In November 1999, the Hopi Appellate Court, the highest court with jurisdiction to resolve civil disputes on the Hopi Indian Reservation, heard arguments in a case involving a conflict between a woman and her sister’s daughters over a plot of farming land in one of its nine mesa-top villages. At trial the woman had argued that, following village customs and traditions, her father had given her the land through an oral bequest prior to passing away in the 1950s. Her nieces argued that even if this were true, given that the woman had married outside the tribe and resided off the reservation for the last 40 years, custom and tradition mandate that she lose whatever rights to the land she may have inherited from her father. The Hopi trial Judge ultimately found in favor of the nieces and their aunt, through her Flagstaff based attorney, had appealed.

Among the issues the Appellate court was to address was whether or not the Hopi trial judge who originally heard the case at the trial level had acted properly in allowing the parties to call elder witnesses to testify at a special hearing about their village’s traditions concerning property and inheritance.

In coming to its decision, the court first congratulated the trial judge – a Hopi man from another village -- for taking testimony from village elders on questions of tradition, stating that he had acted “wonderfully in the absence of guidelines for conducting such a hearing.” (Smith v. James, 98AP000011; 1999 p.2). At the same time, the Appellate Court expressed concern that
because the hearing on the facts of the dispute was held before the Court took testimony from the
elders, the parties couldn’t know, at the time they presented evidence, what kinds of factual proof
would be relevant and sufficient to meet the legal standards required by village tradition. In the
end, the Court found this procedural error fatal to the lower court’s decision and remanded the
case for a rehearing.

The Appellate Court would later go on in its decision to announce guidelines for future
hearings on custom and tradition that drew largely on the testimonial format used by the Hopi
judge in the original trial, filling in the procedural gaps that had made it difficult for trial judges
to implement the provisions of 1976 Hopi Tribal legislation that mandated the court give greater
precedential weight to Hopi custom and tradition than to Anglo-American principles of
inheritance and property law.

But the parties appearing in court that day in 1999 were clearly frustrated when they
heard that their case was going to have to be re-tried. Several gasps were audible to those of us
sitting in the back of the court, one of the three nieces screamed, “No!,” after the Hopi Justices
announced their decision while another turned to the audience as she loudly exclaimed to no-one
and everyone, “That’s not right!” All were noticeably shaken as they left the courtroom. To this
day, the parties have not returned to re-hear the case, the property remains unused, and perhaps
most significantly, the nieces still do not talk to their aunt, their “clan mother” who would
otherwise carry much influence with them.

While the nieces’ sudden outburst might be explained as frustration at having to return,
yet again, to the lower court, I am not inclined to understand their refusal to return to court, to
have the same judge re-hear their case, in quite the same way. Long and bitter disputes over
property inheritance, sometimes spanning generations, are nothing new to Hopi people – indeed,
as I shall argue later, nothing new to Anglo-American law either. And while the dispute in question here had already been in the Hopi legal system for nearly 2 years when it was remanded, the parties both testified that they had been fighting over the property for nearly three decades before ever coming to court.

This case is actually one of a series of six inheritance disputes that came before the Hopi Appellate Court between 1994 and 2003. The decisions rendered by the Appellate Court in these cases would together, result in the most significant refinements of Hopi legal procedure, and expansions tribal court authority, since the court was first created in 1972. In all of these cases both sides argued that their village customs and traditions supported their claims to the property. The legal procedures announced were thus all designed to take better measure of custom and tradition as raised by the parties. And yet, despite these efforts, none of the underlying disputes were ever finally resolved through the Hopi legal system.

What I suggest so vexed these nieces, and so vexes all the Hopi court’s efforts to adjudicate inheritance disputes more generally is its introduction of additional layers of Anglo-style legal procedure to determining matters of custom and tradition. As I have argued elsewhere, turns to procedural formalism in Hopi jurisprudence grow directly from the ways in which the

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legitimacy of Hopi legal practice and power is constituted by actors navigating between the long reach of U.S. colonial oversight and the demands of a Hopi version of cultural sovereignty that calls for a “return” to indigenous “traditions” as a source of tribal law (Richland 2005, 2006, 2007).

In this paper, I will suggest that the litigants’ response here is an example of the regular and recurrent interactional effects of these competing legitimacy demands as they alight in the discourses of tradition in Hopi court. More specifically I argue that these demands shape how tradition gets formulated by Hopi tribal court actors – namely judges and Anglo-law trained attorneys-- as either statements of law or evidence of fact in a way that is legible to and in service of the Anglo-style legal authority of the Hopi court, but which is illegible, and illegitimate to the Hopi parties’ and witnesses’ understanding of tradition.

The notion of tradition is usually translated by Hopi as navoti (a nominalization of the verb navota “to hear”). As a genre of speech, it is characterized by a the recurrent, clause by clause occurrence of reported speech markers, either the Hopi quotative particle yaw (“it is said”), Hopi verbs of speaking such as kita, pangkawu, pang akw (which roughly translate as “says,” “tells,” “tells to [one]”), or their English equivalents. These forms, particularly when they co-occur with indefinite subject forms and verbs inflected with the habitual tense affix -ngwu, constitute the speech event in which they occur as both pointing to and constituting an act of Hopi ceremonial power. And in the theocratic style of esoteric political authority that defines all traditional pueblo governance in the Southwest, including that of the Hopis (Ortiz 1972, Whiteley 1998), such moments of speech are understood not just as the speaker situating themselves in the authoritative line of secret knowledge, nor just as marking the content of their speech as thus “traditional.” They are certainly doing this, but also, and most fundamentally, they
serve as an enactment of that transmission of knowledge in the here and now of the speech event, an enactment of the past, in the present what Paul Kroskrity (1993: 155) explains is at once a “a speaking the past” and a “carrying it hither.”

