of contemporary Hopi law-making. Thus, it is as paradox and irony that we can now understand how the seemingly contrary notions of Hopi tradition and cultural identity (at once sincerely autochthonous and "merely" other-determined) not only play out in the judge's final decision, but provide the discursive force by which Hopi legal actors constitute their juridical praxis. Significantly, this praxis captures aspects of both the "unique and uniform" qualities of contemporary Hopi tribal jurisprudence as they relate to the larger Anglo-American governance systems in which Hopis are caught up.

Conclusion

In this chapter I have proposed a new approach to the paradoxes and ironies involved in the analysis of the politics of Hopi tradition and cultural identity as either sincerely autochthonous and resistant or "merely rhetorical" and other-determined. I have argued that the semiotic constitution and social force of claims to indigenous cultural difference and the sovereignty and self-governance politics and practices that they support are best captured by recognizing the validity of both types of analysis. Rather than reducing or resolving the ironies that such claims present, I have attempted instead to show how the antinomies of cultural identity produce a productive tension in the everyday practice of tribal governance.

To support this claim, I have built upon recent anthropological and semiotic elaborations upon the theories of Charles S. Peirce that highlight the centrality of paradox and irony in the emergent edge of linguistically mediated social action. I specifically rely on the metapragmatics of Michael Silverstein and the legal semiotics of Roberta Kevelson to

diagram a model of discursive iteration and to explicate the paradoxical and ironic ways in which ideologies and discourses of cultural difference enter into a dialectic relation with each other during Hopi tribal court interactions.

Discourses of tradition and cultural identity, particularly as they are mediated by metadiscursive and metapragmatic conflicts over the proper modes of courtroom interaction (e.g., whether to allow speaking in English or Hopi, or to allow questioning by lawyers and/or the judge, etc.), are common in contemporary Hopi legal praxis. Such discourses emerge and shape the very details of Hopi law talk, in ways that, at least at first glance, often appear to assert the same "politics of culture" and binaries of resistance/hegemony that have fueled debates for the last two decades between anthropologists and indigenous activists around the world.

By attending closely to the ways in which iterations of cultural difference shape the metadiscourses and pragmatics that unfold sequentially over the entire course of a 1997 property-dispute hearing, we gain a more complex understanding of Hopi cultural politics. As we reveal the shifting, paradoxical, even ironic ways in which metapragmatic iterations of Hopi cultural difference are employed by the parties to the hearing and how such iterations are *informed by* but never *identical to* the iterations that precede them, a picture emerges that utterly confounds the reduction of Hopi cultural politics to easy theoretical binaries concerning their role in the exercise of legal power.

So what does this mean for our understanding of the politics of cultural difference and the claims to self-governance made through them? Are they sincerely felt and/or anticolonial in their sociopolitical effects, or are they rhetorical strategies that, more often than not, lead only to further assimilation of indigenous peoples (and other "Others") into the colonial consciousness of non-indigenous national and international legal orders within which they are always caught up? I would say they do both and neither. By this I mean that, when properly analyzed, discourses of tradition, cultural identity, and cultural difference are revealed via pragmatic, metadiscursive, and metapragmatic approaches as constituting the very dialectic potentialities of semiosis that shape and affect—and are shaped and affected by—the indigenous self-governance practices they purport to represent. As such, they can sometimes have a decolonizing sense and force, and as the "sincere" expressions of indigenous experience within and beyond the scope of contemporary

governance. At other times (i.e., in other iterations), these same discourses are employed as rhetorics that have an assimilative, reifying sense and force. Both of these "implicate possibles" (Kevelson 1990:15) can emerge within relatively short spans of semiotic flow, such as the courtroom hearing analyzed above. Indeed, these ironies and paradoxes of cultural identity and tradition might allow us at least to partly explain the indignation felt by the defendant in that case and hence the "gut wrenching" character of the hearing as described by the judge. Even more broadly, the inability to understand discourses of tradition and cultural identity as both sincere and rhetorical at once may help to explain the hostility felt by both indigenous activists and scholars on opposing sides of the "invented tradition" debate. Neither perspective is inaccurate, but in failing to understand and honor both, each side misses a central feature of why and how discourses of tradition and identity perdure at the heart of indigenous politics today.

5 »

Suffering into Truth: Hopi Law as Narrative Interaction

CHORUS: Zeus has led us on to know,
The Helmsman lays it down as law
that we must suffer, suffer into truth.
We cannot sleep, and drop by drop at the heart
the pain of pain remembered comes again,
and we resist, but ripeness comes as well.
From the gods enthroned on the awesome rowing-bench
there comes a violent love.

Aeschylus, *Agamemnon* (trans. Robert Fagle, 1977)

Taken together, the analyses in the previous chapters reveal the extent to which the forward edge of Hopi Tribal Court praxis is thoroughly saturated, down to its finest interactional details, by language practices that navigate between discourses of Hopi tradition and the court's Anglo-style legal procedures. For all this attention to discursive minutiae, however, this study must consider the larger picture of Hopi tribal law as social institution. Now that I have argued for viewing the politicized discourses of Hopi tradition, cultural identity, and difference as shaping the fabric of Hopi legal interactions, I need to consider

the extent to which we can step back and see these tensions, built up from such discursive details, operating at higher levels of the Hopi legal system more generally.

I intend to develop this perspective in this chapter. To do so I must approach the questions it raises from a different tack—taking up a more broadly construed notion of legal discourse as "legal narrative"—to consider how the theoretical and critical approaches to legal narrativity can be integrated into a model amenable to an analysis of the details of Hopi courtroom interaction. From such a model, we can perceive the shape and contour of Hopi law as an enduring institution in Hopi social life. I begin by considering the current state of legal narrative scholarship, including a discussion of the wide and seemingly contradictory diversity of its analytic commitments. Then I examine how we can join more recent linguistic anthropological models of narrative interaction (Ochs 2003; Ochs and Capps 2001; Ochs, Smith, and Taylor 1996) with these understandings of legal narrativity to illuminate the everyday constitution of Hopi law as an enduring structure of Hopi social action.

Legal Narrativity in and out of Court

As the epigraph reveals, the title of this chapter comes from the opening lines of Aescheylus's *Agamemnon*, the first work in his *Orestia* trilogy, a canonical text in law, literature, and narrative scholarship (White 1985). In these lines the chorus foreshadows the narrative arc that structures the tragedy. The "suffering" alludes both to the cycle of blood revenge that will flow from father to daughter, mother, and son in the House of Atreus, and to the thoroughly ambiguous morality that surrounds them. What makes this a tragedy is that each killing could be equally characterized as both justified and repugnant within Greek society. Clytemnestra's murder of Agamemnon is justifiable revenge for the murder of their daughter, but it is also spousal homicide. Orestes is justified in revenging Agamemnon's murder, yet he commits matricide. What is thus being dramatized is, according to James Boyd White, "an utterly impossible world without law, in which no one can maintain a story of his or her life. . . . [E]very version is partial" (190). The cycle is only interrupted by Athena, who, in creating the court of the Areopagus—that is, in creating law—forges an institution "where the different versions [of the disputed events] can be placed in open comparison and competition, where the contraries can be comprehended within a larger whole." And it is

upon the conversion of suffering *into* truth, through this telling and enactment of a "public story" (190) that the destructive spiral of partial stories is halted, justice is done, and order (re)constituted in the community.

White's essay on the *Oresteia* as both a story about the law and law's story is now considered seminal to a body of scholarship on law, literature, and legal narrative that has exploded to claim a substantial following (see, e.g., White 1985; Scheppele 1989; Delgado 1989; Cover 1992; West 1993; Ewick and Silbey 1995, 1998; Brooks and Gerwitz 1996; Baron and Epstein 1997; Baron 1999, 1994; Amsterdam and Bruner 2000). Studies of the narrativity of law focus on virtually every degree of analytic scope: from general structural analyses of law as a semiotic and coercive system (White 1985; Cover 1992) to the deconstruction of written legal opinions and other legal texts (White 1990; Levinson 1982; Amsterdam and Bruner 2000), to detailed investigations of moments of courtroom argumentation and discourse (Merry 1990; Conley and O'Barr 1990, 1998). They even appear as the genre of "outsider" scholarship itself—as stories written by legal scholars attempting to "unsettle" and "disrupt" the ratiocination, rule-centered "objectivity," and truth claims that they argue naturalize law's force and authority (Bell 1987; Delgado 1989; White 1990; Williams 1991).

At first glance, then, to investigate the relationship between narrative and the law would appear to lead one into well-traveled territory. Even a partial review of this literature would take (and has taken) volumes (see, e.g., Scheppele 1989; Brooks and Gerwitz 1996; Papke 1991). Some scholars have raised concerns about the explanatory efficacy of narrative for law and its different aspects. Attacks on legal narrative scholarship have emerged from seemingly contradictory fronts. Critics have suggested that certain applications of the notion that stories matter in law do little more than dress up the knowledge that any lawyer can already demonstrate in closing arguments before a jury (Weisberg 1996). Others argue that at least some of this work is so far afield from the actual structure, practice, and effects of law—especially its life-and-death consequences—as to miss what is really most meaningful about it (Weisberg 1996; Farber and Sherry 1993, but see Delgado 1993b). Thus at least one leading proponent in the field has admitted that "the place and status of narrative in the law and legal studies strikes me as uncertain and ambiguous" (Brooks 2003:71).

A closer inspection of some of the key texts from this body of literature reveals that while each has contributed to understanding the narrativity

of a particular aspect of law, gaps remain in conceptualizing how the legal narratives they analyze relate to the story structures and practices described by colleagues who are studying other areas of the legal field. How does law, conceptualized abstractly in statements such as Robert Cover's that "the very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative" (Cover 1992a [1983]:102; see also Cover 1992b [1985]) relate to the concrete details that appear in the storytelling practices of lawyers as they interrogate witnesses at trial (Bennett and Feldman 1981), or in the written opinions of judges (Amsterdam and Bruner 2000; Papke 1981)? And how do any of these types of narrative relate to the "relational" or "outsider" stories of lay parties seeking legal solutions to problems in their everyday lives and/or demanding a certain measure of social justice (Bell 1987; Delgado 1989, 1993a and b; Merry 1990; Conley and O'Barr 1990)?

Certain important questions and internal inconsistencies remain fundamentally unpursued. Is it really the case, as White claims, that the story of the law is the production of a narrative "larger whole" in which the more partial stories of the disputants can finally be told authoritatively? Or are oppositionalists correct in pointing out that, for all its claims to "wholeness," the law is just one more partial story among so many others, and thus the powerful force of law's authoritative narratives ought to be challenged by the stories it excludes? Or are both right? Finally, in any of these characterizations, how are the narrative domains and dimensions of law constructed by social actors engaged in the activities that constitute law's structure, practice, and macrosociological force?

In clarifying the role that narrative plays in shaping both the details and the larger structures of Hopi legality, the analysis provided in this chapter is an effort to answer these questions by locating some common ground on which to extend what studies of legal narrativity have already accomplished. Suggested below is a model for inquiry into the narrative practices of both Hopi and other courtroom interaction that situate it as a key nexus where legal and non-legal social actors engage each other in the co-narration of stories of life experience and the legal order. Within the ritualized, sequential actions of the Hopi hearing—from opening arguments to the presentation of evidence and the final decision—multiple narratives of disputed life events and stories of law and its power are initiated, negotiated, contested, and eventually fused in a moment of Hopi legal narrative coherence. These narratives, like

Athena's intervention in the *Orestia,* transform the meaning of the participants' life experiences *and* the meaning of the law, both of which come together in the production of a "public story" of Hopi tradition, tribal legal action, and their articulation within everyday Hopi life. As such, this story of Hopi law makes a powerful claim on Hopi people—not only on the parties to the original dispute, but also on others who will be bound by the legal precedent created in and through this official statement of Hopi law.

The model I present builds upon insights suggested by Bernard Jackson in *Narrative Models of Legal Proof*, who writes, "Clearly, we have a plurality of narrative discourses at work in the trial. . . . [I]s the trial itself to be viewed as a semiotic system, distinct from the sum total of the narrative syntagms which make it up? In principle, I would want to answer this question in the affirmative" (Jackson 1991:166).

For the model developed in this chapter of the Hopi legal trial as a narrative activity, I draw on recent analyses by discourse-oriented anthropologists of the operation of narratives in interaction that focus on the emergent, intersubjective achievement of such stories and the role they play as problem-solving and sense-making activities (Ochs and Capps 2001; Ochs, Smith, and Taylor 1996; Mattingly 1998).

More specifically, I argue that this activity, as it occurs in the context of Hopi court interactions, involves two distinct yet mutually constitutive orders of narrativity. I contend that it is not merely *within* the Hopi hearing that stories emerge, but that the hearing is itself part of a larger, macrosociological narrative sequence that instantiates Hopi tribal law as a (re)ordering force of authority and power in Hopi social life. And significantly, it is the recursive link between these two narrative orders that perpetuates a naturalizing dialectic of authority and legitimacy, where the microinteractional details of courtroom discourse and the macrosociological legal narratives mutually instantiate and legitimize each other.

