"What Are You Going to Do with the Village's Knowledge?" Talking Tradition, Talking Law in Hopi Tribal Court

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Though the details of face-to-face talk and interaction have been studied in Anglo American and British courtrooms, few attempts have been made to extend similar analyses to the study of contemporary indigenous and (post)colonial legal institutions that continue to employ legal processes informed by both Anglo-style adversarial notions of law and "local" notions of law, culture, and tradition. Using methods of legal discourse analysis and language ideology studies, this article investigates how interlocutors in a hearing before the courts of the Hopi Indian Nation construct discourses of tradition and Anglo American jurisprudence in multiple and competing ways, and for significant sociopolitical effect. An argument is thus made for attending to the microdetails of sociolegal interactions as an important site for exploring the complex articulations between the contemporary lives of indigenous peoples and the laws with which they are imbricated.

Introduction

The emergence in the last three decades of language-oriented studies of adversarial law in the Anglo tradition (American, British, and Australian) 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 & Rothblatt 1978; 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 sociolinguistics, the ethnography of

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communication, and conversation analysis), 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 & O'Barr 1998, 1990; Philips 1998; Mertz 1994; Atkinson & Drew 1979). Much of this work focuses on the various forms of face-to-face interaction that constitute courtroom proceedings, including the turn-by-turn development of discourses in direct and cross-examination interactions, plea bargaining processes, and judge and litigant interactions 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 use as medium not only for reference *to*, but fundamentally for construction *of*, social realities and orders. As such, legal interaction is a critical tool for the exercise of sociolegal power (Conley & O'Barr 1998, Mertz 1994). 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 . . .. (1994:447)

However, while these interactional models have proven their analytic worth in the study of Anglo American and other Anglo legal institutions within their "home" nations, the particular lessons learned from these approaches have not been regularly extended to the sociolegal contexts of contemporary indigenous and (post)colonial legal regimes. Important work has of course been undertaken on the historic and contemporary impact of the colonial imposition of Anglo-style juridicopolitical discourses and institutions around the world (e.g., Chakrabarty 2000; Merry 2000; Comaroff & Comaroff 1991; Comaroff & Comaroff 1997; see Comaroff 2001 and Merry 1990 for good reviews). Others have also considered the details of courtroom interactions involving indigenous peoples appearing in Australian and U.S. courts (Eades 1996, 2000; Merry 1994; Bunte 1992). Yet efforts to analyze the details of emergent, face-to-face interaction as constitutive of indigenous legal institutions—institutions that bear the heavy influence of Anglo-style jurisprudence but are understood by local

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actors as important sites for the negotiation, articulation, and instantiation of their unique (post)colonial nationhood—remain in the purview of relatively few scholars (see, e.g., Hirsch 1998, 2002; Philips 1994, 2002).

This is certainly the case in the sociolegal context that is considered in this article: that of the proceedings of property dispute hearings before the tribal court of the Hopi Indian Nation since the mid-1990s. Like many American Indian tribal courts in the United States today, the Hopi Tribal Court relies heavily on Anglo American adversarial rules and procedures inherited from the colonially imposed Court of Indian Offenses run by the Bureau of Indian Affairs on the Hopi reservation until 1972. At the same time, the Hopi Tribal Constitution, and recent Hopi tribal legislation and case law, recognize the juridical authority of Hopi village leadership and mandate reliance on principles of Hopi custom, tradition, and culture when addressing disputes among tribal members, particularly those regarding issues of probate, child custody, and other matters of property and family law.

In this study, I rely on linguistic anthropological and discourse-analytic theories and methodologies to analyze the face-to-face interactions by which Hopi legal actors engage each other in property disputes through multiple and competing discourses of tradition and law in ways that both contribute to and are shaped by the operations of contemporary Hopi jurisprudence.

As such, this article reflects on hoary concepts of tradition and law that have always played a crucial role in (post)colonial relations and their academic investigation (Bauman & Briggs 2003; Chakrabarty 2000; Comaroff 2001). It also taps into a heated debate among postcolonial theorists, indigenous jurists, and anthropologists over the role that notions of traditions and culture should play in the operation of contemporary indigenous juridicopolitical systems and movements (Coffey & Tsosie 2001; Clifford 2001; Miller 2001; Joh 2000; Dirlik 1999; Porter 1997a; Pommersheim 1995a, 1995b; Linnekin 1990). For some, the introduction of tradition and custom in contemporary legal activities is central to developing a governance that secures real sovereignty for indigenous nations and charts a sociopolitical future that, while undoubtedly informed by a history of colonization, nonetheless remains uniquely their own. For others, reliance on such notions ignores the degree to which normative principles and authorities grouped under the rubric of tradition may in fact misrepresent actual past cultural practices and/or be out of step with current practices, beliefs, and values of the citizens of indigenous nations (Barsh 1999; Miller 2001; Joh 2000). Despite the urgency of these debates, little work has explored the interactional details of contemporary indigenous governmental processes to examine precisely *how* tradition and law are talked about, by whom, and to what effects.

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Starting from Conley and O'Barr's basic premise that "in many vital respects, language is legal power" (1998:14), I pay particular attention to a stretch of conflict talk that emerges in a 1997 Hopi Tribal Court hearing during the examination by a Hopi judge 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 ideologies of objectivity central to Anglo American notions of legal legitimacy into Hopi juridical discourses.

However, the judge's discursive moves frustrate the Hopi witnesses' own expectations of their role in the resolution of the dispute. As a result, these 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. As such, 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 by and through which Hopi social actors invoke, accept, or challenge notions of tradition and Anglo American–style jurisprudence and their articulation in their contemporary legal processes, I subsume the question of what tradition and law "are" in this article under more fruitful inquiries 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 face-to-face negotiation of a balance between notions of law and tradition that not only reaches the finest details of Hopi Tribal Court praxis, but is also central to the ways in which Hopi people constitute their contemporary tribal jurisprudence, its sociopolitical force, and the indigenous lives with which it is imbricated. In so doing, this article is a call for increased attention to the microdetails of the sociolegal interactions that contribute to contemporary sociolegal processes in (post)colonial contexts, and a model for how such endeavors might be undertaken.

Legal Discourse Analysis, Power, and Metadiscursive Practices

Conley and O'Barr's 25 years of scholarship stand at the center of research into the details of Anglo American courtroom interaction (see, e.g., Conley et al. 1978; Conley & O'Barr 1990, 1998;

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O'Barr 1982). Across the span of their careers, the search for greater understanding of the constitution and operation of legal power, authority, and domination emerges as a common theme. As the authors write,

> language is the essential mechanism through which the power of the law is realized, exercised, reproduced, and occasionally challenged and subverted. . .. if 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 offer actual law talk as the ground upon which to explore the accomplishment of the domination of politically marginalized groups such as women and racial and ethnic minorities. They build this argument through an analysis of 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 female litigants and witnesses in Anglo American courts. These inquiries, they suggest, reveal how the discursive practices that constitute the everyday operation of the law perpetuate male domination of women, but in ways that legal researchers and reformers who only consider the rules and norms of law don't anticipate. Thus defense lawyers (re)victimize women witnesses during cross-examination when they employ non-responsiveness and manage the topic of the interaction through leading questions in ways that implicitly express doubt about witness credibility. And this is true even with rape shield reforms that prohibit examination of witnesses' prior sexual history. Thus Conley and O'Barr consider how the details of victim cross-examination in rape trials, as well as other aspects of law talk, contribute to the manner in which Anglo American legal practices perpetuate patriarchal domination of women.