It is this discursive marking of ones talk as something being carried forward across time-space from the past to the present I am concerned with here, and which, for the purposes of comparison of to similar processes in law, I will call the “perpetuity” of Hopi tradition. Perpetuity is a concept that has a particular valence in Anglo-American inheritance law – it refers generally to the language of a will that attempts to limit how a property right will pass, such that the right “will NOT vest during the period fixed by law.” Insofar as it refers to the terms of a bequest by which a property holder attempts to enforce his or her will beyond the reach of law, a perpetuity is literally il-legitimate, beyond the law, and it is generally prohibited under Anglo common law by the infamous Rule Against Perpetuities.

It strikes me, however, that there is something to the notion of Perpetuity, and the semiotic practices by which one might try claim an inheritance in perpetuity in a legal proceeding, that in fact rest at the heart of the law itself. In coming to this, I follow the legal scholar Paul Kahn, who explains that the unique character of law’s social force is that it “carries forward a past that makes a meaningful claim upon us” in the present but also for the future (Kahn 1999:45). I join this with Charles Peirce’s semiotic and pragmatic conceptualization of law as the relationship “Continuity” (see, e.g. Peirce 1955:91), that affords our understanding of specific instances of communication – the actual moments of sign use and interpretation – as tokens of general types that afford that instance of use, and which are reproduced in it. By bringing these two conceptualizations together, I understand the perpetuity as the key mode of
meaning making and framing by which law generates its authority by revealing seemingly transcendent norms to be immanent in the facts of a particular dispute.

Indeed, “Between facts and norms” is how Jürgen Habermas (1998) describes the mediating place that law works to occupy and by which it exercises its unique communicative force in state-level societies.

Central to this mediation, I contend, is the way in which legal discourses bind facticity and normativity in time-space envelopes literary critic Mikhail Bakhtin (1981) called “chronotopes” or time-space envelopes, that, in the context of law, work to forge connections between the sense and sentiments surrounding a given disputed event with the events of prior cases and their “norms” and “facts”, while anticipating other disputes, and their facts and norms, that are yet to come. In so doing, law works by a kind of reflexive perpetuity – the speakers of law bring in to being nothing more than the latest iteration of a on-going precedent -- every case figuring the legal principle in use as at once “immanent in” and “transcending” the facts and norms it brings together.

But, just as much as it forges certain kinds of connections between facts and norms by linking them to other facts and norms across time-space, the pragmatics of law also does the work of rupturing or foreclosing other such connections. It is this rupturing that I am concerned with in this paper. I argue that it is precisely when law is confronted with other interpretive genres whose power is also generated by working the time-space immanent in and transcending, facts and norms, is-ness and ought-ness, that the smooth veneer of legal authority comes under threat. One such threat is posed by that discourses of Hopi tradition, especially when raised in property and inheritance disputes in Anglo-style court of the Hopi tribal nation in Arizona.
It is when the perpetuity of Anglo-law and the perpetuity of Hopi tradition confront each other I argue, that the trial proceedings in these inheritance disputes begin to falter. For when Hopi judges and lawyers attempt to formulate tradition as either akin to the citations to precedent that characterize Anglo-style law, or as the reports of prior statements of speech equivalent to the suspect evidence called of “hearsay”, they in effect foreclose the mediative ground that tradition can claim between facts and norms, sundering the claims to tradition’s normative transcendence from their immanence in the facts at hand. As such, their acts are understood by litigants and witnesses as attempts not just to appropriate Hopi traditional authority, but to undermine it as well. Indeed, as I will show, at every turn these efforts are challenged by Hopi litigants and witnesses called to testify. The result, I suggest, is a kind of legitimation crisis in the fullest sense – that is, a crisis of law making -- that emerges in Hopi court precisely because the perpetuities of Hopi tradition and Anglo-style law are understood as mutually excluding each other – the one defies the ways in which norm and fact are brought together by Anglo-American legal practice in the pragmatics of its perpetuity, and vice versa.

Before turning to the data, I’d like to make two points about this concept of perpetuity and its relation to two more common notions of Anglo-American jurisprudence, citation and jurisdiction.

First, in introducing the concept of law’s perpetuity, I am speaking of something that is certainly related to, but nonetheless distinct from, the role that citationality plays in law. Of course, citing to precedent is key to the ways in which law is textually and discursively perpetuated across space and time. But in introducing the concept of perpetuity, I am precisely interested in the ways in which discourses of law, and in the Hopi case, tradition, not only cite to prior instances of their expression, but collapse the spatio-temporal distance between the past-
present-and future, figuring law as a kind of time-space envelope that transcends all three, even as it binds norms to facts by finding them immanent in the materials of the case at hand.

Citationality (see, e.g. Derrida 1988, Butler 1993), as a theory that foregrounds the transmission of discourse through chains of quotation, can point either to law’s transcendence or its immanence, but it cannot foreground both simultaneously in the way I hope to imply through the concept of perpetuity.