I suggest that the narrative coherence of Hopi tribal law is at first afforded because of a discursive transformation that takes place in the opening moments of each courtroom hearing by which Hopi judges generate legal narrative settings that background the significance of injury—what we might call, à la Aeschylus, the problem of their suffering—and foreground problems of social dispute and conflict. Once this transformation is enacted, it makes interactionally relevant the fact-finding, truth-making practices that are hallmarks of the Anglo-style procedures

of Hopi hearings and the legal decisions that seem so necessarily to flow from them, thereby turning "suffering into truth."

But the hegemonic authority of Anglo-style procedures is not so thoroughly entrenched in Hopi courtrooms that the pursuit of adversarial truth and justice by Hopi judges goes unchallenged by other Hopis. In some Hopi court hearings, particularly those adjudicating intravillage property disputes, the parties strive to negotiate a balance between the adversarial processes of the Tribal Court and the demands of Hopi tribal custom and tradition as articulated by jurists and litigants alike. The aim of my analysis here is to show how Hopi courtroom proceedings, and contemporary Hopi law generally may be understood as conarrative processes constituted through negotiations between an Anglo-style narrative coherence that converts "suffering into truth" and the juridical accommodation of Hopis' desire for a tradition-based legal rationale that works "outside" the Anglo-style truth-making of the court.

A Model of Hopi Law as Narrative Interaction

Linguistic anthropologist Elinor Ochs and her colleagues have developed a model of narrative that is particularly valuable in considering the narrative character of Hopi courtroom hearings. It synthesizes a sociolinguistic concern with the interactional production of stories in actual narrative performances with a focus on narrative as a genre suited to resolving people's problematic and troubling life experiences (Ochs and Capps 2001; Ochs, Smith, and Taylor 1996). "We believe," write Ochs, Smith and Taylor, "that the activity of co-narration stimulates problem solving, while the activity of problem solving stimulates co-narration" (1996:98). Problems are solved via narrative insofar as the genre operates as a critical sense-making endeavor, turning unexpected life experiences into plotted events, sequenced between a prior "setting" of circumstances that foreshadow the events and the subsequent effects of those events (fig. 10)—"responses, actions, and consequences (whether realized or not)" (Ochs and Capps 2001).

But at the heart of narrative sense-making is a tension between telling a story of an event in a way that makes it a coherent whole and telling it in

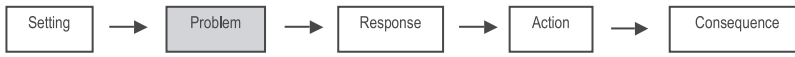


Figure 10. The narrative sequence: a problem-solving genre.

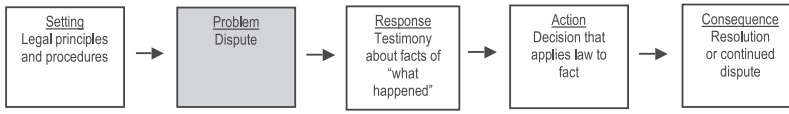


Figure 11. The Hopi hearing as narrative interaction.

a way that authentically represents the indeterminacy of the meaning of the event as it was originally experienced (Ochs and Capps 2001). Like Athena's intervention in the cycle of revenge killing in the *Orestia*, weaving an explanatory story line into the experience of a troubling event can make it part of a "public story"—a "comforting schema"—that not only makes the event meaningful but also clarifies the possible consequences of and responses to the problems that arise from the event. But doing so can also oversimplify (and thus render inauthentic) the complex and contradictory qualities that often make experiences problematic in the first place. To what extent does the legal resolution at the end of the *Orestia* fall flat because it chooses one version of the "truth" of these killings over another? This is the narrative "violence" that Robert Cover's analyses identify as operating whenever the law imposes its normative ordering on what is always a much more complex, indeterminate human affair. On the other hand, narratives that retain so much of the open-ended character of actual experience lose much of their sense-making force, providing no clear solution to the problems that arise from highly conflictual life events.

All narrative activities gain their shape and force as meaning-making practices precisely by striking a balance between these competing drives for coherence and authenticity. Hence the chorus in *Agamemnon* foreshadows, with a luminous oxymoron, the intervention of Athena's law in the misery of House of Atreus—whatever divine resolution it brings—as a "violent love" for the humans whose lives it orders.

Thus we can anticipate the value of this notion of narrative sense-making to understanding the structure of adversarial hearings. Narrative as a problem-solving activity whose story lines strike a balance between coherent order and authentic representation in order to render life experiences meaningful resonates with the overarching goal of the Anglo-style activity of the Hopi court (see fig. 11).

Thus, by bringing a dispute to Hopi Tribal Court, Hopi litigants can anticipate engaging each other in an institutional interaction in which the story of their dispute—the "Problem" in figure 11—will be told against a

"Setting" of adversarial legal principles and procedures. The "Response" to their conflicting opening statements will be the testimony of witnesses regarding the facts in dispute, after which the court will take "Action," deciding how to apply the law to those facts. The "Consequence," ideally, is an official settlement of the dispute. Of course, continued disputation can and does occur: parties may appeal the decision or refuse to comply with what the court orders. Either way, we can see that such a hearing orients Hopi legal actors to arguing over what constitutes the authentic representation of the disputed event and of the tribal legal order that governs this event so that the final decision resolves the problem by rendering fact and law into a single, coherent narrative whole.

The unique insights afforded by applying Ochs and Capps's narrative model to Hopi legal action are enhanced by their sustained attention to narratives as they emerge in the problem-solving activities of everyday conversation. They explain that in the context of interaction among people familiar with each other, "[n]arrative activity becomes a tool for collaboratively reflecting upon specific situations and their place in the general scheme of life. In assays of this sort, the content and direction that narrative framings take are contingent upon the narrative input of other interlocutors who provide, elicit, criticize, refute, and draw inferences from facets of the unfolding accounts" (2001:2–3).

Such an approach to Hopi legal action can thus foreground the extent to which the various forms of legal narrative heretofore studied as isolable, fully realized, and coherent stories emerge as something quite different in face-to-face legal interactions. In courtroom hearings, stories of fact and of law, and even stories that "oppose" such notions, are produced by legal interlocutors. Each story is partial, contested, and ultimately negotiated in and through the constitution of the courtroom proceeding and its product: a "public" story that offers a momentarily coherent (but ultimately unstable) statement of the law and its demands on everyday Hopi life.

The Significance of Settings: Judicial Openings of Hopi Courtroom Narratives

Analyses of narrative interaction have shown that those utterances that function as settings for the rest of the story are crucial in constituting the type of problem that will shape the co-narrative sequence. Within narratives, the co-construction of settings exerts a significant interpre-

tive influence. As Capps and Ochs explain, it is "through components of the story that *precede* the event . . . [that] a teller can *precast* the event as a problem" (1995:43; emphasis in original). As they develop the story setting, narrators choose among the physical, social, and psychological circumstances "portrayed as anticipating or causing a problematic event" (44), and in so doing represent that event as necessarily flowing from such circumstances and necessitating certain responses, actions, and consequences.

Among the provisions in Hopi Ordinance 21 that govern Hopi courtroom procedure are explicit instructions concerning how Hopi judges and their agents are to create a setting for a courtroom hearing at its opening. These provisions, likely by virtue of their promulgation in response to habeas corpus litigation under the Indian Civil Rights Act (ICRA) in federal court (see chapter 2), address only criminal arraignment and trial procedures. Nonetheless, and perhaps because the same Hopi judges sit on both criminal and civil case hearings, these tenets have been extrapolated by judges and litigants to apply to tribal civil proceedings, including property disputes.

The rules of Ordinance 21, Title II, Chapter 6, provide that arraignments shall, initially, consist of "reading the complaint to the accused" and "stating to him the substance of the charges and the language of the law establishing the offense and fixing the penalty," while Title II, Chapter 10 establishes that trials "must proceed in the following order," starting with the clerk of the court who "must read the complaint, and the plea of the defendant" (Hopi Ordinance 21, 2.6.2; 2.10.1). As such, the openings of courtroom proceedings, at least according to the rules, reveal a rather strict regimentation, affording speaking rights only to Hopi judges or their clerks, and strictly delineating what kinds of information can be told there, namely, the complaint, the law it invokes, and the responses of the defendants.

Examining the openings of Hopi property proceedings reveals that they adhere closely to these rules. With advocates, litigants, and audience members already seated in the courtroom, the court clerk and/or bailiff enter and announce the entry of the judge by requesting those in the court to rise. After the presiding judge has taken his seat and requested everyone else to sit, he proceeds to describe, as one Hopi judge regularly formulates it, "why we're here." Consider the following statements made by four different Hopi judges, which exemplify the opening moments of most Hopi hearings I have observed.

: : :

Judicial Openings of Hopi Property Hearings

1. Hearing on March 22, 1995

001 JL: Good afternoon, ladies and gentlemen,
002 we have a case
003 that's before the court,
004 in the matter of
005 Jane Judd, Dalia Arnowna, and Leslie Quwamativa,
006 versus Rachel Stone
007 on the—what appears to be
008 a petition for a quiet title.
009 Ahm concerning a—a piece of land
010 in the village of——

2. Hearing on March 20, 1996

001 JT: Please be seated.
002 (0.5 sec pause)
003 This is (?) in the matter of——Village versus Jehovah's Witnesses and=
004 Randy Spadel.
005 Ahm—ahm—ah—the plaintiff's motion
006 for ah injunction ah in this matter.

3. Hearing of July 1, 1996

001 JL: Thank you,
002 the court is in session.
003 We have ahm case number—case number (.) 96CV154 and 96CV155.
004 We have a petition
005 that was filed by Shelly Talas
006 against Leslie Fred and ahm—Ber—Bernadette Mawtana?

4. Hearing on August 10, 1998

001 JG: (Court is) in session.
002 This is in the matter of 98CV009114,
003 a date and time for hearing
004 on a complaint filed by Verlie Hanama . . .

: : :

In these initial statements we see a recurrent, three-part structure whose second and third parts adhere closely to the rules established in Ordinance 21 and reveal the narrative setting within which Hopi hearing interactions are regularly situated. We can characterize the three

parts of the structure as follows: (1) opening, (2) naming, and (3) historicizing. Each instance of talk above begins with some opening speech act, involving either acknowledgment of the people standing in the courtroom ("Thank you"; "Good afternoon"; "Please be seated") or a performative statement ("Court is in session"), or some combination of the two (see example 3, lines 01–02).

Just after the opening, each judge produces what I have called a naming phrase that combines a present-tense demonstrative (e.g., "This is") or first-person plural possessive ("We have") with the official case name and/or number. This is followed by the third part, historicizing, which refers to the act of filing the petition, motion, or complaint with the court—that is, the history of acts of the plaintiff used to initiate the hearing.

In the naming and historicizing parts, we can see the court's hearing process being identified as part of both a broader legal text-object—the "case"—and also cast in a narrative sequence that starts with the plaintiff's complaint to the court. I contend that in these preliminary acts, each Hopi judge is already working to construct a narrative setting, one that "precasts" certain pre-hearing actions as those from which the subsequent institutional responses (the hearing discourses of argumentation and witness examination) and actions (the final decision) will be understood as flowing.

Moreover, these openings create a setting that foreshadows certain constraints on how subsequent interactions will proceed and be made relevant and meaningful. This becomes clear as these preliminary statements continue, producing a more elaborate formulation of the sequence of complaint and counter-complaint filed by the opposing parties. Consider the talk in example 5 below, which follows directly after what emerged in example 1 above:

: : :

5. Hearing on March 22, 1995

008	JL:	(1.5 sec pause)
009		Ah the parties are represented by attorneys
010		ah the petitioners are represented by the ahm (.) Hopi legal services,
011		Seth A. Arland, attorney.
012		And the respondents are represented by ahm (.) Wanda Wardlow, attorney also.
013		Ah s—there was a petition filed quite some time ago

(following) a request for a preliminary injunction.
The ah (.) preliminary injunction request
filed by the pet—petitioner (.)
ahm (.) was not followed through with,
because, some point after the petition for injunction was filed,
the respondents ah (.) or rather
the petitioner's request (?) did not issue.
So it wasn't issued.
Ah (.) then the ah petitioner filed an amended petition,
to which the ahm (.) respondents responded.
And then thereafter the petitioners responded
to (.) ahm (.) the ahm (.) answer from—from the respondents.
And I do think that's where we're at at the present time.

