

American Indian Law Review

Volume 18 | Number 2

1-1-1993

Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992

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NOTES AND COMMENTS

DEVELOPING A TRIBAL COMMON LAW JURISPRUDENCE: THE NAVAJO EXPERIENCE, 1969-1992

*Daniel L. Lowery**

Table of Contents

I. Introduction	381
II. Using Navajo Common Law	387
A. Statutory Authority	387
B. The Status of Custom in Navajo Law	389
C. What is "Custom"?	390
D. Raising and Proving Custom in the Courts	391
1. The Pleading Requirement	392
2. Proving the Existence of a Custom	393
a) Recorded Precedent	394
b) Learned Treatises	394
c) Judicial Notice	395
d) Expert Testimony	397
III. Criminal Law	399
A. Specific Crimes	400
B. Defenses	401
C. Juveniles	401
IV. Family Law	402
A. Children	403
1. Adoption	403
2. Paternity	404
B. Marriage	404
1. Customary Marriage	405
2. Cohabitation	406
3. Husband-Wife Privilege	407
4. Interspousal Immunity	407

* Clerk, Alaska Superior Court Judge Dana Fabe, J.D., 1993, University of Cincinnati. I would like to extend my deepest gratitude to Chief Justice Robert Yazzie, Justice Raymond Austin, and retired Justice Homer Bluehouse for giving me the opportunity to listen and learn from them during my 1992 clerkship with the Navajo Nation Supreme Court. I would also like to extend a special thanks to Jim Zion — without his encouragement, insights, and assistance in gathering materials, this comment would probably never have been written.

First place winner, 1992-93 American Indian Law Review Writing Competition.

C. Divorce	408
1. Customary Divorce	408
2. Property Division	408
3. Alimony	409
4. Child Custody	410
5. Child Support	411
V. Property and Land Use Law	412
A. Common Property	412
B. Customary Land Use	413
C. Customary Trusts: Family Property Rights	414
D. Grazing and Land Use Permits	415
E. Adverse Possession and Abandonment	415
VI. Probate Law	416
A. Classification and Intestate Distribution of Property	416
B. Customary Trusts and Grazing/Land Use Permits	418
C. Wills	419
VII. Common Law Rights	420
A. Access to the Courts	421
B. Association With Relatives	422
C. Children's Rights	422
D. Due Process	422
E. Equal Protection of the Law	424
F. Fair Employment Opportunities	425
G. "Fundamental" Rights	425
H. Marriage	426
I. Political Liberty	426
J. Privacy	427
K. Representation	427
VIII. Tort Law	428
A. Assault	428
B. Fault: Comparative Negligence	429
C. Wrongful Death	429
IX. Other Areas of Law	430
A. Civil Procedure	430
1. Res Judicata	430
2. Domicile	431
B. Contracts	431
C. Government	432
D. Remedies and Punishments	433
1. Criminal	433
a) Restitution	433
b) Probation and Parole	434
c) Punishment	434
2. Civil	435

a) Restitution	435
b) Equity	436
c) Garnishment	436
X. Conclusion	437

I. Introduction

As Indian tribes across the country work to maintain or revive their traditional cultures in the face of continuous assimilationist pressures, they are recognizing the key role that tribal courts must play to win that struggle.¹ In particular, by bringing their unwritten customary law, or common law,² into the imposed Anglo-American style tribal court systems, tribes are resurrecting, institutionalizing, and applying to the cases that come before them the norms and values that underlie the tribal traditions and customs.³ The courts of the

1. See Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989) (discussing the obligation of tribal courts to defend against the encroachment of Anglo-American cultural values through law) [hereinafter Tso, *Process*]. An independent court system is clearly a source of empowerment for tribes. See Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 421-22 (1992); Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 1000 (1991); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 274 (1987); Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1398-400 (1985).

2. In 1987, the Navajo Nation Supreme Court announced its preference for the term "common law" over "customary" or "traditional" law, for the reason that the former term "properly emphasizes the fact that Navajo custom and tradition is law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law." *In re Estate of Belone v. Yazzie*, 5 Navajo Rptr. 161, 165 (Navajo 1987) (emphasis in original); see also James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 269-70 (1984) (discussing the foundation of American common law in customs and traditions); Richard Van Valkenburgh, *Navajo Common Law I: Notes on Political Organization, Property and Inheritance*, 9 MUSEUM NOTES: MUSEUM OF N. ARIZ. 17, 17 (1936) (using term "Navajo common law" for the legal traditions of the tribe).

For the purposes of this comment, however, "common law," "customary law," and "traditional law" are used interchangeably to denote that body of tribal legal traditions and customs, and the underlying cultural norms and values, applied by the tribal courts.

3. See, e.g., *Spotted Tail v. Spotted Tail*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6032, 6032 (Rosebud Sioux Trib. Ct. App. 1989) (noting that "it is well within the framework of Lakota tradition and custom that placement [of children of divorced parents] be made, if appropriate, with a member of the extended family, particularly when that individual has provided substantial care and nurture to any of the children"); *Hepler v. Perkins*, 13 Indian L. Rep. (Am. Indian Law. Training Program) 6011, 6016 (Sitka Community Ass'n Trib. Ct. 1986) (taking note of tribal Court of Elders decision applying traditional law to resolve child custody dispute); *Mexican v. Circle Bear*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6031, 6033 (Cheyenne River Sioux Trib. Ct. 1985) (holding, pursuant to tribal custom and usage, that custody of spouse's dead body lies in surviving spouse); *In re K.D.M.*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6002, 6002 (Cheyenne River Sioux Ct. App. 1984) (finding a right to due process based in tribal traditions); *Miller v. Crow Creek Sioux Tribe*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6008, 6010 (Intertribal Ct. App. 1984) (recognizing

Navajo Nation have been leaders in this movement,⁴ especially since the early 1980s, when the Navajo Court of Appeals (later to become the Navajo Nation Supreme Court) initiated its Navajo Common Law Project (the Project).⁵

traditional tribal kinship systems).

As one author has noted, "tribal courts are ideally situated to serve as a bridge between local tribal culture and the dominant legal system." Pommersheim, *supra* note 1, at 412. As the power and security of the courts increase, the tribal jurisprudence can "reflect[] the aspiration and wisdom of traditional cultures seeking a future of liberation and self-realization in which age old values may continue to flourish in contemporary circumstances." *Id.* at 413.

It should be noted that there exists a range of tribal court structures in the United States. Some courts are organized by the tribes themselves under the tribal constitutions. Taylor, *supra* note 1, at 237. Others, the so-called CFR courts, are subject to federal regulation. *See* 25 C.F.R. § 11.1 (1992). The various Pueblo tribes of the American Southwest also apply traditional law through their tribal councils. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 62 (2d ed. 1988).

The modern Navajo tribal court system was developed by the Navajo Nation Tribal Council between 1948 and 1959 and does not owe its existence to a constitutional provision. *See* Stephen Conn, *Mid-Passage — The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 332 (1978). Although its legislative origins might suggest a lack of judicial independence, the Navajo system has in practice established itself as an integral and assertive branch of tribal government. Certainly, no other tribal court system is as sophisticated in structure and resources, and more widely viewed as a model of successful tribal judicial self-reliance, than the Navajo courts. *See* Taylor, *supra* note 1, at 236; Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 18 (1979); Murray Campbell, *Navajo Justice System Wins Farflung Praise*, TORONTO GLOBE & MAIL, Sept. 16, 1991, at 17. *But see* SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE* 100, 103 (1978) (condemning tribal court systems, including that of the Navajo Nation, as "little more than pale copies of the white system," and arguing that "it would be more realistic to abandon the [tribal court] system altogether and to deal with Indian civil and criminal problems in the regular county and state court systems").

4. The Navajo tribal court system consists of seven district courts and five family courts scattered around the 25,351 square mile reservation in Arizona, New Mexico, and Utah, as well as a supreme court (of appeals) in Window Rock, Arizona. NAVAJO NATION JUDICIAL BRANCH, FOURTH QUARTERLY REPORT: JAN.-MAR., FISCAL YEAR 1992, at 11-12 [hereinafter REPORT]. In addition, many matters are handled through special judicially created court procedures, including the small claims procedure and the Peacemaker Court. *See* JAMES W. ZION & NELSON MCCABE, *NAVAJO PEACEMAKER COURT MANUAL: A GUIDE TO THE USE OF THE NAVAJO PEACEMAKER COURT FOR JUDGES, COMMUNITY LEADERS AND COURT PERSONNEL* (1982) [hereinafter MANUAL]; *RULES FOR SMALL CLAIMS PROCEEDINGS* (1990) (issued by the Navajo Nation Supreme Court). Note that the Navajo Court of Appeals was supplanted by the Navajo Nation Supreme Court, which was created by the Tribal Council in 1985. NAVAJO TRIB. CODE tit. 7, § 301 (Supp. 1984-85).

5. James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 92 (1983) [hereinafter Zion, *Peacemaker Court*]. In 1991, the solicitor to the Navajo Nation Supreme Court issued a prospectus announcing updated goals for the Navajo Common Law Project, including: the undertaking of comprehensive research on Navajo common law; the development of a court archive of relevant materials; the collection of oral histories of the Navajo; the writing of a definitive treatise on Navajo common law; renewed efforts to employ Navajo common law in court decisions; and others. James W. Zion, *Prospectus: A Project for the Development of Navajo Common Law* 6-9 (July 29, 1991)

Although customary Navajo law had been applied by the tribal courts even before decisions began to be published in 1969,⁶ the Project signaled the beginning of a new, less inhibited effort to revive the Navajo common law.

The most far-reaching exercise of custom and tradition by the Navajo courts took place just as the Project got underway, when the judges of the courts formally adopted the rules establishing the Navajo Peacemaker Court.⁷ In 1981 Navajo Nation Tribal Chairman Peter MacDonald took steps to examine how customs and traditions could be incorporated into the court system itself.⁸ These official efforts dissipated due to lack of funding, but the Navajo courts were galvanized into considering the issue.⁹ One of the first findings, made after consultation with authorities on traditional Navajo dispute resolution procedures, was that a form of local mediation had been the predominant customary means of handling legal problems.¹⁰ Inspired, the judges of the Navajo courts convened in 1982 to consider the possibility of reestablishing the traditional Navajo mediation mechanisms in the courts themselves.¹¹ In their discussions, the judges noted that many community problems were especially unsuited to resolution by litigation,¹² that lawsuits

(unpublished manuscript, on file with author) [hereinafter Zion, Prospectus].

From the author's experience working for the Navajo Nation Supreme Court between May and August 1992, progress is being made toward some of these goals, particularly the researching and archiving of anthropological, sociological, and legal materials bearing on Navajo common law. The court has begun a digest of such materials, and is working on an index. On the other hand, no work was yet being done on any kind of Navajo common law treatise, and it was too early to tell if the courts had increased their frequency of common law usage from what it was before the prospectus was issued. The factor that most inhibits the efforts of the court to develop Navajo common law is, of course, a lack of funding.

6. See *Navajo Nation v. Platero*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049, 6050 (Navajo 1991); Conn, *supra* note 3, at 368-70.

7. MANUAL, *supra* note 4, at 2.

8. Zion, *Peacemaker Court*, *supra* note 5, at 92-93.

9. *Id.* at 93-94.

10. *Id.* at 94-97. In a 1982 decision, Judge Tom Tso of the Window Rock District Court ordered traditional mediation to resolve a marriage dispute. *In re Marriage of Allison*, 3 Navajo Rptr. 199, 199 (Window Rock Dist. Ct. 1982). Tso took note of "a long-standing custom and tradition among the Navajo people for a judge of the Navajo Tribal Courts to appoint a member of the community to mediate and conciliate problems among members of the community." *Id.* at 199.

There is also evidence that such mediation was an ongoing, widespread, ad hoc means of resolving disputes, which persisted unofficially even after courts were first established by the federal government in the Navajo Nation. James W. Zion, *The Navajo Peacemaker Court*, 15-4/16-1 PERCEPTION 48, 49 (1992) [hereinafter Zion, *Navajo*]; Raymond D. Austin, *Navajo Common Law Principles and Alternative Dispute Resolution 7* (1992) (unpublished manuscript, on file with author) (Austin currently serves as Associate Justice on the Navajo Nation Supreme Court.).

11. Zion, *Peacemaker Court*, *supra* note 5, at 98-99.

12. The Navajo Peacemaker Court Manual indicates various kinds of disputes for which use of the court would be appropriate: family disputes, problems among neighbors (such as "nuisances, animal trespass or annoyance, conduct which bothers others and like things"), alcohol-

were prohibitively expensive and time-consuming for most Navajos, and that less-acculturated Navajos were unfamiliar with, and therefore at a disadvantage in, the imposed litigious system.¹³ The solicitor to the court of appeals presented a proposed outline of a court procedure, to be established under the rule-making authority of the courts instead of through the Navajo Tribal Council, that would formally institutionalize the customary mediation techniques of dispute resolution.¹⁴ After much debate, the judges agreed to implement the procedure on an experimental basis, and the Navajo Peacemaker Court was born.¹⁵

Parties electing to attempt resolution of their dispute through the Peacemaker Court choose a peacemaker, traditionally called a *naat'aanii*,¹⁶ or have one selected for them by the local chapter government or the district court.¹⁷

related problems among family and neighbors, sexual misconduct, torts, "[b]usiness matters of \$1,5000 [sic] or less," and "[a]ny other matter the District Judge feels should be or can be taken care of in the Peacemaker Court." MANUAL, *supra* note 4, at 7-8.

Traditionally, mediation was apparently used to resolve most serious problems among community members, including criminal matters. William Bluehouse Johnson, currently serving on the Laguna and Isleta Pueblo tribal courts, has noted that customary Navajo mediation was of use to some of the judges [of the early Navajo tribal courts] as part of settling either criminal or civil cases.

For example, if a Navajo judge perceived that underlying reasons like fencing and boundary disputes were at the root of an assault case, then that judge might refuse to hear the case as a criminal action. Instead the judge could bring the disputants together and have them work out those underlying problems that led to the assault. A judge would also offer advice [sic] by lecturing on values of cooperation and harmony in the community in the manner of traditional headmen.

William B. Johnson, *Navajo Peacemaker Court: Impact and Efficacy of Traditional Dispute Resolution in the Modern Setting* 6 (1990) (unpublished J.D. thesis, University of New Mexico). In practice, the Peacemaker Court has been used to deal with such matters as child abuse, an offense which in the Anglo legal system is considered criminal. *Id.* at 28 (citing information provided by the Chinle and Ramah district courts).

13. MANUAL, *supra* note 4, at 2-3.

14. Zion, *Peacemaker Court*, *supra* note 5, at 98.

15. *Id.* at 98-99. The adopted rules establishing the Peacemaker Court indicate that the court "is an experiment in preserving an important and fundamental tradition by supporting it with the modern legal methods of written rules and procedures." MANUAL, *supra* note 4, at 156-57.

16. Tom Tso, former Chief Justice of the Navajo Nation Supreme Court, has described the significance of the *naat'aanii*:

That term has been translated as "peace chief," but it also means something greater. The Navajo language uses action words to describe things. This word refers to someone who can speak well in public. If the community hears someone who speaks well, with the content of the speech showing wisdom, organization, and spirituality, that person is *naat'aanii*. . . . A *naat'aanii* will lead discussions to talk about others or talk out problems, and his or her word has a great bearing on the group's decisions.

Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15, 17 (1992) [hereinafter Tso, *Moral Principles*]; see also Zion, *Navajo*, *supra* note 10, at 49; 2 DAN VICENTI ET AL., *THE LAW OF THE PEOPLE: DINE' BIBEE HAZ'AANII* 116-18 (1972) [hereinafter 2 VICENTI].

17. NAVAJO PEACEMAKER CT. R. 2.1; James W. Zion, Introduction to the Navajo

The peacemaker, often a community or religious leader or respected elder, guides the ensuing discussions between the parties and other concerned individuals, including family members.¹⁸ The peacemaker may also interject his or her own perspectives, especially where a discourse on traditional Navajo values is deemed appropriate.¹⁹ When everyone has had their say, the peacemaker generally wraps up the session with a prayer addressing the concerns that have been raised.²⁰ If a solution agreeable to the parties has been reached during the course of the peacemaking session, then the results may be written out and taken to the district judge for signature as a final judgment.²¹ If the parties cannot agree, Anglo-style litigation through the district court is still available to them.²²

The Peacemaker Court celebrated its tenth anniversary in 1992. Unfortunately, the statistics on its usage and success are not available.²³ Evidence

Peacemaker Court 5 (July 6, 1991) (unpublished manuscript, on file with author).

18. NAVAJO PEACEMAKER CT. R. 2.2.

19. *Id.* at 2.2(c).

20. See HOZHOJI NAAT'AANII (Navajo Peacemaker Court videotape 1992) (produced by the Navajo Nation Judicial Branch); Raymond D. Austin, Incorporating Tribal Customs and Traditions Into Tribal Court Decisions 7 (unpublished paper, delivered at 1992 Indian Law Conference of the Federal Bar Association, Albuquerque, N.M., Apr. 2-3, 1992) (on file with author). An observer at a peacemaking session involving a marital dispute between a young couple described the proceedings:

Parties sit in a circle facing one another and listen to the others' point of view. A mediator sits in the middle and listens intently to each side. Though some family members grow impatient for their turn, they wait until the mediator recognizes them to speak.