Secondly, to the extent that I will argue that the “perpetuities” of law and tradition work discursively to exclude each other in Hopi law, I want to also argue that the concept of “perpetuity” more generally fleshes out how I have come to understand recent rethinks of jurisdiction as juris-diction (derived from combining the Latin forms iuris and dicta, to form a double genitive meaning simultaneously “law’s speech/speaking of the law” (see Benveniste 1973)) as the ways in which the scope of law’s power and authority are announced and delimited in the everyday details of legal discourse (Richland 2011). In so doing I build upon the work of law and humanities scholars like Costas Douzinas, Shaun McVeigh, Bradin Cormack and others who suggest that it is precisely in jurisdictional questions that one can observe governmental institutions in their law-making, -applying, and -executing capacities, posing the question of their own authority to themselves. More importantly, it is in those moments of jurisdiction—such as preambles of constitutions, or when litigants ask after a court’s authority to hear their case, that the law at once assumes its power to decide generally (that is, that the law has some power, over some thing), asks after the particular limits of that power as it may apply to the case at hand (Cormack 2008), and then elides the fact that in asking it is announcing that power anew. The net effect of this juris-diction is to convert difficult questions regarding the ultimate sources of legal power and authority into much easier questions of its practical scope and distribution. As Bradin
Cormack writes, “Jurisdiction obliquely encounters the impossibility of grounding the juridical norm by remolding the problem and projecting it onto the manageable … axis of competence or scope” (Cormack 2008:8). And in this sense, it takes those more troubling questions out of discursive circulation. It is through jurisdiction that “the law functions by keeping the source of its authority in fixed view as, insistently, the merely technical (and for that reason discursively unassailable)…” (Cormack 2008:7).

What I argue for in this paper is that juris-diction, is accomplished in and through the quality of legal discourse as perpetuity. It is in the linking up of facts and norms of a present dispute to those of prior and as-yet-to come cases, and the binding of facticity and normativity that is thereby accomplished, that legal power is at once created in, but figured as already preexisting and thus authorizing (that is as at once immanent in and transcendent of), the pragmatics of everyday legal speech. It is a collapsing of what Walter Benjamin (1978) described as law’s two modes– the constitutive (or law-making) and the perpetutive (law-preserving) – and in so doing, foregrounding the latter while presupposing the former. As Costas Douzinas writes, “Every trial explicitly or implicitly addresses the power of the court to judge… every judgment is the violence at law’s inception, the original performative dictio.” (2008: 28).

What is so suggestive in the Hopi courtroom discourses I analyze here is the conflict that emerges when the perpetuity of Anglo-style legal jurisdiction is confronted by the perpetuity of Hopi tradition as juris-diction – especially in Hopi property disputes where both are being invoked by differently situated Hopi actors – judges, lawyers, litigants and elders, to authoritatively claim the exclusive right to hold the mediative ground between facts and norms. In this sense the perpetuity of law, and the perpetuity of tradition struggle both in and as jurisdiction over the unstable ground of Hopi property disputes. And as we shall see, neither can
fully carry the day. Hopi law is revealed as a jurisdiction, caught between jurisdictions, and thereby held in suspense. Contemporary Hopi jurisprudence might thus be said to be caught up in a crisis of perpetuities against rules.

To show how this unfolds I will turn to an analysis of the courtroom discourses in which such matters unfold in the realtime interaction between Hopi judges, witnesses, litigants and lay and professional advocates.

Hopi Tribal Court: Arguing with Tradition.

Approximately 6,700 Hopi tribal members reside on the Hopi reservation, which occupies 1.5 million acres of aboriginal Hopi lands in northeastern Arizona. These residents occupy twelve villages located on or around three mesas that, before the 1930’s, operated under autonomous village leadership. In 1936, and pursuant to the Indian Reorganization Act (25 U.S.C. 479; 1934), these autonomous villages federated into a Hopi Tribe to be governed by a representative Tribal Council. The Hopi Constitution also includes an explicit reservation of power to village leadership, giving them regulatory and adjudicatory power over intravillage matters including addressing family and property disputes.

Tribal governance was elaborated again in 1972 with the creation of the Hopi Judiciary, one that is largely Anglo-Adversarial in its processes and procedures. At the same time tribal legislation and case law require the Hopi 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)

These customs, tradition and culture are largely understood by Hopi as pointing to and enacting the norms, practices and institutions related, either directly or indirectly, to the clan traditions and ceremonies that animate ritual life in the several Hopi villages. Both before and after 1936, the idealized image that Hopis have of village organization sees them as constituted of several matrilineal, matrifocal, exogamous groups they call ngyam or clans (See Titiev 1944, Eggan 1950, Whiteley 1988, Geertz 1994). Each clan has its own origin story which describes the migration of ancestors to their current residence and their original admission to the village community, admission which was premised on their performance of rituals efficacious for bringing rain. It was in exchange for performing of those rituals, pursuant to each clans’ esoteric traditional knowledge that clans were first given land to farm. It is also those ceremonies that constitute the ritual cycle performed every year, a performance that is generally understood as (re)instantiating this originary moment and the social charter it created among the village clans, every year.