Often Conley and O'Barr's analyses of the larger macrosociological forces operating within and upon these interactions are laid out in ways that could make more explicit a reckoning of the specific manner in which representations of norms of talk and social relations are invoked and constituted by interlocutors through their interactions. While their conclusions concerning the relationship between trial talk and legal power are not doubted here, it seems at least as important to attend to the schematics concerning language and its links to other sociocultural phenomena that participants themselves index and construct when they are engaged in their legal discourses. What are the implicit images of relations between men and women, and their language practices, that lawyers constitute in their cross-examination tactics such that they

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smack of gender discrimination and violence? How do witnesses participate in the constitution of these images of gendered relations and interactions? Are they complicit in them, or do they work to counter them; and how does such participation contribute to witnesses' (re)victimization through courtroom discourse? Moreover, is this (re)victimization itself the product of some particularized form of gendered violence constituted through images of male/female discourses and relations? Or is it more generally the "violence" that seems 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 have conducted their work. But assumptions regarding the social force and meaning of particular speech activities cannot be so safely made in situations, such as many (post)colonial legal contexts, where cross-cultural influences and concerns of legal pluralism are more explicitly at work. Importing the theories and methodologies of legal discourse analysis into interactional contexts such as those of the Hopi Tribal Court thus requires an approach to the data that takes more measure of the sociocultural images and norms that participants index or claim through their talk and how such representations impact that talk and the social force that flows through it. The recent focus of scholarship into what are being called language ideologies and metadiscursive practices is concerned with just these kinds of discursive features.

Language Ideologies and Metadiscursive Practices

In the 1990s, linguistic anthropologists who had long investigated the details of actual language use and interaction began to pursue lines of inquiry that account for the ties that situated instances of language use have to local norms and beliefs about language and the macrosociological forces of social order that might flow through them (Kroskrity 2000; Schieffelin et al. 1998; Gal 1996; Silverstein & Urban 1996; Bauman & Briggs 1990). An interest emerged among these scholars in understanding the local schemas and practices 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 performance, metapragmatics, and even textuality all evinced a recognition of the dialectical relationship that perdures between the beliefs that people have about language and the actual use of specific language forms. Most recently, and under the rubric of language ideology analyses (Kroskrity 2000; Woolard 1998), this interest has taken on an even broader focus, expanding the study

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of this dialectical relationship farther into society and its forces by considering how beliefs and talk about talk are informed by political economic forces. As such, language ideologies and metadiscursive practices (communication that implicitly and/or explicitly refers to, indexes, or otherwise frames other discourses [Briggs 1993]) are explored today as mediating, in complex and often conflicting ways, the manner in which details of language use and practice are invoked by social actors to authorize, naturalize, and/or resist and deconstruct local, colonial, nation-state, and even global social orders (Kroskrity 2000; Schieffelin et al. 1998).

Recently, sociolegal scholars have initiated inquiries into the language ideologies and metadiscursive practices of Anglo American legal actors (Philips 1998; Mertz 1996, 1998; Matoesian 1995, 1998, 2001). In analyses of litigation contexts, some of Conley and O'Barr's powerful insights have been elaborated on in ways alluded to above. Matoesian (2001) offers a detailed analysis of witness examination interactions in the William Kennedy Smith rape trial, revealing the complex ways in which metadiscursive devices are employed by both lawyers and witnesses in the competition over influencing jurors' interpretive frames of their courtroom talk. These devices are rhetorically effective because they are attentive to the institutional metadiscursive constraints that Anglo American procedural law places on courtroom interaction, while at the same time they are evocative of a web of ideologies of gender, sex, violence, and language use relevant to the rape trial (Matoesian 2001).

Matoesian reveals how the defense attorney and one of the prosecution witnesses engaged in explicit contest over the implications of a statement 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 framed the reported statement in a way suggesting that it constituted part of the discourse of "small talk" and friendly banter that are not typically the ways in which women talk to their friends' alleged rapists. The witness proposed a different frame of the statement, attempting to explain it as more confrontational and challenging of the defendant. Both sides of the metadiscursive contest, and the juror audience, Matoesian claims, were equally informed by what he calls a "layered logic of patriarchal domination" (2001:38), by which women who are victims of rape or connected to victims are expected to act and talk in certain ways, ways that do not include an affect of anything other than fear, anger, or confusion (Matoesian 2001). 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. And it is through such a

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comparison that 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 Conley and O'Barr's claims. However, his attention to metadiscursive practices and language ideologies offer additional insight into the patriarchal character of cross-examination discourses by providing compelling data that such notions did in fact inform the interlocutors' own experiences of the interaction and shaped the flow of legal power through it.

It is thus a background in the theories and methodologies of legal discourse analysis, combined with more recent studies of language ideology and metadiscursive practices, that together make possible the extension of interaction-based analyses into contemporary indigenous and (post)colonial sociolegal institutions. Such a combination affords insight into the details of Anglo-style juridical practice employed in such contexts, and the constitution and flow of sociolegal authority and power in and through those practices, while at the same time compelling the analyst to recognize and attend to the fact that such practices are fundamentally refigured through the local ideologies by which indigenous and other participants of (post)colonial legal institutions conceptualize them. To show how this works, I shall apply this kind of analysis to the discourses of tradition and law that emerge in Hopi Tribal Court interaction.

The Hopi Tribe and Its Courts: A Brief Description

The Hopi reservation, established by executive order in 1882, currently occupies 1.5 million acres of aboriginal Hopi land in northeastern Arizona. The approximately 6,500 Hopi living on the reservation occupy 12 villages located on or around three mesas. Until the 1930s, nine of these villages operated under autonomous village leadership, and there existed no formal tribal organization or any tribal governance. In 1936, however, the Bureau of Indian Affairs federated Hopi villages under a Hopi constitution written and adopted pursuant to policies of the Indian Reorganization Act (25 U.S.C.A. §§ 461–462, 464–479 [1934]). A representative Hopi Tribal Council was also convened at that time as the sole body of tribal leadership. It was only in 1972, when the Hopi Tribal Council passed Hopi Ordinance 21, that a Hopi tribal judiciary was established to replace the Bureau of Indian Affairs' Courts of Indian Offenses and provide the tribe with both a trial and appellate court (Hopi Ordinance 21, §§ 1.1.1., 1.2.1, 1.3.1).

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Ordinance 21 relies heavily on the procedures of Anglo American–style adjudication in its enumeration of the operations of the Hopi Tribal Court. Many of the basic processes and practices in the Hopi Tribal Court system are thus similar to the activities of many U.S. state and federal courts. Generally speaking, Hopi Tribal Court is adversarial—litigants submit written briefs and present oral arguments that set forth the facts of the dispute and interpret principles of law in a manner designed to advocate for a resolution favorable to each party's interests and to challenge the facts and law presented by their opponents. Litigants can present evidence, including witness testimony, and cross-examine the witnesses of their opponents. After the presentation of evidence, litigants provide closing arguments. Final decisions are made by either juries composed of members of the Hopi tribe (in criminal cases) or judges (in civil cases and cases on appeal), and these decisions can be appealed to the Hopi Appellate Court upon a claim of judicial error during the trial.

The participants in Hopi Tribal Court proceedings are also similar to the players in Anglo American courts. Both Hopi and non-Hopi may sit on the Hopi judiciary; however, non-Hopi must have a law degree while tribal members need not have such formal legal training (although some law-related experience is usually required). Litigants have the right to represent themselves or retain counsel. Counsel need not have a law degree nor be a member of the tribe. Due to prohibitions of cost and location, counsel is extremely difficult for parties to retain, and though Hopi Legal Services offers some resources, parties regularly represent themselves or retain many different representatives over the course of litigation. Court clerks and bailiffs are also present for most trial proceedings, as are audiences composed of relatives of the parties, litigants waiting for their trials, and other court officials.

All trials are held in the Hopi courtrooms adjacent to Hopi Police Headquarters near Keams Canyon on the Hopi reservation.

Tradition in Hopi and Other Tribal Jurisprudence

At the same time that the Hopi Tribal Court employs these Anglo American–style adversarial rules and procedures, 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, the Hopi Tribal Council mandated that "in deciding matters of both substance and procedure," the tribal court give more "weight as precedent to the . . . customs, traditions and culture of the Hopi Tribe" than to U.S. state and federal law (see Resolution, Hopi Tribe, H-12-76). The Hopi Appellate Court has recently reiterated this rule, writing in *Hopi Indian Credit Association v. Thomas*, "The

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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, remains distinctly Hopi" (AP-001-84,4 [1996]).