The dialog [sic] often turns into a stern, no holds barred lecture to the couple by other family members, fluctuating from English to Navajo. A sister harshly scolded her brother for the pain and heartache he caused the family.

....

Even when emotions run high, everything is spoken in a civil tone. Judging from the tears that are wiped away, no one holds anything back. The court bailiff provides a box of Kleenex.

Everyone gets their chance to speak to the issue and there is no time limit. There are no lawyers to ask questions and no judge to rule on what is or isn't relevant.

....

Within about 90 minutes, all the parties shake hands and the young couple agrees to work together the try to save the marriage for themselves, their children and their families.

... Based on a recorded transcript of the proceeding, Chinle District Court Judge Wayne Cadman and his staff will write a binding court order to follow up and enforce what the couple agreed on.

Richard Sitts, *Navajo Peacemaking Makes a Comeback*, THE INDEPENDENT (Gallup, N.M.), July 27, 1991, at 1. Note that apparently there is significant variation in the proceedings of peacemaking sessions around the reservation. Johnson, *supra* note 12, at 31-34.

21. NAVAJO PEACEMAKER CT. R. 4.3.

22. *Id.* at 2.5.

23. One seasoned peacemaker, Freddy Lee, estimated in 1991 that 80% of the sessions were

exists, however, that the procedure has become popular even on an unofficial level, where peacemaking is apparently going on without resort to the courts at all.²⁴ Certainly, the Navajo Peacemaker Court has been scrutinized with interest by representatives of legal systems from around the world, including those from litigious systems looking for alternatives and those from tribal systems seeking ways to preserve their traditional legal methods within nontraditional formalized systems.²⁵

Although the creation of the Peacemaker Court may have been the single most significant practical step yet taken by the Navajo Nation towards reestablishing traditional Navajo law, the tribal courts have extended their efforts within the confines of their Anglo-style judicial system as well. The use of Navajo common law in written decisions of the Navajo courts has increased dramatically over the nearly two-and-a-half decades since opinions began to be published.²⁶ This comment offers an overview of that jurisprudence.

While this comment is organized under broad headings — criminal law, contract law, tort law, and so on — familiar to students and practitioners of Anglo law, this analytic framework must be recognized as of dubious validity in the context of the customary law of the Navajo tribe. For example, the fundamental Anglo differentiation between civil and criminal law was not made at all under traditional Navajo law, wherein "criminal" and "civil" matters were usually dealt with in the same fashion, by requiring restitution

effectively settled. Sitts, *supra* note 20, at 1. Note, however, that a 1990 commission chaired by the senior judge from the U.S. District Court for the District of Arizona concluded that the Peacemaker Court was under-utilized. Zion, Prospectus, *supra* note 5, at 3-4. The commission recommended that the court be promoted more on a community level, and the Navajo courts responded by hiring two Peacemaker Court "coordinators" to conduct the necessary outreach. *Id.* at 4; see also Johnson, *supra* note 12, at 29 (noting a lack of public awareness of the Peacemaker Court). In the Chinle district, which is recognized as one of the most active in peacemaking, the Peacemaker Court was used for only eleven cases in 1988. *Id.* at 27 (citing information provided by the Chinle District Court). The frequency of usage is currently on the increase, however. Letter from James W. Zion, Solicitor to the Navajo Nation Supreme Court, to author (Jan. 15, 1993) [hereinafter Letter].

24. Interview with James W. Zion, Solicitor to the Navajo Nation Supreme Court, Window Rock, Ariz. (July 1992).

25. See Zion, *Peacemaker Court*, *supra* note 5, at 108-09; Tso, *Process*, *supra* note 1, at 227; see also Austin, *supra* note 10, at 7 (noting that the Peacemaker Court has "become a model around the world").

26. See the appendix to this comment. Note that this comment is limited to an analysis of published decisions only. As a consequence, lower court decisions are excluded except for those few that have been selected for publication in the Navajo Reporter. See *id.* By far the majority of opinions examined, therefore, are those of the Navajo Nation Supreme Court (or, before 1986, the Navajo Court of Appeals). Because the development of Navajo common law depends almost exclusively on the body of published jurisprudence, the author does not view the regrettably small sampling of lower court decisions as particularly relevant, on a practical level, to the usefulness of this comment or its conclusions.

to the victim by the offender.²⁷ The distinction thus makes little contextual sense, and is flat out misleading if accepted as indicative of traditional Navajo legal thinking. In the interest of translating the Navajo common law jurisprudence into a language familiar to the largest audience, however, the author has chosen to accept the dangers of an artificial and culturally biased categorization.

To acknowledge one other shortcoming of this comment, it will be apparent that depth of analysis was sacrificed for comprehensiveness in scope. Nevertheless, the result will hopefully serve at least three functions: first, to assist practitioners of law in the courts of the Navajo Nation, whose role in continuing the development of the tribal common law is essential and who can only help their clients by knowing how the courts have found and applied that law; second, to describe for the benefit of tribal courts everywhere how one particular tribe — the Navajo Nation — has set about the formidable task of building a body of law founded on tribal customs and traditions; and, finally, to promote an understanding of the challenge faced by Native American tribes to preserve their cultures through law, and to show that, at least in the case of the Navajo, only occasionally does that effort result in a fundamental departure from Anglo-American common law, even if a particular shared legal doctrine may spring from entirely divergent world views.

II. Using Navajo Common Law

A. Statutory Authority

Since its passage in 1977, the Navajo Tribal Code has mandated the application of Navajo customs in the tribal courts.²⁸ The Code, moreover, only restates tribal law that has been in force since 1959 regarding the use of customary law.²⁹ Thus, although the courts themselves have only recently begun to openly and enthusiastically look to Navajo customs, usages, and

27. See *infra* notes 426-50 and accompanying text.

28. The Code provision reads:

§ 204. Law Applicable

(a) In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.

(b) Where any doubt arises as to the customs and usages of the Navajo Nation the court may request the advice of counsellors familiar with these customs and usages.

(c) Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.

NAVAJO TRIB. CODE tit. 7, § 204 (Supp. 1984-85).

29. Navajo Tribal Council Res. CJA-1-59, § 1 (Jan. 6, 1959) (codified as amended in scattered sections of NAVAJO TRIB. CODE tits. 7, 8, 14, 17 (1977)).

traditions, the authority for doing so has existed for decades. The slow pace of customary law development by the courts undoubtedly is the result of many factors, including the gradually growing sense of sovereignty and independence of the Navajo Nation as a whole, as well as an increasing freedom of the tribe to manage its own affairs without federal interference.³⁰ In any event, the early reluctance of the Navajo tribal courts to openly apply custom was not apparently due to any lack of statutory authority.³¹

Until 1985, the Code required the courts to apply, in all civil cases, customs not prohibited by federal statute.³² Cases to which both federal law and tribal customary law were inapplicable were to be governed by state law.³³ With the passage of an amended Judicial Code in 1985, the courts were granted even greater authority to apply custom. First, custom not prohibited by federal law was to be applied in all, not just civil, cases.³⁴ Second, the application of state law was made entirely optional and remained subordinate to both federal and tribal law.³⁵ These amendments, while leaving essentially unchanged the authority of the Navajo courts to make use of custom, nonetheless appeared to catalyze new efforts by the courts to develop and employ tribal customary law.³⁶

The Tribal Code contains other significant provisions as well.³⁷ For example, under title 8, courts are required to apply custom "in the determina-

30. Recent federal policy towards Indians has emphasized tribal self-determination. See, e.g., Indian Self-Determination and Education Assistance Act of 1974, 25 U.S.C. §§ 450-450n (1988).

31. See Conn, *supra* note 3, at 368-70 (noting the difficulties faced by the Navajo Nation in attempting to apply customary law while simultaneously establishing an Anglo-style court system). It should be noted that while the Navajo courts did not apply customary law as freely as they currently do, the record demonstrates that even during the periods of strictest federal oversight the Navajo judges were able to sometimes covertly use Navajo common law. See *Navajo Nation v. Platero*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049, 6050 (Navajo 1991); Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. REV. 275, 304 (1991).

32. NAVAJO TRIB. CODE tit. 7, § 204(a) (1977).

33. *Id.* § 204(c).

34. See *supra* note 28.

35. See *supra* note 28.

36. Note, for example, the growing number since 1985 of Navajo Nation Supreme Court rulings making use of common law. See the appendix following this comment.

37. Beyond the statutory provisions dealing with probate and judicial qualifications, Navajo common law is also emphasized elsewhere in the Navajo Tribal Code. For example, the preamble to the Navajo Nation Corporate Code instructs courts to "give the utmost respect in deciding the meaning and purpose of this code to the unique traditions and customs of the Navajo People." NAVAJO NATION CORP. CODE 2, Navajo Tribal Council Res. PJA-1-86 (Jan. 29, 1986) as amended by CD-61-86 (Dec. 11, 1986).

In 1991, the Navajo courts themselves promulgated a Code of Judicial Conduct which places great emphasis on the foundation of judicial ethics in Navajo tradition. See Tso, *Moral Principles*, *supra* note 16 (explaining particular traditional ideas underlying each of the eleven canons of the Code).

tion of heirs" when such custom is proved.³⁸ This provision reflects the fact that custom initially was applied by courts predominantly in probate matters.³⁹ The Code also requires that all judicial appointments to the Navajo courts be members of the Navajo tribe, able to speak Navajo, and "have some knowledge of Navajo culture and tradition."⁴⁰ Applicants for judgeships must also demonstrate understanding of the clan system and religious ceremonies, and appreciate "the traditional Navajo lifestyle."⁴¹

B. The Status of Custom in Navajo Law

In addition to the statutory provisions requiring use of customs and traditions by the courts, the Navajo Nation Supreme Court has recently been emphasizing that Navajo common law is the "law of preference" in the Navajo Nation.⁴² The practical effect of this policy has been to put lawyers, judges, and parties on notice that custom and tradition, if pleaded and demonstrated, will be given great weight on appeal. The policy has also confirmed the intention of the supreme court to take judicial notice of Navajo common law where it can.⁴³ It is not clear, however, whether the policy has yet significantly affected the frequency with which Navajo common law is raised by parties.⁴⁴

Certain Navajo customs also constitute the equivalent of an unwritten tribal constitution, according to a 1990 decision of the Navajo Nation Supreme

38. NAVAJO TRIB. CODE tit. 8, § 2(b) (Supp. 1984-85).

39. See the appendix following this comment (three of seven decisions prior to 1979 involved probate matters).

40. NAVAJO TRIB. CODE tit. 7, § 354 (Supp. 1984-85). Navajo Nation President Peterson Zah at one time advocated testing to ensure that all practitioners of law in the Navajo courts be able to speak Navajo. 2 VICENTI, *supra* note 16, at 255-56.

41. NAVAJO TRIB. CODE tit. 7, § 354(5) (Supp. 1984-85). The established advocate program of the Navajo Nation Bar Association, by allowing Navajos who lack law school education to practice in the tribal courts, serves similar goals. As the supreme court has noted, "An understanding of the Navajo life-style and culture is indispensable to the practice of law within the Navajo Nation, and Navajo advocates advance the development of a modern judicial system which retains traditional norms." Tafoya v. Navajo Nation Bar Ass'n, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6120, 6121 (Navajo 1989); *see also* Tso, *Process, supra* note 1, at 229 (discussing role of Navajo advocates).

42. *See* Navajo Nation v. Platero, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049, 6050 (Navajo 1991); Austin, *supra* note 10, at 7.

43. *See, e.g.,* Sells v. Sells, 5 Navajo Rptr. 104, 108 (Navajo 1986) ("The soul of this Court is to apply Navajo Tribal law, especially where our custom and tradition are appropriate.").

44. Keeping track of the frequency with which custom is pleaded is difficult in part because, to the author's knowledge, no comprehensive studies have been conducted of the unpublished opinions of the Navajo trial courts. Furthermore, only a fraction of cases brought before the tribal courts are appealed to the Navajo Nation Supreme Court, and the court itself is consequently unable to keep track of such information except through informal communications with trial-level judges.

Court. In *Bennett v. Navajo Board of Election Supervisors*,⁴⁵ the court explained:

the Navajo word for "law" is *beehaz'aanii*. While we hear that word popularly used in the sense of laws enacted by the Navajo Nation Council . . . , it actually refers to a higher law. It means something which is "way at the top"; something written in stone so to speak; something which is absolutely there; and, something like the Anglo concept of natural law.⁴⁶

Customs and traditions that are "fundamental and basic to Navajo life and society" are included within the *beehaz'aanii*.⁴⁷ The court has indicated that individual rights to political liberty, marriage, association with relatives, and fair employment opportunities, along with "rights retained by the people," are part of the *beehaz'aanii*.⁴⁸ So far, no other Navajo customs have been assigned this special status by the courts.

The power of the *beehaz'aanii* is sufficient to "set the boundaries for permissible governmental action by the legislative, executive, and judicial branches of the Navajo Nation."⁴⁹ Thus, Navajo common law in some instances will presumably prevail over all other sources of law, including Tribal Council legislation.⁵⁰

C. What is "Custom"?

Although Navajo courts have employed custom in their decisions at least as far back as 1969, when opinions began to be published,⁵¹ it was not until 1982 that any court attempted to define "custom." Then, in *Lente v. Notah*,⁵² the Navajo Court of Appeals explored for the first and only time the characteristics of a "custom" and acknowledged the problems intrinsic to relying on custom to legally resolve disputes.⁵³ While explicitly declining to adopt any particular definition of "custom," the court cited to various

45. 18 Indian L. Rep. (Am. Indian Law. Training Program) 6009 (Navajo 1990).

46. *Id.* at 6011.

47. *Id.*

48. *Id.*; Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105, 6113 (Navajo 1990). See *infra* notes 351-57 and accompanying text for a discussion of fundamental rights.

49. *Bennett*, 18 Indian L. Rep. (Am. Indian Law. Training Program) at 6011.

50. It should be noted that the Navajo Nation, unlike many tribes, does not have a written constitution.

51. See, e.g., *In re Trust of Benally*, 1 Navajo Rptr. 10, 12 (Navajo Ct. App. 1969) (acknowledging that decedent's property "belonged to his wife and children living with him at the time of his death according to Tribal custom"); see also *In re Marriage of Daw*, 1 Navajo Rptr. 1, 3-4 (Navajo Ct. App. 1969) (upholding customary marriage under tribal statute, even though no marriage license had been obtained).

52. 3 Navajo Rptr. 72 (Navajo Ct. App. 1982).

53. *Id.* at 79-81.

anthropological sources indicating that, at a minimum, a custom must be a practice and not solely a belief.⁵⁴ More than this, the court would not say, indicating only that any definition of "custom" should be the product of a more complete study of the issue.⁵⁵

The court did, however, point out the dangers inherent in any attempt to ascertain a particular custom and apply it in the courts: (1) custom could vary throughout the Navajo Nation; (2) the existence and proper application of a custom could be disputed; and (3) traditions could fall out of use to an extent that they could no longer be considered custom.⁵⁶ Interestingly, the court also expressed concern that the parties to a dispute might not recognize an otherwise applicable custom.⁵⁷ This latter issue has not surfaced in any published opinion since *Lente*, the court apparently having decided that subjective recognition of custom by the parties is irrelevant to the question of whether and how custom should be applied.⁵⁸ With regard to all of the potential pitfalls in trying to use custom in the courts, the court concluded only that courts should determine whether "a particular custom or tradition is generally accepted and applicable to the parties before the court."⁵⁹ The mechanisms for making such determinations were laid out in subsequent decisions, as discussed below.

D. Raising and Proving Custom in the Courts

The Navajo Nation Supreme Court did not return to the question of proper use of customary law until 1987.⁶⁰ Immediately after the court of appeals

54. *Id.* at 80. The court of appeals took note that custom had been defined as "practice and not an opinion"; "what men *do*, not what they *think*"; and "the practice or regular conduct of members of a group of people, acting in a certain way." *Id.* (citations omitted).

55. *Id.* The court noted that such a study was currently being undertaken by the Navajo courts, apparently referring to the Navajo Common Law Project begun in 1982. *Id.* See *supra* notes 5-6 and accompanying text for a discussion of the Project.

56. *Id.* at 79-80. These peculiar difficulties in applying tribal traditional law have been noted by commentators. See, e.g., Brandfon, *supra* note 1, at 1014.

57. *Lente*, 3 Navajo Rptr. at 80. The court noted that "[o]ld customs and practices may be followed by the individuals involved in a case or not." *Id.*

58. Although the court has never revisited the issue, it did quote *Lente* in a recent decision emphasizing that claims made under Navajo custom must be particularly scrutinized. *Hood v. Bordy*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6061, 6063 (Navajo 1991). Despite its acknowledgment of the various warnings given in *Lente*, however, the court in *Hood* did not emphasize nor even specifically address the "subjective recognition" aspect of the 1982 decision.