It is in part the significance of this ritual cycle as at once an icon and enactment of Hopi village sociality that helps explain the Hopi commitment to the now well-described pattern of Pueblo ceremonial and cultural “conservatism,” in which the felicitous execution of ritual activity “comes only from letter-perfect attention to detail and correct performance,… [with] emphasis on formulas, ritual, and repetition…” (Ortiz 1972: 143, see also Eggan 1950). Letter perfect performance of its ritual obligations is how the component clan and ritual sodalities perpetually (re)make their community. This also helps explain why it is access to, and possession of, the traditional knowledge that informs these performances, that serve as a key source of
social power among Hopi. As Peter Whiteley explains, “one of the most distinguished terms for a man is navoti’ytaqa, 'a man of knowledge’” (Whiteley 1998: 94). It is because of this, he argues, that for Hopi “ritual knowledge is a ‘strategic resource’ (71) serving as ‘the ‘currency,’ perhaps, of power’ (74). At Hopi then, tradition is at once the stuff of social power, and an index of its perpetuity.

Hopi people generally agree that clans are the corporate holders of land, ceremonial homes, ceremonial power and its corresponding offices of ritual authority, and that these symbolic and material resources were bestowed upon them because of their proper performance and commitment to a “traditional” Hopi way of life. It is therefore not surprising that discourses of tradition, who legitimately knows it, and what it provides for, are a regular and recurrent feature of the legal texts and courtroom interactions that constitute Hopi property disputes.

The Perpetuities of Tradition in Hopi Tribal Court

In the over 90 hours of courtroom interaction I observed, discourses invoking notions of traditional knowledge, who can express it, and how, are a recurrent feature of both the written texts and oral arguments proffered by litigants, witnesses, lawyers and judges in Hopi property disputes. Qualitatively, the instances of tradition talk that emerge in Hopi courtroom interactions reveal a wide diversity of form, content, and distribution of speaking rights. And as shown in Figure 1.) below, many of these instances appear to us as articulating normative principles of behavior, either explicitly, or as refracted through clan relations and ceremonial and other social obligations -- expressing what Kroskrity has called an ideology of “regulation by convention” (1993) that is a key element to the idealization of ritual formulae as a model for Hopi behavior generally.

Figure 1.) Tradition as Normative Principle.
a.) An “Anglo” Advocate during direct examination pursuing an argument that her client rightfully inherited a plot of land from her father. (March 1995):

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

b.) A Hopi witness describing to a Hopi judge principles of clan relation between a party and the grandfather she claims bequeathed her clan land: (December 1997):

Wit. You won’t be the same clan as your grandpa.  
You’d have to be the- some other clan  
As you are aware at Hopi clanship.

But in other moments within and across Hopi courtroom interactions, an orientation to specific instances of speech, made by particular persons, do seem to enter into arguments being formulated in and around notions of Hopi tradition and ritual responsibility. Thus consider the exchange in Figure 2.

Figure 2.) Tradition as Prior Speech Event. (March 1995)

Attorney : Ahm Louise, in your knowledge ah as a community member of Hotevilla, and as a member of Hopi ah your entire life, is that in line with -with the understanding of how things work -

Louise : I believe that was true because, like I said, our grandmother left Old Oraibi, solely for the reason of remaining Hopi. She didn’t want the White Man’s Way. She didn’t want any other way but the Hopi way. And I believe that, I believe that she would say that because that was also her instructions to all of us.

Note here how the attorney questions the witness in an effort to get her to respond in a way that indexes her claims to Hopi tradition as significant because of the social conventions of practice and belief that are known to all Hopi members of her village – that is generalized normative principles. But the witness’s response ignores these constraints, instead formulating the truth-
value of her claims as derived from the particular motivations, desires, and “instructions” of her grandmother.

In other instances, however, whether tradition is formulated as the report of particular individuals prior expression of their motivations, or as a general principle of tradition are not so easy to tease apart. This is particularly true when the testimony of tradition is given in Hopi. Consider first the stretch of talk in Figure 3. It comes from a hearing held August, 2000, offered by a woman, Jean, who was in a dispute with her brother, Dan, over a ceremonially home left vacant by their now-deceased mother. Such homes are generally recognized by Hopis as carrying certain gender specific ceremonial responsibilities that require they pass from clan mothers to their daughters. The dispute arose when Dan claimed that their mother left a will in which she bequeathed the home to him. In this stretch of talk Jean, representing herself, was allowed to make her closing argument as to why she believed the disputed home should go to her, and not her brother:

**Figure 3.** Arguing with Tradition in Hopi Court. (August 2000)

001 Jean: Ingu yan wuuyoqi
My mother **there/then** become old  
*When my mother became old*

002  Kur hakiy aw niiqe
Apparently who to so  
*She did not know who to turn to so*

003  Pu' inumi maatavi.
here/now to me relinquish.  
*She gives me that.*

004  Pu’ i’ [DAN],
Here/Now this [DAN]  
*Now DAN*,

005  Pam pay taaqa.
He merely man  
*He is just a man.*
Pam son put ang hinmani.
He NEG that. along there/then be carrying along.EXP
He won’t be able to carry that out.

Pi qa tiimaytongwu!
Truly not witness dance HAB
He doesn’t even come to the dances!

Pam YAW yep sinmuy oo'oy'ni?
He QUOT at this point people be serving.EXP
Will he (as they say) be receiving the people?

Pam YAW yep sinmuy amungem noovalaw.ni?
He QUOT at this point people. for them prepare food.EXP
Will he (as they say) come and prepare food for the people to eat?

Pangsosa sinom ökiwis.ngwu
To then/there people be approaching.HAB
The people all come to that house.

I' YAW panti.ni?
This QUOT do it that way.EXP
Can he (as they say) do all that?

Qa'e!
NEG.
No!