In this respect, Hopi law echoes the call from tribal jurists across American Indian tribal courts to develop both substantive and procedural bodies of law that rest fundamentally on the traditions and customs of the people they represent (Coffey & Tsosie 2001; Porter 1997b; Cooter & Fikenstcher 1998; Vincenti 1995; Pommersheim 1995a, 1995b). Thus Vincenti writes, "The real battle for the preservation of traditional ways of life will be fought for the bold promontory of guiding human values. It is in that battle that tribal courts will become indispensable" (Vincenti 1995:137). As a consequence, "the courts have found it absolutely necessary to consult tribal custom and tradition and incorporate these values into American-style legal systems" (1995:137).

At the same time that the Hopi Appellate Court expresses a value for the use of Hopi custom and tradition in Hopi law, the court recognizes that introducing tradition into contemporary Hopi jurisprudence is neither a simple nor straightforward process. In the same opinion quoted above, the court writes, "Hopi custom, traditions, and culture are often unwritten and this fact can make them more difficult to define" (*Hopi Indian Credit Association v. Thomas*, AP.001-84, 4 [1996]). Other tribal legal professionals have raised similar concerns about the ability to articulate legal principles from tradition (Tso 1989; Zion 1987). Zion, who, in reflecting on his work in Cree, Pima, Navajo, and Blackfeet courts, explains that the difficulties in "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 Hunter 1999).

Still others 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 legal representations of customs and traditions—misrecognized as either bodies of timeless principles that must be adhered to despite social and political change (Miller 2001; Barsh 1999), or alternatively as not faithful *enough* to "actual tribal pasts"—are more about political power plays, constituting "modes of resistance to all that Western legal culture represents" (Joh 2000:125) rather than as any real articulation of local values and practices. As such, custom, tradition, and culture are notions considered "too problematic" to constitute a foundation for tribal jurisprudence insofar as they invoke troubling "questions of authenticity,

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legitimacy, and essentialism'' more suitable to arenas of politics than law (Joh 2000:120).

These sentiments parallel recent and often bitter arguments between indigenous leaders and scholars critical of the use of tradition by indigenous political systems and movements as inauthentic and illegitimate representations of an ''Edenic'' tribal past designed primarily for contemporary political gain (e.g., Clifton 1989, 1997; Hanson 1989, 1997; Linnekin 1990, 1991). These hostilities have most notably arisen in the contexts of indigenous Oceania, where scholars questioning the ''invention'' and essentialization of custom and tradition in political revitalization movements among native Hawaiians, Maori, and others have come under severe critique from their colleagues and the indigenous groups they purport to describe (Hanson 1989, 1997; Linnekin 1991; Trask 1991; for an overview see Friedman 1993).

But similar challenges have also been invoked by academics studying contemporary Native North American nation-building movements (Clifton 1997; Mauze 1997; see Dirlik 1999). Indeed, it is in light of this perspective on the contemporary discourses of tradition that at least one scholar concludes that ''being Indian in the United States today is, in New Age lingo, being 'into denial' in a big way'' (Clifton 1997:156).

Dirlik (1999) has noted the blind spot these critics seem to have for understanding the political efficacy of the indigenous discourses of culture and tradition in their sovereignty movements. He writes, ''[t]he label of *essentialism,* extended across the board without regard to its sources and goals, obviates the need to distinguish different modes of cultural identity formation that is subversive not only of critical but also of any meaningful political judgment'' (1999:75, emphasis in original). Dirlik calls for greater attention to the structures of power, political contexts, and historicity that inform the contemporary claims of custom, tradition, and unique cultural identity made by indigenous social actors in order to see how such claims might be radical and liberatory in the face of years of colonial oppression and hegemonic control (Dirlik 1999). And as such, he lends his voice to the arguments of others who call for a rethinking of the evaluation of tradition and identity discourses in contemporary indigenous politics away from analyzing the ''authenticity'' of praxis and ideologies claimed as customary and traditional, and toward an exploration of the manner in which such notions of tradition and custom are worked up in complex and multiple ways in relation to discourses and practices that are understood as nonlocal and nontraditional, and that also inform indigenous life and politics today (Clifford 2001; Jolly 1992, 1994).

This endeavor remains fundamentally un-pursued in the context of tribal court jurisprudence. Indeed, scholars repeatedly note

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that there persists a general lack of studies that detail the actual operation of tribal courts and their discourses (Joh 2000; Barsh 1999; Cooter & Fikenstcher 1998). Despite the explicit recognition by tribal jurists that the force of tribal custom and tradition in today's tribal law necessitates careful consideration of their integration into contemporary Anglo American–style legal operations (Barsh 1999; Porter 1997a; Pommersheim 1995a, 1995b), virtually no work has been undertaken to examine the details by which this process is accomplished in the discourses that constitute tribal legal practices. It is thus toward an effort to begin to fill this void that I now turn to the talk and interactions of the Hopi Tribal Court.

Talking Tradition and Talking Law in Hopi Courtroom Interactions

The courtroom interactions analyzed in this article come from approximately 30 hours of audio recordings of property dispute hearings before the Hopi Tribal Court collected by the court as part of its official record, from 1995 to 2002. In addition, the author conducted interviews of Hopi tribal members (including legal professionals and lay members),[1] Hopi Tribal Court archival research, and ethnographic observation of Hopi courtroom proceedings over 27 months of fieldwork on the Hopi Reservation beginning in 1996, a period that included a 13-month stay from November 2001 to December 2002.

A review of Hopi case file archives revealed that since 1995, 15 civil complaints concerning property were filed with the court. Property issues loom large in Hopi members' concerns about law and order in their village communities. This is reflected in the Hopi Constitution, which, when originally drafted by the Bureau of Indian Affairs was designed in recognition of the degree to which Hopi in 1934 identified matters of property as an intensely local concern. Indeed, despite other major governmental reforms written into that constitution, issues regarding probate and the assignment

[1] The interviewing conducted during this period did not regularly include discussions with Hopi litigants. The decision to forgo such interviews, which would have undoubtedly made valuable contributions to this study, was based on several considerations. Perhaps most important, many of the cases analyzed here (including the case from which comes the judge-witness interaction given the most detailed analysis here) 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 Footnote 2), I was concerned (along with court officers) that my contact with litigants might be construed as ex parte communications from the court to the particular party, communications that might be seen as unduly influencing the outcome of their litigation. For this reason, it was determined that 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.

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of village land were two of only four subject matter areas (along with family disputes and adoptions) reserved to the exclusive jurisdiction of what is generally referred to as the "traditional" leadership of the nine separate Hopi villages (Constitution and By Laws of the Hopi Tribe Article III, § 2 [1936]). This reservation 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.

Thus Hopi concerns regarding property remain deep. 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 over property as the single greatest threat to the health and welfare of Hopi communities today.[2] And a primary problem identified by tribal members regarding the resolution of these property conflicts is the difficulties they perceive in balancing claims to property based on notions of Hopi culture and tradition with the Anglo American–style jurisprudence they see as characterizing contemporary Hopi tribal law.

Consequently, it is not surprising that discourses of culture and tradition are a frequent and recurrent feature of both the written texts and oral arguments proffered by ligitants, witnesses, lawyers, and judges in Hopi property disputes. A review of the 15 cases on file with the Hopi court reveals that 14 include recurrent 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 custom and tradition. And of the 12 hearings from these cases for which audio recordings were available, in only one did parties not argue a matter of Hopi tradition or culture.[3] These figures mirror trends in other tribal courts across the United States. In a recent study of 359 published tribal court decisions from 1992 to 1998, of 56 different tribal jurisdictions,

[2] My involvement in this project derives from, and is authorized by, the fact that Hopi tribal members themselves identified a need to investigate matters of tradition and law in their property conflicts. The history of social science among the Hopi is long and controversial. Efforts by ethnographers to represent Hopi life have been tainted by misappropriations of Hopi culture (Whiteley 1993). The degree to which Hopi have felt exploited by such practices has led one anthropologist to ponder whether anthropological work among the Hopi should come to an end altogether, unless future work can respond to the specific concerns of the Hopi themselves (Whiteley 1993). However, based on my work as a clerk for the Hopi Appellate Court since 1996, and my recognized background in law and linguistic anthropology, I was approached by Hopi village and tribal leaders to explore issues of Hopi custom, tradition, and contemporary Hopi tribal law as they relate to the problems villages are facing in addressing property disputes among their community members. This has led not only to the research and analysis presented in this article, but also to the creation of programs designed to inform tribal members about their tribal legal system and to village leaders in the processing of property conflicts.