59. *Lente*, 3 Navajo Rptr. at 80. The court also noted that "the application of custom depends on a good many circumstances and all the facts of the case." *Id.* at 81. On the facts of *Lente* itself, involving a child custody dispute, the court upheld the trial court's decision to award custody to the child's father, even though strict Navajo custom mandated that children go with their mother in the event of a divorce. *Id.* The court found that the trial court was not bound to "strictly follow custom and tradition," so long as it had "carefully determined all the facts and circumstances before making a ruling." *Id.*

60. See *In re Estate of Belone v. Yazzie*, 5 Navajo Rptr. 161 (Navajo 1987). For treatment

handed down *Lente v. Notah* in 1982, however, Judge Tom Tso, later to become Chief Justice of the Navajo Nation Supreme Court, issued a series of influential decisions from the Window Rock District Court bearing on the problems of raising and proving Navajo custom in the courts.⁶¹

1. The Pleading Requirement

The first of these decisions, *Apache v. Republic National Life Insurance Co.*,⁶² concerned a dispute over whether a divorce decree terminated a Navajo woman's right to the proceeds from her former spouse's life insurance policy, regardless of the contract's terms.⁶³ Judge Tso found no applicable federal law and, under title 7, section 204 of the Navajo Tribal Code, applied Navajo customary law over Arizona state law.⁶⁴

Tso held that because the plaintiff had alleged a violation of Navajo tradition in the complaint, customary law came into play.⁶⁵ The hesitancy expressed by the court of appeals in *Lente*, decided almost four months earlier, towards applying customary law without regard for the parties' subjective recognition of the particular custom was apparently replaced in *Apache* with an assumption that custom, if properly pleaded, was applicable to all civil cases.⁶⁶

The pleading requirement was confirmed by the Navajo Nation Supreme Court five years later in *In re Estate of Belone v. Yazzie*.⁶⁷ Furthermore, the court in *Belone* held that if a unique local custom was to be relied upon, the pleading had to so state.⁶⁸ The requirement that an intention to rely on

of this key case, see *infra* notes 74-126 and accompanying text.

61. *In re Interest of J.J.S.*, 4 Navajo Rptr. 192 (Window Rock Dist. Ct. 1983); *In re Estate of Apachee*, 4 Navajo Rptr. 178 (Window Rock Dist. Ct. 1983); *Tome v. Navajo Nation*, 4 Navajo Rptr. 159 (Window Rock Dist. Ct. 1983); *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250 (Window Rock Dist. Ct. 1982).

62. 3 Navajo Rptr. 250 (Window Rock Dist. Ct. 1982).

63. *Id.* at 250. Boyd Apache had designated his wife, Rebecca Jane Apache, as a beneficiary of the life insurance policy provided him as an employee of the Navajo Nation. *Id.* The couple separated, and Rebecca Jane then obtained a divorce by default. *Id.* The insurance policy was not addressed in the divorce decree. *Id.* Shortly thereafter, Boyd died in an automobile accident. *Id.*

64. *Id.* at 251.

65. *Id.* In their petition for an injunction to prevent payment of the insurance proceeds, Boyd's sister and mother claimed: "That by Navajo tradition, Rebecca Apache upon divorce to Boyd Apache relinquished all rights and title to his property, and upon the final decree of divorce as a single unmarried person having no claim or right to the estate or insurance of Boyd Apache." *Id.* "This allegation adequately and properly put the opposing parties on notice that Navajo custom would be relied upon as applicable law." *Id.*

66. See *id.*; *Lente v. Notah*, 3 Navajo Rptr. 72, 80 (Navajo Ct. App. 1982).

67. 5 Navajo Rptr. 161 (Navajo 1987). The court held that "[w]here a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim." *Id.* at 164.

68. *Id.*

custom be announced in the pleading was based on the due process rights of the opposing party and the need for the court to be on notice that custom might be applied.⁶⁹ Like the district court in *Apache*, the court made no mention of *Lente's* expressed concerns with the subjective recognition by the parties of the applicability of a particular custom.⁷⁰

2. Proving the Existence of a Custom

Judge Tso's seminal decisions in 1982 and 1983 were especially significant for establishing the permissible methods of demonstrating the existence of applicable custom. In *Apache*, Tso noted that expert testimony needed to be used only when a custom's existence was in doubt,⁷¹ that judicial notice could be taken of customary law generally known within the community, and that custom could be found from "accurate sources."⁷² Several months later, in *Tome v. Navajo Nation*,⁷³ Tso reiterated the holding of *Apache*, adding that custom could be applied upon "proof" of its existence.⁷⁴

Later in 1983, in *In re Estate of Apachee*,⁷⁵ Tso set forth a comprehensive description of the ways custom could be demonstrated in the courts.⁷⁶ Custom could be found through testimony of the parties, judicial notice, expert testimony, other evidence, precedent in the courts, or "some learned treatises on Navajo ways."⁷⁷ This list was reaffirmed shortly thereafter in the last of Tso's formative district court decisions, *In re J.J.S.*⁷⁸

In the 1987 *Belone* decision, authored by then-recently appointed Chief Justice Tso, the Navajo Nation Supreme Court adopted the *Apachee* list almost verbatim.⁷⁹ The court held that parties could prove the existence of applicable Navajo common law through: (1) recorded precedent of the Navajo courts; (2) learned treatises on the Navajo way; (3) judicial notice; or (4) expert testimony.⁸⁰ Significantly, the court omitted testimony and other evidence offered by the parties themselves, another indication of the court's apparent intention to objectify Navajo customary law rather than to rely on the

69. *Id.* On the facts of *Belone*, the court held that, because the appellee had not alleged a violation of Navajo custom until trial, she could not seek relief under Navajo customary law. *Id.* The court went on, however, to discuss the applicable custom "for purposes of guidance." *Id.*

70. See *supra* notes 57-58 and accompanying text.

71. *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250, 251 (Window Rock Dist. Ct. 1982).

72. *Id.* at 252.

73. 4 Navajo Rptr. 159 (Window Rock Dist. Ct. 1983).

74. *Id.* at 161.

75. 4 Navajo Rptr. 178 (Window Rock Dist. Ct. 1983).

76. *Id.* at 179-81.

77. *Id.* at 179-80. For a more complete discussion of some of the methods on Judge Tso's list, see *infra* notes 82-127 and accompanying text.

78. 4 Navajo Rptr. 192, 193 (Window Rock Dist. Ct. 1983).

79. *In re Estate of Belone v. Yazzie*, 5 Navajo Rptr. 161, 165 (Navajo 1987).

80. *Id.*

expectations and perceptions of the parties.⁸¹ *Belone* remains the governing authority on permissible methods of demonstrating Navajo custom in the courts.

a) Recorded Precedent

The principle of stare decisis appears to govern Navajo jurisprudence to the same extent as it influences American state and federal courts.⁸² Navajo common law decisions are no exception to the rule — indeed, common law precedent is cited frequently by the courts, especially when a traditional value or moral precept is relevant.⁸³ Note, however, the requirement that precedent be recorded; the courts do not (because they cannot) cite to cases decided before 1969, when written opinions first began to be collected in the Navajo Reporter.⁸⁴

b) Learned Treatises

While the Navajo courts make frequent use of anthropological, sociological, legal, and other studies to establish the existence of Navajo customs, generally such sources are employed as corroborative evidence only.⁸⁵ There is an apparent distrust on the part of the courts for the accuracy of Navajo studies, especially those written by non-Navajos.⁸⁶ Judge Tso, in *Apachee*, explained this aversion as due to a feeling that studies of the Navajo are often "incomplete, inaccurate or do not reflect the current state of the Navajo common law."⁸⁷ Tso indicated that, therefore, the most reliable studies would

81. See *supra* note 57-58 and accompanying text.

82. As time passes and the body of tribal jurisprudence grows, the Navajo courts cite more and more often to prior decisions. See the appendix following this comment.

83. See, e.g., *In re Estate of Begay #2*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6130, 6131-32 (Navajo 1992) (citing numerous prior decisions developing the Navajo common law right to due process); *Alonzo v. Martine*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6129, 6129 (Navajo 1991) (relying on prior decisions applying the Navajo common law of respect for children). In nearly half of the decisions developing or making use of Navajo common law, the courts have cited to Navajo precedent. In a few cases, non-Navajo jurisprudence has been employed as well. See the appendix following this comment.

84. See *supra* note 6 and accompanying text.

85. See, e.g., *Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105, 6112 (Navajo 1990) (citing to prior case law as well as anthropological source to establish invalidity of employer's anti-nepotism rule in light of Navajo common law kinship obligations); *In re J.J.S.*, 4 Navajo Rptr. 192, 193-95 (Window Rock Dist. Ct. 1983) (citing opinion of solicitor to Navajo Court of Appeals, as well as various sociological and anthropological sources to set out Navajo common law of adoption). But see *In re Marriage of Francisco*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6113, 6115 (Navajo 1989) (citing solely to anthropological/historical work to support finding that Anglo-style common-law marriage was not sanctioned under Navajo common law).

86. See, e.g., *In re Estate of Apachee*, 4 Navajo Rptr. 178, 180 (Window Rock Dist. Ct. 1983) (noting that "[t]he *Dine'* are the most accurate commentators on themselves.").

87. *Id.*

be those by "wise and experienced Navajo authors."⁸⁸

The range of written sources the courts have consulted is wide. In 1982's *Lente v. Notah*,⁸⁹ the first Navajo decision to explicitly cite to Navajo studies, the court of appeals made use of two general jurisprudential works to attempt to define "custom,"⁹⁰ and two volumes by noted (non-Navajo) anthropologists to support the ideas that relatives have always been especially important to Navajo children and that the children would remain with the mother in a traditional divorce.⁹¹ Since *Lente*, the Navajo Nation Supreme Court has cited to an anthropological work on only two other occasions. In a 1989 decision, *In re Marriage of Francisco*,⁹² the court supported its holding that Navajo custom did not recognize common law marriages with a reference to Raymond Friday Locke's *The Book of the Navajo*.⁹³ In 1990, the court cited to an anthropological source to support its finding that traditional Navajo notions of kinship operated to invalidate an overly broad anti-nepotism policy instituted by a public services company on the Navajo reservation.⁹⁴

More frequent references to Navajo and other studies have been made by the district courts. Judge Tso, during his tenure on the Window Rock District Court during the early 1980s, referenced psychological studies, texts on American law, sociological analyses, anthropological works, treatises on English common law, articles discussing Navajo customary law itself, court of appeals solicitor opinions, and Navajo government and social services publications.⁹⁵ Similar references have been made by the Crownpoint District Court, under Judge Marie Neswood,⁹⁶ and by Judge (currently Chief Justice) Robert Yazzie when he presided over the Window Rock District Court in the mid- and late-1980s.⁹⁷

c) Judicial Notice

By far the predominant means of establishing Navajo customary or common law in the courts has been through the doctrine of judicial notice.⁹⁸

88. *Id.*

89. 3 Navajo Rptr. 72 (Navajo Ct. App. 1982).

90. *Id.* at 80 (citing JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (1921); EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* (1953)).

91. *Id.* at 80-81 (citing CLYDE KLUCKHOHN & DOROTHEA LEIGHTON, *THE NAVAHO* (1946); GARY WITHERSPOON, *NAVAJO KINSHIP AND MARRIAGE* (1975)).

92. 16 Indian L. Rep. (Am. Indian Law. Training Program) 6113 (Navajo 1989).

93. *Id.* at 6115.

94. *Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105, 6112 (Navajo 1990).

95. *See In re J.J.S.*, 4 Navajo Rptr. 192, 194-95 (Window Rock Dist. Ct. 1983); *In re Estate of Apachee*, 4 Navajo Rptr. 178, 182-84 (Window Rock Dist. Ct. 1982); *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250, 251-52 (Window Rock Dist. Ct. 1982).

96. *In re Interest of D.P.*, 3 Navajo Rptr. 255, 257 (Crownpoint Dist. Ct. 1982).

97. *See Estate of Benally v. Navajo Nation*, 5 Navajo Rptr. 209, 211-13 (Window Rock Dist. Ct. 1986).

98. More than two-thirds of the published decisions employing or explaining Navajo

This trend is most likely explained by the failure of parties to present evidence going to the existence of custom, as well as by the efforts of the courts to establish a body of precedential customary law and to encourage use of that law.⁹⁹

The doctrinal foundations for judicial notice of Navajo common law were laid by Judge Tso when he was on the Window Rock District Court. In the 1983 decision, *Apache v. Republic National Life Insurance Co.*,¹⁰⁰ Tso took judicial notice of traditional Navajo law severing all property ties between former spouses.¹⁰¹ Tso then used that law to support his holding that the complainant had no right to the proceeds of her former husband's life insurance policy, regardless of the fact that she had never been dropped as a beneficiary — an example of how tribal common law can depart from basic tenets of Anglo-American law.¹⁰² Tso emphasized the duty of trial court judges to take judicial notice of customary law that is generally known or can be found from "accurate sources."¹⁰³ In a statement that was later to be adopted by the Navajo Nation Supreme Court, Tso indicated that the standard for judicial notice of Navajo common law was whether "every damn fool knows" the custom.¹⁰⁴ A few months later, in *Tome v. Navajo Nation*,¹⁰⁵ Tso took judicial notice of the Navajo customary law that assets connected with land were the property of the Navajo Nation, not individuals, and that therefore the district court had a duty to act as guardian of a Navajo newspaper and publishing business.¹⁰⁶

The Navajo Nation Supreme Court, under the leadership of Chief Justice Tso, gave its endorsement to use of judicial notice in *In re Estate of Belone*

common law involve judicial notice. See the appendix following this comment.

99. See the appendix following this comment (showing infrequency of use of expert witnesses to prove common law and predominance of judicial notice as means of finding law). See *supra* notes 42-44 and accompanying text.

100. 3 Navajo Rptr. 250 (Window Rock Dist. Ct. 1982).

101. *Id.* at 252-53.

102. *Id.* at 253. The district court noted that its holding was "not offensive to any sense of Anglo-European justice." *Id.* (citing *New England Mut. Life Ins. Co. v. Spence*, 104 F.2d 665, 667 (2d Cir. 1939) (noting that the English-American law regarding the continuing interest of an ex-spouse in one's life insurance policy was "very ancient and still prevails")). There is no disputing the fact, however, that plain disregard of a life insurance contract's terms with regard to who is the named beneficiary, absent special circumstances, is the product of a uniquely Navajo public policy concern. See generally 44 AM. JUR. 2D *Insurance* § 1714 (1982).

103. *Apache*, 3 Navajo Rptr. at 252.

104. *Id.* (quoting EDWARD W. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 329, at 761 n.25 (2d ed. 1972)). Tso appears to have misconstrued Cleary's view of the "every damn fool" aphorism, which was that the phrase was clearly an exaggeration. CLEARY, *supra*, § 329, at 761 n.25. In practice, the Navajo courts have not interpreted the standard strictly, instead following the more flexible criteria for taking judicial notice. See *infra* notes 110-13 and accompanying text.

105. 4 Navajo Rptr. 159 (Window Rock Dist. Ct. 1983).

106. *Id.* at 161.

v. Yazzie¹⁰⁷ in 1987. While explicitly citing the *Apache* conclusion that "judicial notice may only be taken of those facts every damn fool knows," the court took care to clarify that this aphorism was not to be taken literally.¹⁰⁸ The actual test, the court indicated, was whether "a custom is generally known within the community, or . . . capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned."¹⁰⁹

In practice, since *Belone* the court has never made an effort to establish in the record that judicially noticed customary law is "generally known," and the "accurate" sources it has relied on have been primarily legal, sociological, or anthropological treatises or, more often, the court's own expert knowledge.¹¹⁰ Usually, the court has taken judicial notice of and applied Navajo common law on its own initiative, without paying particular attention to whether common law was pleaded by the parties or relied upon by the trial court.¹¹¹ With regard to the latter situation, however, the court in *Belone* emphasized the need for district court judges taking judicial notice of customs to "clearly set forth" those customs in their opinions so that the evidence for the existence of the customs could be reviewed on appeal.¹¹² In sum, judicial notice — especially by the Navajo Nation Supreme Court — appears to be the most important, and least standardized, means of establishing Navajo common law.¹¹³

d) Expert Testimony

Although Judge Tso mentioned in his 1983 district court decisions the possibility of establishing Navajo common law through expert testimony,¹¹⁴ the preeminent and authoritative opinion on the issue was given by the Navajo Nation Supreme Court in the 1987 opinion, *In re Estate of Belone v. Yazzie*. In *Belone*, the court undertook an exhaustive examination of the procedural requirements for making use of expert witness testimony to prove the existence of customary law.¹¹⁵ Following is a schematic of the "guidelines" set out by the court in that decision:

(1) *Qualifications*: The trial court must accept the witness's expert status,

• 107. *In re Estate of Belone v. Yazzie*, 5 Navajo Rptr. 161, 165 (Navajo 1987).

108. *Id.* (quoting EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 329 (3d ed. 1984)).

109. *Id.*

110. See the appendix following this comment.

111. See, e.g., *Alonzo v. Martine*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6129, 6129 (Navajo 1991); *Boos v. Yazzie*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6115, 6116 (Navajo 1990).

112. *Belone*, 5 Navajo Rptr. at 165-66.

113. It should be noted that judges are accorded considerable discretion under the Anglo-American judicial notice doctrine as well, and that this is viewed as necessary for reasons of convenience and expediency. See 29 AM. JUR. 2D *Evidence* §§ 14-26 (1967).

114. *In re Interest of J.J.S.*, 4 Navajo Rptr. 192, 193 (Window Rock Dist. Ct. 1983); *In re Estate of Apachee*, 4 Navajo Rptr. 178, 180 (Window Rock Dist. Ct. 1983).