Note the shifting array of temporalities, in which past and anticipated interactions are fused in a succession of events that link the present courtroom discourse to a temporally transcendent narrative of “tradition”. Starting with lines 001-007, the speaker generates a time-space envelope “within” which remain constant the ceremonial responsibilities communicatively passed from her mother to her in the “then/there” (yan, line 1) of the past, with those that would be passed on to Dan if he were to get the home in the “here/now” (pu’ line 4, the “habitual” suffix ngwu, line 7) of this court proceeding, and with those which he is imagined as failing to fulfill in the “then/there” that would follow (“expective” suffix -ni, line 6).
Indeed, in the second half of the narrative, the woman combines use of the Hopi quotative particle *yaw* ("they say") with verbs inflected with the expective *-ni* particle. In this way she conveys within single clauses at lines 8, 9, and 11 the sense of a three-fold temporality that frames her present claim as reporting "timeless" talk of traditions that have occurred and are occurring from some point in the past to now and which reach forward to anticipated social moments of Dan’s potential violation of those traditions. A time-space envelope is thus crafted in which the bequest of the home and the present courtroom arguments are transcended by norms of tradition that were announced and in-force before, during, and after the factual events relevant to this hearing. In so doing, the woman’s utterance serves as a performance of the perpetuity of Hopi tradition, and her authority in and through it. Tradition here serves both to reference the Hopi norms that legitimate her claims in much the way that lawyers cite to legal precedent to legitimate their claims in US courts but also point up her own authority as emerging from the line of transmission of that tradition, from prior speech events to the now – a perpetuity that speaks the past and carries it hither.

Compare this to the two stretches of talk at Figure 4, a. and b. The interaction in 4a comes from the trial court hearing in the case described in my introduction, in which a Hopi Judge queries an elder about how often a woman must return to her village to continue to claim customs of her village,

**Figure 4.) Tradition as Norm or Fact?**

(a). **Hopi Judge questioning elder witness about principles of tradition (August 1995)**

<table>
<thead>
<tr>
<th>Line</th>
<th>Transcript</th>
<th>English Equivalent</th>
</tr>
</thead>
<tbody>
<tr>
<td>001</td>
<td><em>Judge:</em> Pam hapi pay yephaqam hak ayo’</td>
<td>In that way truly now somewhere here someone to there</td>
</tr>
<tr>
<td></td>
<td></td>
<td><em>In that manner someone may go over there</em></td>
</tr>
<tr>
<td>002</td>
<td><em>Hiisakis</em> sen pam pas pew pipte’</td>
<td>How often perhaps she much to here return</td>
</tr>
</tbody>
</table>
How often must s/he return

003 Put pay naat
It now still
And still -

004 Tutuyqawngwu put tuutskwat maintain control over +HAB it land
Ah...have the right over others in that land

... 011 Wit: Pu’ pam angqw suushaqam pitungwu
Then s/he from there for once return+HAB
S/he should return once in a while.

Compare this to the stretch of talk in 4b. which comes from a Hopi woman who was called to testify as to the “oral will” given by her now deceased mother-in-law to her, her husband, his brothers. They claim that this stands as evidence that she intended her cattle to go only to her sons, and not her daughter, their opponent in the dispute. It comes after a lengthy stretch of testimony in which she establishes her credentials as an “expert” in Hopi custom and tradition. After doing so, she starts explaining the circumstances surrounding the oral bequest, explaining how it happened at the cattle ranch run by the boys for their mother:

(b.) Witness testifying to the terms of an oral bequest made by her mother-in-law prior to her death. (October 1997)

001 Witness: She was looking at the cows and she said, in Hopi, - ahm …

002 “Wuuti pay qa wakasvoqmuytangwu. Woman well not cattle have [HAB]
A woman should not have cattle.

Note how in both examples, the interlocutors produce utterances that combine indefinites, third person pronouns, or generalized subject references (i.e. Wuuti – a woman), with verbs inflected with the habitual aspect suffix –ngwu. As my consultants explained, such forms are regularly
used in combination to perform a genre of speech Hopi call öwkhanta “admonitions” that are often used by persons of authority to "admonish" others to change some problematic behavior. A speaker invoking this construct “advises” a recipient by explaining what one does (indefinite), because of what has always been done (habitual). As such, these utterances project the character of what linguists call a gnomic or generalizable truth-value. Thus when the judge uses it in 4a, it seems to work quite effectively at framing a request from the elder witness to produce a generalized principle of tradition – and sets up the witness to produce an utterance of tradition expressed, using the same syntactic combination, that sounds like an Anglo-style legal norm – a legal type ready for application, by the judge to the case at hand.

A certain complexity arises, however, when such forms are deployed by a speaker like the one in 4b, who frames it as the content of the reported speech of another, and namely someone who is an esteemed matrilineal elder, like a mother. How ought we make sense of this testimony? Is it offered as evidence of a prior speech event – testimony about the facts surrounding a particular past expression of her mother-in-law’s wishes regarding the distribution of her property to her children? Is it testimony of a generalized principle of tradition? Or is it another instance of tradition as perpetuity, a discursive peformance that speaks the past and carries it hither?