[3] And this was in large part because the hearing was postponed to give the litigants an opportunity to settle out of court, which they did.

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Figure 1. Explicit References to Hopi Tradition in Property Hearings.

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

I' pay—I' pay mongwit aw yukuya. Pay puma son qa hin navoti' yungqa puma put ep yakyang 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.

ii.) A Hopi advocate in opening arguments (December 12, 2001):

Since that evidence will favor my clients it's very likely that under Hopi custom and tradition that they will succeed on the merits of the case.

iii.) An "Anglo" advocate during direct examination (March 22, 1995):
Now it's true, isn't it, that in Hopi tradition, orchards are generally considered to be the man's property?

opinions concerning property disputes included references to tribal customs and traditions more often than opinions concerning any other subject matter area (Barsh 1999).[4]

Qualitatively, the instances of tradition talk that emerge in these Hopi courtroom interactions reveal a wide diversity of form, content, and distribution of speaking rights (who can say what, and

Figure 2. Indexing Hopi Tradition Through Reference to Ceremonial Obligations and Family Relations[5]

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

Pi qa tiimaytongwu! Pam yaw yep sinmuy oo'oy'ni? Pam yaw yep sinmuy amungem noovalawni? Pangsosa sinom okiiwisngwu. I' yaw pantini ? Qa'e. I' pay son pantini, 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 all come to that [house].
Can he do all that? No. He won't do that, he's a man.

ii.) 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 implies 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 other's clan as you are aware at Hopi clanship.

[4] But even here, custom and tradition are explicitly invoked in property case opinions only 23% of the time, revealing the apparent disproportionate reliance on Anglo American–style law about which so many tribal jurists complain. However, it may also be the case that discourses and claims articulating notions of custom and tradition emerge more regularly in the interactional contexts of oral arguments before tribal courts, where tribal members can press their claims to the court, than in what is represented once tribal judges commit to paper their final decisions and supporting rationale in the published court opinions.

[5] It is important to note that intimately wrapped up with notions of tradition with the Hopi are always issues of gender and identity. With regards to the body of practices and beliefs 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, the fulfillment of which are invoked to justify claims to considerable symbolic and

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Figure 3. Constructions of Hopi Tradition in Relation to "Anglo"-Style Norms and Practices of the Hopi Tribal Court.

i.) 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.

ii.) 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.

iii.) 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.

how, about Hopi tradition). Thus statements of tradition are expressed by Hopi and non-Hopi, and by laypersons, advocates, and judges, in both English and Hopi utterances. Furthermore, in some instances, tradition (*navoti*, "knowledge/teachings/tradition," in Hopi) is sometimes invoked through direct reference, as revealed in the examples in Figure 1. In others, however, it is indexed more indirectly, through talk about family and clan relations, or ceremonial and other social obligations (see Figure 2).

For the analysis in this study, 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–style juridical practices of the court. Sometimes tradition is constructed in opposition to adversarial practices and norms of contemporary Hopi tribal law, while at other times Hopi tradition is talked about in ways consistent (or at least not in inherent conflict) with that law and court procedures. Thus consider the examples in Figure 3.

material capital (including property). Thus it is often said that as a matrilineal, matrilocal society, clan identity flows primarily from the mother to her children, and that homes that mothers occupy can only be inherited by her daughters. Moreover, and as we saw in this case, it is often said that only those daughters that 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 their work is primarily in raising crops in the field, and in participating in the public and private rituals of the ceremonial societies, are often said to only be able to lay claim to those fields that they work for the benefit of their mothers, sisters, and ceremonial societies, but can never expect to inherit clan homes. Indeed, men upon marriage are said to be expected to go and live with their wife's family, until such time as 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 many instances in contemporary Hopi communities, men claim and own homes inherited from their mothers, and they live there with their Hopi wives. As a result, these issues of gender and identity are complex, detailed, and, while quite important, would necessitate a level of detailed and committed analysis that is best reserved for future consideration.

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In all the examples just provided, consideration is given largely to the content of tradition discourses in property dispute hearings before the Hopi court. However, the flows of power and authority in sociolegal interactions are constituted not just in *what* is said, but in *how* it is said, and in the metadiscursive practices and ideologies that inform and shape that talk. Consequently, to properly consider the social force of discourses about Anglo-style law and Hopi tradition in Hopi Tribal Court interactions, and the multiple and even competing ways in which those notions are constituted by Hopi legal actors, it is necessary to delve deeper into the microdetails through which these actors engage each other in those interactions as they emerge in face-to-face exchanges. To do this, I offer an analysis of an exemplary stretch of conflict talk that emerged in one particular property hearing that came before the Hopi Tribal Court in 1997.

A Dispute Over Property Inheritance Before the Hopi Tribal Court

The dispute of particular interest here emanated from a conflict between three sisters (petitioners) and their aunt (respondent) 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 for their grandfather at the time of his death (Affidavit in support of Petition for Injunctive Relief, *James v. Smith*, CIV-018-94 [1994]). According to them, Hopi custom and tradition dictate that property left intestate by a decedent should go to the person in the family who showed the most commitment to its maintenance and to the support of its late owner (Affidavit in support of Petition for Injunctive Relief, *James v. Smith*, CIV-018-94 [1994]). 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 Hopi women's property—should go to them, her daughters (Affidavit in support of Petition for Injunctive Relief, *James v. Smith*, CIV-018-94 [1994]).

The respondent, however, claimed that in 1954 she and her husband, an Apache man (and not a Hopi tribal member), were taken by her father to the field in question and told that she was to inherit the property upon his death (Answer to Amended Petition and Counter Petition to Quiet Title and For Injunctive Relief, *James v. Smith*, CIV-018-94 [1994]). The respondent claimed that because this land is an orchard, traditionally worked by the husband, it does

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not constitute the kind of clan lands that are inherited through the mother. Consequently, she contended that tradition requires that her father's intent to pass the land to her should prevail (Answer to Amended Petition and Counter Petition to Quiet Title and For Injunctive Relief, *James v. Smith*, CIV-018-94 [1994]) The petitioners countered this, arguing that regardless of the father's prior statements, tradition holds that the respondent had lost her claim to this land when she failed to return to show any commitment to its maintenance and when she married a non-Hopi man and left the reservation to live with him (Response to Answer/Counter Petition, *James v. Smith*, CIV-018-94 [1995]).

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 based on 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 its 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. (Hopi Tribal Court, Minute Entry, *James v. Smith*, CIV-018-94 [1995])[6]

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 of the party's lawyers to submit a list of questions, written in English, concerning the issues of custom and tradition to be investigated at the hearing. The judge then explained that he would translate the questions into Hopi and orally present them to the witnesses (Hopi Tribal Court, Minute Entry, *James v. Smith*, CIV-018-94 [1994]). In recognition of the likelihood that many of the witnesses would be of a considerably advanced age, the judge ordered the hearing to be held in their village (Hopi Tribal Court, Minute Entry, *James v. Smith*, CIV-018-94 [1994]).

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

[6] Out of respect for the privacy of Hopi village members, the name of the village involved in this dispute has been omitted from this minute entry.

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present were the judge, the witnesses, and the parties (Hearing in the Village of _____, *James v. Smith*, CIV-018-94 [1994]).[7]

A Hearing on Custom and Tradition

The stretch of talk analyzed below was audio-recorded by the court clerk in winter 1997, but was not observed by this analyst. The tribal judge presiding was a Hopi man with 28 years of 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-style court than it would for courts grounded in Anglo adversarial legal traditions.

Departing from the normal examination processes of the Hopi Tribal Court, the judge played a central role in the questioning of 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 addressing them to the witnesses himself. This approach had two significant consequences. First, no opportunity was given for any sort of 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 under these circumstances would seem to stymie the very purpose of the hearing: to make a determination as to which party produced the more credible understanding of custom and traditional practices. As a consequence, 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).

[7] Again, there has been an omission of the village name.

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This situation played directly into a second consequence that I give considerable treatment. The judge had much greater control over the metadiscursive framing of witnesses' testimony in a hearing set up like this one. In an unusual mixing of roles, the fact finder and decision maker 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 as a response to a given set of questions, the judge attempted to control both 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 turned precisely around the issue of the framing of this testimony, as this issue remained a continuous source of interactive trouble between the participants over the course of the hearing.