: : :

In this part of the judge's opening statement, and just after the announcement of the representatives for each party (lines 08–12), the judge relates a more elaborate version of various communicative acts that he suggests lead to "where we're at at the present time" (line 26). Thus in lines 13–14, he describes a petition filed "quite some time ago" along with a request for preliminary injunction, its failure to issue (lines 15–21), the filing of an amended petition (line 22), which led to a counterfiling from respondents (line 23), and the subsequent response from the petitioners to that "answer" (line 25). With these statements, which in the metadiscursive categories of Anglo-American law generally constitute the "procedural history" of a case, the judge has now entirely constructed the setting of this hearing as proceeding from the legal dialogue generated by the two parties. And because the back-and-forth being related here is mediated through the textual practices of the adversarial Hopi court, the implication is that this is a discourse of legal disputation and conflict (Amsterdam and Bruner 2000).

But consider what is not being articulated here. In each of these examples, little mention is made of the actual substance of the party's petition. There is no discussion of any of the plaintiff's injuries, which is likely the trouble that originally motivated the parties to pursue legal action. Though in two of the examples the judge does mention some aspects of each petition—a quiet title action in one and an injunction in the other—even these must be primarily understood as part of the

institutional concerns of the court rather than the personal concerns and troubles of the plaintiff. The discourse entirely foregrounds the actions requested of the court and not the personal troubles that are the original source of the parties' "suffering."

Thus in his opening statement the judge works to construct the hearing-in-progress as situated in a narrative sequence that casts it as the law's institutional response to a problematic event involving the two parties. As revealed here, the problematic event being constituted by the judge through this talk is not what either of the parties are complaining of—not the problem of their injuries and accusations—rather, it is, in a sense, the social "problem" of complaining itself. That is, by these opening statements, the judges establish the event of dispute and the social conflict it engenders as the narrative engine driving the institutional interactions being played out as the Hopi hearing. Within this setting, all the subsequent courtroom arguments, testimony, and decision-making are thus constituted as the law's response and action to resolve the problem of complaint. Insofar as these Hopi courtroom discourses are framed in their entirety as flowing from these opening judicial statements—statements that are broadly construable as settings for the institutional narrative of Hopi court proceedings—we can see them as crucial elements in the transformation of the individual stories of personal suffering into a co-narrative of social conflict, one that will be produced in and through the courtroom interactions. Most significantly, as I explore in more detail below, this transformation is an intermediate step in the creation of a "public story" of Hopi law—one that completes the transformation of "partial" tales of individual "suffering" *into* narratives of sociolegal "truth," insofar as Hopi legal actors orient to social conflicts as problems that can be responded to and acted upon by the truth-making interactions of Hopi legal proceedings.

Thus Hopi property proceedings appear to be regularly initiated by these rather regimented discourses by judges who alone have the authority to announce the hearing settings, and which remain embedded deep within rule-sanctioned court processes. As such, they precast a regularly patterned story line to follow in the remainder of the courtroom interaction—one that is largely to involve the fact-finding and truth-making practices regularly associated with Anglo-style legal practice.

However, as previous chapters have shown, detailed discursive analysis of the entirety of Hopi property proceedings reveals that over their

course, considerable ideological, metadiscursive, and metapragmatic contestation and paradox pull the story of Hopi courtroom interaction away from idealized Anglo-style adversarial practice. This is especially evident as courtroom interlocutors argue over the proper ways to introduce notions of Hopi custom and tradition and the reasons for doing so into the proceedings. Thus we may argue that raising issues of tradition in Hopi court introduces competing narrative plotlines that Delgado (1986) and Conley and O'Barr (1990) might describe as "outside" or "relational" considerations that engage the Anglo-style norms and procedures of Hopi law in complex and contradictory ways. Significantly, Hopi judges respond by accommodating such "competing" plotlines of Hopi tradition, though, as we saw in the last chapter, not always in ways that result in positive outcomes for their proponents.

Largely through such negotiations of the settings of the narrative sequences collaboratively told in Hopi property proceedings, Hopi courtroom interactions and the "public story" of Hopi law and life to which they ultimately contribute involve a unique and fundamental integration of notions and norms of Anglo-style law and notions of Hopi tradition and cultural difference. For evidence of this, we turn again to interactions that emerge in Hopi property proceedings that came before the court, this time in August 2000.

The Contested Narrativity of a Hopi Property Proceeding

In this case a Hopi woman I will call Jean and her daughter Ann filed objections to the efforts of Jean's adopted brother Dan, who had moved the court to appoint him administrator of their mother's estate. In support of this motion, Dan's advocate produced a document that named Dan as administrator of the estate, which he and Dan claimed was the valid will of the mother, Mrs. Karl. By other terms in the same document, Dan was to inherit a home currently occupied by Jean and her daughter and to give Jean a different home, located in another Hopi village. These latter terms, by which she would suffer the loss of her home to Dan, are the basis of Jean's most strident complaint. Moreover, as we shall see, Jean argues that her complaint is strongly supported by Hopi traditions of kinship which, as discussed earlier, mandate that only women can inherit homes—particularly those, like hers, that have considerable ceremonial responsibilities attached to them.

Much like the other Hopi hearing openings discussed above, this one is initiated by the judge in a manner that narratively casts it as a response to a past problem of dispute.

: : :

Example 1

Opening of the Hearing of August, 2000

009		(1.5 sec pause)
010	JUDGE:	**Normally**
011		the court would not hold a hearing,
012		(.)
013		on the appointment of the administrator,
014		however,
015		there was an **objections**
016		**to the appointment**
017		**therefore** we ha—I (.) called this hearing.
018		This is *just* on the appointment (.)
019		of the administrator
020		and nothing more.

: : :

Specifically, at lines 15–17, the judge frames the ongoing hearing as a response flowing from the problematic event of the "objections to the appointment" of the administrator, implying, in light of the courtroom context and the use of the consequence adverb "therefore" (line 17) that the hearing will be an attempt to address this problem.

But notice at lines 010–013 how the hearing itself is cast as an activity that the court "normally" would not do in such cases of appointment. The judge makes explicit here the recursive relationship between the hearing and macrosociological narratives of Hopi law that I argue are implicit in all the opening statements of Hopi property hearings analyzed above. In this moment the judge projects how the hearing itself will be the site of the very problem that also motivates it. Thus, in this recursive sense, the hearing necessitates that Hopi law generate a response and take action that will have consequences for that dispute while *also being* that response, action and consequence.

In their studies, Ochs and Capps explain that such recursiveness regularly occurs in everyday narrative interaction. They describe a "process

of recursion, in which . . . [a response] itself becomes a problematic event, which then gives rise to further non-goal based responses or goal-based attempts and so on" (2001:173). In the setting constructed here, the problematic quality of the hearing is not so much the hearing itself as the discourses of complaint and counter-complaint that will be spoken there. That is, I contend, by defining this setting, the judge is simultaneously casting the hearing as an institutional response for resolving the problematic dispute—part of a larger macrosociological narrative of social conflict and social (re)ordering through law. At the same time, the hearing is a discursive activity that itself will rely on narrative interaction to (re)tell the details of those "motions" and "objections" that the judge now sets as first motivating the calling of the hearing.

As such, this hearing is the response of Hopi law (as social institution) to the problem of dispute as it operates within the larger emergent narrative of Hopi law's role in Hopi social life. On the other hand, it is a narratively constituted activity in its own right. And the result is a furthering of Hopi law through narrative: the interactional fact-finding of the hearing produces a "truth" regarding the parties' "suffering" and thereby returns coherence to a Hopi social order that had been rent asunder by conflict over injury and accusation. Thus the action and consequence produced as the next relevant steps in the narrative interaction of the hearing—that is, ideally, the judge's application of law to the facts in the decision and the consequences of resolution that come from it—can also come to stand as actions and consequences for the macro-narrative of law and its role in (re)ordering Hopi social relations.

To do this, however, requires other interactional moves that we can also observe in the judge's preliminary talk and later in the introduction of the evidentiary stage of the hearing. For in the conversion of the trouble of personal injury (that is, "suffering") into a legal problem of social conflict that can be handled by the truth-making and law-applying activity of the Tribal Court (that is, one that can be turned "into truth"), the Hopi judge must also frame a setting for the talk within the hearing itself that proposes significant constraints and affordances on what kinds of objections can be narrated at the hearing, by whom they can be told, and how. Consider the next utterances, part of the same introduction as the talk in example 1, and following seconds after.

: : :

Example 2

(2) "Setting" the Anglo-style law of the hearing narrative

029 JUDGE: Because the Hopi Tribal Court
030 does not have a pr—*pro*bate procedure
031 **we are following** the uniform (.3 sec pause) probate procedure
032 of federal rules of ah probate,
033 ah [we're using them
034 ADVOC: [C.F.R.? [25 C.F.R. 11 [.7?
035 JUDGE: [Mm hm. [Right.

: : :

Using at lines 31-32 the present progressive "are following" plus the pronoun "we" combined with reference to the federal rules of probate, the judge and Dan's advocate metapragmatically collaborate in framing the discourses to emerge within this hearing as set within an interactional context that will "follow" a particular legal schema, namely those laws codified at 25 *Code of Federal Regulations* 11.7.

The constraints and affordances foreshadowed by this legal setting are more fully disclosed later in the hearing in a manner consistent with Anglo-American principles of probate law, which mandate the consideration of two factual questions presented with a challenge to a will, namely "did the decedent intend to make a will, and if so, what are its terms?" (Langbein 1975:495). Thus the judge, in opening the evidentiary stage of the hearing, explains as follows.

: : :

Example 3

Elaborating the setting of Anglo law and its constraints on hearing narrativity

001 JUDGE: **Right now**,
002 the will under—ah on its face
003 is a **valid** will
004 unless if you **can show**
005 (.)
006 **that** (.) at the *t*ime this will was written
007 on April 15th, 1999,
008 you—**Miss K.** was mentally incapa—

009 ah could not (.) understand
010 **what the contents of the will was**,
011 ahhm that she **could not fully** (.) **comprehend**
013 or that she (.) was not fully (.) aware
014 of what was happening.
015 Those are **the only circumstances**
016 that a wil—a will can be (.) set aside
017 and ahm (.7) ahm(1.0) and a—a—the—the—estate can be distributed
018 according to (.) the wishes of the family members.
: : :

In this stretch of talk, the judge proposes that "following" federal probate rules (in example 2) now mandates treating the will "right now" (line 001), in the hearing interaction, as presumptively "valid" (line 003) and thereby proposes a setting that constrains any subsequent objections to be narrated in ways that afford them legal relevance only insofar as they "can show . . . that Miss K. could not fully comprehend" "what the contents of the will was" (lines 004–010).

That this setting not only affords these objection stories but also limits the relevance of other kinds of information is then made explicit in lines 015–019 when the judge explains that these are "the only circumstances" that will move the court to set aside the will and distribute the estate differently.

These moves reveal the character of fact-finding and hence truth-making at the hearing as part of a larger narrative interaction that precast an impending application of the law in the near future. The "truth" told by the judge is thus of a particular kind, specifically tailored in anticipation of a future in which legal doctrine and principle can be brought to bear on it. When juxtaposed to the language ideologies of Anglo-style legal practices, by which the only information admissible in court is that which is relevant under the legal principles being applied (Philips 1992), the full relation reveals itself. The truth constructed through the hearing makes relevant an application of the law, because the law is explicitly cast as making relevant only certain kinds of truth. As Mertz and Weissbourd write, "[L]egal types never have 'automatic' tokens . . . there is no automatic connection between a particular event and its characterization as a cultural-legal type. Rather, the similarity between the two must be culturally created or imputed in a process of judgments." It is by virtue of this process—primarily through co-narrative

shaping—that the truth of a particular case can "take on (symbolic)cultural-legal significance" (1985:279) that is afforded through the hearing process.

However, when the rights to tell the hearing narrative are opened up, and Jean is given an opportunity to press her claims, the seemingly coherent, linear hearing narrative becomes more complex. This occurs when Jean proposes a new setting that precasts the dispute against a backdrop not of the Anglo-style rules and procedures of the court but instead of Hopi custom and tradition.

Her proposal of this competing setting starts with a subtle metapragmatic shift that occurs in her cross-examination of Dan, after he has taken the witness stand and testified to the soundness of Mrs. K's mind when preparing the purported will. The following interaction emerges.

: : :

Example 4

Jean's "cross-examination" of Dan

001	JEAN:	But she is not in her right *MI*ND.
002		How do you KNOW
003		she's in her right mind?
004	DAN:	Because I *know* the lady.
005	JEAN:	*You* KNOW it don't—you don't know the lady.
006		You say you do,
007		but you don't.
008	?M:	[clears throat]
009		(2.3 sec pause)
010	DAN:	I think I *know* her
011		just as well as anybody
012		that there is
013		that [go around her.
014	JEAN:	[No.
015		(.5 sec pause)
016	DAN:	I have that.
017		(.3 sec pause)
018		And you know
019		(.5 sec pause)
020		*that* I believe I know her.
021	JEAN:	No, I don't think so.
022	DAN:	(No well).