The polyvalence of tradition in this way is not only evident to the researcher, it is something that gets commented upon by Hopi litigants and lay advocates as well. Consider example 5a, which comes from the same case as 4b, in the closing arguments made by one of the brothers. As he suggests Hopi tradition and oral wills are one and the same thing:

5. Tradition as statement of law and evidence of hearsay.
(a.) A male litigant making closing arguments about the relationship between oral wills and tradition (December 1997):

Hopi tradition is- is speaking and letting people know, your intention and your wishes. …. I think that tradition is something that a person (.) puts together, in their favor or mine, that they know its time, and they come forward with it. And they speak it, and tell us, “This is what I want you, my children to have.”

Or consider the comment at 5b, made by a Hopi lay advocate in response to a non-Hopi lawyer who had just objected to his witness’ testimony on tradition as hearsay

(b.) Hopi lay advocate responding to non-hopi lawyer’s objection that witness testimony on tradition is hearsay (November 2001):

When someone is trying to explain an answer, 99% of the time they have to give- Hopis have to give some kind of a background to that, and 99% of the time it’s hearsay. …. I guess, Hopi practice – ah Hopi language, the way we talk, we have to have some background before we say what we know and that’s- that’s just Hopi custom and practice.

To understand the full contribution these complexities of tradition and its perpetuity play in the on-going legitimation crises posed by Hopi inheritance disputes to before the Hopi tribal court, it is necessary to explore how Hopi legal actors-- namely Judges and law trained attorneys attempt to constrain the significance of tradition discourses as either statements of law or evidence of fact, but not both, and how the witnesses and litigants producing those discourses respond to those efforts.

Let us return, then, one again to the dispute between the three nieces and their aunt in dispute over a piece of property. And let’s pick up where we left off in 4a, with the Hopi Judge questioning elders and attempting to get them to speak about general “principles of tradition”

Though the first elder to respond seems to follow suit, she shortly thereafter begins to talk not about general principles at all, but about her knowledge of the facts of the case – namely that the woman, the nieces aunt “this one [the woman] never came back frequently.”
6. Challenging the legitimacy of tribal court appropriations of tradition.

a). Witnesses challenging the formulation of tradition as generalizable legal principles (August 1995).

011 Witness: Pu’ pam angqw suushaqam pitungwu
Then s/he from there for once return+HAB
S/he should return once in a while.

012 I’ pay qa hisat, sutsep papki
This now not sometime always return
This one [the woman disputant] never came back frequently.

The judge then quickly jumps in, requesting that they not speak about the specifics of the case, reminding them that:

016 Judge Pay nu’ ayanwat as umuy tuvingta
Well I that way CntrFct you ask
I asked you in a different way instead.

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

018 turtta put yu’a’totani
Let it will talk
As we talk about this.

This time, however, the elder balks:

023 Witness: Noqw my understanding is
But my understanding is

…

024 Su’upan as itam pumuy- pay pumuysa engemyaqw
I thought we were [doing this] only for them?

025 Kur hapi pay pas itam so’osokmuy engemya.
But appears [to me] now we are doing this for all.
Judge: Pay puy umuhnavor iy itam umumi tungla’yyungwa
We are asking you for your traditions

[Some lines omitted]

Another elder speaks up from the floor of the court,

Witness 2: Um it kitsokit- um navot’iyat uma hintatsanique oovi
What are you going to do with the village’s tradition?

[Some lines omitted]

Nu’ aw wuwaqw,
When I think of it,

it yep [Village name] navotiyat kitsokit navotiyat this
this village’s traditional way,

tut pay kya so’on hak pas hin
that is something that probably no one

pas navoti’ytani
will know very much about.

The elders object here because, as they see it, when the judge attempts to get them to
speak about generalized principles of tradition, it violates their understanding of tradition as a
body of potent but esoteric knowledge-power (navoti) that is not distributed equally across all
villages, or even within each village. It is indeed a common refrain among Hopi people I know
that no two villages, or even two of clans within the same village, can have the same
understanding of tradition.²

As these two elders rightly recognize, when the judge asks them to speak about general
norms of tradition, he is asking them to subsume their capacity to perform tradition to the norms
of an Anglo-American style legal system that requires general norms to be applied by triers of
fact (here the Judge) to the facts of the case.
To the elders however, this appears as little more than power grab, one that would illegitimately separate the iconic qualities of tradition as an expression of general rules from its indexical force as an instantiation of their authority to perform it, and would do so for the purposes of authorizing his power as a Hopi tribal judge applying tradition in the resolution of the property dispute. When the second elder (witness 2) finally informs the judge at lines 36-39 that the village’s traditional way is “something that no one will know very much about,” he is in fact shutting down the interaction, refusing to testify in the way the judge wants. Ironically his denial of knowledge about tradition could, in a sense, be read as a kind of performance in the negative – an assertion of his traditional authority by non-assertion.

At least from the elders' perspective, what the Judge here sees as merely enacting Anglo-style tribal law of inheritance, albeit grounded in Hopi tradition, is to them the illegitimate appropriation and dismantling of their social authority, as they generate it, through their legitimate perpetuation of tradition. By responding with a non-response, the elder witnesses attempt to turn the tables back around, risking the appearance of offering testimony that is illegitimate to the aims of the court’s Anglo-style legal procedures, but so as to preserve the legitimacy of their traditional authority. The breakdown in the hearing – and the rupture it causes to the perpetuation of law -- is then, in a sense, in the service of the preservation of the perpetuity of tradition.