The Judge–Witness Interaction and the Emergent Trouble

Judicial efforts to control the frame of 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, a Hopi woman no longer living in the village was required to return to her land if she was to maintain possession of it. Consider first lines 002–011:

(1) Judicial efforts to frame the relevant issues for witness testimony.[8]

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 naala hoyok-hoyokni	
	From here to there perhaps alone move- will move	
	S/he might move away from here alone	

[8] The portions of transcript provided in this article from the 1997 Hopi hearing employ several conventions typical of linguistic anthropological and other discourse analytic studies (see Duranti 1997). Thus, names of speakers occur in the left column, Hopi utterances are represented first in Hopi using an orthography from *Hopïikwa Lavàytutuveni, A Hopi Dictionary of Third Mesa Dialect* (Bureau of Applied Research in Anthropology 1997). Utterances are represented one clause per line, with each clause then translated twice, first with a morpheme-by-morpheme translation and then a looser English gloss, which appears in italics. Portions bolded mark the forms explicitly discussed herein. 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, which intensify their object forms.
CntrFct: Marks a Hopi particle *–as* that is employed in counterfactual statements.

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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 **Hiisakis** 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 isn't unusual for a judge to make a statement concerning the issues to be considered by the witnesses as they provide their testimony. Indeed, what is ever admitted as evidence in an Anglo American trial are facts that are not simply reliable, but first and foremost relevant, and the back-and-forth contestation that often emerges among advocates during witness examination often turns on challenges by one attorney objecting to the relevance of witness testimony that another attorney is attempting to elicit. Judges in most Anglo American–style adversarial proceedings can thus be regularly seen as involved in making determinations about what is and is not information sufficiently relevant to warrant a witness providing it through testimony on the stand (see, e.g., Philips 1993).

But this is not all the Hopi judge was doing. In focusing on the grammatical and discursive structure of this stretch of talk, notice the use of the indefinite terms[9] **yephaqam** (somewhere here) and **hak** (someone) at line 002. Here the judge was setting up the facts for elders to review as hypothetical events similar but not identical to the actual facts of the dispute. Then in lines 007–011, he posed his question, employing at lines 010 and 011 verbs inflected with the habitual aspect[10] marker **-ngwu**. The judge repeatedly used the Indefinite+HABITUAL construction exemplified here throughout

[9] Generally speaking, indefinite terms (somebody, anybody, somewhere, anywhere, someone, etc.) are a class of lexical and grammatical forms used when reference is made to something that is held as unidentifiable. In Hopi usage, as will be explored, indefinite terms can be employed by speakers to make claims without specifically referring to actual people, places, or times (see *Hopïkwa Lavàytutuveni* [Bureau of Applied Research in Anthropology 1997]).

[10] The habitual aspect is a grammatical category that denotes a quality of the event described as characteristic of a period of time. In Hopi usage, **-ngwu** can give the sense that the event or state it characterizes is a customary behavior or occurrence, or is a generally true comment about the world (Again, see *Hopïkwa Lavàytutuveni* [Bureau of Applied Research in Anthropology 1997].).

his questioning of all the witnesses. As one native speaker explained to me, the form is often used in Hopi discourse by someone, usually an authority figure, to "admonish" another to change some problematic behavior. A speaker invoking this genre advises a recipient by explaining what *one should* do, because of what has *always been* done. Such utterances thus project an evidential character of gnomic, generalized truth-value about the facts they purport.

When the judge employed the Indefinite+HABITUAL construction in his questions, he was projecting a metadiscursive frame proposing that elders testify about gnomic, generalized principles of tradition. And if we turn now to line 014, we see that witness 3 produced just such a principle, employing a similar construction. She said,

(2) Testimony of Witness 3: Part I.

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

Using the third-person pronoun **Pam** (third-person singular pronoun s/he) to anaphorically reference the "someone" in the judge's question, coupled with the indefinite temporal particle **suushaqam** (for once) and the habitually inflected verb **pìtungwu** (return +HAB), the witness offered a principle of tradition, which is indeed that someone should return once in a while to their land.

But in the very next line, the elder shifted referents, and using the demonstrative **I'** (this) began referring to the actual woman disputant and actual facts of the dispute.

(3) Testimony of Witness 3: Part II.

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

And with the remainder of her turn she continued in this vein, testifying at lines 016–018 and at lines 021–035 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 III.

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. . .	

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

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

021 Yang kur ansta as hìimu'yta
Along here perhaps CtrrFct 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'ykyangw
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 Paasat 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.

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Significantly, the type of gnomic grammar[11] 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 form construction at lines 019–020, **Hakìy** ... **Hakam** ... **Hakìy** ... **tumalay'tangngwu** (someone ... somewhere ... habitually has such work) follows precisely the framing that the judge proposed. Yet in his response at lines 038–040, 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.

It is after this that the witness began to realize that the judge's use of the Indefinite+HABITUAL construction was not simply initiating a topic for her testimony, framing what would be deemed some of the possibly relevant information she could speak to, but was in fact working as a much more complete metadiscursive constraint on her talk, compelling her to speak *only* of gnomic principles of tradition and expressly not to the particularities of this dispute.

The witness then initiated a challenge to the judge and his efforts to control her talk. At lines 059–061, she questioned why the judge only wanted testimony on generalized principles of custom.

(6) Witness resistance to metadiscursive constraints on her testimony: Part I.

058	**Witness 3:**	Noqw my understanding is
		But
		But my understanding is
059		Sùupan as ima yep naami hìntsakqw
		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 engemya.
		Perhaps truly well Ints we all of them for the benefit of
		But appears [to me] now we are doing this for all.

[11] Gnomic forms are those grammatical forms employed for the expression of generalized truths.

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In response, the judge asserted at line 062 that he was asking for **umuhnavotiy** (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

and then explained that testimony on the facts had been completed, as follows:

(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 yukìwta..
It truly well thoroughly finished
That has all been done.

It is this final comment that prompted another elder witness to pointedly question the very purpose of the hearing. At lines 070 and 071, he said,

(9) Witness 4 questioning the purpose of the hearing.

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

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

He then asked, at line 74,

(10) Questioning the judge's interest in village tradition.

074 **Witness 4:** Um it kitsokit- um navotìyat uma hintsatsnaniqe oovi
You this village you knowledge your will be doing therefore
What are you.-What are you going to do with the village's knowledge

This tense interaction continued, and after the judge reiterated his search for clarity on principles of tradition, it ended when witness 4 finally announced, at lines 087–090,

(11) Thwarting the hearing.

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

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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 gnomic, generalized statements rather than in application to the particularities of the dispute. What motivated this conflict? Why did the judge remain so committed to his restrictions on witness testimony, even when they contributed to the breakdown of the hearing process? And why did the witnesses resist this constraint? An answer comes if we consider the language ideologies that inform these actions to suggest that this conflict talk is as much a struggle over questions of authority and the legitimate exercise of legal power as it is for 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 & Bruner 2000; Mertz 1998; Conley & O'Barr 1998; Mertz & 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" (1985:279). It is by virtue of this process, achieved primarily through discursive and metadiscursive shaping, that 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, legitimacy for powerful legal outcomes is achieved because this metadiscursive shaping

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allows, as Mertz explains, for "the putative objectivity of the story once told in the apparently dispassionate language of the law" (1998:158).

In most Anglo American legal arenas, these processes are initiated by the presentations of events and activities through evidence discourses engaged in by the witnesses and advocates of two parties. These presentations often contradict each other insofar as they are undertaken by lawyers who have already significantly "transformed" the events of the dispute in order to highlight those facts most likely to fit under a legal type that best supports their claims. Then through cross-examination, evidence (including witness testimony) is put under a critical lens to test its credibility, giving the finder of fact and the decision maker an opportunity to consider which parties' legal claims find the strongest support, made in light of the presentation of the events, relevant legal principle, and the legal type–token relationship forged between them.