: : :

Though Jean starts by directly challenging Dan's claims, working within the proposed normative schema of attempting to establish Mrs. K's mental state, it is immediately clear that she does not employ the metapragmatics of the witness examination interactional format well described by analysts of Anglo-style adversarial legal proceedings (Matoesian 2001; Conley and O'Barr 1998; Drew 1992). That format, which centers on efforts by examiners to maximize their control over the interactional topic, is described by analysts as a regular pattern of cross-examination with a variety of interrogative moves, including proposition + tag question forms, repetition, nonuptake, and others (Conley and O'Barr 1998).

Virtually none of these are present in Jean's discourse here. Thus when she poses a question at line 002–003, it is one that makes relevant an elaborated response from Dan at line 004. Absent are the proposition + tag question structures used by trained advocates (see, e.g., Conley and O'Barr 1998), as Jean displays little control over the topic of talk. Moreover, she regularly produces direct responses to Dan's answers, such as at lines 005–007, 014, and 022, that, while challenging him, nonetheless allow him considerably more influence over the direction the talk takes. Indeed, as the question at lines 002–003 is the only one in the entire series, what emerges is in fact more like the discourses of direct conflict talk than a witness examination of the type expected in an Anglo-style adversarial proceeding.

Seconds later, Jean makes an assertion that, in both content and format, proposes a radically different setting within which to situate the narrative of her complaints, one that had not yet been afforded in this hearing. After a pause in the interaction, Jean interrupts Dan, introducing a dramatic shift in topic.

: : :

Example 5

Jean constructs a new setting for her injuries

045		(2.7 sec pause)
046	DAN:	[And I—
047	JEAN:	[**I thought** *I* was supposed
048		to be **the daughter**.
049		**I thought** they adopted me.
050		How come I'm **not getting anything**
051		and *YOU'RE* **getting every[thing=**

052 DAN: [No. If you—
053 JEAN: =and they haven't even adopted you?
054 DAN: No.
055 The thing about it is,
056 they—she did give you the **house up top**.
057 You and the girls.
058 JEAN: **But I want more than that.**
059 Because I'm the one
060 **that's taking care of everything *at* the village**.
061 You are *not* gonna take my house from me.
062 JUDGE: 'Kay.
063 Ahm Jean?

: : :

Though ostensibly still within the discursive space of the witness cross-examination, Jean's turn at lines 47–51 is initiated with questions, more rhetorical than interrogative, concerning her relations to the decedent. She thus metapragmatically initiates an entirely new plotline. Note her use in line 48 of the demonstrative "the," saying "*the* daughter" (rather than "her daughter"), a move that casts a setting for the problem of the will against her relationship to her mother, particularly as that relationship is to be understood in light of a general category of kin ties that persist in Hopi society. Note also her repeated use of the phrase "I thought," loading these utterances with irony and sarcasm. These usages index a set of shared traditional norms that Hopi interlocutors understand as inhering in these social relationships, which Jean implies are now being violated.

In this interactional moment, discursively isolated from the cross-examination stage of the hearing, Jean announces a different and even "oppositional" setting for the courtroom interaction, thereby proposing a wholly new narrative frame within which to make her complaints meaningful. This new narrative precasts the telling of a story of dispute that operates "outside" the "rule-oriented" narrative sequence initiated at the outset of the hearing. That is, the setting she offers precasts her injuries and suffering as not primarily informed by Anglo legal norms of whether the will is or is not valid but by the question of whether the distribution of homes it proposes is consistent with Hopi traditions of

matrilineal inheritance: "relationship-oriented" norms by which only Hopi women can inherit homes from their mothers.

This analysis is given support in the next lines, 50–51, in which Jean makes plain her formulation of the problem—the fact that she is not "getting anything" and Dan is "getting everything." As a claim regarding the actual terms of the will, this is clearly hyperbolic, indexing her understanding of the problem as focused entirely on the potential loss of her home, not on the circumstances surrounding the writing of the will. Indeed, when Dan attempts to treat it as such, responding that by the will she *was* getting the "house up top" at lines 55–56, Jean responds, "But I want more than that" (line 58), making explicit that her narration of her complaint is unrelated to the factual determination of the truth regarding the will's construction—the problem that has until then been the engine of the hearing interaction.

She ends with an elaboration of the new narrative setting she introduces and the recast problem it foregrounds, stating at lines 59–60 that she is the one "that's taking care of everything at the village." This move indexes yet another well-established norm of Hopi property inheritance, one we have seen at play in chapter 3, that it is women who fulfill the village ceremonial responsibilities associated with these clan homes and thus who can most expect to inherit them from their mothers.

Notably, it is precisely at this same moment (line 58) that she also drops the question format with which her immediately preceding turns had been produced, giving up the metapragmatics that signaled this interaction as still a question-answer witness examination. Thus, in her efforts to tell the story of her injury, her talk proceeds in ways that separate her storytelling from the Anglo-American legal discourses employed by the participants until then and force her interlocutors to renegotiate not just the content of the narrative interaction of the hearing, but also the distribution of rights to tell it. Indeed, subsequent efforts by the judge to reassert these constraints of content and form show Jean attempting to reorder the narrative interactions between them as well. Just after Jean's last assertion, the judge interjects as follows.

: : :

Example 6

Jean constructs a new tellership format for the hearing narrative

062	JUDGE:	'Kay.
063		Ahm Jean?

064		Ah **this is just** eh ah—the—the hearing
065		on whether he SHOULD be appointed as the=
066	JEAN:	**No.**
067	JUDGE:	=person,
068		ahm because
069		Amy had written a letter objecting to the appointment
070		we're having this hearing
071		to determine whether he would be the *PROP*er person
072		[to=
073	JEAN:	[**Mm mm.**
074	JUDGE:	=distribute the property according to the will.
075	JEAN:	**No.**
076	JUDGE:	'Kay.
077		(.7 sec pause)
078		All right.

: : :

When the judge states at lines 62–64 that "this is just" a hearing on whether Dan should be the appointed administrator, her use of the minimizing adverb *just* reveals that she is not only attempting to reestablish the earlier purposes of the hearing but also working to reject Jean's last assertions and constrain any further talk along such lines. However Jean's bald negations at lines 66, 73, and 75 project her understanding of the judge's talk not as an effort to reset these constraints on what can be told at the hearing but as direct questions concerning Dan's capacity to be an administrator.

In this way, Jean's talk makes relevant a fully new interactional format for the hearing, one in which the judge is directly engaging the disputing parties in talk about the substance of their competing claims, participating in their elicitation and enunciation through her own question-and-answer sequences. This is in dramatic contrast to the typical role of a judge in Anglo-American litigation, where he or she is primarily viewed as a procedural gatekeeper—interjecting only when litigants act or claim there as been an act that violates those procedures. Interestingly enough, this new format is metapragmatically similar to the interactional format that the judge in chapter 3 took up in the case analyzed there, one that he chose precisely because he was talking to Hopi elders about issues of Hopi custom and tradition. And though the judge in this hearing appears at first to be equivocal regarding these format changes, they nonetheless

take hold, and the rest of the hearing proceeds with the judge, rather than Jean or Dan's advocate, taking the primary role of questioner. Thus, in example 7 the judge questions as follows.

: : :

Example 7

Accommodating Jean's non-adversarial format

001	JUDGE:	Unkay.
002		Ahm Jean?
003		Do you know why
004		you do not wish
005		to have Mister Talashoma be named
006		as the personal representative?

: : :

Even more significantly, especially for the parties to this hearing, this shift in format is mirrored by a shift in what becomes relevant information at the hearing. Thereafter, Jean is fully afforded the opportunity not only to make "relationship-oriented" claims based in Hopi tradition, but to "breakthrough into performance" (Hymes 1975, 1981) and this time to do so with a much greater measure of competence than that displayed by the man on the witness stand in the case analyzed in the last chapter. Free from the metapragmatic demands of Anglo-style witness testimony, Jean is able to frame her claims as part of a traditional narrative, stating as follows in Hopi.

: : :

Example 8

Framing the dispute as a narrative of Hopi tradition

001	JEAN:	Ingu	yan	wuuyoqtiqe
		My mother	in this way	become old.SUBCL
		When my mother became old		
002		kur	hakiy	awni nìiqe
		apparently	who	to so.SUBCL
		she did not know who to turn to so		
003		pu' inumi	maatavi.	
		then to me	relinquish.	
		she gave me that [the responsibility].		

004 Pu' i' Dan,
Now this Dan
Now Dan,

005 pam pay taaqa.
he now man
he (is just) a man.

006 Pam son put ang— ang— ang— hinmani.
He not that along there along there along there be carrying along.FUT
He won't be able to carry that out [the responsibility].

007 Pi qa tiimytongwu!
Truly not will witness dances HAB
He doesn't even come to the dances.

008 Pam **yaw** yep sinmuy oo'oy'ni?
He it is said at this point people will be serving
Will he (as it is said) be receiving the people?

009 Pam **yaw** yep sinmuy amungem noovalawni?
He it is said at this point people for them will prepare food
Will he (as it is said) come and prepare food for the people to eat?

010 Pangsosa sinom ökiwisngwu
To there people be approaching.
The people all come to that house.

011 I' **yaw** pantini?
This it is said will do it that way.
Can he (as it is said) do all that?

012 Qa'e!
NEG PAUS
No!

013 I' pay son pantini,
This now not will do it that way
He won't do that.

014 I' taaqa.
This man.
He's a man.

015 Pu' i' piw different clan.
Now this also different clan.
And he's a different clan.

: : :

Note particularly the repeated use of the Hopi quotative particle *yaw* ("it is said"), at lines 08, 09, and 011. This metapragmatic particle is a marker of Hopi genres of oral tradition, one that works to "traditionalize" (Bauman 1992:126) a story performance by indexing how the information being conveyed reports the talk related at some prior communicative moment (Shaul 2002; Kroskrity 1993; Wiget 1987). Taken together, the stretches of Jean's talk and interactions with Dan and the judge reveal her efforts to narrate this dispute in a manner that recasts her injuries in a setting much closer to the kinds of traditional authority that many Hopis see as a normative universe outside the scope of contemporary Hopi law, and often in conflict with it.

In this sense, we might say that what Jean is engaged in is precisely the kind of storytelling that operates to challenge Anglo-style law and its truth-making processes—the kind that oppositionalists like Delgado call for and display. In producing a narrative setting that frames the dispute problem as one that is not about the writing of the will but about the actual distribution of the home, Jean recasts her complaint of injury and violation in light of her own acts of social responsibility (lines 01–03) and how these match the normative universe of Hopi traditions regarding gender and clan relations (lines 08–15).

Such talk also constitutes precisely the kinds of relational values that Conley and O'Barr (1990) recognize as normally outside the truth-making and rule-applying processes of the law. Yet they are just the kinds of discourses of relationship and cultural identity that Hopis I spoke with, including Hopi judges, regularly invoke as fundamental to a full and proper understanding of Hopi social relations. As such, they are crucial to an authentic story of much Hopi life on the reservation.

What thus emerges in these moments of interaction is a story of law that is being produced by the participants to this hearing interaction in ways that navigate the tensions between their need to tell a coherent "public story" that can (re)order the Hopi lives affected by this dispute and their need for an authentic rendering of their stories of personal suffering within a Hopi normative universe that, at least in part, operates "outside" the Anglo-style legal procedures of Hopi jurisprudence. It is, then, a moment where narrative tension between coherence and authenticity plays itself out in the interactions of the hearing, accomplishing something of a "violent love" that brings these competing needs together in an at least temporary union.

This is most clearly evident in the fact that Jean's narrative recasting not only changes the courtroom interactional format but actually contributes to the final decision, when the judge determines that the case should be dismissed so that it can be resolved by the leaders of Jean and Dan's village.

: : :

Example 9

Rendering a decision that accommodates tradition

001	JUDGE:	I—at this time, I do believe
002		that the—the people of——Village
003		**do know these persons very well**
004		and they should be the ones
005		who will be eh—taking care of this matter.

: : :

By suggesting that the dispute should be resolved by members of the parties' village because they "do know these persons very well," the judge, I would argue, is creating meaningful space in this "public story" for precisely the kinds of personal history, responsibility, and social relations that Jean raises. What appear to be "outside" stories of Hopi tradition and cultural identity come to reside, at least for this moment, in the larger narrative coherence that constitutes law's story in Hopi society. For while Jean's talk is initially "outside" both the original narrative setting of the hearing and the distribution of speaking rights through which argumentation and witness examination are to proceed, by the end she is able to tell her plotline in a manner of her choosing.

Moreover, I would argue, where the narrative interaction of the hearing is negotiated in a way that makes room for the powerful telling of Jean's narrative, the larger narrative order of law in Hopi society instantiated by that hearing is preserved and furthered as well, now as a "public story" for which the court is "on record" to all future Hopi litigants that in the Hopi legal system both Anglo-style law and the normative orders of Hopi tradition and culture are metadiscursively brought into conversation with each other. This is true, even if, as the case is here, the ultimate determination is that the court is not the place to address concerns like those expressed by Jean. For the legitimate authority of law as a system of social (re)ordering is equally preserved in moments when

the imposition of that authority would generate a narrative coherence that would exclude too much of the authentic experience of the parties personal stories of suffering. In this case, at least, the Hopi judge was able to recognize how the juridical transformation of suffering *into* truth would result perhaps more in a suffering *under* truth for the parties. Thus, the judge preserved the legitimacy of Hopi law's "public story" by recognizing the limits of its coherence.