115. *Belone*, 5 Navajo Rptr. at 166-67.

based on evidence of the witness's specialized knowledge or understanding.¹¹⁶ This evidence may include:

- (a) the witness's reading;
- (b) the witness's practice of custom; or
- (c) the witness's understanding of custom, based on: (i) oral education; (ii) adherence to a traditional way of life; (iii) a long-term interest in Navajo custom; or (iv) community status as a person knowledgeable of Navajo custom.¹¹⁷

(2) *Relevance*: The trial court must assess whether the expert's skill, knowledge, or experience is likely to be helpful in determining the existence of custom relevant to resolving the dispute.¹¹⁸

(3) *Necessity*: The expert's testimony must be drawn from knowledge that either:

- (a) is so specialized that the lay person could not understand it;¹¹⁹ or
- (b) will help the jurors' comprehension of custom about which they may have general knowledge.¹²⁰

(4) *Discretion*: The expert's testimony may be excluded if the trial court believes that:

- (a) a reasonable opinion cannot possibly be offered about the existence of a particular custom; or
- (b) the offered opinion is insufficiently grounded in fact.¹²¹

Beyond these guidelines, the court in *Belone* held that a trial court should

116. *Id.* at 167.

117. *Id.*

118. *Id.* at 166.

119. *Id.* The court phrased the requirement to be that the expert's knowledge "is so specialized as to be beyond the understanding of laymen." *Id.* Clearly, this standard cannot be construed literally — an expert would hardly be of any use where a custom was inherently incomprehensible to the trier of fact. The court may have intended that the requirement be that a lay person would require expert testimony to understand a particular custom.

120. *Id.* Presumably, this provision would apply to judges as well as jurors. See NAVAJO TRIB. CODE tit. 7, § 204(b) (Supp. 1984-85) (providing that "the court may request the advice of counsellors familiar with . . . customs and usages").

Strangely, the court noted that "some jurisdictions" would allow the more lenient (3)(b) standard of necessity. *Belone*, 5 Navajo Rptr. at 166. If the court intended to permit this standard to apply throughout the Navajo Nation (and it seems irrational to allow district courts to determine which standard they prefer), then the "beyond the understanding" criterion of (3)(a) becomes meaningless because any finding of admissibility under (3)(a) would necessarily result in a similar finding under (3)(b). As there are no obvious reasons to hold to the stricter standard of necessity, the court should do away with it entirely and instead adopt the (3)(b) standard. See also NAVAJO TRIB. CODE tit. 7, § 204(b) (Supp. 1984-85) (allowing use of expert "counsellors" where "any doubt arises as to the customs and usages of the Navajo Nation").

121. *Belone*, 5 Navajo Rptr. at 166 (citing CLEARY, *supra* note 108, § 13, at 33, 34). Although the expert's testimony must be grounded in fact, "the witness can draw inferences from facts that the trier of fact would not be competent to draw." *Id.* at 167. Note that the basis for the expert's knowledge must be established in the record for appellate review. *Id.*

hold an informal pretrial conference with "two or three" appointed expert witnesses when there is any doubt about the existence or nature of a custom that could determine the dispute's outcome.¹²² While they could attend this conference and question the experts, parties apparently could not offer their own testimony.¹²³ The court noted that the experts might then, in traditional Navajo fashion, arrive at a consensus about the custom.¹²⁴

The court admitted that district courts, while bound to abide by the guidelines set out in *Belone*, ultimately had discretion in determining the admissibility of expert testimony regarding Navajo customs.¹²⁵ On review, the Navajo Nation Supreme Court could only overturn an abuse of discretion or a failure to follow the procedural steps for evaluating the admissibility of expert testimony.¹²⁶

An analysis of the published decisions indicates that expert testimony on tribal common law has been acknowledged by the Navajo courts in only four decisions.¹²⁷ Whether or not this small number reflects the true incidence of the use of experts is unclear.

III. Criminal Law

It is perhaps not surprising that Navajo common law has been employed by the tribal courts much less frequently in criminal than in civil cases.¹²⁸ The reasons for this disparity are undoubtedly several: the Navajo criminal code is comprehensive, closely tracking the 1962 Model Penal Code of the American Law Institute;¹²⁹ while the criminal case load of the courts is large,¹³⁰ the number of criminal appeals is not;¹³¹ and all "major crimes" are tried under federal law in federal courts.¹³² The Navajo Nation Supreme

122. *Id.*

123. *Id.* ("The parties and their counsels may attend, but their participation should be limited to asking questions to clarify the expert witnesses' conclusions.").

124. *Id.* ("This is the way Navajos have traditionally clarified their understanding of customs, and it is more appropriate than the adversarial system where each party tries to interpret custom to benefit its own interests.").

125. *Id.*

126. *Id.* The court did not establish any standard for gauging when an abuse of discretion has occurred.

127. See the appendix following this comment.

128. See the appendix following this comment.

129. *Navajo Nation v. Platero*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049, 6051 (Navajo 1991) (Tso, J., concurring). The Navajo criminal code is contained in title 17 of the Navajo Tribal Code.

130. Of the approximately 67,000 cases heard by the Navajo courts in 1990, 80% to 85% were criminal. REPORT, *supra* note 4, at 2.

131. For example, during the first three months of 1992, seventeen civil appeals were filed, in contrast to only three criminal appeals. *Id.* at 13-14. During the same period, however, 6,328 criminal cases were filed, but only 304 civil cases. *Id.* at 72.

132. See Major Crimes Act, 18 U.S.C. § 1153 (1988). Major crimes include murder,

Court, however, has recently hinted at an interest in developing the use of Navajo common law to resolve criminal matters,¹³³ and it remains to be seen whether that interest will manifest itself in a growing body of case law.¹³⁴

Below are discussions of the areas of criminal law in which the Navajo courts have looked to tribal custom. Note that the common law rights of criminal defendants are discussed in a later section,¹³⁵ as are traditional remedies and punishments for crimes.¹³⁶

A. Specific Crimes

The Navajo Nation Supreme Court in its common law decisions has only pointed to one form of traditional crime — the corruption of a government official. In *Navajo Nation v. MacDonald, Sr.*,¹³⁷ a 1991 decision, the court heard an appeal from Peter MacDonald, Sr., the former Chairman of the Navajo Nation whose conviction in the tribal courts in 1990 on various charges of bribery, conflicts of interest, and conspiracy garnered widespread attention. MacDonald argued on appeal that the imposition of consecutive sentences for his crimes was cruel and unusual punishment.¹³⁸ The court disagreed, and elaborated on the traditional attitudes of Navajos towards government corruption: "Official corruption in public office is a serious offense, because it robs the Navajo people of their property. Even more seriously, using Navajo culture, it robs the Navajo people of their dignity."¹³⁹

In the only other decision discussing a common law crime, the Tuba City District Court, in a 1990 opinion addressing civil claims arising from a sexual assault, recognized traditional Navajo notions about rape.¹⁴⁰ The court noted that "sexual assaults, rapes, and attempted rapes" violated Navajo common law.¹⁴¹

manslaughter, kidnaping, maiming, incest, assault with intent to commit murder, assault resulting in serious bodily injury, burglary, robbery, and other felonies. *Id.*

133. See *Platero*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 6050.

134. The United States Supreme Court recently affirmed the right of Indian tribes to use customary law in criminal cases. See *United States v. Wheeler*, 435 U.S. 313, 331-32 (1978). The court in *Wheeler* noted that

Indian tribes are "distinct political communities" with their own mores and laws, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their members and in *preserving tribal customs and traditions* Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own.

Id. (emphasis added) (citations omitted).

135. See *infra* notes 318-75 and accompanying text.

136. See *infra* notes 426-41 and accompanying text.

137. 19 Indian L. Rep. (Am. Indian Law. Training Program) 6053 (Navajo 1991).

138. *Id.* at 6053-54.

139. *Id.* at 6059.

140. *Kuwanhyoima v. Kuwanhyoima*, No. TC-CV-344-84, slip op. at 2-4 (Tuba City Dist. Ct. Apr. 9, 1990) (*Kuwanhyoima* I).

141. *Id.*, slip op. at 3 ("Sexual assaults, rapes, and attempted rapes are against the morality

Finally, a 1983 opinion of the solicitor to the Navajo Nation Supreme Court addressed the crime of disturbing graves.¹⁴² While most of the opinion dwells on the construction of a tribal statute and American law, the solicitor noted that

[t]here is a strong policy in Navajo common law against any disturbance of any grave, although I am advised that some disturbances of graves by medicinemen for *proper religious* purposes may be permissible under Navajo common law where such a disturbance is considered necessary and proper for a proper ceremonial, in the opinion of the medicineman. This case will of course have to remain for a proper determination in a case before the court.¹⁴³

B. Defenses

Criminal defenses under Navajo common law were addressed by the Navajo Nation Supreme Court in 1991 in *Navajo Nation v. Platero*.¹⁴⁴ In *Platero*, the court considered a defendant who used force while mistakenly believing that he was acting as a police officer.¹⁴⁵ Such an honest mistake, the court ruled, was enough to exonerate the defendant from criminal charges.¹⁴⁶ The court also noted that Navajos traditionally did not take measures against an offender unless the criminal act was "willful or intentional."¹⁴⁷ These defenses to criminal charges were tied, the court explained, to the traditional aversion to punishment and coercion in Navajo society.¹⁴⁸ Furthermore, the court appeared to hold that the elements of willfulness and the absence of mistake must be borne as part of the prosecution's burden of proof.¹⁴⁹

C. Juveniles

The Navajo courts have employed common law in at least two criminal cases involving minors. In 1982, Judge Marie Neswood of the Crownpoint District Court found that, under Navajo common law, restitution was a

and public policy of the Navajo People, as shown by the customs and traditions." The district court also noted that sexually assaulted women were entitled to "fair compensation" under Navajo common law, *see infra* notes 387-88 and accompanying text, and that no interspousal immunity existed for such assaults. *See infra* notes 196-98 and accompanying text.

142. Op. Solic. Navajo Tribal Courts, No. 83-6 (1983).

143. *Id.* at 3.

144. 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049 (Navajo 1991).

145. *Id.* at 6050-51. The defendant had apparently not yet received his termination notice in the mail when the incident occurred. *Id.* at 6050.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.* at 6050-51.

fundamental means of redressing criminal offenses, and that juvenile offenders should be presumptively required to provide such restitution to victims.¹⁵⁰ The Navajo Nation Supreme Court in *In re A.W.*,¹⁵¹ a 1988 decision, held that juvenile criminal offenders were protected by Navajo common law due process to the same extent as were adults.¹⁵²

IV. Family Law

By far, family law occupies the bulk of the Navajo court decisions applying Navajo common law.¹⁵³ Issues involving children, marriage, and divorce are especially amenable to resolution by traditional law — largely because the common law in this area is more completely developed and recognized by the courts than in others, but perhaps also because the courts are more concerned with retaining traditions in the context of the home and the family than, say, in dealing with crimes or contract disputes.¹⁵⁴

The Navajo courts have time and again emphasized the central role that families and clans play in traditional Navajo culture. The Navajo Nation Supreme Court recently noted that kinship among the Navajos is much more deeply felt and complicated than it is among Americans generally.¹⁵⁵ In a 1983 decision of the Window Rock District Court, Judge Tom Tso explained the importance of family and clan in Navajo tradition:

It must also be understood that the Navajo clan system is very important, with a child being of the mother's clan and "born for" the father's clan. The clan is important, and the family as an economic unit is vital. The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters, and all the members of the family group have important duties to each other. These duties are based on the need to survive and upon very important religious values which command each to support each other and the group.¹⁵⁶

150. *In re Interest of D.P.*, 3 Navajo Rptr. 255, 257 (Crownpoint Dist. Ct. 1982).

151. 15 Indian L. Rep. (Am. Indian Law. Training Program) 6041 (Navajo 1988).

152. *Id.* at 6043 ("Navajo customary due process applies in juvenile proceedings to the same extent as applied in adult proceedings.").

153. See the appendix following this comment.

154. See *Billie v. Abbott*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6021, 6024 (Navajo 1988) ("Navajo domestic relations, such as divorce or child support, is an area where Navajo traditions are the strongest.").

155. *Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105, 6112 (Navajo 1990).

156. *In re Estate of Apachee*, 4 Navajo Rptr. 178, 182 (Window Rock Dist. Ct. 1983). Chief Justice Emeritus Tso recently noted that

[t]he clan system is in fact a legal system where rights and responsibilities are enforced by clan members. A legal concept that comes from this system is that of *k'e*, which has been translated into English as 'solidarity,' but is much more than

A. Children

The special treatment of children by the Navajo courts is apparent in the case law. Wherever children are involved in or affected by the dispute, the courts go to great lengths to ensure that the children's interests are considered carefully.¹⁵⁷ The Navajo Nation Supreme Court explained this attention in *Alonzo v. Martine*,¹⁵⁸ a 1991 decision dealing with retroactive child support. Citing to various precedents, the court noted that "Navajos do not view children as property or possessions, but value them as individuals in a community."¹⁵⁹ Furthermore, "[t]here is a fundamental Navajo belief that children are wanted and must not be mistreated in any way."¹⁶⁰ These tenets, emphasizing the duty of care and respect owed to Navajo children by the courts, run through all of the decisions involving children.

Note that this comment discusses common law juvenile criminal offenses in the section on criminal law;¹⁶¹ child custody and support in the below subsection on divorce;¹⁶² and the rights of children in the section on rights.¹⁶³

1. Adoption

The Navajo common law concerning adoption illustrates the degree to which Navajo and Anglo-American law can diverge. The seminal opinion on the subject is *In re Interest of J.J.S.*,¹⁶⁴ a 1983 decision issued by Judge Tom Tso of the Window Rock District Court. Tso first pointed out that the notions of adoption stemmed from different sources in Navajo and Anglo law. While Anglo law was concerned "with the termination of parental rights or creating a legalistic parent and child relationship," Navajo common law on adoption was premised on the traditional cultural precept that children belong to more than just the parents.¹⁶⁵ Extended families and clans had an obligation to care for children whose parents were unable to do so.¹⁶⁶

that. . . . There are even relations and obligations to mountains, plants and animals, Mother Earth, and all of creation.

Tso, *Moral Principles*, *supra* note 16, at 17.

157. See, e.g., *Nez v. Nez*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6123, 6124-25 (Navajo 1992) (remanding divorce decree for findings of fact that best interests of children were considered, as required by Navajo common law).

158. 18 Indian L. Rep. (Am. Indian Law. Training Program) 6129 (Navajo 1991).

159. *Id.* at 6129.

160. *Id.* (citing *In re Interest of J.J.S.*, 4 Navajo Rptr. 192, 194 (Window Rock Dist. Ct. 1983)).

161. See *supra* notes 150-51 and accompanying text.

162. See *infra* notes 219-34 and accompanying text.

163. See *infra* notes 329-33 and accompanying text.

164. 4 Navajo Rptr. 192 (Window Rock Dist. Ct. 1983).

165. *Id.* at 195.

166. *Id.*

The correct statement of the Navajo Common Law of adoption is that there is an obligation in family members, usually aunts or grandparents or [other] family member[s], who are best suited to . . . support and assist children in need by taking care of them for such periods of time as are necessary under the circumstances, or permanently in the case of a permanent tragedy effecting [sic] the parents. . . . The mechanism is informal and practical and based upon community expectation founded in religious and cultural belief.¹⁶⁷

To summarize *J.J.S.*: (1) the obligation under Navajo common law to care for children is shared by the parents as well as the extended family and clan;¹⁶⁸ (2) adoption itself, therefore, is essentially an assumption of primary care duties by the children's relatives when the parents are unable to perform those duties;¹⁶⁹ and (3) adoption may be either permanent or temporary, as the need may be.¹⁷⁰ Note, however, that these holdings have never been addressed by the Navajo Nation Supreme Court.¹⁷¹

2. *Paternity*

The interests of children are preeminent in paternity disputes settled by Navajo common law.¹⁷² The straightforward rule, stated by the Navajo Nation Supreme Court in 1987 in *Davis v. Davis*, is that "a child born during a marriage is considered the issue of that marriage."¹⁷³ This rule is based on the Navajo common law concern that children have an identifiable father to support and care for them.¹⁷⁴ The courts have not yet determined whether there is common law applicable to paternity suits involving children born out of wedlock.

B. *Marriage*

Just as children hold special status under Navajo common law, so do issues related to marriage. The customary sanctity of marriage has been emphasized

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. The solicitor to the Navajo Court of Appeals in 1983 issued an opinion regarding the Navajo common law of adoption. Op. Solic. Navajo Tribal Courts, No. 83-10 (Sept. 19, 1983). The opinion comes to the same conclusions as those in *J.J.S.* See *id.*

172. See *Davis v. Davis*, 5 Navajo Rptr. 169, 171 (Navajo 1987) (noting that the Navajo common law presumption "that a child born during a marriage is . . . the issue of that marriage . . . was developed to protect the child from the disabilities attached to the status of illegitimacy.").