But, out of concern for the cultural (and communicative) expectations of the Hopi elders called to testify, the judge in this hearing 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 legal type–token relationships usually performed by the attorneys in adversarial trials here had to be undertaken by the judge himself. This potentially put him in the position of contributing heavily to the construction of the competing arguments that he himself would have to decide between, insofar as he was also the fact finder and decision maker in this trial. Any concern for maintaining legitimacy for the tribal court, its decisions, and its authority, in light of Anglo American notions of juridical "objectivity," was threatened by the conflation of the various adjudicatory roles under the judge's sole capacity as adjudicator.

Consequently, the judge's repeated use of the metadiscursive Indefinite+HABITUAL Hopi construction, and his rejection of elders' responses that spoke to the facts of the case, worked to compel witnesses to tell tradition in a manner that produced generalized principles such as the legal types announced in Anglo American law. And it is by these discursive choices that the Hopi judge attempted to accommodate the ideologies of gnomic "objectivity" that ground Anglo American legal legitimacy at the very interactional moment that he also invited discourses of Hopi custom and tradition into the court proceedings.

But by excluding the opportunity for adversarial confrontation of testimony on custom and tradition, the judge was forced to impose this gnomic metadiscursive frame on witnesses' testimony so that they would produce generalizable principles of custom ame-

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nable to adjudication in an Anglo American–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 that violated established Anglo American legal norms and threatened to undermine any legitimacy the legal proceeding (and decisions that flowed from it) could have according to such norms.

Implicit in the judge's moves was a construction of Hopi tradition as at least partly commensurable with Anglo American–style norms and practices of the Hopi court. There is certainly an acknowledgement of differences between the two notions, reflected in the adjustments he made (and attempted to make) to both the witness examination process and the way tradition is told there. Indeed, the very metadiscursive decision to move the entire proceeding to the village both bodily and semiotically re-centered 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 emerged. Yet it was still a court proceeding, and the judge was still the presiding authority. Thus there persists a fundamental significance displayed in those moves suggesting 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–style law it is understood as embodying and enacting. And it is along these lines of metadiscursive negotiation that this Hopi judge attempted to strike a discursive balance of the kind Pommersheim speaks of: working to insure that tribal court proceedings in this case resonated with both the authority of Hopi tradition and the language of "objectivity" required in the legitimate exercise of Anglo American–style jurisprudence (Pommersheim 1995b).[12]

While this may explain the judge's stalwart commitment to his use of the gnomic Indefinite+HABITUAL construction (and his other semiotic moves), even in light of 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 been carrying with them when they entered the hearing, and the fit these conceptions have with the judicial metadiscursive practices just reviewed.

[12] Special thanks are due to one of the anonymous reviewers of an earlier draft of this article who helped 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 were being constructed in this case.

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Tradition and the Exclusivity of Hopi Knowledge/Power

It is a regularly related Hopi belief that authoritative knowledge of village traditions, and the power that comes with it, is not equally distributed to all Hopi people. Rather, tradition is often described as a body of "esoteric ritual knowledge" specific to each village and learned only by some Hopi via traditional narratives told during their secret initiation into their specific village's ceremonial societies (Whiteley 1998:94; see also Brandt 1954; Geertz 1994; Levy 1992; Rushforth & Upham 1992; Titiev 1944; Whiteley 1988, 1998). This is explored most thoroughly in Whiteley's discussion of the general distinction made by Hopi between *pavansinom* ("important/ruling people") and *sukavungsinom* ("common/ordinary people"):

> *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. Non-members 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, emphasis in original)

But the Hopi notion of pavansinom does not merely apply 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 socio-ritual order, people called *popqwat*, or witches/sorcerers. Witchcraft gossip spreads about those people who appear to live lives so full of material and symbolic wealth, and whose enemies seem so regularly downtrodden, that they have achieved these circumstances through their preternatural knowledge and manipulation of cosmic forces.

A picture thus emerges of the manner by which Hopi understand a fundamental and inextricable link between knowledge and power. For, 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. (1998:94–5, emphasis in original)

At least in some ways, then, knowledge of tradition is thus itself a form of coercive control for some Hopi, albeit one that ought never manifest itself explicitly in some differential access to material resources. Instead, and insofar as this knowledge is tightly

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guarded by those who possess it, it becomes a scare resource—property in its own right—that instills fear and respect for those who have it from those who don't.

Navoti can also work in a more hegemonic way to legitimize the authority of those possessing it. Whiteley explains that pavansinom

> tare also attributed with control over highly valued truth. 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, such an individual is one whose age, status in his kin group, ceremonial position, and demonstrated facilities with oral tradition, denote an unimpeachable control of truth. (Whiteley 1998:94, emphasis in original)

For the Hopi, then, knowledge of tradition—whether sacred or secular—is often intimately 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. Knowledge is power in the truest sense. And it is also truth in the most powerful sense. As such, it can be constitutive of a Hopi individual's legitimate authority to affect the world through the planning and execution of sacred ritual and secular political acts, including—in no small part—the resolution of disputes.

Insofar as the litigants asked the Hopi elders to appear at the hearing precisely for their perceived "unimpeachable" access to truth and wisdom, it is also likely that at least some members of their village recognized them as Pavansinom.[13] Thus it is in light of this understanding of Hopi conceptions of the knowledge, power, and authority of Pavansinom that it is possible to gain insight into the Hopi elders' difficulties with the judge's use of gnomic framing strategies in the judicial hearing analyzed earlier.

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[13] Indeed, one of the elder witnesses made this explicit at the hearing. He said,

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 . . .

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Talking Tradition, Talking Law in Hopi Tribal Court

As described above, the judge appeared motivated to insist on this metadiscursive frame in an effort to get the elders to produce testimony concerning custom and tradition already transformed from particularized comments on a specific set of events to more abstract, generalized principles amenable to the Anglo American–style adjudicatory processes of the court. But use of this metadiscursive frame had another consequence. That is, where use of the gnomic allows for reflection and analysis of hypothetical situations and abstract, "objective" principles—excellent for Anglo American–style lawmaking—it did not allow for the elders to conduct explicit discussion of the actual world or the taking of action in it. And as we saw, these elders were specifically prohibited from discussing the particularities of the actual case, and from the recommending of steps to be employed for remedying the dispute. The effect this seemed to have from the perspective of the Hopi elders was the separation of the inseparable—the splitting of knowledge from the power and authority to act on it. These elders, these Pavansinom, seemed to object to the degree that they were being compelled by the judge to speak with legitimacy as to their knowledge of custom and tradition (navoti) but without having any force over the purposes to which it would be put. From their perspective, they were repeatedly told to speak about custom and tradition in the abstract, but not to resolve the very dispute for which they had been called and upon which they expected to take action. As another elder witness at the hearing attempted to establish early on,

> Now i' pay yan Hopivewat pay oovi itamùupe . . . noqw pay, itam . . . itam hak yanhaqam hìntaqat itam aw yukuyanggwu, me. Itamumi posnayaqw pu' itam amungem put yukuyangwu, me. I' yangqw . . . Pahanna 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 ' 'pay yan Hopivewatnìiqe" 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.
>
> 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.

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Indeed, the reference to "this white man" above may in fact be best understood as a synecdochic critique of the tribal adjudicatory system within which these elders found themselves; that is, a system that on its face confronted them with the structures, practices, and discourses of a fundamentally Anglo American–style jurisprudence—a system that wanted 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 suggested that the judge's refusal to let them speak to the facts of the case was asking them to "do this for all," she implied that the judge was compelling them to talk too freely about tradition, in a manner suggesting a direct conflict with at least some Hopi ideologies about the humble exercise of power. When another elder questioned what the judge would do with the "village's knowledge," he was foregrounding the fact that this judge himself is not from their village, and as such was precluded by Hopi ideologies of tradition from legitimately knowing or even hearing the information he sought.