Conclusion

Ochs and Capps's model of narrative interaction recognizes the extent to which active engagement and narrative achievement among interlocutors work a fundamental transformation of individual experience into public stories. They write that narrative interaction involves "a central paradox: the practice of rendering personal experience in narrative form entails de-personalization. Though the experiences may be unique, they become socially forged. Idiosyncratic experiences become co-narrated according to local narrative formats, recognizable types of situations and people, and prevailing moral frameworks, which inevitably constrain representation and interpretation" (2001:55). As I have attempted to show in this chapter, when we apply this notion to the context of Hopi courtroom interaction, their model of narrative interaction reveals that the norms and rights of participation employed there—norms and rights that involve a thorough mixing of Anglo-style legal and Hopi traditional discourses—effect a particular kind of narrative transformation. Accounts of personal injury—"suffering"—are transformed and fused into a coherent, authoritative, public narrative of the parties' lived experiences—"truth"—that is informed by both Anglo-American discourses of adversarial jurisprudence and discourses of Hopi tradition.

Specifically, I have tried to show how, by virtue of the interactional structures afforded in the courtroom hearing, Hopi courtroom interlocutors work early and often in the interaction to set the competing plotlines of personal injury and accusation within two orders of legal narrativity—that of the narrative interaction of the particular courtroom hearing itself and that of the larger emergent story of Hopi law in society more generally, within which the hearing itself is cast. Both of these orders dialectically constitute the hearing as a narrative response to the problem of social conflict and dispute.

Thus Hopi judges open hearings by recounting not the prior events of personal injury of which the parties themselves complain, but the various legal complaints and countercomplaints themselves, through constructions of narrative settings, called "procedural history," in Anglo-American law that describe the various legal filings and institutional actions taken up until the time of the hearing itself. In this way, the hearing itself is precast in a setting not of injury and human suffering but of social conflict and dispute that has already been constituted through legal texts and practices. What is thereby foregrounded at the earliest stages of a hearing is a macrosociological story of law as a "grand" narrative/institution designed to respond to and act upon the problem of social conflict for the purpose of (re)ordering society.

Significantly, this is also a setting for the very kind of disputation that will, in the immediate future, be enacted in the hearing process. The effect is a *relationship of recursion* between this macrosociological order of law's story and the narrative interaction concerning the particular dispute that is the subject of the hearing.

Thus the narrative interactions undertaken in the Hopi hearing to respond to and act upon a particular dispute—the arguing of competing claims, the examination of witnesses, and the act of delivering a final decision designed, at least ideally, to resolve the dispute—are precast as instantiating the response, action and consequences that Hopi law, as a social institution writ large, brings to conflict in Hopi society generally.

In this way, personal stories of injury and accusation are recast as partial and competing plots in a larger narrative about "what happened" in the past. And in light of certain ideologies of law and objectivity that inform the Anglo-style jurisprudence (Mertz and Weissbourd 1985) of the Hopi court, the primary response to discursive conflicts over "what happened" initiates processes of fact-finding and the collaborative articulation of a "truthful" account of the past event. This truth-seeking—or making, if we are to view it from an interactional and constructivist perspective—is the central interactional activity of the courtroom hearing.

As we saw by delving further into the unfolding of one particular property proceeding, however, the interactions that constituted this Hopi probate hearing and its recursive constitution of the macro-narrative of Hopi law also included considerable moments of resistance and

contestation to the Anglo-style truth-making and law-applying processes being narratively accomplished there.

Thus we saw how the fact-finding interactions in that hearing, though initially cast within a narrative setting of Anglo-American law and principles of testamentary intent, were later confronted by one of the litigants as foreclosing her efforts to emplot stories of her injuries and complaints in narratives that index Hopi notions of property inheritance traditions and norms of social relationship and responsibility. When she pursued those plotlines anyway, she did so in a manner that not only challenged what could be told in the hearing but also the Anglo-style participation framework of witness examination that constitutes the idealized procedure of Hopi hearings.

I thus argue that it is proper to understand her narrative acts as efforts to tell precisely the kinds of oppositional stories described by scholars like Delgado and others, who contend that a full and authentic rendering of their experiences as marginalized peoples are not afforded by the truth-making done in U.S. state and federal courtroom proceedings. This Hopi litigant's personal truth as an authentic rendering of her injuries in light of Hopi traditions is thus pitted against the truths of Anglo-style legal coherence, in much the way Ochs and Capps describe as central to the production of conversational narratives generally. And in so doing, Jean's storytelling, as first introduced, stands "outside" and compels a dramatic rupturing of what can be said in the hearing up to then. As such, the story she constructs is disembedded from the Anglo-style adversarial format through which the hearing narrative, up until then, had been accomplished.

When, in the end, the Hopi judge accommodates the litigant's new narrative setting, adjusting the format of the hearing to create an interactional space where Jean's arguments about kinship, tradition, and culture can be told, we must acknowledge the possibility that her story is perhaps not so far "outside" the "public story" of contemporary Hopi law after all. As such it reveals the extent to which the transformation of *Hopi* suffering into *Hopi legal truth* at the center of contemporary Hopi jurisprudence strikes a balance between Anglo-style and Hopi norms of custom and tradition. Indeed, the "grand story" of Hopi law in society is now on record as being one in which the Anglo-style adversarial and Hopi traditional discourses can be brought together. Future Hopi legal actors can now turn to this case as precedent for demanding similar treatment when they appear before the court.

I have attempted to argue for and display both a theory and method for locating the center of Hopi legal narrativity, a shared location where the stories in law, outside law, and as law can be observed in a moment of convergence in Hopi hearings where interlocutors participate in the narrative transformation of Hopi "suffering into truth."

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Conclusion: Arguments with Tradition

This study has been a historic, ethnographic, and discourse-analytic investigation of the tribal courts of the Hopi Indian Tribal Nation. The central concern of my research has been an exploration of the ways in which notions of Hopi tradition and Anglo-American-style law emerge in and shape the constitution of the interactions by which legal actors confront each other in Hopi tribal court proceedings. My aim has been to respond to a perceived gap in the ethnographic record concerning contemporary tribal court operations. It has also been to address, via sociolegal and linguistic anthropological theories and methodologies, a fundamental issue occupying jurists and scholars working in indigenous legal contexts today, namely, how to think about an indigenous jurisprudence that strikes a balance between managing the influences of colonial oversight and addressing the demands of everyday indigenous life.

Like the courts of many other American Indian tribal nations across the United States, the historic and contemporary norms, structures, and practices of the Hopi tribal legal processes bear the considerable influence of Anglo-style adversarial jurisprudence. As described in chapter 2, the introduction of court-based

jurisprudence into Hopi society began in the 1940s when the Bureau of Indian Affairs created and oversaw the operation of the Hopi Court of Indian Offenses. Though manned by tribal members, the Hopi and Tewa chosen for those positions were sympathetic to the Bureau of Indian Affairs and its agendas. The court was completely under the BIA's immediate control, was housed at the BIA office in Keams Canyon, and used U.S. legal codes and court procedures in its operations. When the Hopi Tribal Council passed legislation in 1972 creating the contemporary Hopi Tribal Court, one of the explicit reasons for doing so was that it would return juridical authority to the Hopi Tribe itself. However, for more that thirty years this court has exhibited many parallels of structure and praxis with Anglo-American jurisprudence. Thus the built space of the Hopi Courts resembles that of any U.S. state or federal court, and the Hopi rules of criminal and civil procedure outline a system by which litigants or their attorneys file written complaints and then appear in court to argue their cases and examine witnesses before a Hopi judge or jury who render a decision that bears the binding force of tribal law.[1]

At the same time, Hopi legislators and jurists have proffered law that provides for and encourages the use of principles of Hopi custom and tradition in the resolution of disputes before the court, including provisions for the use of courtroom procedures that move away from the adversarial process mandated by the court's rules of procedure.[2] In this regard, Hopi legal actors echo jurists working in other American Indian legal contexts who have called for tribal courts across North America to develop forms of jurisprudence that emerge from local traditions and cultural practices. Failure to do so, many argue, results in the mere replication of Anglo-American laws and cultural values within tribal borders, furthering policies of assimilation and diminishing the sovereignty and cultural vitality that tribal nations struggle to preserve in the face of colonial control (see, e.g., Coffey and Tsosie 2001; Porter 1997a; Melton 1995).

As the call for a jurisprudence grounded in notions of tradition and culture grows louder in some corners of contemporary indigenous law and politics, in others, scholars and practitioners contend that a turn to tradition is not a simple or straightforward process (Cooter and Fikenstcher 1998; Pommersheim 1995a; Zion 1987) and in some instances may be detrimental to native peoples (Miller 2001; Joh 2000; Barsh 1999). For some, the problems are largely pragmatic, for while they laud the idea of a contemporary jurisprudence grounded in local cultural norms and practices, they wonder aloud about the difficulties attending such an ef-

fort, including how the orally transmitted norms of local tradition could ever meet the standards of proof informing the Anglo-style proceedings of today's tribal law (Zion 1987).[3] For others, the concern is one of authenticity, as they argue that representations of tradition in contemporary tribal jurisprudence misrepresent actual past cultural practices and/or are out of step with the contemporary values and practices that define contemporary tribal life (Miller 2001; Joh 2000). For them, the call for a tradition-based jurisprudence is motivated more by an "outward-oriented" (Miller 2001) politics of resistance to U.S. colonial domination than by any real concern to provide remedies for member's conflicts—conflicts that emerge in an everyday tribal social life that either no longer resembles or never did resemble the idealized image indexed in these notions of tradition.

Significantly, these competing views of tradition's place in contemporary indigenous jurisprudence parallel recent and often vitriolic debates in anthropology and cultural studies concerning questions of the "invention" of tradition and the politics of culture in indigenous law and sovereignty movements around the world (see, e.g., Linnekin 1983, 1991; Keesing 1989, 1991; Trask 1991; Friedman 1993; Jackson 1989; Briggs 1996; Hanson 1997; Dirlik 1999; Clifford 2001; Dombrowski 2002, 2004; Povinelli 2002).

Yet despite the centrality of these issues to the study and practice of contemporary indigenous law and politics generally, little research has attempted to explore precisely how notions of tradition are being constituted by social actors engaged in the face-to-face interactions that make up the everyday practice of indigenous legal institutions. This analysis of Hopi tribal courtroom interactions is intended to respond to these debates by investigating the positioning of Hopi notions of tradition and cultural difference through the ideological, metapragmatic, and narrative practices of litigants, lawyers, judges, and other participants in Hopi dispute-resolution discourses.

To situate the analyses in this study within a larger theoretical context, I conclude with a brief consideration of part of the voluminous literature surrounding the debates of "invented" tradition and the politics of "native culture." I then argue that my research offers an important corrective to that scholarship, suggesting how the theories and methods of linguistic anthropology as employed in this study offer ways to rethink tradition as socially constituted and politically efficacious while backgrounding questions of the "authenticity" of tradition and cultural

difference in order to deal primarily with the everyday practices by which tribal members themselves position their traditions and their culture in the negotiations that undergird their laws and how their lives are caught up in them.

Tradition, Culture, and the Politics of Authenticity

The Rise of the "Invented" Tradition

In many respects the deconstruction of tradition began in the early 1980s with efforts that took their cue from the influential collection of essays edited by the Marxist historians Eric Hobsbawm and Terence Ranger (1983) titled *Invented Traditions.* The studies in this collection aimed to expose how claims to the "traditional" character of practices and beliefs elevated to the status of state ritual or symbol (e.g., processions of English royalty or the wearing of the Scottish kilt) are often nothing more than recent practices of no real historic continuity, devised to engender a false consciousness that buoys the state, lends it stability and grandeur, and naturalizes its existence. When aimed at the ideologies of Western nation-states, theories of "invented" tradition have worked effectively to reveal the coercive practices that legitimize and authenticate the hegemonies of the state, and, as in the social sciences, to deconstruct the notion of state traditions, which also reveals the extent to which the authority to authenticate is employed to silence the voices and interests of those marginalized by state power.

The application of "invented-tradition" models in the anthropological investigation of indigenous communities, however, has sometimes had quite the opposite effect. The use of notions of invented tradition to analyze the contemporary activities of American Indian, Hawaiian, Maori, and other indigenous peoples (Clifton 1989, 1997; Jackson 1989; Linnekin 1983, 1991; Keesing 1989, 1991; Hanson 1989, 1997) has resulted in direct and difficult conflicts between such communities and scholars. And, as explained more fully below, these conflicts fundamentally turn on the question of authenticity, the authority to authenticate, and the roles that analysts and communities play, respectively, in processes of representation.