Finally, consider the spate of interaction in 6b. Here again contests over the interpretation of tradition arise again, but this time it is because the non-Hopi attorney cross-examining them attempts to frame the niece’s testimony as exclusively evidence of the facts of a prior speech event. The attorney here is following up on what the niece had already testified as her “understanding of tradition,” She asks:
(b). Challenging the formulation of tradition discourse as hearsay evidence (March 1995).

001 **ATY:** And if a *man* gives his daughters rights,
002 in his lands,
003 before he passes on.
004 **If the daughter** leaves the reservation,
005 would she have to relinquish her rights in those lands?
006 **Neice:** In Hopi,
007 *they* - *our mothers* say they do.
008 **ATY:** You think then,
009 that *your mother would* say,
010 that even if the daughters got land from their fathers,
011 if they leave,
012 they have to give up that land.
013 **Neice:** Yes. That’s what *my mother* tells me.

*Some lines omitted*

019 **ATY:** And you don’t ahm- know
020 about whether or not
021 this is *how everybody feels* at Hotevilla?
022 **Neice:** I don’t know how they feel.
023 **ATY:** Okay, so this would just be your own feelings
024 **Neice:** Yes.
025 **ATY:** Based on what *your mother told you.*
026 **Neice:** Yes.

Note how the attorney initiates her question, posing it as a hypothetical situation ("if a- a man… If the daughter…"). one that makes relevant an answer that will speak of normative responses that Hopis have to such circumstances. And the witness starts her answer in this way at lines 006 and 007 – first explaining that “In Hopi they say” before restarting to specify this “they” as “our mothers.” Note that the phrase, “they …. say” makes explicit the same notion of knowledge "gained through hearing," an implicit reference, I would suggest, to *navoti* and the esoteric ritual moments of transmission by which one generation of clan members pass them on to the next. This understanding is supported by the her clarification that it is “our mothers” whose speech she is reporting, insofar as “our mothers” glosses the Hopi word *itangu*, a category of social persona, who are the key sources of traditional authority in these matrilineal clans.
But the attorney makes a very subtle change to the line of questioning, one that may or may not even be conscious on her part. At line 009 she reframes the witnesses testimony not as information she learned from “our mothers”, but as a reference to knowledge gained from “your mother.” In so doing she situates the information being offered as linked to moments of talk specifically between the witness and her mother, not the class of social persona known as *itangu*. This implicitly casts doubt on the normative character of her testimony by suggesting that her claims are not shared equally —it is not necessarily “how everybody feels” in the village, to which the Niece balks, exclaiming “I don’t know how they feel”.

When it is then recalled that the witness’ mother is deceased at the time of the hearing, even what appears to be a reference to “on-going” discourses of Hopi tradition (what "your mother tells you") is actually now a reference to speech that is unambiguously located in the past. This is corroborated in the last two lines spoken by the Attorney, when she not frames what the witnesses has testified to as "just your own feelings…based on what your mother told you." That is, testimony that is doubly invalid as an expression of factual evidence – being both a non-expert opinion, and worse, one based on hearsay.

By shifting the temporal frames in these ways, the witnesses testimony of tradition become re-presented as an illegitimate expression of the normative values of their community precisely because it is treated as based on facts that are distant in time – i.e. lodged solely in a past – from the events and the dispute that animate the parties and the courtroom interaction underway. In a manner almost diametrically opposed to the interaction between the elders and the judge above, in this interaction, the subsumption of the perpetuity of Hopi tradition by the lawyer here occurs when she treats the party's expressions of *navoti* as precisely *not* a performance by an authoritative speaker that “carries hither” a speaking of *THE past* -- but
merely as the “speaking of A past” – that is rather suspect testimony of the facts of a prior moment of out of court speech, offered for the truth of what they assert. Indeed, these delegitimizing formulations of the witnesses testimony on tradition are raised so often that towards the end of the hearing, the attorney interrogating the witness here acknowledges, with a bit of resignation, "Your honor… I think hearsay is the only thing we’ve been relying on in this court!"

I have already described the outcomes resulting from all this judicial wrangling. The trial court renders a decision in favor of the three nieces. This is later overturned by the Appellate Court, who find errors in the legal procedures for introducing tradition testimony, but not before, and rather ironically, announcing very similar procedures as the rule of their law in future cases where tradition must be introduced at trial. And the ironies ramify, for in so doing, the Appellate Court actually expands its authoritative reach over cases involving inheritance that it didn’t have before and refines its legal procedures for appropriating tradition so that it can claim legitimacy in its efforts to resolve those cases. But all the while the parties to the underlying case— the nieces and their aunt -- get no resolution to their inheritance dispute, and the esteemed elders called forward to speak to how this matter should be resolved, according to their village traditions, are never in fact heard. The scope of law’s authority may thus have been expanded, and its perpetuity re-instantiated, but it is at the expense of being able to legitimately “hear” tradition, and those who speak it to resolve the actual dispute.

In these cases, and in the way inheritance disputes remain irresolute before Hopi tribal court, we come to see how law works to occupy that field of perpetual mediation all on its own. Tradition can be a statement of legal principle in Hopi court, or it can be testimonial evidence of
facts, but it cannot be the discourse that binds the two together. Only Law can do that, at least in
the way Hopi judges attempt to apply Anglo-style legal procedures.

**Conclusion: Perpetuities As (and Against) Rule: Law, Tradition, Juris-diction.**

The title of this article is a play on the infamously common law principle of Anglo-
American inheritance law called the Rule Against Perpetuities (RAP).