173. *Id.*

174. *Id.*; *Alonzo v. Martine*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6129, 6129 (Navajo 1991).

by the Navajo Nation Supreme Court: "Traditional Navajo society placed great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the 'Holy People.' This blessing insure[s] that the marriage will be stable, in harmony, and perpetual."¹⁷⁵ The right to marriage has been deemed by the court to be "fundamental."¹⁷⁶ The decisions dealing with marriage-related issues, therefore, reflect these deep-seated attitudes towards the importance of the cultural institution.

1. Customary Marriage

Marriages in the Navajo Nation have been governed by tribal statute since 1954, when the Tribal Council passed legislation instructing courts to validate traditional Navajo marriages occurring on or before January 31, 1954.¹⁷⁷ The statute was passed, apparently, to ensure that Navajos would from then on obtain marriage licenses and thereby avoid problems in obtaining government benefits for their dependents.¹⁷⁸ The Tribal Council's action set the stage for the inevitable day when the court would be faced with a plea to validate a customary marriage that had occurred after the deadline.

The first recorded opinion in the Navajo Reporter, a 1969 court of appeals decision, deals with exactly this problem.¹⁷⁹ In *In re Marriage of Daw*, the court circumvented the 1954 statute by holding that a customary marriage that had occurred in 1964 was also a "common law" marriage, that the latter was not specifically prohibited, and that therefore the court could validate the appellants' marriage.¹⁸⁰ The court reaffirmed *Daw* ten years later in *In re Marriage of Ketchum*,¹⁸¹ holding that "any marriage contracted by tribal custom after January 31, 1954 may not be validated by the tribal court but is recognized as a common law marriage."¹⁸² The court, citing a 1972 federal district court decision, then listed the requirements of a common law marriage: (1) consent to be husband and wife; (2) actual cohabitation; and (3)

175. *Navajo Nation v. Murphy*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6035, 6036 (Navajo 1988).

176. *Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105, 6112 (Navajo 1990). For a discussion of the right to marriage under Navajo common law, see *infra* notes 358-60 and accompanying text.

177. *In re Marriage of Francisco*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6113, 6113-14 (Navajo 1989) (citing Navajo Tribal Council Res. CF-2-54 (Feb. 11, 1954) (codified at NAVAJO TRIB. CODE tit. 9, § 61 (1977), amended by Navajo Tribal Council Res. CAP-36-80 (Apr. 30, 1980))).

178. *Id.* at 6114.

179. *In re Marriage of Daw*, 1 Navajo Rptr. 1 (Navajo Ct. App. 1969).

180. *Id.* at 3-4. Note that by "common law marriage," the court apparently referred to Anglo-style common law marriage, which is distinct from customary Navajo marriage.

181. 2 Navajo Rptr. 102 (Navajo. Ct. App. 1979).

182. *Id.* at 105.

open acknowledgment to the community of the parties' married status.¹⁸³

Although the institution of Anglo-style common law marriage — as opposed to Navajo customary marriage — was again confirmed by the Navajo Nation Supreme Court in 1988,¹⁸⁴ a year later the court ruled in *In re Marriage of Francisco* that "Navajo tradition and custom do not recognize common-law marriage; therefore, this Court overrules all prior rulings that Navajo courts can validate unlicensed marriages in which no Navajo traditional ceremony occurred."¹⁸⁵ At the same time as it declared the invalidity of Anglo-style common law marriages, the court noted the repeal in 1980 of the Tribal Council's 1954 law and held that "[t]o enhance Navajo sovereignty, preserve Navajo marriage tradition, and protect those who adhere to it, Navajo courts will validate unlicensed Navajo traditional marriages between Navajos."¹⁸⁶

The outcome of all the judicial sidestepping and reversals is that marriages conducted according to Navajo tradition have always been upheld by the Navajo courts, despite the temporary existence of a tribal statute apparently instructing otherwise. The current case law, as expressed in *Francisco*, recognizes only formally licensed marriages and marriages conducted according to traditional Navajo ceremonies.¹⁸⁷

2. Cohabitation

As discussed above, the Navajo Nation Supreme Court has held that relationships characterized by cohabitation will never rise to the level of "marriage" unless a marriage license is obtained or a traditional Navajo marriage ceremony is performed.¹⁸⁸ In fact, the court has noted that "Navajos scorn those who have relationships out of marriage, and the man in such a relationship is called a 'stay-until-dawn man.' The woman shares the scorn because the term implies her need to sneak the man out before neighbors arise and go out."¹⁸⁹ In 1983, however, Judge Tom Tso issued a decision from the

183. *Id.* (citing *Kelly v. Metropolitan Life Ins. Co.*, 352 F. Supp. 270 (S.D.N.Y. 1972)).

184. *Navajo Nation v. Murphy*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6035, 6036 (Navajo 1988).

185. *In re Marriage of Francisco*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6105, 6115 (Navajo 1989).

186. *Id.* at 6114-15.

187. The ceremonies have been described as consisting of at least the following components: (1) the bride and bridegroom meet and agree to be married; (2) the parents of the bridegroom ask the parents of the bride for her hand in marriage; (3) the bride and bridegroom share commel mush from the sacred basket; (4) the guests offer advice and good wishes to the bride and bridegroom; and (5) an optional exchange of gifts occurs. *Id.* at 6113 (citing Navajo Tribal Council Res. CJ-2-40 (June 3, 1940)). For a more extensive description of traditional Navajo weddings, see 3 DAN VICENTI ET AL., *THE LAW OF THE PEOPLE: DINE' BIBEE HAZ'AANII* 275-77 (1972) [hereinafter 3 VICENTI].

188. See *supra* notes 177-87 and accompanying text.

189. *Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rep. (Am.

Window Rock District Court bench holding that a man traditionally assumed obligations to a woman and her family and clan when he placed "his saddle outside [her] hogan."¹⁹⁰ Those obligations may include a duty to care for adoptive children of the same clan as the woman.¹⁹¹ The precise extent of the man's obligations is unclear, but certainly must be tied to changes in male and female roles in Navajo society.¹⁹²

3. Husband-Wife Privilege

The Anglo common law principle that spouses may not be forced to testify against one another in criminal cases was found by the Navajo Nation Supreme Court, in a 1988 decision, to also exist at Navajo common law.¹⁹³ While the Navajo privilege apparently operates identically to the Anglo version, it is explicitly grounded solely on the traditional Navajo interest in "preserving the harmony and sanctity of the marriage relationship."¹⁹⁴ The court hedged its holding, however, by noting that it was putting off for another occasion the weighing of the cultural interest behind the privilege against the judicial interest in considering all relevant evidence in criminal cases.¹⁹⁵

4. Interspousal Immunity

Interspousal immunity for unreasonable assault has been found by a Navajo district court to be prohibited by Navajo common law. In *Kuwanhyoima v. Kuwanhyoima* (*Kuwanhyoima I*),¹⁹⁶ a 1990 decision of the Tuba City District Court, acting Judge Homer Bluehouse (concurrently serving on the Navajo Nation Supreme Court) ruled that the common law principle of *hozho* (harmony) dictated that a "man does not have the privilege of using unreasonable force against his wife."¹⁹⁷ Furthermore, separated spouses had no privilege of assaulting or annoying one another in any manner.¹⁹⁸ On the facts of *Kuwanhyoima I*, Bluehouse ruled that the defendant's assault and

Indian Law. Training Program) 6105, 6112 (Navajo 1990); see also *Francisco*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6113 (noting that "[u]nder traditional Navajo thought, unmarried couples who live together act immorally because they are said to steal each other").

190. *In re Adoption of S.C.M.*, 4 Navajo Rptr. 167, 172 (Window Rock Dist. Ct. 1983).

191. *Id.*

192. See *infra* notes 215-18 and accompanying text.

193. *Navajo Nation v. Murphy*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6035, 6036 (Navajo 1988).

194. *Id.*

195. *Id.*

196. No. TC-CV-344-84 (Tuba City Dist. Ct. Apr. 9, 1990).

197. *Id.*, slip op. at 2-3.

198. *Id.*, slip op. at 3 (citing *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250, 252-53 (Window Rock Dist. Ct. 1982)). Acting Judge Bluehouse also noted that "[f]ollowing separation there is no privilege which allows a man to interfere with the dignity of his wife." *Id.* (citing *Apache*, 3 Navajo Rptr. at 252-53)).

attempted rape of his estranged wife was not characterized by "reason or proportionality" and therefore "not privileged or sanctioned by any provocation."¹⁹⁹

C. Divorce

1. Customary Divorce

Customary divorce has been illegal in the Navajo Nation since 1940, when the Navajo Tribal Council passed legislation requiring all divorces to be authorized by the courts.²⁰⁰ Nonetheless, the courts have referred to traditional divorce procedures in such matters as determining the Navajo common law of property division, discussed below.²⁰¹

2. Property Division

The sole decision on Navajo common law divorce and property division is *Apache v. Republic National Life Insurance Co.*,²⁰² a 1982 opinion written by Judge Tom Tso on the Window Rock District Court. In considering whether a divorced woman could collect on her deceased former husband's life insurance policy, the court discussed at length the Navajo divorce customs, saying that with regard to property division, "Under Navajo custom the woman can simply keep the property of the marriage and send the man to his own family, taking only his own property acquired before the marriage. She also has the option of working out an arrangement with the man."²⁰³ The common law rule, then, appears to have been that the woman had the choice whether to take the property acquired during the marriage.²⁰⁴ The court stressed, however, that once the divorce was finalized, the woman surrendered any right to further claims of property:

199. *Id.*, slip op. at 4. Exactly what Judge Bluehouse would have considered "reasonable" or "proportional" force is unclear, but the implication is that in such cases an assault would be justified.

The solicitor to the Navajo Nation Supreme Court has argued a stronger position: "Under Navajo common law, violence toward women, or mistreatment of them in any way, is illegal." James W. Zion & Elsie B. Zion, *Hozho' Sokee' — Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 413 (1993).

200. NAVAJO TRIB. CODE tit. 9, § 407 (1977); see *In re Marriage of Slim*, 3 Navajo Rptr. 218 (Crownpoint Dist. Ct. 1982) (holding that statute outlawing customary divorces overrides Navajo custom and tradition); *Apache*, 3 Navajo Rptr. at 252-53 (discussing forms of customary divorce but acknowledging that such divorces are illegal by tribal statute). For a discussion of traditional Navajo divorce procedures, see 3 VICENTI, *supra* note 187, at 302-05.

201. See *infra* notes 202-06 and accompanying text.

202. 3 Navajo Rptr. 250 (Window Rock Dist. Ct. 1982).

203. *Id.* at 253.

204. See 3 VICENTI, *supra* note 187, at 303-04 (noting that Navajo divorces traditionally resulted in *all* property, including any private property owned by the male spouse before marriage, being left with the female spouse).

There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common-sense. To permit a former spouse to keep such ties that she or he may be said to be lurking behind the hogan waiting to take a portion of the corn harvest is unthinkable²⁰⁵

Applying this common law principle of finality, the court held that the appellant was not entitled to collect on the proceeds of her former husband's insurance policy, despite the express designation of the appellant as a beneficiary in the policy.²⁰⁶

3. Alimony

In the 1980 decision, *Johnson v. Johnson*,²⁰⁷ the Navajo Court of Appeals upheld an award of alimony to a fifty-two-year-old homemaker and mother who was unable to support herself after her divorce.²⁰⁸ The court considered Navajo custom, and concluded that traditionally alimony did not exist — instead, the responsibility for continuing support of the female spouse fell on her family.²⁰⁹ On the facts of the case, however, the court determined that it was not feasible for the appellee's family to support her and that there was nothing in Navajo common law to *prohibit* Navajo courts from awarding alimony.²¹⁰

Later, a 1986 decision of the Navajo Nation Supreme Court, *Sells v. Sells*,²¹¹ confirmed the *Johnson* ruling, holding that in general Navajo courts were permitted under Navajo common law to award alimony.²¹² The court also set out a number of "guidelines" to aid district courts in determining whether alimony was warranted.²¹³ These guidelines listed several factors to be considered, including the needs and age of the spouse seeking support, the length of the marriage, the economic situation of each spouse, and other information.²¹⁴

Alimony appears to be one area of current Navajo law where the application of customs and traditions of the Navajo is not particularly appropriate. Before the introduction of the wage economy and its consequent

205. *Id.* at 254.

206. *Id.* at 253-54.

207. 3 Navajo Rptr. 9 (Navajo Ct. App. 1980).

208. *Id.* at 10-11, 13.

209. *Id.* at 11.

210. *Id.*

211. 5 Navajo Rptr. 104 (Navajo 1986).

212. *Id.* at 105 (citing *Johnson v. Johnson*, 3 Navajo Rptr 9 (Navajo Ct. App. 1980)).

213. *Id.* at 106.

214. *Id.* The court also included in its list "[c]onsideration of Navajo tradition and customary Navajo law, where applicable." *Id.*

destructive effects on the traditional roles of married couples, wives held the economic power in families because they controlled the valuable family property, including the livestock and land.²¹⁵ When divorce occurred, the woman was left with virtually all of the family property and could continue to work the fields and raise the livestock — usually with the aid of her extended family.²¹⁶ As the influence of European-Americans grew, however, women suddenly became dependent on their husbands, who would support the family by working for wages either on or off the reservation.²¹⁷ A divorce would then leave the Navajo woman in much the same position as a traditional Anglo woman — without income, property, skills, work experience, or other ability to support herself.²¹⁸ Alimony, nonexistent in the past, became a practical necessity.

4. Child Custody

The Navajo common law with respect to child custody was first addressed in 1982 by the Navajo Court of Appeals in *Lente v. Notah*.²¹⁹ While holding that the district court was free to disregard tradition in consideration of other factors, the court noted that Navajo children customarily went with their mother in the event of a divorce.²²⁰ "There are exceptions to this general rule, of course, but they are said to be rare and . . . must be approved by everyone concerned, especially the head mothers."²²¹

Also in 1982, however, the Window Rock District Court issued a child custody ruling that offered a different interpretation of the relevant common law. In *Goldtooth v. Goldtooth*,²²² Judge Tom Tso recognized that children were members of the mother's clan, and that this fact "could be used as an element of preference in a child custody case."²²³ Tso went on, however, to hold that the traditional importance of the extended family to Navajo children should trump the "mother's clan" rule, and that child custody should therefore be determined by considering "the children's place in the entire extended family."²²⁴ Judge Tso's interpretation has apparently won out over that of

215. 3 VICENTI, *supra* note 187, at 314, 333.

216. *Id.* at 304.

217. *Id.* at 316.

218. For an examination of the adverse impact of the wage economy on the self-reliance and social status of Navajo women, see Laila S. Hamamsy, *The Role of Women in a Changing Navaho Society*, 59 AM. ANTHROPOLOGIST 101 (1957). But see Mary Shepardson, *The Status of Navajo Women*, 6 AM. INDIAN Q. 149 (1982) (concluding that Navajo women have regained their high status since the advent of the wage economy).

219. 3 Navajo Rptr. 72, 80-81 (Navajo Ct. App. 1982).

220. *Id.*

221. *Id.* at 81 (citing GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE 76-77 (1975)).

222. 3 Navajo Rptr. 223 (Window Rock Dist. Ct. 1982).

223. *Id.* at 226.

224. *Id.*

Lente; a 1984 decision of the court of appeals, *Pavenyouma v. Goldtooth*,²²⁵ quoted Tso's "brilliant analysis" and upheld an award of joint custody under Navajo common law.²²⁶

5. Child Support

The principle that a father must support his children is firmly embedded in Navajo common law:

It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least its mother, the duty of support. It is said that if a man has a child by a woman and fails to support it, "He has stolen the child." In other words, the man who receives the benefit and joy of having a child is a thief if he does not share in the worldly burdens of taking care of it.²²⁷

While the above quotation is taken from a 1983 decision, the Navajo Nation Supreme Court has reaffirmed this common law obligation many times since.²²⁸ The duty was clarified by the court in the 1987 decision, *Notah v. Francis*,²²⁹ where it held that: (1) child support was an absolute obligation owed to the child, though it might be paid to the mother; (2) the duty to make child support payments would continue for as long as needed, or for as long as the court ordered; and (3) the duty could not be relieved by the mother's failure to take legal action — i.e., no statute of limitations applied.²³⁰

The rigid tenor of *Notah* was relaxed somewhat by a 1988 supreme court decision, *Descheenie v. Mariano*,²³¹ wherein the court held: (1) the duty to provide child support applied to both parents; (2) each parent had to contribute "his or her reasonable share toward the child's support, according to each parent's income and resources"; and (3) the level of support had to be one that the child was accustomed to.²³² The court emphasized that the child support award must not reduce the paying parent to absolute poverty, "keeping in mind that for the child to prosper, the parents must also prosper."²³³ The court then provided a general formula, taking into account the adjusted net

225. 5 Navajo Rptr. 17 (Navajo Ct. App. 1984).

226. *Id.* at 19, 20.

227. *Tom v. Tom*, 4 Navajo Rptr. 12, 13 (Navajo Ct. App. 1983).

228. Most recently, in *Nez v. Nez*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6123, 6125 (Navajo 1992). In *Nez*, the court held that it "cannot be restrained by the failure of one parent to ask for child support, or back child support, from the other" in a divorce settlement — the court must ensure that children's best interests are met. *Id.*

229. 5 Navajo Rptr. 147 (Navajo 1987).

230. *Id.* at 148-49.