Perhaps the most blatant attacks leveled against contemporary American Indian constructions of tradition have come from the ethnohistorian James A. Clifton. In his analyses, Clifton has looked to theories of invented tradition to challenge the authenticity of contemporary cere-

monial activity and the portrayal of the American Indian represented therein. He writes that it is necessary to "recognize that the current most favored image of the Indian past and present is a human invention, one construction of a complex social and historical reality" (Clifton 1989:5). This image, claims Clifton, persists everywhere because it is currently "politically chic . . . to accept unquestioningly everything said, done, or claimed by persons defined as 'Indian' as authentic cultural things handed down from generation to generation since time immemorial" (Clifton 1997:147).

In an effort to reveal how contemporary Indian claims to tradition are often creations designed for "manipulating . . . guilt feelings for their political purposes" (Clifton 1989:25), Clifton uncovers the contemporary, often recent, sources of practices and events claimed to be traditional. Thus, he takes issue with the efforts by men he calls "avocational medicine men" to perform a Green Corn rite in a Great Lakes Algonquian community (Clifton 1997). In what sounds like an extended diatribe, Clifton challenges every aspect of the man, the performance, and the community engaged in the Green Corn rite as fundamentally invented. Revealing the medicine man leading the ritual to be a university-educated professional, Clifton asserts, "I have grave difficulty in seeing him as anything aboriginal" (148), and avers that his role as medicine man is a "sideline for him, not a time, energy, and identity (i.e., properly shamanic) vocation" (148). Additionally, he explains that he finds the use of the terms *group* and *community* problematic when referring to these people, since it is clear that they are no longer the cohesive unit that "their ancestral band communities once were" (149).

For Clifton, the theories of invented tradition do not generate a critical space in which to challenge hegemonic claims to historical veracity. Indeed, such notions seem to be used in large measure to reinforce hegemonic narratives. That is, Clifton's work implies that there exist authentic traditions that oppose the "fabrications" of tradition presented here, and he claims a privileged position to make the distinction (Clifton 1989:5). By taking an anthropological position that he claims is committed to the "rigors . . . of truth telling" (Clifton 1997:147) and not in any way subject to political interest, Clifton readily casts down judgments regarding what is and is not "truly" traditional, "truly" Algonquian, "truly" American Indian.

While it is clear that Clifton's use of invented tradition theory remains decidedly and explicitly structural and essentializing, other anthropologists

working within its frame do claim to operate from more post-structural positions. Allan F. Hanson and Jocelyn Linnekin, whose work with Maori and Native Hawaiian ethnonationalist movements sparked considerable debate in the mid 1990s, are in fact explicit in distinguishing their work from what they call the "objectivist" works of analysts like Clifton (Hanson 1989, 1997; Linnekin 1991). Defining himself and Linnekin instead as "constructionists," Hanson explains, "For us, tradition and culture are constantly in the process of renegotiation and redefinition, such that invention is a normal and inevitable part of the perpetuation and use of all culture and tradition" (Hanson 1997:196). Furthermore, Hanson explains that this perspective on tradition is fundamentally informed by the analyst's "sympathy—and . . . outrage—for the exploitation the people they study have suffered and solidarity with their efforts to achieve self-determination" (197).

It is with a rather different zeal and solidarity with a different order of power and authority that Linnekin seems to have undertaken her analyses of tradition invention in Hawaiian nationalist practices in the late 1970s. While she is quick to explain that "tradition is inevitably 'invented' " (Linnekin 1983:241), other aspects of her work seem to suggest that she argues implicitly for something else. One example is her description of the 1976 trans-Pacific voyage of a double canoe from Hawaii to Tahiti (Linnekin 1983). She explains that the trip, originally proposed to test theories of Polynesian migration to Hawaii, was taken over by "the cause of cultural renaissance." In what she describes as a "series of ironies," she suggests how the project began to encounter problems once it took on this new focus. She explains that, after contemporary Hawaiians were recruited as the crew for the canoe, "[a]rguments ensued over the authenticity of the Hokule'a's [the canoe's] construction; the purists in the dispute were the haole [non-Hawaiian] academicians. The Hawaiian crewmen, although fiercely anti-haole, felt that modern improvements would not tarnish the canoe's significance for their cause" (245).

Other than differences of explicitness in presentation, Linnekin's assumptions here are similar to Clifton's described earlier. Despite her claims, Linnekin is quick to subject contemporary Hawaiian pictures of "tradition" to the tests of the "purist" academicians. It is the Hawaiians' interest in cultural renaissance that "ironically" makes the building of the canoe less authentic. Their willingness to include modern improvements thwart the scientists' efforts to represent the past authentically

and test the theories of early Polynesian migration. And again, like the Great Lakes Algonquian group, contemporary Hawaiian communities are excluded from the authentic, overruled in their authority, and denied their identity.

Not surprisingly, both Hanson and Linnekin have received much opprobrium for their work from the local communities they study. Despite Hanson's claims that he is "simply misunderstood" (Hanson 1997:200), it seems evident that the indigenous communities that have risen up against such "constructivist" models of invented tradition are quite justified in the ire (Friedman 1992). Friedman explains that this is true because Hanson and Linnekin's work "[i]s based on an absolute distinction between something aboriginal and something impure, mixed, Westernized, and while the general argument is that there is no difference, the effect of the article is to reinforce precisely such a difference. One reason for this is that the process of invention is never in question . . . only the product . . . [which is thus treated] like any other ethnographic object" (851–52).

The most vocal proponents of a so-called invented-tradition approach to critiquing indigenous politics have had their voices muted by the responses of native rights activists, anthropologists, and postcolonial scholars (Clifford 2001; Dirlik 1999; Briggs 1996; Chakrabarty 1998; Jolly 1992; Trask 1991). At least some suggest that a certain irony lies at the bottom of any research through which scholars are able, in the same breath, to claim and perform exactly the representational authority that they disclaim when it is performed by the leaders and activists of the indigenous communities they study. For all these scholars, notions of tradition and cultural difference are challenging precisely because they persist in viewing such notions as essentialized forms, ready for authentication—as representations that can be selectively contextualized and compared to Western scientific conclusions. Left unexamined are the actual practices, values, beliefs, and communicative contexts through which such representations of tradition are developed and function. They are treated as objects to be evaluated not in terms of the cultural logic from which they derive but only in terms of the historiographic or ethnographic logic the analysts espouse.

Indeed, I believe what George Sioui, a Huron historian, has written regarding history holds equally well for efforts to analyze the "authenticity" of traditions invoked in indigenous politics: "History as imposed on Amerindians represents the outsider's refusal to let them fulfill their

vision. Trying to understand life's teachings means following its movements; caring only for recording the "facts" in order to remember them means choosing stagnation over movement, the profane over the sacred" (Sioui 1995:23).

The "Politics" of Multiculturalism and Native Culture

A new line of research has recently emerged that threatens to march into the same terrain scorched by "invented tradition." Though this new research offers important and timely critiques of the ambiguities surrounding the political and legal doctrines that define relations between indigenous peoples and the national and international legal regimes with which they are caught up, it stirs more troubling analytic waters when its focus is trained on what some scholars in this line have called the "politics" of multiculturalism and/or "native culture" (Dombrowksi 2004; see also Biolsi 2004; Schröder 2003; Povinelli 2002; Sider 1993).

Dombrowski (2004, 2002, 2001), in his analyses of the political economy of indigenism in Native Southeast Alaska, argues that performances of native culture and recognition of native claims to aboriginal lands are cultural and political projects that are afforded, and even underwritten, by the timber industry and non-Indian government parties against whom we normally assume such practices are directed. Passage of federal laws capping timber harvesting, coupled with provisions in the Alaska Native Claims Settlement Act (ANCSA) that settled native title and created native corporations with private rights to that title, created a situation whereby big business and its state backers could support claims to native cultural sovereignty as a way to circumvent environmental laws that apply to Alaska's public lands but not to lands held by natives—lands that cash-strapped native corporations were willing to open up to the timber industry for clear-cutting at relatively low costs.[4]

Thus, Dombrowski argues, what is crucial to understand is the "flexibility that indigenous claims provide development advocates. As individuals and groups with claims on significant resources, but with few means (legislative or otherwise) to compel those in power to recognize their claims, indigenous groups remain a potential tool for governments and their industry allies" (Dombrowksi 2002:1067–68).

Similarly, Biolsi is critical of the continued U.S. federal recognition, and in some cases expansion, of tribal nationhood (Biolsi 2004). Challenging assumptions that this policy reflects U.S. recognition of the political

and ethical demands of the colonized (244), Biolsi argues, to the contrary, that federal policies of tribal self-determination are just the most recent incarnation of U.S. hegemonic control of American Indians, now made consistent with predominant neoliberal practices of governmentality. From this perspective, Biolsi writes, " 'Native American sovereignty' is about tribes being responsibilized for the welfare of their 'own' tribal members . . . and the offloading of the welfare of Indian people from the federal or state governments" (244). Hence he queries whether it is not critical for scholars to remain "alert to the possibility that the oppression of Indian peoples is most efficient precisely . . . when it clothes itself in the framework of 'tribal sovereignty' and 'Indian self-determination' " (243).

These critiques echo predicaments identified for indigenous peoples caught up with other nation-state regimes around the world (Jackson 1995; Briggs 1996; Povinelli 1998, 2002). Povinelli describes the "cunning of recognition" that underlies the politics of multiculturalism expounded in a recent body of Australian law acknowledging Aboriginal claims to land based on the Anglo legal doctrine of native title. Specifically, in the 1992 *Mabo* decision, the Australian Supreme Court ruled that Aboriginal peoples had and retained native title interests to land where the claimant "clan or group" could show that they "continued to acknowledge the law and (so far as practicable) to observe the customs based on the traditions of that clan or group."[5] Povinelli suggests that the *Mabo* decision's presentation of Australia's "shameful racist history" as now an "excised 'cancer,' " while still requiring Aboriginal claimants to native title to prove up a specific kind of cultural distinctiveness reveals the extent to which this politics of indigenism works ultimately in the service of reasserting non-aboriginal Australian hegemony. These moves obscure the degree to which the laws of native title after *Mabo* require aboriginal claimants to enter into a vicious cycle of cultural performance, "demanding that they both *be* in relation to specific laws, social policies, and state identities, and simultaneously, *erase* any suggestion that these cultural beliefs are an opportunistic *being for* these laws, policies and identities—*and* erase yet again any local traditions sanctioned by statutory and common law" (Povinelli 1998:606, emphasis in original).

In the political economy of native culture, then, the distinctiveness ascribed to or announced by indigenous peoples is highlighted and critiqued by scholars for being "compatible with an incorporative project,"

initiated by national and international legal orders that work to redeem themselves by asking indigenous subjects "to stage . . . this sublime scene—not too much and not too little alterity" (Povinelli 2002:184). And it is for this reason, many suggest along with Povinelli, that the politics of native culture are in fact not really "about Aboriginal people, their laws, and customs" but about the "linguistic and textual mediations necessary for the continual coercions of liberal law" (ibid.).

But is this the *only* possibility revealed in and through the politics of native culture and the attendant claims to indigenous self-determination? The arguments above are of course persuasive. It is not hard to imagine savvy capitalists, Australian jurists, or BIA officials striving to find ways to reconcile a rising public concern and interest in multiculturalism both nationally and internationally with their own economic, juridical, and regulatory bottom lines. Yet the flip side of this argument seems less tenable. Are we really prepared to suggest that indigenous political activists and legal actors affirming their nations' cultural sovereignty are just dupes of the hegemonic maneuverings of non-Indian business and government interests? We would do well to recall that many of these natives are professionally accomplished and seasoned members of elite echelons of legal, academic, and political institutions, familiar with and as capable as anyone else of critiquing the machinations of state-level politics and business interests.

It is perhaps more plausible, as Miller (2001) and Dombrowksi (2002, 2004) suggest, that it is precisely the preservation and promotion of these native professionals' elite status, against and above the rights of other tribal (and nontribal) members that motivates their activism on behalf of cultural sovereignty. But this really just reasserts the very claim that these activists themselves are making—that is, that discourses of cultural distinctiveness are a central feature of contemporary indigenous economics, law, and politics as it is worked out by the indigenous social actors who participate in those governance practices.

I thus remain persuaded by the critiques of indigenous cultural politics as essentializing discourses that can, in some circumstances, serve the hegemonic interests of Indian and non-Indian elites. However, I suggest that a proper analysis of the discourses of tradition and cultural difference as tropes of indigenous social action mandates that we take native jurists and activists quite literally at their word. That is, we must be prepared to account for the equal possibility that such discourses are *also* potentially acts "outside of" or "against" non-Indian hegemony in

precisely the ways that American Indian and other indigenous jurists and activists claim them to be. I thus have argued throughout that it is necessary to hold these contradictory, even paradoxical, notions of cultural difference at once, neither reducing such claims to distinctiveness as either *always* constitutive of indigenous resistance or *always* complicit in the perpetuation of nonindigenous hegemony. Instead we should see them as *potentialities* that can and do emerge at the forward edge of the politics of native culture as practiced in the everyday operations of both indigenous and nonindigenous governance today.