Significantly, through these expressions, the elders articulated a construction of tradition and its relations to the courts' Anglo-style law that commented upon and competed directly with the same discursive moves employed by the Hopi judge to accommodate Anglo American notions of legal legitimacy. As much as the judge's legal power traded on his capacity to metadiscursively combine the content of Hopi traditional knowledge with the generalizing discourses of Anglo American legal ideology, the implications of these witnesses' objections are that legitimate exercise of their power and authority traded on expressions of tradition that must be constructed as both restricted in application to particularized circumstances and spoken only to exclusive audiences. Where the metadiscursive constraints the judge used to accommodate the demands of Anglo American legal objectivity directly conflicted with the ideologies of exclusivity grounding the constructions of Hopi traditional authority these elders proposed, they could challenge the discursive imposition of Anglo American legal principles into their testimony by challenging the judge's talk as requiring them to tell tradition in improper ways. It is in and through these multiple and competing constructions of tradition and contemporary Hopi law that this discursive conflict emerged, and it is the high stakes of power, authority, and legitimacy that prohibited either side from backing down.

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Conclusion

In a 2001 property dispute proceeding before the Hopi court, a Hopi witness testified to the actions of one of the parties that she felt justified the issuance of a preliminary injunction against him. Among the things the witness described was how she and her sister encountered the man at the site of the disputed property, in the middle of night, wearing all black, with his long hair brushed over his face. When they confronted the man, the witness explained, he refused to identify himself or talk at all. "And I said 'Who is it?'" the witness explained, "And he was still standing there. He was standing there."

A Hopi consultant who had heard the testimony explained that what the woman was describing suggested this man's attempts to intimidate them. "He's trying to indicate to them he has the power to call these supernaturals to help him," suggesting his powers as a powaqa. And this largely had to do with the man's refusal to respond when spoken to. As the consultant explained,

> 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. Because the supernaturals come from another world, and so logically, they may not speak the language we speak or there's a communication barrier.

As suggested by this explanation, the failure to interact, the refusal to communicate, suggest the limits of Hopi community to Hopi. Talk matters in this way for Hopi. It marks the horizons of belonging and locates the powers "out there" that can either contribute to community well-being or threaten its dissolution. Face-to-face interaction grounds community, instantiates it, (re)creates it in the course of life on the Hopi reservation.

If talk and interaction matter to the peoples caught up in the sociolegal contexts of (post)colonial relations and conditions, then they must matter to those of us engaged in the academic inquiry into and representation of those contexts. The effort has been made in this inquiry to both argue for and display the importance of attending to sociopolitical language and interaction of the type that emerge in the context of contemporary Hopi tribal court proceedings. These analyses reveal how differently situated Hopi actors take up the discourses of Hopi tradition and the Anglo American–style jurisprudence of the Hopi court in multiple, complex, and competing ways for the purpose of securing the significant power, authority, and legitimacy that come with and through those discourses. By attending closely to the form and context of

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those interactions, and the metadiscursive practices and language ideologies that inform them, we can see a Hopi judge and Hopi witnesses actively and agentially engaging in the constitution of notions of tradition and law in the emergent interactional moments of their tribal courtroom proceedings.

As such, this analysis stands generally for the value of, and as a model for, extending the theories and methodologies of legal discourse analysis and metadiscursive practices to the study of contemporary indigenous and (post)colonial legal institutions. In so doing, unique perspective is gained on the complex ways in which Anglo-style legal practices and institutions are locally constituted in the details of everyday (post)colonial sociolegal interactions, articulating with other local discourses of power and authority (i.e., "tradition"), and are emergent in light of the ideologies and beliefs that inform indigenous interlocutors' use of those sociolegal practices.

More particularly, I hope that this analysis additionally offers an important corrective to the work of scholars who criticize the role of tradition in contemporary indigenous law as 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, that there can be no real division 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 engaged each other in conflict over the rights to control the expression of Hopi tradition precisely because of the power that accrues to those who possess those rights.

Those scholars critiquing 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 the details of the kinds of sociopolitical interactions described here. As such, 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 the extent to which tribal actors' talk about tradition constitutes important and powerful sociopolitical acts designed to challenge the hegemony of (post)colonial regimes that continue to impinge on them. Either way, by not considering the manner in which tribal legal actors are actively talking with, to, and through the discourses of tradition and law that constitute tribal legal practices, sociolegal scholarship in these arenas will continue to overlook the multiple,

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complex, and sometimes conflicting ways in which notions of tradition, law, and culture mediate the (post)colonial conditions within which tribal members' lives and laws are imbricated.

References

Amsterdam, Anthony, & Jerome Bruner (2000) *Minding the Law*. Cambridge: Harvard Univ. Press.

Atkinson, J. Maxwell, & Paul Drew (1979) *Order in the Court: The Organization of Verbal Interaction in Judicial Settings*. London: Macmillan Press Ltd.

Bailey, F. Lee, & Henry B. Rothblatt (1978) *Cross-Examination in Criminal Trials*. San Francisco: Bancroft-Whitney.

Barsh, Russel L. (1999) "Putting the Tribe in Tribal Courts: Possible? Desirable?," 8 *Kansas J. of Law & Public Policy* 74–97.

Bauman, Richard, & Charles L. Briggs (1990) "Poetics and Performance as Critical Perspectives on Language and Social Life," 19 *Annual Rev. of Anthropology* 59–88.

——— (2000) "Language Philosophy as Language Ideology: John Locke and Johann Gottfried Herder," in P. V. Kroskrity, ed., *Regimes of Language. Ideologies, Polities, and Identities*. Santa Fe: School of American Research Advanced Seminar Series, School of American Research Press.

Brandt, Richard B. (1954) *Hopi Ethics. A Theoretical Analysis*. Chicago: Univ. of Chicago Press.

Briggs, Charles L. (1993) "Metadiscursive Practices and Scholarly Authority in Folkloristics," 106 *J. of American Folklore* 387–434.

Bunte, Pamela A. (1992) "'You can't get there from here.' Southern Paiute Testimony as Intercultural Communication," 34 *Anthropological Linguistics* 19–44.

Bureau of Applied Research in Anthropology (1997) *Hopǔkwa Lavàytutuveni, A Hopi Dictionary of Third Mesa Dialect*. Tucson: Univ. of Arizona Press.

Chakrabarty, Dipesh (2000) *Provincializing Europe*. Princeton: Princeton Univ. Press.

Clifford, James (2001) "Indigenous Articulations," 13 *The Contemporary Pacific* 468.

Clifton, James A. (1989) *Being and Becoming Indian. Biographical Studies of North American Frontiers*. Chicago: Dorsey Press.

——— (1997) "Avocational Medicine Men: Inventive 'Tradition' and New Age Religiosity in a Western Great Lakes Algonquian Population," in M. Mauze, ed., *Present Is Past. Some Uses of Tradition in Native Societies*. New York: Univ. Press of America.

Coffey, Wallace, & Rebecca Tsosie (2001) "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," 12 *Stanford Law & Policy Rev.* 191.

Comaroff, Jean, & John L. Comaroff (1991) "Christianity, Colonialism, and Consciousness in South Africa," Vol. 1. *Of Revelation and Revolution*. Chicago: Univ. of Chicago Press.

Comaroff, John L., & Jean Comaroff (1997) The Dialectics of Modernity on a South African Frontier, Vol. 2. *Of Revelation and Revolution*. Chicago: Univ. of Chicago Press.

Comaroff, John L. (2001) "Symposium Introduction: Colonialism, Culture, and the Law," 26 *Law and Social Inquiry* 305.

Conley, John M., & William M. O' Barr (1990) *Rules Versus Relationships*. Chicago: Univ. of Chicago Press.

——— (1998) Just Words: Law, Language, and Power. Chicago: Univ. of Chicago Press.

Conley, John, et al. (1978) "The Power of Language: Presentational Style in the Courtroom," 78 *Duke Law J.* 1375.

Cooter, Robert D., & Wolfgang Fikenstcher (1998) "Indian Common Law: The Role of Custom in American Indian Tribal Courts," 46 *American J. of Comparative Law* 287.

Dirlik, Arif (1999) "The Past as Legacy and Project: Postcolonial Criticism in the Perspective of Indigenous Historicism," in T. Johnson, ed., *Contemporary Native American Political Issues*. Walnut Creek, CA: Alta Mira Press.

Duranti, Alessandro (1997) *Linguistic Anthropology*. Cambridge: Cambridge Univ. Press.

Eades, Diana (1996) "Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina," 16 *Language and Communication* 215–27.

——— (2000) "'I don't think it's an answer to the question.' Silencing Aboriginal Witnesses in Court," 29 *Language in Society* 161–95.