231. 15 Indian L. Rep. (Am. Indian Law. Training Program) 6039 (Navajo 1988).

232. *Id.* at 6039.

233. *Id.*

incomes of both parents and the reasonable needs of the children, for district courts to use in calculating child support awards.²³⁴

V. Property and Land Use Law

As for all Indian tribes, land ownership and use is a distinctive and complicated area of law for the Navajo Nation. Title of reservation land is owned by the United States government for the benefit of the entire tribe, while use rights are held by individuals.²³⁵ Navajos also have claims to allotment lands, and some own land in fee.²³⁶ Further muddling things is the fact that families and clans are often the actual users of the land, although an individual owns the land use permit.²³⁷ Much of this area of the law is governed by statutes and regulations — both federal and tribal.²³⁸ The Navajo courts have, however, found common law principles applicable to land disputes.

A. Common Property

While the concept of private property is hardly alien to Navajos, private ownership of land "is unknown in the Navajo Nation."²³⁹ The Navajo Nation Supreme Court, quoting a 1983 district court decision of Judge Tom Tso, recently explained this common law concept as follows: "Land is basic to the survival of the Navajo People. While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and . . . use it and who depend upon it for survival — the Navajo People."²⁴⁰ Tso went on in his decision to note the common law responsibility of the Navajo courts to protect the land of the Navajo Nation, ensure its management in the best interests of the Navajo People, and bring it to "undisputed and peaceful use."²⁴¹ Thus, Tso held, the sale of a business situated on the Navajo reservation was subject to scrutiny for determination of whether the sale reflected the best interests of the Navajo Nation.²⁴²

On the other hand, improvements upon land are considered private

234. *Id.* at 6040.

235. CANBY, *supra* note 3, at 268. Note that the Navajo Nation also owns land in fee. 3 VICENTI, *supra* note 187, at 343, 345.

236. 3 VICENTI, *supra* note 187, at 343-45.

237. *See* Begay v. Keedah, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6021, 6022 (Navajo 1991).

238. *See, e.g.*, 25 C.F.R. § 167 (1992) (federal grazing regulations); NAVAJO TRIB. CODE tit. 3 (1977).

239. Hood v. Bordy, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6061, 6063 (Navajo 1991).

240. *Id.* (quoting Tome v. Navajo Nation, 4 Navajo Rptr. 159, 161 (Window Rock Dist. Ct. 1983)).

241. Tome, 4 Navajo Rptr. at 161.

242. *Id.*

property.²⁴³ Grazing and other land use permits are also legally the property of particular individuals, though the customary trust doctrine, when it applies, gives a shared interest in a permit to the family that uses it (see below).²⁴⁴

B. Customary Land Use

In 1974, the Navajo Court of Appeals first made use of the term "traditional use area" in *Dennison v. Tucson Gas & Electric Co.*,²⁴⁵ a case involving the exercise by the Navajo Nation of eminent domain over an area on which the plaintiffs had their home and grazed their livestock.²⁴⁶ The court held that the plaintiffs were entitled to just compensation for the taking of "their" land.²⁴⁷ Twelve years later, in a probate case, *In re Estate of Wauneka*,²⁴⁸ the Navajo Nation Supreme Court recognized that "[e]very acre of land on the reservation not reserved for a special purpose is a part of someone's customary use area," thus establishing the fundamental importance of this particular aspect of Navajo common law.²⁴⁹ The court in *Wauneka* offered this explanation of customary usage:

Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use area concept.²⁵⁰

After holding that, under *Dennison*, customary usage rights were a legal property interest, the court set forth the factors that established that a customary use area was at issue before the court: (1) the decedent had "exercised continuous and exclusive possessory use of the land during his lifetime"; (2) this usage was "never disputed by either the sovereign, the Bureau of Indian Affairs, or other land users from the immediate area"; and (3) the area was "fenced and readily ascertainable."²⁵¹

The court in *Wauneka* did not assert that the factors it listed should govern all claims of customary usage, although there appears to be no conflict

243. *In re Estate of Wauneka*, 5 Navajo Rptr. 79, 81 (Navajo 1986).

244. *Begay*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 6022; *Johnson v. Johnson*, 3 Navajo Rptr 9, 12 (Navajo Ct. App. 1980).

245. 1 Navajo Rptr. 95 (Navajo Ct. App. 1974).

246. *Id.* at 96-98.

247. *Id.* at 105.

248. 5 Navajo Rptr. 79, 81 (Navajo 1986)

249. *Id.* at 83.

250. *Id.* at 81. For a description of traditional Navajo legal perspectives on "custom use" areas, see 3 VICENTI, *supra* note 187, at 280.

251. *Wauneka*, 5 Navajo Rptr. at 82.

between those criteria and a statement by the court in 1991 in *Hood v. Borden*²⁵² that "individual Navajos who use or improve the land with buildings, corrals, fences, etc. create for themselves a customary use ownership interest."²⁵³ The *Hood* Court reaffirmed that such property interests were valid and noted that owners of customary usage rights could sell or dispose of their improvements to that land as they wished.²⁵⁴

In *Yazzie v. Catron*,²⁵⁵ a 1992 decision, the Navajo Nation Supreme Court discussed the relationship between customary usage areas and grazing permits. The court held that permit holders also were required to have general usage rights to the land described in the permit, and that "[s]uch rights are most frequently held as a customary use area on land occupied by the permit holder's family in previous generations."²⁵⁶

C. Customary Trusts: Family Property Rights

Customary trusts were developed by the Navajo courts for the main purposes of simplifying the probate of permits and land, and of giving a legal structure to traditional Navajo family-based usage of land.²⁵⁷ While a customary trust may be set up by the courts with the consent of the concerned parties at the time of distribution of a decedent's estate, a customary trust may also come into existence when a holder of a permit or land use right passes it on to one of her children to be held and used for the benefit of that child and the other children or grandchildren.²⁵⁸ No written opinions of the Navajo courts have yet addressed a dispute over proper management of a customary trust, though the Navajo Nation Supreme Court has emphasized that Navajo common law trusts "have nothing to do with the American common law trust."²⁵⁹

252. 18 Indian L. Rep. (Am. Indian Law. Training Program) 6061 (Navajo 1991).

253. *Id.* at 6063.

254. *Id.* (citing BERARD HAILE, PROPERTY CONCEPTS OF THE NAVAHO INDIANS 11 (1954)).

255. 19 Indian L. Rep. (Am. Indian Law. Training Program) 6125 (Navajo 1992).

256. *Id.* at 6126.

257. *Wauneka*, 5 Navajo Rptr. at 82. Customary family and clan ownership of certain kinds of property has been documented in the anthropological literature. According to Berard Haile's landmark study, based on data gathered in 1910, Navajo "[f]amilial and individual properties . . . often blend with no particular regard for assigning ownership definitely." BERARD HAILE, PROPERTY CONCEPTS OF THE NAVAHO INDIANS 13 (photo. reprint 1978) (1954). Such "blending" occurred particularly with regard to family expenses — such as cooking ware, bedding, and ceremony expenses. *Id.* Gifts were given by the bridegroom to the bride's family. *Id.* Clan ownership was virtually unknown in Navajo tradition, except insofar as restitution was concerned. *Id.* at 5-9. When a member of a clan was killed or raped, compensation to the victim's clan was demanded of the offender. *Id.* at 7-9.

258. *Begay v. Keedah*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6021, 6022 (Navajo 1991); *Johnson v. Johnson*, 3 Navajo Rptr 9, 12 (Navajo Ct. App. 1980).

259. *Begay*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 6022.

D. Grazing and Land Use Permits

"In Navajo common law a grazing permit is one of the most important items of property which a Navajo may own."²⁶⁰ The reasons for the significance attached to grazing permits is obvious: under the Navajo Nation Tribal Code, the grazing of livestock is not allowed on land owned by the Navajo Nation unless a valid permit has been issued.²⁶¹ To a large extent, however, Navajo common law governs the use of grazing and land use permits. Most importantly, while a permit is issued to a specifically named individual, Navajo family units are traditionally the actual beneficiaries of the permits,²⁶² and the courts have established customary trusts (discussed above) to resolve this conflict between statutory and common law.²⁶³ The symbiotic relationship between permits and customary land use areas has also been established by the Navajo Nation Supreme Court; in the 1992 decision *Yazzie v. Catron* the court noted that, while grazing of livestock was not allowed without a permit, permit holders had to have concurrent land use rights before the permit could be exercised.²⁶⁴

E. Adverse Possession and Abandonment

In a 1982 decision, *Shirley v. James*,²⁶⁵ the Navajo Court of Appeals indicated that "customary adverse possession" existed at Navajo common law.²⁶⁶ The court upheld the district court's determination that "[t]he long period of occupation and land use by the plaintiff's father" constituted customary adverse possession.²⁶⁷ As the facts of the case were not given, however, the doctrine has remained essentially undefined. Insofar as ownership of land is concerned, the Navajo Nation Supreme Court has ruled that land of the Navajo Nation may not be "wrested away through adverse possession or prescription by individual occupiers."²⁶⁸ Any customary adverse possession, therefore, would necessarily apply only to land usage rights.

260. *In re Estate of Joe*, 4 Navajo Rptr. 99, 99 (Navajo Ct. App. 1983).

261. NAVAJO TRIB. CODE tit. 3, § 781 (1977).

262. *See, e.g., Johnson*, 3 Navajo Rptr. at 12 (holding, under Navajo common law, that when a land use permit is given as a gift, the permit does not become the donee's separate property, but is presumed to belong to the donee's entire family); *see also Earl v. Earl*, 3 Navajo Rptr. 16 (Navajo Ct. App. 1980) (dismissing action on authority of *Johnson v. Johnson*, 3 Navajo Rptr. 9 (Navajo Ct. App. 1980)).

263. *Begay*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 6022; *Johnson*, 3 Navajo Rptr. at 12.

264. *Yazzie v. Catron*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6125, 6126-27 (Navajo 1992). *See supra* notes 255-56 and accompanying text.

265. 3 Navajo Rptr. 83 (Navajo Ct. App. 1982).

266. *Id.* at 83.

267. *Id.*

268. *Hood v. Bordy*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6061, 6063 (Navajo 1991).

"Another aspect of traditional Navajo land tenure is the principle that one must use it or lose it."²⁶⁹ In *Begay v. Keedah*, a 1991 decision, the Navajo Nation Supreme Court determined that, on remand, title to a grazing permit should be quieted with the foregoing principle in mind.²⁷⁰ On the facts of the case, the court noted the appellant's allegation that the particular permit in question had not been used for thirty-five years.²⁷¹ No published decision of the Navajo courts, however, has either applied or offered further explanation of the common law with regard to abandonment of property interests.

VI. Probate Law

Custom and tradition are nowhere more apparent than in probate law, and nowhere else are custom and tradition more likely to diverge from Anglo-American law, for the simple reason that the disposal of estates is inevitably linked to cultural kinship patterns.²⁷² The Navajo courts have used custom in probate matters at least since opinions began to be published.²⁷³ Custom has been applied to resolve a great variety of probate-related problems. The distribution of intestate property is clearly governed by Navajo common law;²⁷⁴ both the Navajo Nation Tribal Code and the Navajo Rules of Probate Procedure specify that custom takes precedence over all other sources of authority in that area of law, so long as custom is asserted and proved by the parties.²⁷⁵ Similarly, the courts have employed common law in the interpretation of wills, and especially oral wills.²⁷⁶ Finally, the development of the legal idea of a "customary trust" is fundamentally a probate matter and based on Navajo tradition.²⁷⁷ Each of these areas of the Navajo probate common law jurisprudence is discussed below.

A. Classification and Intestate Distribution of Property

The authoritative opinion discussing traditional Navajo concepts of intestate property distribution is *In re Estate of Apachee*,²⁷⁸ a 1983 district court decision written by Judge Tom Tso and given the Navajo Nation Supreme Court's stamp of approval in 1988.²⁷⁹ Tso began by finding that property

269. *Begay*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 6023.

270. *Id.* The court ordered the lower court to employ "the equitable principles of Navajo common law." *Id.*

271. *Id.*

272. For an anthropological analysis of Navajo kinship and inheritance structures, see KLUCKHOHN & LEIGHTON, *supra* note 91, at 105-09.

273. See *In re Trust of Benally*, 1 Navajo Rptr. 10, 12 (Navajo Ct. App. 1969).

274. *In re Estate of Wauneka*, 5 Navajo Rptr. 79, 82-83 (Navajo 1986).

275. NAVAJO R. PROBATE P. 10 (issued by the Navajo Nation Supreme Court); NAVAJO TRIB. CODE tit. 8, § 2(b) (1977).

276. See *infra* notes 306-17 and accompanying text.

277. See *infra* notes 294-305 and accompanying text.

278. 4 Navajo Rptr. 178 (Window Rock Dist. Ct. 1983).

279. *In re Estate of Thomas*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6053,

was traditionally divided into "productive" and "nonproductive" goods.²⁸⁰ Productive goods included those items of property that essentially benefitted more than solely the deceased.²⁸¹ Such goods could include livestock, land, and land use or grazing permits.²⁸² The test was whether a particular piece of property was "an essential piece of property for the maintenance of the [decedent's] camp;" the camp being the group of family and clan members living together with the decedent.²⁸³ If the test was met, then that property was considered "productive," and upon the death of the property holder it was "held for the benefit of those living in the camp."²⁸⁴ The intestate distribution of productive property, therefore, was governed by who lived in the same camp as did the deceased property holder.

Nonproductive goods, on the other hand, included "jewelry, tools and equipment, and non-subsistence livestock such as horses."²⁸⁵ Judge Tso noted that cash "can present a special problem because it can be treated either as productive property or nonproductive property."²⁸⁶ Nonproductive property traditionally was subject to special distribution proceedings.²⁸⁷ These proceedings, under *Apachee's* interpretation of the common law, had to be held at the decedent's camp and be supervised by a *naat'aanii* (community leader or peacemaker).²⁸⁸ The decedent's nonproductive property would then be distributed with preference for immediate family members and consideration of the relative needs and places of residence of all claimants.²⁸⁹ The "immediate family" was defined by the claimant's biological closeness with, actual residential proximity to, and extent of mutual assistance and support exchanged with the decedent.²⁹⁰ Children not residing with the decedent

6053 (Navajo 1988) (approving *In re Estate of Apachee*, 4 Navajo Rptr. 178 (Window Rock Dist. Ct. 1983)).

280. *Apachee*, 4 Navajo Rptr. at 182.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* "Treated as productive property, cash would be held in the camp for its economic security as a unit. Seen as nonproductive, cash would be distributed among family members." *Id.* The court seemed to imply that the appropriate classification of cash would depend on the specific facts of the case. Note, however, that the presumption will apparently be that the cash is nonproductive. *See id.* at 183 (treating money as nonproductive because neither party claimed otherwise).

287. *See id.* at 182.

288. *Id.* For a discussion of the significance of the *naat'aanii* in Navajo common law, *see supra* note 16 and accompanying text.

289. *Apachee*, 4 Navajo Rptr. at 182.

290. *Id.* at 183. While the court cited to case law grappling with the definition of "immediate family" in the context of oral wills, it did not specifically argue that the definition should be the same in the intestate situation. *See id.* (citing *In re Estate of Lee*, 1 Navajo Rptr. 27 (Navajo Ct. App. 1971); *In re Estate of Benally*, 1 Navajo Rptr. 219 (Navajo Ct. App. 1978)). As the

were considered members of the immediate family, although they might have to also demonstrate need.²⁹¹

Finally, items of personal property may be buried with the decedent under Navajo tradition.²⁹² Similarly, the decedent's clothing may be burned.²⁹³

B. Customary Trusts and Grazing/Land Use Permits

The probating of land use and grazing permits, including customary land use claims, has posed a special problem in the Navajo Nation as the available land base has diminished in proportion to the growing population.²⁹⁴ Insofar as land use permits are concerned, courts must, under the Tribal Code, transfer the permit to the decedent's "most logical heir."²⁹⁵ Furthermore, courts must "make every effort to keep the land assignment in one tract and not subdivide it."²⁹⁶ The Navajo Nation Supreme Court articulated a more generally applicable rule regarding probate of permits in 1987 in *In re Estate of Benally v. Denetclaw*:²⁹⁷ "[A] court probating land use and grazing permits held and used by a family unit must consider the pattern of land use and the relationships within the family in dividing the estate. . . . Interests in productive land cannot simply be divided up according to the intestate statutes

...²⁹⁸

The obvious ambiguities and unpredictable results of the "most logical heir" clause in the Tribal Code prompted the Navajo courts to begin handling probate disputes over permits and customary land usage by creating "customary trusts," the aim of which was explicitly to "keep tracts of land and grazing permits intact and in the family."²⁹⁹ Where a customary trust has been established, the entrusted property descends "in somewhat the same way

significance of the immediate family to establish the validity of an oral will is somewhat different than in the intestate context, it may be that a more inclusive definition should pertain in the latter case.

291. *See id.* (holding that child living with decedent's ex-spouse was member of decedent's immediate family "because he was 'born for' his father's clan and is in need of assistance").

The district court in *Apachee* ordered another hearing for a determination of what the relative needs of the decedent's heirs were. *Id.* at 184.

292. *Id.* at 183.