Arguing with Tradition

What I think is missing in the analyses of "invented" tradition and the "politics of native culture" is the fact that the notions of tradition and cultural difference have come to have their own lives within the indigenous communities that they were once used to diagnose. Neither is any longer solely the purview of social scientists. Though each notion may continue to be employed in the naturalization of social inequalities in relations between "modern" European and American intellectuals and the rest of the world, "tradition" and "culture" mean other things as well in those contexts where indigenous peoples are confronting each other in the negotiation and constitution of their local political economic orders.

Even where indigenous constructions of tradition and culture arise in contexts caught in the long shadow of Euro-American domination, such as those of contemporary tribal court operations, to presume that this means indigenous peoples invoke these notions only as reactions to threats of such external control denies them the very measure of self-determination that they are struggling to maintain. This is true insofar as such arguments claim that discourses of tradition and cultural difference merely ape the definitions and distortions of "otherness" that social scientists have imposed on them. Such claims suggest that tradition and culture have little local or internal valence for indigenous peoples or assume that they themselves are unable to actively consider, negotiate, and contest precisely what tradition means for them, politically or otherwise.

Moreover, such arguments once again elevate researchers to the position of authority regarding what is or is not "authentically" traditional or cultural, where they so often turn to the ethnographic record and

other forms of anthropological inquiry to reveal how contemporary representations of tradition and culture misrecognize "actual" past or current indigenous practices and beliefs. But why are these traditional discourses not recognized in some of these present practices as well? Why is it proper to evaluate only the referential content of traditional claims—their truth-value—and not their indexical character, their illocutionary force in light of the contexts in which such claims are made? And, finally, why does culture continue to stand as a notion that only social scientists or Western political actors control, and one that, for good or ill, escapes the conscious reflection and active construction of tribal peoples themselves? I would argue that, in fact, it does not.

It is a fundamental aim of this study, in addition to filling the gap in the ethnographic record concerning the study of American Indian tribal courts, to offer a crucial corrective to the contemporary anthropological theorizing of tradition. This corrective calls for taking better measure of what social actors in indigenous communities are "doing" with tradition rather than simply concerning ourselves with evaluating what truths they are claiming. Thus, through a reliance on discourse-centered theories and methodologies, the analyses conducted in this study attempt to bracket essentializing notions of tradition that have played a central role in social scientific inquiry and authority since its origins (Bauman and Briggs 2003). Instead, as stated in the introduction, the effort has been to subsume questions regarding what tradition and culture "is" to an analysis and description of the actions and effects that are accomplished through discourses of tradition and culture as they emerge in the interactional contexts that constitute the courtroom proceedings of the Hopi Tribal Court.

To that end, the core analytic chapters of the study—chapters 3, 4, and 5—have offered analyses of the discourses of three Hopi hearings to provide distinct but related approaches to the ways in which interactional constructions of tradition and cultural difference discourses contribute to the negotiation of contemporary Hopi tribal court operations and the political-economic and interpretive effects of those operations.

Chapter 3 offered the first foray into discourses of Hopi tribal court proceedings, relying centrally on theories of language ideology and metadiscourse to reveal how beliefs and talk *about* courtroom talk itself emerge at the center of a conflict interaction between a Hopi judge and the Hopi witnesses from which he sought information concerning the traditional distribution of property in a Hopi village. I have argued

that ideologies of exclusivity and particularity undergird the manner in which the witnesses claim Hopi tradition can be authoritatively told. I have shown how these conflict with the Anglo-style juridical ideologies of objectivity and universality that informed the judge's efforts to get the witnesses to talk about generalizable "principles" of tradition. This ideological contest and its metadiscursive and metapragmatic expression fuel much of the conflict talk under analysis, insofar as the Hopi witnesses challenge what they see as the judge's efforts to appropriate their knowledge and authority for himself, while the judge's own concerns with preserving an Anglo-style legal legitimacy for the Hopi court procedures constrain his efforts to pursue this information in other ways. In this way I have attempted to show that while discourses of tradition are indeed about power and authority, such claims are not merely outward-looking; rather, they constitute some of the fundamental rhetoric and practice through which everyday Hopi juridical activity is accomplished.

Moreover, I have revealed how the explicit metadiscourses and ideologies of tradition are not only constituted in opposition to the Anglo-style norms and procedures of the court, but also employed by the judge in ways that attempt to harmonize tradition with those practices and beliefs. In so doing, I have attempted to establish that tradition is not some homogeneous or unreflexive body of values and practices but is conceptualized by Hopis in complex, multiple, and competing ways.

In chapter 4, I explored these multiplicities in more detail, recognizing that often the force and effect of the competing interpretations of Hopi tradition are elided through subtle metapragmatic manipulations that emerge over the course of Hopi hearing interactions and contribute centrally to the legal action taken by or against the parties. Such subtleties remain hidden (even to the parties) until we view them emerging over the span of an entire hearing, revealing how the metapragmatics of "talk about tradition talk" minutely shift during hearing interactions to generate paradoxical senses of the legal force and effect of Hopi tradition.

To pursue such a view of Hopi courtroom discourse, I have relied upon recent anthropological and semiotic elaborations upon the theories of Charles S. Peirce—particularly those of Michael Silverstein and Roberta Kevelson—which highlight the centrality of paradox and irony in the emergent edge of linguistically mediated social and legal action.

We gain an even more complex understanding of Hopi cultural politics by using such a view to attend closely to the ways in which iterations

of cultural difference unfold sequentially, shaping the full course of a 1997 property-dispute hearing. When we see the shifting, paradoxical, even ironic, ways in which parties to the hearing employ metapragmatic iterations of Hopi cultural difference, and it is revealed that these iterations are *informed by* but never *identical to* the iterations that precede them, a picture emerges that utterly confounds the reduction of Hopi cultural politics to easy binaries of resistance/hegemony. Instead, notions of cultural difference constitute dialectic potentialities of semiosis that shape and effect—and are shaped and effected by—the kinds of indigenous self-governance practices they purport to represent. As such, they can sometimes have a decolonizing, deeply sincere sense and force for the Hopi legal actors who use them, and at other times have assimilative, reifying ones, all within relatively short spans of sociolegal action.

In the last chapter the scope of inquiry is widened to explore how this same dialectic informs Hopi law as social institution more generally. That inquiry draws on a body of legal scholarship that claims that much of the force and operation of law in Anglo-American society is best understood as constituted by narrative discourses and practices in which the primary institutional goal is a transformation of litigants' stories of personal suffering into a unified narrative of social truth upon which the law can operate.

Combining insights gained from this literature with those of recent anthropological explorations of the narrative shape of face-to-face interaction, we see how Hopi property proceedings are constituted as collaborative, sense-making activities, in many ways similar to those of Anglo-American courts. At the same time, however—and this is what makes these proceedings uniquely Hopi—tribal litigants regularly raise claims in light of Hopi traditional norms and practices that directly challenge how those claims are canalized by the court's sense-making activities and the legal truths that can be told there.

Thus I analyze interactions in a Hopi property proceeding that opens with the judge constructing the dispute between the parties as a story concerning the validity of their mother's will. As the hearing unfolds, however, one of the litigants repeatedly violates the discursive constraints of this setting by raising claims that invoke norms of Hopi traditional kin relations, doing so in ways that break out of tacit rules of witness examination and other modes of courtroom interaction. Significantly, the judge makes some initial efforts to reinstate these con-

straints, but ultimately accommodates the violations, abandoning, remarkably, much of the adversarial character of the proceeding to allow the tradition-based arguments of the litigant. Here again, discourses of tradition and culture are not treated as essentialized or homogenous notions, but emerge as thoroughly negotiated discourses, made meaningful primarily in light of their contributions to the larger story of contemporary Hopi jurisprudence.

Collectively, what the analyses in this study make clear is that to continue to ignore the sociopolitical contexts in which indigenous notions of tradition and claims to cultural difference emerge is to ignore the primary force of their meaning. This in turn leads to the problematic practice of social scientists inserting their own views concerning the (truth-)value of tradition, and/or the authenticity of cultural identities, and hence leads to the continued difficulties of anthropologists who claim authority above that of tribal members themselves to determine what is and is not properly "indigenous."

I do not mean to suggest that questions of "authenticity" are completely irrelevant to the study of tradition and culture discourses. Nor do I claim that notions of tradition and culture are empty signifiers—parts of a rhetoric that has no reference to any actual social structures, practices, or values of the peoples that invoke those notions. Indeed, in any of the courtroom interactions analyzed here, and in many of my discussions with Hopi people, we can discern quite regular understandings regarding what is or is not Hopi tradition and culture. Rather, my argument is that questions concerning the "authenticity" of tradition and the value of a "politics of culture" must ultimately remain those of the indigenous peoples themselves, not the analyst. That is, insofar as so many scholars have rightly revealed that such discourses of authenticity always come backed with epistemological assumptions that claim and naturalize (often unequal) distributions of power and authority, then these ought to be understood as part of the role that tradition and culture discourses play in contemporary indigenous law and politics, and not appropriated by anthropologists and other social scientists themselves.

Tradition and cultural difference thus have their referents, and this is not disputed here. But they also have their indexicalities. Though each is not *just* a rhetoric, it *is* nonetheless a rhetoric—continuing to operate within indigenous communities today as a discourse that stands, as much for indigenous peoples today as for the scientists that have studied

them, as the content and channel of a peoples' past and their unique identity in the present, as well as the power and authority that come with discerning and defining that past and present for the future. To presume otherwise and suggest that notions of tradition and cultural difference in contemporary indigenous law and politics are inadequate because they either hew too closely to outdated past practices or misrecognize those past practices in the pursuit of mere political advantage is to deny indigenous peoples the very kinds of discourses and practices that we, as social scientists, afford ourselves. In so doing, we once again legitimize our own authority to define indigenous life more clearly and legitimately than indigenous peoples themselves. This study is intended, in part, to address such hubris. I hope that the analyses provided here offer some initial theoretical and methodological approaches that, at least in this arena, may compel us to measure more humbly our analytic claims and commitments against the values and voices of the peoples we represent by them.

Notes

Chapter 1: Introduction

1. *Cherokee Nation v. Georgia* 30 U.S. 1, 17, 19 (1831).

2. *U.S. Code* 25 (1887), §§ 331–33).

3. *U.S. Code* 25 (1934), §§ 461–62, 464–79).

4. Nor is this back-and-forth appear likely to end soon. This is even more evident in the arena of Indian gaming and the socioeconomic and political success that at least some tribal nations have finally carved out for themselves—gains that initially won backing (or at least nonintervention) from Federal caselaw, legislation, and even state-level and local non-Indian sentiment (see, e.g., *California v. Cabazon Band of Indians*, 480 U.S. 483 [1975]; *Indian Gaming Regulatory Act*, *U.S. Code* 25 (1988), §§ 2701–21). Not long after these gains, however, Indian nations experienced considerable federal and non-Indian public backlash, such as that expressed in a recent special report in *Time* (Bartlett and Steele 2002) and on the campaign trail in the California gubernatorial recall election of 2003, where non-Indians claimed to uncover the ills and unfair practices imposed on Indian and non-Indian communities by these enterprises and called for federal and state legislatures to force restructuring of tribal nation gaming practices (see also Cornell et al. 1998)

5. The gender-specific sense of *men* is intended, since field agents almost invariably chose Indian men to fill judicial posts in a manner that often ignored the leadership roles accorded to women in the tribal communities over which those courts presided.

6. At virtually the same time as the courts were being created, the Supreme Court decision in the case *Ex Parte Crow Dog* (109 U.S. 556 [1883]) was published, which held that federal courts lacked jurisdiction to try and punish a Sioux Indian who had killed another Sioux in Indian country. Less than two years later, Congress would pass the Major Crimes Act (*U.S. Code* 18 (1885), § 1153), which gave exclusive jurisdiction to U.S. federal courts to try Indians accused of seven named "major" crimes (later amended to ten), including murder, rape, kidnapping, and incest.

7. Indeed in *U.S. v. Clapox,* 35 F. 575 (D.C. Ore. 1888), the only U.S. case to adjudicate the legality of CFR courts, the Federal circuit court in Oregon explicitly describes the primary function of Courts of Indian Offenses not in terms of the implementation and regulation of law and order but as "mere educational and disciplinary instrumentalities by which the Government of the United States is endeavoring to improve and elevate the condition of these dependent tribes."