Friedman, Jonathan (1993) "Will the Real Hawaiian Please Stand: Anthropologists and Natives in the Global Struggle for Identity," 149 *Bijdragen: J. of the Royal Institute of Linguistics and Anthropology* 738.

Gal, Susan (1989) "Language and Political Economy," 18 *Annual Rev. of Anthropology* 328–53.

Geertz, Armin (1994) *The Invention of Prophecy. Continuity and Meaning in Hopi Indian Religion*. Berkeley: Univ. of California Press.

Hanson, F. A. (1989) "The Making of the Maori: Culture Invention and Its Logic," 91 *American Anthropologist* 890–902.

——— (1997) "Empirical Anthropology, Postmodernism, and the Invention of Tradition," in M. Mauze, ed., *Present Is Past. Some Uses of Tradition in Native Societies*. New York: Univ. Press of America.

Hunter, Mary Jo B. (1999) "Tribal Court Opinions: Justice and Legitimacy," 8 *Kansas J. of Law and Public Policy* 142.

Joh, Elizabeth E. (2000) "Custom, Tribal Court Practice, and Popular Justice," 25 *American Indian Law Rev.* 117–32.

Jolly, Margaret (1992) "Specters of Inauthenticity," 4 *The Contemporary Pacific* 49–72.

Kroskrity, Paul V., ed. (2000) *Regimes of Language. Ideologies, Polities, and Identities*. Santa Fe: School of American Research Advanced Seminar Series, School of American Research Press.

Levy, Jerrold (1992) *Orayvi Revisited. Social Stratification in an "Egalitarian" Society*. Santa Fe: School of American Research Press.

Linnekin, J. (1990) "The Politics of Culture in the Pacific," in J. Linnekin & L. Poyer, eds., *Cultural Identity and Ethnicity in the Pacific*. Honolulu: Univ. of Hawai'i Press.

——— (1991) "Cultural Invention and the Dilemma of Authenticity," 93 *American Anthropologist* 446–9.

Matoesian, Gregory (1995) "Language, Law and Society: Policy Implications of the Kennedy Smith Rape Trial," 29 *Law & Society Rev.* 669–701.

——— (1998) "Discursive Hegemony in the Kennedy Smith Rape Trial: Evidence of an Age Graded Allusion in Expert Testimony," 8 *Pragmatics* 3–19.

——— (1999) "Intertextuality, Affect, and Ideology in Legal Discourse," 19 *Text* 73–109.

——— (2001) *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*. New York: Oxford Univ. Press.

Mauze, Marie, ed. (1997) *Present Is Past. Uses of Tradition in Native Societies*. New York: Univ. Press of America.

Melinkoff, David (1963) *Language of the Law*. Boston: Little, Brown and Company.

Merry, Sally E. (1990) *Getting Justice and Getting Even. Legal Consciousness Among Working-Class Americans*. Chicago: Univ. of Chicago Press.

——— (1994) "Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court," in M. Lazarus-Black & S. Hirsch, eds., *Contested States: Law, Hegemony, and Resistance*. New York: Routledge.

——— (2000) *Colonizing Hawai'i. The Cultural Power of the Law*. Princeton: Princeton Univ. Press.

https://doi.org/10.1111/j.0023-9216.2005.00082.x Published online by Cambridge University Press

Mertz, Elizabeth (1994) "Legal Language: Pragmatics, Poetics, and Social Power," 23 *American Rev. of Anthropology* 435–55.

——— (1996) "Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom," in M. Silverstein & G. Urban, eds., *Natural Histories of Discourse*. Chicago: Univ. of Chicago Press.

——— (1998) "Linguistic Ideology and Praxis in U.S. Law School Classrooms," in B. Scheiffelin, K. Woolard, & P. Kroskrity, eds., *Language Ideologies Practice and Theory*. Oxford: Oxford Univ. Press.

Mertz, Elizabeth, & Bernard Weissbourd (1985) "Legal Ideology and Linguistic Theory: Variability and Its Limits," in E. Mertz & R. Parmentier, eds., *Semiotic Mediation: Sociocultural and Psychological Perspectives*. New York: Harcourt Brace Jovanovich.

Miller, Bruce G. (2001) *The Problem of Justice. Tradition and Law in the Coast Salish World*. Lincoln, NE, and London: Univ. of Nebraska Press.

O'Barr, William M. (1982) *Linguistic Evidence: Language, Power and Strategy in the Courtroom*. New York: Academic Press.

Philips, Susan U. (1993) "Evidentiary Standards for American Trials: Just the Facts," in J. Hill & J. Irvine, eds. *Responsibility and Evidence in Oral Discourse. Series in Social and Cultural Foundations of Language*. Cambridge: Cambridge University Press.

——— (1994) "Local Legal Hegemony in the Tongan Magistrate's Court: How Sisters Fare Better than Wives," in M. Lazarus-Black & S. Hirsch, eds., *Contested States: Law, Hegemony, and Resistance*. New York: Routledge.

——— (1998) *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control*. Oxford: Oxford Univ. Press.

——— (2000) "Constructing a Tongan Nation-State through Language Ideology in the Courtroom," in P. V. Kroskrity, ed., *Regimes of Language. Ideologies, Polities, Identities: Advanced Seminar Series*. Santa Fe: School of American Research Press.

Pommersheim, Frank (1995a) "Tribal Courts: Providers of Justice and Protectors of Sovereignty," 79 *Judicature* 134.

——— (1995b) *Braid of Feathers. American Indian Law and Contemporary Tribal Life*. Berkeley: Univ. of California Press.

Porter, Robert B. (1997a) "Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues," 7 *Kansas J. of Law and Public Policy* 82.

——— (1997b) "Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies," 20 *Columbia Human Rights Law Rev.* 235–304.

Probert, Walter. (1959) "The Language-Behavior of Lawyers," 35 *University of Pennsylvania Law Review*.

Rushforth, Scott, & Steadman Upham (1992) *A Hopi Social History: Anthropological Perspectives on Sociocultural Persistence and Change*. Austin: Univ. of Texas Press.

Schieffelin, Bambi, et al., eds. (1998) *Language Ideologies. Practice and Theory*. Oxford Studies in Anthropological Linguistics, 16. New York: Oxford Univ. Press.

Silverstein, Michael, & Greg Urban (1996) *Natural Histories of Discourse*. Chicago: Univ. of Chicago Press.

Spivak, Gayatri Chakravorty (1990) *The Post-Colonial Critic: Essays, Strategies, Dialogues*. New York: Routledge.

Titiev, Mischa (1944) "Old Oraibi. A study of the Hopi Indians of Third Mesa," Harvard University Peabody Museum of American Archaeology and Ethnology. Papers, v. 22, no. 1.

Trask, Haunai Kay (1991) "Natives and Anthropologists: The Colonial Struggle," 6 *The Contemporary Pacific* 159–67.

Tso, Thom (1989) "The Process of Decision Making in Tribal Courts," 31 *Arizona Law Rev.* 225–35.

Vincenti, Carey N. (1995) "The Reemergence of Tribal Society and Traditional Justice Systems," 79 *Judicature* 134.

Whiteley, Peter (1988) *Deliberate Acts. Changing Hopi Culture Through the Oraibi Split*. Tucson: Univ. of Arizona Press.

——— (1998) *Rethinking Hopi Ethnography*. Washington, D.C.: Smithsonian Institution Press.

Woolard, Kathryn (1998) "Simultaneity and bivalency as strategies in bilingualism," 8 *Journal of Linguistic Anthropology* 3–29.

Zion, James (1987) "Searching for Indian Common Law," in B. Morse & G. Woodman, eds., *Indigenous Law and the State*. Dordrecht, Holland: Foris Publications.

Cases Cited

James V. Smith, CIV-018-94 (1994).

Hopi Indian Credit Association v. Thomas, AP-001-84 (1996).

Statutes Cited

Constitution and By-Laws of the Hopi Tribe (1936; Amended 1969, 1980, 1993).

The Indian Reorganization (Wheeler-Howard) Act, 25 U.S.C.A. §§ 461-462, 464-479 (1934).

Resolution, Hopi Tribe H-12-76 (1976).

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