293. *Id.*

294. The 1990 census put the total resident population of the Navajo Nation at 148,451. The tribal land area was just over 25,000 square miles. BUREAU OF THE CENSUS, U.S. DEPT OF LABOR, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS: AMERICAN INDIAN AND ALASKA NATIVE AREAS 11 (1992) (vol. CP-1-1A).

295. *In re Estate of Benally v. Denetclaw*, 5 Navajo Rptr. 174, 179 (Navajo 1987) (citing NAVAJO TRIB. CODE tit. 3, § 785 (1977)).

296. *Id.*

297. 5 Navajo Rptr. 174 (Navajo 1987).

298. *Id.* at 180.

299. *Id.* For further discussion of Navajo customary trusts, *see supra* notes 256-58 and accompanying text.

as property held in joint tenancy with right of survivorship."³⁰⁰ Thus, the decedent's interest in the property simply passes in equal proportions to the remaining members of the trust.³⁰¹ Parties to the trust are determined by the court, and patterns of land use and family relationships must be factors in that determination.³⁰² A court must only allow the creation of a trust if the heirs are able to cooperate with one another and effectively manage the trust.³⁰³ Thus, a customary trust may not be imposed upon unwilling parties, and dissenting claimants may be excluded from a trust established among the other claimants.³⁰⁴ If the decedent is the holder of the permit, the Navajo Nation Supreme Court has noted that under Navajo tradition the "most logical heir," who is personally involved in using the permit, "will become the new holder."³⁰⁵

C. Wills

In 1988, the Navajo Nation Supreme Court wrote: "We can find no record of testamentary succession, either written or oral, in Navajo custom before the introduction during the middle of this century of the Anglo-American legal concept of succession through designation in a will."³⁰⁶ Despite its disclaimer, however, the court has judicially noticed that oral wills are a "well-established" Navajo custom, and it has upheld the validity of such wills, subject to certain conditions.³⁰⁷

The seminal opinion on oral wills is *In re Estate of Lee*,³⁰⁸ a 1971 decision of the court of appeals in which the appellant raised the existence of an oral will to challenge a probate judgment issued by the district court.³⁰⁹ The court first noted that oral wills were a traditional Navajo method of devising property.³¹⁰ There were two requirements, however, that had to be met before such a will would be considered legally valid: (1) the oral will had

300. *Denetclaw*, 5 Navajo Rptr. at 180.

301. The Navajo Nation Supreme Court noted that the primary difference between Navajo customary trusts and joint tenancies was that "[c]ommon-law requirements governing the creation and destruction of joint tenancies do not apply to customary trusts." *Id.*

302. *Id.*

303. *Id.* (citing *In re Estate of Wauneka*, 5 Navajo Rptr. 79, 82 (Navajo 1986)). "Effective management" of the customary trust apparently requires an intention on the part of the members of the trust to keep the land intact and to use the land productively (e.g., for farming or grazing). *See id.*

304. *Id.*

305. *Begay v. Keedah*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6021, 6022 (Navajo 1991) (citing *Denetclaw*, 5 Navajo Rptr. at 179).

306. *In re Estate of Thomas*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6053, 6054 (Navajo 1988).

307. *See id.* (citing *Lee*, 1 Navajo Rptr. at 31).

308. 1 Navajo Rptr. 27 (Navajo Ct. App. 1971).

309. *Id.* at 28-29.

310. *Id.* at 31.

to be made in the presence of the testator's immediate family; and (2) the members of the immediate family had to agree to the terms of the will.³¹¹ In 1988 the Navajo Nation Supreme Court phrased the second requirement to be that the immediate family "agree that the testator orally made known his or her last will before them," thus apparently doing away with any need for family members to agree to the provisions of the will at the time of its making.³¹²

The court wrestled for seventeen years with the question of who comprised a testator's immediate family for purposes of an oral will. In *Lee*³¹³ itself, the court found that because the testator's wife and children were not present at the making of the alleged will, it was invalid.³¹⁴ In 1978, the court adopted the rule that the children of the testator's first marriage, who were not living with the testator when he died, did not have to be present for an oral will to be valid.³¹⁵ This rule was discarded, however, in *In re Estate of Thomas*,³¹⁶ a 1988 decision by the Navajo Nation Supreme Court. The court in *Thomas* asserted that the prior decision excluding children born of former marriages from the immediate family was "inconsistent with the Navajo custom which teaches that parents should view each of their children equally," and it adopted a "strict rule that all children of the deceased constitute the immediate family" and must therefore be present at the making of a valid oral will.³¹⁷

VII. Common Law Rights

Prior to 1987, the Navajo Nation courts had not applied common law to questions of the rights and liberties of parties. The reasons for this reluctance — or lack of opportunity — are unclear. Most likely, however, the existence of both the Indian Civil Rights Act (ICRA) and the Navajo Nation Bill of Rights were viewed as sufficient supporting legal authority in cases involving rights.³¹⁸ The recent surge in the use of common law in this area is probably

311. *Id.* at 32.

312. *Thomas*, 15 Indian L. Rep. (Am. Indian Law. Training Program) at 6054. James Zion, the solicitor to the Navajo Nation Supreme Court, has suggested that the notion of civil rights itself is antithetical to traditional Navajo law, which is premised on the existence of a non-authoritarian government. Letter, *supra* note 23.

313. 1 Navajo Rptr. 27 (Navajo Ct. App. 1971).

314. *Id.* at 32.

315. *Estate of Benally v. Navajo Nation*, 5 Navajo Rptr. 209, 222-23 (Window Rock Dist. Ct. 1986).

316. 15 Indian L. Rep. (Am. Indian Law. Training Program) 6053 (Navajo 1988).

317. *Id.* at 6054.

318. See, e.g., *Dennison v. Tucson Gas & Elec. Co.*, 1 Navajo Rptr. 95, 98-99 (Navajo Ct. App. 1974) (finding right to due process deriving from the U.S. Constitution, the ICRA, and the Navajo Bill of Rights).

Native American tribes are not subject to the Bill of Rights of the federal Constitution. See, e.g., *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896). Consequently, in 1968 Congress passed the ICRA, which imposed on tribal governments the duty to respect certain tribal member rights,

a manifestation of the Navajo Nation Supreme Court's increasing inclination to use and develop Navajo common law wherever applicable, regardless of other sources of authority.³¹⁹ During the last five years, the court has found that a great variety of individual rights are preserved in the Navajo common law, including the rights to: association with relatives, access to the courts, due process, equal protection of the law, marriage, political liberty, nondiscrimination on the basis of sex, and legal representation. In addition, the court has developed children's rights and the idea of "fundamental" rights. Finally, a recent opinion by the court's solicitor notes a traditional Navajo right to privacy.³²⁰

A. Access to the Courts

The common law right to one's day in court was recognized by the Navajo Nation Supreme Court in the 1990 decision, *Plummer v. Plummer*.³²¹ The court noted that Navajos traditionally exercised this right in community and family gatherings, where disputes were resolved by consensus.³²² The precise extent of the right is unclear, but it at least guarantees "an opportunity to be heard at a meaningful time and in a meaningful way."³²³ A party asserting lack of an opportunity to be heard at a "meaningful time" must demonstrate that she was unable to prepare and raise her claims in time and that harm or prejudice to her case will result unless a continuance is granted.³²⁴ "Mean-

closely tracking those in the federal Constitution. See 25 U.S.C. § 1302 (1988). The reaction to ICRA was not positive among American Indians: "Few Native Americans saw the ICRA as a protection of their individual rights against tribal violations. Instead, most Indians saw it as a federal intrusion into their affairs." Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 171 (1991).

It was in anticipation of these concerns that the Navajo Tribal Council in 1967 enacted the Navajo Bill of Rights. NAVAJO TRIB. CODE tit. 1, §§ 1-9 (1967) (amended 1986); see Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6009, 6010 (Navajo 1990). Chief Justice Robert Yazzie explained the courts' preference for relying on the Navajo Nation Bill of Rights, at least insofar as the right to due process is concerned, in a 1992 speech to Amnesty International's Legal Support Network:

Today, the Courts of the Navajo Nation apply the Navajo Nation Bill of Rights . . . in light of Navajo common law. One of the reasons we do this is that there are cultural differences between the general American notions of civil rights and Navajo ideas of what "due process" or "equal protection of the law" happen to be. Due process means fundamental fairness, and that is a value judgment.

Robert Yazzie, The Indian Civil Rights Act: Address Before the University of Cincinnati College of Law 5 (Jan. 25, 1992) (on file with author).

319. For a discussion of this point, see *supra* notes 42-44 and accompanying text.

320. These points are each discussed at *infra* notes 321-75 and accompanying text.

321. 17 Indian L. Rep. (Am. Indian Law. Training Program) 6151 (Navajo 1990).

322. *Id.* at 6152.

323. *Id.*

324. *Id.*

ingful way" is apparently satisfied when a court allows a party an opportunity to raise her claims in some fashion.³²⁵

B. Association with Relatives

In the 1990 decision, *Arizona Public Service Co. v. Office of Navajo Labor Relations*,³²⁶ the Navajo Nation Supreme Court held invalid a public utility company's anti-nepotism policy prohibiting the hiring of persons related by marriage and requiring that all relatives be at least two supervisory levels apart within the company's employee structure.³²⁷ In striking down the policy, the court asserted that the policy violated, among other rights, the fundamental right under Navajo common law to associate freely with one's relatives.³²⁸

C. Children's Rights

As discussed above, the Navajo courts have relied extensively on Navajo common law in their decisions regarding children.³²⁹ The subject of children's rights has been no exception. In *In re A.W.*,³³⁰ a 1988 decision, the Navajo Nation Supreme Court considered whether children were entitled to due process in juvenile criminal proceedings.³³¹ The court determined that the rights of children "are customarily protected to the same extent as are the rights of adults," and that therefore due process was required in juvenile proceedings just as in adult proceedings.³³² With respect to the facts at hand, the court held that a child's right to due process required, in a delinquency proceeding, that notice be given to the child's parent or guardian, that representation by an attorney be provided the child, and that the parent or guardian be allowed to speak for the child and assist in the preparation of the case.³³³

D. Due Process

The right to due process has been explored more often by the Navajo Nation Supreme Court than any other right. In a 1992 decision, *In re Estate of Begay #2*,³³⁴ the court offered a summary of the case law bearing on the

325. *Id.* ("What is a 'meaningful way'? If a party is allowed an opportunity to raise any claim he or she may have and the court allows an opportunity and procedure for doing so, that is sufficient.").

326. 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105 (Navajo 1990).

327. *Id.* at 6113-14.

328. *Id.* at 6113.

329. See *supra* notes 157-60 and accompanying text.

330. 15 Indian L. Rep. (Am. Indian Law. Training Program) 6041 (Navajo 1988).

331. *Id.* at 6043.

332. *Id.*

333. *Id.*

334. 19 Indian L. Rep. (Am. Indian Law. Training Program) 6130 (Navajo 1992).

common law right to due process:

Just as embedded as *res judicata* in the Navajo common law is the principle of due process. Although due process of law is expressly guaranteed by section 3 of the Navajo Nation Bill of Rights, this Court has noted that "[t]he concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act . . . [nor] the Navajo Bill of Rights." Instead, due process is "fundamental fairness in a Navajo cultural context," and "strict standards of fairness and equity . . . are inherent in the Navajo common law." Due process is found by synthesizing the principles of Navajo custom and government, and it is applied "with fairness and respect."

This Court has held that Navajo due process ensures notice and an opportunity to be heard for all parties to a dispute; entitles parties to representation; protects the right to seek political office; prevents the enforcement of ambiguous statutes affecting personal and property rights; must be provided when the government takes private property without the owner's consent; and applies to juvenile proceedings to the same extent as to adult proceedings.³³⁵

Clearly, then, the court has made due process the guarantor of many other subsidiary rights. Equally obvious is the fact that the court views due process as essentially a component of Navajo common law which is only buttressed by specific guarantees in tribal and federal statutes.³³⁶

In *Begay #2* itself, the court ruled that the appellant's due process rights were not violated by a trial judge's *sua sponte* raising of *res judicata* against the appellant; although a minimal appearance of impropriety may have been demonstrated, it was outweighed by interests in judicial economy.³³⁷ The court did indicate, however, that a more "significant appearance of bias on the part of a judge might constitute a violation of a party's due process rights."³³⁸ The court also ruled that due process was satisfied when the appellant was not denied an opportunity to participate in a suit involving her interests; even if the court failed to take action on her motion to intervene, the appellant's remedy was to file for a writ of mandamus.³³⁹

335. *Id.* at 6131 (citations omitted).

336. *Id.*

337. *Id.* at 6132.

338. *Id.*

339. *Id.*

E. Equal Protection of the Law

The right to equal protection under the law has arisen in the recorded opinions of the Navajo courts only with regard to the equal status of women and men.³⁴⁰ In *Davis v. Davis*,³⁴¹ a 1987 divorce case, the supreme court noted that while equal protection was guaranteed by the Navajo Nation Bill of Rights and ICRA, "the Navajo people have traditionally recognized that Navajo women have equal status with Navajo men to participate in decisions affecting family and tribe."³⁴² The court relied on this aspect of Navajo common law to hold that the appellant wife could argue paternity of her child before the district court.³⁴³

A stronger statement was made by the court in *Navajo Nation v. Murphy*,³⁴⁴ a 1988 decision that considered the merits of retaining a husband-wife privilege against forced testimony in the Navajo courts. While holding that the privilege would be kept, the court took pains to note that it would not be based on the rationale underlying the traditional Anglo common law privilege: namely, that wives did not have a separate legal existence from their husbands.³⁴⁵ "Navajo tradition and culture have always revered the role of Navajo women within Navajo society," the court said.³⁴⁶

In 1990, the court considered a claim brought under title 1, section 3 of the

340. The equal rights of women in American Indian tribes has been a subject of concern. Even after the passage of the ICRA in 1968, which imposed many of the provisions of the United States Bill of Rights on tribes, Native American women have often not been accorded the same rights as men by tribal courts. See generally Christofferson, *supra* note 318.

It should be noted, however, that

Native American people, and in particular Native American women, have suffered a longer history of discrimination in the United States than any minority group. Much of this discrimination arose out of the [federal] government's policies of assimilation, termination, and genocide.

... Historically, in many North American Indian tribes, women enjoyed equal rights with men and in some cases were even considered superior to men.

Id. at 177. Whether or not this analysis is entirely accurate with regard to the Navajo tribe, the resurrection of common law attitudes towards equality of the sexes may prove to be an important progressive effect of the current movement of the Navajo courts.

341. 5 Navajo Rptr. 169 (Navajo 1987).

342. *Id.* at 171. The solicitor to the Navajo Nation Supreme Court, in an article discussing domestic violence within the tribe, wrote:

Navajo norms and values, which are the foundations of the Navajo common law, make it clear that women are equal with men, have a religiously-sanctioned status through identity with Changing Woman, and have rights which arise from individual dignity. The essential Navajo value is that while men and women are distinct, they have relations with each other as complementary equals.

Zion, *supra* note 199, at 413.

343. *Id.*

344. 15 Indian L. Rep. (Am. Indian Law. Training Program) 6035 (Navajo 1988).

345. *Id.* at 6036.

346. *Id.*

Navajo Tribal Code, barring the denial or abridgment of rights on account of sex.³⁴⁷ While its analysis rested on the Code provision, the court acknowledged that the provision was added to the Navajo Nation Bill of Rights in 1980 for the express purpose of recognizing the traditional importance of women in Navajo society.³⁴⁸

F. Fair Employment Opportunities

The Navajo common law right to work was addressed by the Navajo Nation Supreme Court in 1990's *Arizona Public Service Co. v. Office of Navajo Labor Relations*.³⁴⁹ The court invoked the "fundamental . . . right to a fair opportunity for employment" in upholding a labor relations board decision striking down an overly strict anti-nepotism policy instituted by the Arizona Public Service Company.³⁵⁰ The court did not elaborate on the parameters of the right to employment opportunities, and the right has not been addressed since that decision.

G. "Fundamental" Rights

The Navajo Nation Supreme Court in 1990 first began to hint that there were certain rights that were more "fundamental," and hence presumably less derogable, than others. In *Bennett v. Navajo Board of Election Supervisors*,³⁵¹ the court set forth the idea that there existed a kind of "unwritten constitutional law" or "natural law" comprised of customs and traditions that were "fundamental and basic to Navajo life."³⁵² This special body of common law was the *beehaz'aanii*.³⁵³ Rights springing from the *beehaz'aanii* were themselves "fundamental," meaning they could only be limited "for good and weighty reasons for the protection of the public interest."³⁵⁴ The court noted that the "rights retained by the people," acknowledged in the Navajo Nation Bill of Rights, constituted such fundamental rights.³⁵⁵ Because the standard of judicial review for government intrusions on "lesser" rights has not yet been clearly established, however, the significance of fundamental rights is ambiguous.

In *Bennett*, the court held that the right to political liberty, including the

347. *Bennett v. Navajo Bd. of Election Supervisors*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6009, 6012 (Navajo 1990).

348. *Id.* (citing NAVAJO NATION BILL OF RIGHTS pmbl., §§ 1, 5 (1986)).

349. 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105 (Navajo 1990).

350. *Id.* at 6113.

351. 18 Indian L. Rep. (Am. Indian Law. Training Program) 6009 (Navajo 1990).

352. *Id.* at 6011.