8. In many ways, from today's perspective, the IRA appears to have furthered its own assimilative goals—the tribal governance proposed by the IRA called for tribes to pass constitutions and convene representative tribal councils whose actions were often subject to approval by the secretary of the interior (Wilkins 2002; Newton 1998). Yet the notion that the everyday governance of tribal nations should rest in the hands of tribal members themselves was a foothold in the federal recognition of tribal sovereignty that tribes would rely on in the development of their contemporary tribal governments in ways likely never anticipated by Collier and other authors of the IRA. So while these original tribal constitutions did not regularly recognize any separation of governance powers, let alone the creation of tribal courts (Newton 1998), tribes have nonetheless interpreted their powers under such constitutions to allow for the promulgation of tribal legal systems.

9. *U.S. Code* 25 (1968), §§ 1301–3; *U.S. Code* 25 (1975), §§ 1451–53.

10. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997); *Shirley v. Atkinson Trading Post*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001).

11. In the case of critiques of contemporary tribal traditions as "invented," the idea is that such inventions replace an "authentic" tradition and culture that was once whole and homogenous but has since been lost (see chapter 6).

Chapter 2: Making a Hopi Nation

1. Hopi history is replete with stories of terrible times of famine and drought in the not-so-distant past (see, e.g., Rushforth and Upham 1992; Levy 1992).

2. See "Moqui (Hopi) Reserve: Executive Order of President Chester A. Arthur, December 16, 1882" (in Kappler 1902:805).

3. *Healing v. Jones*, 210 F. Supp 125 (D. Ariz 1962).

4. "The Navajo-Hopi Settlement Act," Public Law 93-531, 25 *U.S. Case* 640 et seq. (1974).

5. The Uto-Aztecan language family is one of the largest indigenous language families in the Americas in terms of population, linguistic diversity, and geographic distribution. Nahuatl, a southern Uto-Aztecan language with more than twenty-eight varieties and more than a million speakers in Central and South America is the most widely distributed language in this family.

In addition to Hopi, which constitutes its own subfamily in the northern branch of the Uto-Aztecan language group, twelve other northern Uto-Aztecan languages are divided among the Numic (Comanche, Panamint, Shoshoni, Ute-Southern Paiute, Mono, and Kawaiisu) and Takic (Cahuillo, Luseño, and Tübatubal) subfamilies.

6. Indian Reorganization (Wheeler-Howard) Act, 25 *U.S. Code*, §§ 461–62, 464–79 (1934).

7. Two of the current Hopi villages, Polacca and Lower Mùnkapi, did not achieve recognized status as independent villages until after the creation of the Hopi Tribe.

8. Certification of Adoption, Constitution and By-Laws of the Hopi Tribe, 1936. On record with the Hopi Tribe, Kiqötsmovi, Arizona.

9. Indian Reorganization (Wheeler-Howard) Act, 25 *U.S. Code*, § 48 (1934): 984.

10. Constitution and By-Laws of the Hopi Tribe, 1936.

11. Spellings of the names of Hopi villages vary considerably across the vast ethnographic literature about the Hopi people, in part because there remains no single orthography of the Hopi language that tribal members generally accept as standard. One recent effort to establish a standardized orthography for the Hopi language is the *Hopi Dictionary/Hopìikwa Lavàytutuveni: A Hopi-English Dictionary of the Third Mesa Dialect* (University of Arizona Press, 1998). Though it represents the Hopi language as it is spoken in the villages of only one of the reservation's three mesas, it is to date the most comprehensive dictionary of the Hopi language and is currently being used as the basis for Hopi literacy classes on the reservation. For this reason, the orthography used in this study to represent Hopi words and discourse will follow the one established in *Hopi Dictionary/Hopìikwa Lavàytutuveni*.

12. Id. at Article III, § 2, which reads, in relevant part,

> The following powers which the Tribe now has under existing law. . .are reserved to the individual villages:
> (a) To appoint guardians for orphan children and incompetent members
> (b) To adjust family disputes and regulate family relations of members of the village
> (c) To regulate the inheritance of property of members of the village
> (d) To assign farming land, subject to the provisions of Article VII.

13. Id. at Article VI, § 1[g].

14. Hopi Tribe, Resolution H-01-37 (1937).

15. Pabanale's recollections suggest certain limitations that he may have been instructed to observe in the prosecution of non-Indians, such as the time he chastised the Hopi police to "be careful who you arrest" after they caught a non-Indian coal miner intoxicated on the reservation. He told them, "Of course, you have brought this case to our Hopi tribal court but I will tell you that I don't have the authority to convict a federal employee" (Black 2001:56).

16. Hopi Tribe, Ordinance 21, approved July 10, 1972 (copy on file with Hopi Tribal Court).

17. Indian Civil Rights Act,*U.S. Code* 25 (1968).

18. The saying "being admitted to the bar" derives from this division, beyond which only attorneys, and laypersons "called to the bench," may proceed.

19. In accordance with Hopi ideals of economy and multiple functionality, the room is often used for meetings and dining when not used for hearings.

20. Hopi Tribe, Ordinance 21.

21. Hopi Tribe, Ordinance 21, Title I, chaps. 1, 2, and 7.

22. Id. at chaps. 1, 2.

23. Id. at 1.2.2, 1.3.3.

24. Id. at 1.3.4.

25. Incarceration and monetary fines that any tribal court can impose are limited by the Indian Civil Rights Act (*U.S. Code* 25, § 1302 [1968], 7) to no more than $5,000 and one year in jail for each offense.

26. Hopi Indian Rules of Civil and Criminal Procedure (1974), § II, Rule 2 (copy on file with Hopi Tribal Court).

27. Id. at § II, Rules 3–10.

28. Id. at § II, Rules 14–36.

29. See Hopi Tribe, Resolution H-12-76 (1976; copy on file with Hopi Tribal Court).

30. Hopi Tribe v. Mahkewa, A. P. 002-93 (1995); Hopi Indian Credit Association v. Thomas, A. P. 001-84 (1996); Smith v. James, 98 A. P. 000011 (1999); Nutongla-Sanchez v. Garcia, 98 A. P. 000014 (1999).

31. A. P. 001-84 (1996), 4.

32. Id.

33. Id. at 5.

34. 98 A. P. 000011 (1999), 6.

35. Nutongla-Sanchez v. Garcia, 98 A. P. 000014 (1999); In re Matter of Estate of Neomi Komaquaptewa (00 C.V. 000137).

36. Constitution and By-Laws of the Hopi Tribe, Article III, § 2.

37. Even here, custom and tradition are explicitly invoked in property case opinions only 23 percent of the time, revealing the apparently disproportionate reliance on Anglo-American law about which so many tribal jurists complain. However, discourses and claims articulating notions of custom and tradition may emerge more regularly in the contexts of oral arguments before tribal courts, where tribal members can press their claims to the court, than they do in judges' written final decisions and published court opinions.

38. Interviews conducted during this period did not regularly include discussions with Hopi litigants. I decided to forgo such interviews, which would undoubtedly have made valuable contributions to this study, for several reasons. Perhaps most important, many of the cases analyzed here (including the case from which comes the judge/witness interaction that I analyze in most detail) are still considered to be open matters before the Tribal Court. Because my research was conducted as part of a larger project initiated by the Hopi court and village communities (see above and note 6), I was concerned (as were court officers) that my contact with litigants might be construed as *ex parte* communications from the court to the particular party, which might be seen as unduly influencing the outcome of the litigation. The benefit of additional insight gained by such interviews would not outweigh the costs that might accrue to people still litigating and living through these property conflicts.

39. It is important to note that issues of gender and identity are always intimately wrapped up with notions of tradition among Hopis. With regard to the body of practices and beliefs that Hopis generally describe as customary and traditional, there persist, at least ideally, clear and specific distributions of social identities and responsibilities among men and women, which are invoked to justify claims to considerable symbolic and material capital (including property). Thus it is often said that in this matrilineal, matrilocal society, clan identity flows primarily from the mother to her children and that homes that mothers occupy can only by inherited by their daughters. Moreover, as we saw in this case, it is often said that only those daughters who assist the elders in their old age and in the preparation of food during ceremonial occasions should expect to receive homes. Men, on the other hand, because they work primarily in raising crops and participate in the public and private rituals of the ceremonial societies, are often said to be able to lay claim only to those fields that they work for the benefit of their mothers, sisters, and ceremonial societies; they can never expect to inherit clan homes. Indeed, a man upon marriage is said to be expected to live with his wife's family until they can get the materials together to build her a home on her clan lands.

Of course these are idealized, structured notions of gender and identity relations, and in contemporary Hopi communities men frequently claim and own homes inher-

ited from their mothers and live in them with their Hopi wives. Issues of gender and identity are complex, detailed, and, quite important, but a thorough treatment of them would require a level of detailed and committed analysis that is best reserved for future consideration.

Chapter 3: Language Ideologies

1. Hopi Tribe, Resolution H-12-76 (1976; copy on file with the Hopi Tribal Court).

2. *Smith v. James,* 98 A. P. 000011 (1999), 2.

3. Id. at 5.

4. Affidavit in support of Petition for Injunctive Relief, *James v. Smith*, CIV-018-94 (1994).

5. Answer to Amended Petition and Counter Petition to Quiet Title and for Injunctive Relief, id. at p. 2.

6. Id. at 3.

7. Response to Answer/Counter Petition, at 2.

8. Hopi Tribal Court, Minute Entry, at 1. Out of respect for the privacy of Hopi village members, I have omitted the name of the village involved in this dispute.

9. Hopi Tribal Court, 1996 Minute Entry, id. at 1.

10. It is important to acknowledge the gendered character of witness selection in this case. Though I was never able to verify my take on this with my Hopi consultants, I am inclined to think that it is no coincidence that the men called to testify as witnesses were called by the woman who claims that she inherited the disputed property from her father and, likewise, that the women called to testify were called by the three nieces who claim that they inherited the property from their mother.

As the discussions in chapter 2 suggest, a deeply gendered ideology underlies all Hopi property considerations, related to the fact that clan identity is reckoned matrilineally. While men are expected to work land and build homes for their wives and children, only women can claim to "possess" homes and the lands on which they are built, and only mothers can pass them down to their children (or their sister's children). This idea stems from the historic Hopi ideology that real property rights rest solely in the corporate body of the clan (or perhaps the lineage; see Whiteley 1985, 1986; Levy 1992). Thus just as clan identity is reckoned matrilineally, so is clan property devolution. Men can devolve lands to their sister's children (as their matrilineal uncles) but not to their own children. However, since the mid-twentieth century, Hopis have increasingly recognized that, given the history of certain villages, particularly those on Third Mesa, the clans' corporate holding of land and homes has broken down in some places. Then, extrapolating from a more general principle that remote, unclaimed lands should be used by any industrious Hopi man willing to cultivate them, some Hopis argue that the lands in villages that have little or no clan lands should now be considered "open" for use and improvement by Hopi men of any clan. Such "nonclan" lands, some Hopi claim, ought to be freely alienable by the men who work them and not folded into the corporate holdings of their sisters' or wives' clan property claims.

Whatever the perspective, the question of the status of village lands as "free" or "clan-held" operates as something of a fault line in Hopi "gender battles." Women and men often argue strenuously against each other over who bears the ultimate authority to alienate the lands in question. I suspect that this might explain why the three petitioners were able to secure women to testify that their mother had the proper authority to distribute the land in dispute, while the respondent, who claimed the land

in question was given to her by her father (the petitioners' grandfather), named an all-male list of elder witnesses to testify on her behalf. This suspicion, however, was never verified in any of my discussions with Hopi consultants.

11. 1997 Hearing in the Village of——, *James v. Smith*, CIV- 018 –94 (1994).

12. Generally speaking, indefinite terms are a class of lexical and grammatical forms that refer to something that is held as unidentifiable (see *Hopìikwa Lavàytutuveni* 1997).

13. Special thanks are due to an anonymous reviewer of an earlier draft of this chapter who helped to clarify this point for me, leading to a more complex appreciation of the different and competing ways in which tradition and its relations to tribal law are being constructed in this case.

14. Indeed, one of the elder witnesses makes this explicit at the hearing:

> Witness 6: Pay antsa, itam kitsokit ep wimmongwit, itam hapi momngwit, me. Niiqe itam pep pumuy amungem hin wuuwantota pep.
>
> *As a matter of fact we are the ceremonial leaders in the village. We are the leaders you see, and we are the ones who concern ourselves with things for their welfare.*

Chapter 6: Conclusion

1. Hopi Tribe, Ordinance 21; Hopi Indian Rules of Civil and Criminal Procedure.

2. See Hopi Tribe, Resolution H-12-76; Smith v. James, 98 A. P. 000011 (1999).

3. See also *Hopi Indian Credit Association v. Thomas*, A. P. 001-84 (1996).

4. See 94 Stat. 2371, 1980; Public Law 101-626, 1990, and Public Law 93-203.85, 43 U.S.C.A. §§ 1601 et seq.

5. *Eddie Mabo and Others v. the State of Queensland, Australian Law Review* 107 (1992): 2.

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