The question that animates the RAP has to do with how far into the future we ought to
allow a present property holder to determine how their property is heritable. As the modern
version of the common law rule provides, a testamentary provision will only be valid if the
interest it creates vests no later than 21 years after "some life in being" at the time the provision
was created. The idea is that a testator should not be able to create a perpetuity, dictating, in the
present, the distribution of their property infinitely into the future. The Rule thus attempts to
impose a limit, invalidating any distribution that would occur beyond the time when the
grandchildren of the youngest generation alive at the end of the testator's life (approximately the
fourth subsequent generation) would reach maturity and thus take ownership.

So what is the problem? It turns out that it is quite difficult to determine in the present
when a property interest will vest in the future, if at all. This is particularly true when what
matters to the Rule is not even what actually happens in the future, but what is imagined in the
present as a possible future.

The problems this has posed for lawyers has been in evidence for over one hundred years.
Writing in the 19th century, John Chipman Gray notes the "few lawyers of any practice drawing
wills and settlements who" in failing to anticipate the possible futures that their testamentary
documents create in violation of the RAP, "have not at some time either fallen into the net which
the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped
it." (1915[1886]: xi). Yet despite this long-standing awareness of the problem, the traps posed by
the Rule remain. Indeed, as recently as 1998, Britain's Law Commission proposed substantial
reforms to the Rule Against Perpetuities. Before that, in 1990, at the National Conference of
Commissioners of Uniform State Laws enacted the Uniform Statutory Rule Against Perpetuities,
a revision to the 1987 Uniform Rule that, in only three years, was already found faulty in its
application. And perhaps, most famously, in 1963, the California Supreme Court in Lucas v.
Hamm (56 Cal.2d 583 (1963)) held that a lawyer is not liable for malpractice when the will he
prepared was void for violating the Rule Against Perpetuities. This is true, the court explained,
because the Rule has always proved difficult to follow.

Interestingly, the decision quotes Chipman Gray for the fact that, since its earliest
formulation, "there is something in the subject which seems to facilitate error." I am inclined to
think that it is the subject of the Rule that poses the problem. That is, I wonder if the challenges
posed by the Rule speak to a larger challenge that inheritance, and tradition, and any other
discursive modality that has perpetuity at its heart, poses to law, and its perpetuity, more
generally.

The question the rule seeks to address -- if understood in retrospect as a court would
when trying to apply it -- would ask after the extent to which the possible future imagined in the

3 The Law Commission, Item 7 of the Sixth Programme of Law Reform: The Law of Trusts. The Rule Against
Perpetuities and Excessive Accumulations. To the Right Honorable the Lord Irving of Lairg, Lord High Chancellor

4 Uniform Law Commission, The National Conference of Commissioners on Uniform State
Laws, The Uniform Statutory Rule Against Perpetuities, with 1990 Amendments, Prefatory Note,

5 Id. at 588, quoting Gray 1942, xi.
past (in a testator’s will, say) should constrain how inheritance is distributed in the actual future that has arrived now in the present. Understood in this way, the founding question of the Rule poses precisely the questions of perpetuity that animate the authority of law more generally. If, as I have tried to show, law generates its authority “between facts and norms” through discursive moves that figure law as at once immanent in and transcending any single instance of bringing facts and norms together, it appears to do so by the same kind of “speaking the past” and “carrying it hither” that is imagined at the execution of any act of testation.

If we can say that the abiding question of inheritance (literally, the act by which one “makes heirs”) -- is the question of a testator perpetuating his will into the future – his perpetuity – then the dilemmas of Rule Against Perpetuities just described can perhaps be understood as yet another instance of law’s crisis in the face of any perpetuity other than its own. Law is itself constituted as a kind of continuity—a perpetual transmission that endeavors to speak its past and carry it hither every time it is enacted anew in courtroom hearings or legal opinions. It is, also, however, a perpetuity whose legitimacy and authority is premised on representational practices that work by excluding other discourses whose authority is claimed in mediating between and transcending norms and facts via perpetuity.

When viewed in this light, it is not surprising then that Hopi customs and traditions seem to be done a violence by the formulating practices of Anglo-style tribal legal actors, As with the Rule Against Perpetuities, the temporal displacements operating in the ideologies of the Anglo-style legal processes of the court, and by which its legal actors formulate tradition as either a statement of law or evidence of fact, both do a kind of violence to the perpetuity of tradition – preventing its capacity to bind norm and fact, transcendence and immanence, such that those who wish to argue in and through tradition are denied the opportunity to either legitimately
“speak the past” or forcefully “carry it hither”. But these problems arise not because these perpetuitities are so radically different, but rather so very similar. The problem is like an ill-fitting shirt that is somehow more troubling because we expect that it should fit, and only remember (time and again, but always too late) that it simply rubs us, quite literally, the wrong way. So too do Hopi litigants, like the three nieces, or their witnesses, expect that their traditions, and the inheritance matters they inform should find adequate resolution and re-presentation in law and its perpetuities. And yet, time and again, they discover that the fit of Hopi tribal law to the legitimate expression of their traditions, is just not right. It is this, in the end, that explains the crises of juris-diction– of the speaking of law/law’s speech that, in the Hopi courtroom, seems to be held in suspense – that the perpetuities of its Anglo-style legal discourses and the perpetuities of Hopi tradition, when they confront each other in inheritance disputes. And, perhaps even more importantly, it suggests the extent to which it is perpetuity, or perpetuities that sit at the very heart of that which stands as (and against) rule.

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