353. *Id.*

354. *Id.* at 6012. The court's stated level of protection for fundamental rights may be less than that accorded under the United States Constitution. See *infra* note 362 and accompanying text.

355. *Bennett*, 18 Indian L. Rep. (Am. Indian Law. Training Program) at 6011.

right to seek and hold governmental office, was a fundamental right.³⁵⁶ In *Arizona Public Service Co.*, also decided in 1990, the court added the rights to marriage, free association with relatives, and fair opportunity for employment to the list of fundamental rights.³⁵⁷

H. Marriage

The fundamental right to marriage, under Navajo common law, was established by the Navajo Nation Supreme Court in 1990.³⁵⁸ The court cited a prior decision, *In re Marriage of Francisco*,³⁵⁹ discussing the importance of marriage in traditional Navajo society, and took note of the scorn Navajos traditionally held for out-of-marriage relationships.³⁶⁰

I. Political Liberty

In 1990, the court in *Bennett v. Navajo Board of Election Supervisors* held that the right to political liberty also was fundamental under Navajo common law: "there is a strong and fundamental tradition that any Navajo can participate in the processes of government, and no person who is not otherwise disqualified by a reasonable law can be prohibited from holding public office."³⁶¹ The "reasonable" level of scrutiny applied by the court at first glance appears too lenient to be applicable to potential violations of a "fundamental" right.³⁶² Elsewhere in *Bennett*, however, the court determined that a "good and weighty reason" related to the public interest must be demonstrated if the government is to be allowed to intrude on the right to political liberty.³⁶³ On the facts of *Bennett*, the court struck down a tribal statute limiting the offices of president and vice president to former elected officials and employees of the Navajo Nation.³⁶⁴ The court held that the statute was unreasonable and unsupported by a "valid and substantial governmental interest."³⁶⁵

356. *Id.*

357. *Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105, 6113 (Navajo 1990).

358. *Id.*

359. 16 Indian L. Rep. (Am. Indian Law. Training Program) 6113 (Navajo 1989).

360. *Arizona Pub. Serv. Co.*, 17 Indian L. Rep. (Am. Indian Law. Training Program) at 6112 (citing *Francisco*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6113).

361. *Bennett*, 18 Indian L. Rep. (Am. Indian Law. Training Program) at 6011.

362. In U.S. constitutional law, for example, infringements on fundamental rights are subject to strict judicial scrutiny for determination of whether the restriction is "narrowly tailored" to serving a "compelling" governmental interest. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that the right to marry is fundamental, so restrictive statute must be subjected to strict scrutiny); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman's right to decide whether to have an abortion is fundamental and can only be outweighed by narrowly drawn statute supported by compelling governmental interests).

363. *Bennett*, 18 Indian L. Rep. (Am. Indian Law. Training Program) at 6012.

364. *Id.* at 6013.

365. *Id.*

J. Privacy

While the Navajo courts have never addressed it, the right to privacy under Navajo common law was asserted in an opinion of the solicitor to the Navajo Nation Supreme Court to support the opinion's conclusion that random alcohol testing as a condition of parole or probation was illegal.³⁶⁶ The opinion cited Associate Justice Homer Bluehouse as "a recognized expert on Navajo traditional law" for the proposition that all persons, including criminals, were traditionally accorded at least a minimal right to privacy under Navajo common law.³⁶⁷ The right to privacy of parolees and probationers, the opinion found, could not be unreasonably infringed upon.³⁶⁸

K. Representation

The Navajo common law right to effective representation is firmly established in Navajo Nation Supreme Court precedent. In *Boos v. Yazzie*,³⁶⁹ a 1990 challenge to the court's mandatory pro bono program for members of the Navajo Nation Bar Association, the court defended the program by noting the traditional Navajo practice of always allowing accused persons the option of having a representative.³⁷⁰ Thus, the court held, indigent persons were guaranteed under Navajo common law the right to representation.³⁷¹

One year later, the court explored the issue more thoroughly in *Navajo Nation v. MacDonald, Sr.*³⁷² First, the court reiterated the holding of *Boos* that the right to representation was guaranteed under Navajo common law.³⁷³ The court then went on to note that the common law was actually stricter than the standard set by the ICRA, in that the traditional Navajo representative had to be a "good speaker" to avoid being considered ineffective and, therefore, inadequate to satisfy the party's right.³⁷⁴ The court also hinted that the representative must execute an acceptable level of planning in order to meet the effectiveness standard.³⁷⁵

366. Random Alcohol-Use Testing of Parolees and Probationers, Op. Solic. Navajo Tribal Courts, No. 92-05 (Sept. 30, 1992).

367. *Id.*, slip op. at 6-7.

368. *Id.*, slip op. at 14.

369. 17 Indian L. Rep. (Am. Indian Law. Training Program) 6115 (Navajo 1990).

370. *Id.* at 6116.

371. *Id.*

372. 19 Indian L. Rep. (Am. Indian Law. Training Program) 6053, 6053 (Navajo 1991).

373. *Id.*

374. *Id.* The court noted that, traditionally,

[t]he effectiveness of a speaker (and there could be more than one) was measured by what the speaker said. If the speaker spoke wisely and with knowledge while persuading others in their search for consensus, that indicated effectiveness. If the speaker hesitated, was unsure, or failed to move the others, that person was not a good speaker and thus was ineffective.

Id.

375. *Id.* at 6056 ("Planning is an important Navajo value, and the record shows the defense

VIII. Tort Law

The Navajo Nation Supreme Court has not yet issued an opinion applying Navajo common law to a case involving the commission of a tort. However, in *Kuwanhyoima v. Kuwanhyoima* (*Kuwanhyoima II*),³⁷⁶ the court did uphold a 1990 common law assault decision by the Tuba City District Court.³⁷⁷ It seems likely that the lack of supreme court common law precedent in the area of torts is due simply to a lack of opportunity, rather than to an aversion to applying common law in such cases.³⁷⁸

Navajo common law may have broad future implications in the field of torts. In a 1986 district court decision, Judge (now Chief Justice) Robert Yazzie quoted a 1970 speech given before the National American Indian Court Judges Association: "[W]hat is expected in all cases of injuries that arise between traditional Navajos is that the person who did the injury will make a symbolic material payment for the loss that he has caused"³⁷⁹ It remains to be seen whether the Navajo courts will interpret this statement to mean that strict liability existed under Navajo common law for all injuries caused to others.³⁸⁰

A. Assault

In an important domestic violence case, Associate Justice Homer Bluehouse in 1990 issued a decision as acting judge of the Tuba City District Court addressing the Navajo common law of assault and rape. *Kuwanhyoima v. Kuwanhyoima* (*Kuwanhyoima I*)³⁸¹ was brought as a civil action to recover compensatory and punitive damages for the sexual assault of the plaintiff by her husband, the defendant, who was aided in breaking into the plaintiff's home by his sister.³⁸²

Beginning with an affirmation of the traditional Navajo value of *hozho*, or harmony, Bluehouse noted that "[i]nherent in that concept is proportionality,

was prepared and planned well.").

376. No. A-CV-13-90 (Navajo Dec. 5, 1990).

377. *Id.*, slip op. at 3 (upholding *Kuwanhyoima v. Kuwanhyoima*, No. TC-CV-344-84 (Tuba City Dist. Ct. Apr. 9, 1990) (*Kuwanhyoima I*)).

378. Letter, *supra* note 23.

379. *Estate of Benally v. Navajo Nation*, 5 Navajo Rptr. 209, 211 (Window Rock Dist. Ct. 1986) (quoting Barry K. Berkson, *Torts in Tribal Courts*, Presentation to the National American Indian Court Judges Association, Reno, Nev. (Jan. 28, 1970)).

380. The strict liability view is supported by an examination of traditional Navajo means of dealing with tortfeasors. See 3 VICENTI, *supra* note 16, at 149-50. Of critical significance, however, is the fact that repayment for injury was only token and symbolic. *Id.* at 150. For further discussion of this point, see *infra* notes 391-92 and accompanying text.

381. No. TC-CV-344-84 (Tuba City Dist. Ct. Apr. 9, 1990).

382. *Id.*, slip op. at 1-2.

reasonableness, and individual dignity.³⁸³ The common law principle of *hozho*, Bluehouse indicated, prohibited the use of "unreasonable force" by a husband against his wife, and permitted him no interference with the dignity of his wife when the two were separated.³⁸⁴ Furthermore, attempted rape and severe beatings were prohibited under Navajo common law.³⁸⁵ Bluehouse ruled that, because of the lack of "reason or proportionality" in the husband's acts against his separated wife, the assaults contravened Navajo common law.³⁸⁶

Bluehouse also noted that the doctrine of interspousal immunity did not exist at Navajo common law, nor did the defense of provocation, although the latter could be raised to diminish the plaintiff's recovery.³⁸⁷ As for damages, Bluehouse held that Navajo common law clearly entitled a woman "to fair compensation for sexual assaults and rape."³⁸⁸ On review of *Kuwanhyoima I*, the Navajo Nation Supreme Court noted merely that "the district court opinion and judgment appear regular on their face," though the application and interpretation of Navajo common law was not specifically challenged by the defendant.³⁸⁹

B. Fault: Comparative Negligence

"Comparative negligence does not exist at Navajo common law," ruled Judge Robert Yazzie of the Window Rock District Court in the 1986 decision, *Cadman v. Hubbard*.³⁹⁰ Indeed, it is questionable whether any conception of tort fault existed in traditional Navajo society other than strict liability.³⁹¹ The Navajo Nation Supreme Court has not yet ruled on the issue of tort fault under Navajo common law.

C. Wrongful Death

The tort of wrongful death is recognized at Navajo common law, according to a 1986 decision of the Window Rock District Court.³⁹² Referring to expert testimony and a published speech on torts in tribal courts, Judge Yazzie

383. *Id.*, slip op. at 2.

384. *Id.*, slip op. at 2-3 (citing *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250, 252-53 (Window Rock Dist. Ct. 1982)).

385. *Id.*, slip op. at 4.

386. *Id.*

387. *Id.*, slip op. at 3.

388. *Id.*

389. *Kuwanhyoima v. Kuwanhyoima*, No. A-CV-13-90, slip op. at 3 (Navajo Dec. 5, 1990) (*Kuwanhyoima II*).

390. 5 Navajo Rptr. 226, 229 (Window Rock Dist. Ct. 1986).

391. See *supra* note 380 and accompanying text. Note that, regardless of the applicable common law, Navajo courts have in practice based tort awards on negligence. See, e.g., *Navajo Tribe of Indians v. Jones*, 5 Navajo Rptr. 235 (Window Rock Dist. Ct. 1986).

392. *Estate of Benally v. Navajo Nation*, 5 Navajo Rptr. 209, 210-11 (Window Rock Dist. Ct. 1986).

held that the payment of restitutionary damages for the careless causing of the death of another was part of the common law.³⁹³

IX. Other Areas of Law

The Navajo courts have applied tribal common law to several problems not falling into one of the broad categories described above. It should also be acknowledged that Navajo common law has not yet been recognized at all in several areas.³⁹⁴ Of course, simply because the courts have not yet applied the common law in a particular area does not mean that it does not exist; an abundance of legal customs and traditions have been catalogued and described by anthropologists and other observers, including by Navajos themselves.³⁹⁵

A. Civil Procedure

1. *Res Judicata*

The Navajo Nation Supreme Court, in the 1992 decision *In re Estate of Begay #2*,³⁹⁶ announced: "The principle of res judicata, which prohibits the same dispute from being legally resolved more than once, is firmly grounded in Navajo common law."³⁹⁷ The common law principle is that once a decision has been made with regard to a dispute, that decision is respected.³⁹⁸ "The Navajo people did not learn this principle from the white man. They have carried it with them through history."³⁹⁹

The doctrine of res judicata, which is also established in the Navajo Rules of Civil Procedure,⁴⁰⁰ has been applied by the Navajo Court of Appeals to affirm the power of the courts to issue final legal decisions,⁴⁰¹ and by the Navajo Nation Supreme Court to allow district courts to *sua sponte* bar relitigation of disputes recently resolved by the same court.⁴⁰²

393. *Id.* at 213-14.

394. For example, one author has noted that "no substantive Navajo common law with respect to tribal debts or obligations exists." Frye, *supra* note 31, at 289.

395. With respect to lending disputes, one commentator has noted that "[a]nthropological sources suggest that traditions and customs regarding debts of tribal members did, and perhaps still do, exist." *Id.* at 289. The commentator advises, consequently, that "creditors should be aware that Navajo custom and tradition, if proved at trial, could preempt the commercial law developed by the states." *Id.* at 292.

396. 19 Indian L. Rep. (Am. Indian Law. Training Program) 6130 (Navajo 1992).

397. *Id.* at 6131.

398. *Id.* (quoting *Halwood v. Estate of Badonie*, No. A-CV-09-86, slip op. at 4 (Navajo July 1, 1988)).

399. *Id.* (quoting *Halwood*, No. A-CV-09-86, slip op. at 4).

400. NAVAJO R. CIV. P. 8(c)(2)(H) (res judicata is an affirmative defense).

401. *Halona v. MacDonald*, 1 Navajo Rptr. 189, 205 (Navajo Ct. App. 1978).

402. *Begay #2*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 6131.

2. Domicile

While the Navajo Rules of Civil Procedure define the requirements for changing the venue of a trial,⁴⁰³ the threshold issue of where a party is legally domiciled has been interpreted by the Navajo Court of Appeals to fall within the purview of Navajo common law.⁴⁰⁴ In *Halona v. MacDonald*, a 1978 decision, the court held that Navajo custom dictated that a Navajo is domiciled where his or her mother is "from."⁴⁰⁵ The court explained that "[p]erhaps this custom may have to be breached in the future, but for the present, Navajos may be considered to be domiciled where they maintain their traditional and legal ties, regardless of where they actually live."⁴⁰⁶

Halona involved a dispute over where on the Navajo reservation the defendant was domiciled for purposes of venue,⁴⁰⁷ but the court's reasoning was extended by the Window Rock District Court in 1983 to a case involving a party who lived off the reservation in Utah.⁴⁰⁸ District Court Judge Tom Tso, interpreting *Halona*, ruled that, although the party lived elsewhere, he was domiciled in the Navajo Nation and was therefore able to bring an action in the Navajo courts.⁴⁰⁹

B. Contracts

Navajo contract law is largely governed by Anglo-American common law and a tribal version of the Uniform Commercial Code.⁴¹⁰ Contract interpretation may in some cases, however, be subject to applicable Navajo common law, according to a 1982 decision by Judge Tom Tso of the Window Rock District Court, *Apache v. Republic National Life Insurance Co.*⁴¹¹ The dispute in *Apache* concerned a divorced woman's claim to the proceeds of her ex-husband's life insurance policy.⁴¹² Although the insurance contract had

403. NAVAJO R. CIV. P. 26.

404. *Halona*, 1 Navajo Rptr. at 195.

405. *Id.*

406. *Id.*

407. *Id.* at 191. The suit was originally brought in Shiprock, New Mexico, and the appellants sought to change venue to Window Rock, Arizona. *Id.* Both communities are situated on the Navajo reservation.

408. *In re Adoption of S.C.M.*, 4 Navajo Rptr. 167, 167 (Window Rock Dist. Ct. 1983).

409. *Id.* at 169. The appellant, while residing in Provo, Utah, was originally from Toh-la-kai, on the Navajo reservation in New Mexico. *Id.* The district court, citing *Halona*, found his domicile to be in the Navajo Nation. *Id.* The court explained that "[t]he Navajo rule of custom domicile is comparable to the law of some nations which assign a national domicile to all individuals born in their territory, even where they become citizens of other nations." *Id.*

410. See, e.g., *Hood v. Bordy*, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6061, 6062 (Navajo 1991) (citing 17 AM. JUR. 2D *Contracts* § 10 (1964) for requirements of valid contract formation); NAVAJO UNIFORM COM. CODE, Res. No. CJA-1-86 (Jan. 29, 1986).

411. 3 Navajo Rptr. 250, 251 (Window Rock Dist. Ct. 1982).

412. *Id.* at 250.

not been altered after the divorce to remove the plaintiff as a beneficiary, Tso held that Navajo common law dictated that a divorce be a final separation of spouses, in the interest of quickly restoring community harmony.⁴¹³ Because local law was to be applied in construing insurance contracts, Navajo common law operated to bar the plaintiff from collecting on the insurance policy.⁴¹⁴ Although conflicts of laws questions are lurking within it, the *Apache* decision may be limited to insurance and other contracts where local law prevails in the interpretation of the contract terms.

C. Government

The Navajo courts have issued a few decisions, perhaps grounded in Navajo common law, touching on the basic issues of governmental authority and duty. In a 1974 opinion, *Dennison v. Tucson Gas & Electric Co.*,⁴¹⁵ the court of appeals noted "the customary division of governmental powers into three (3) branches, executive, legislative, and judicial."⁴¹⁶ The court also found the government's power of eminent domain to be "inherent" and "essential to the existence of all governments."⁴¹⁷ Whether *Dennison* can really be called a Navajo common law decision, however, is doubtful: Navajo custom and tradition is never specifically cited, and it appears that the above language is based more on Anglo-American tradition and international law than Navajo common law.⁴¹⁸

Four years after *Dennison*, the court gave a less ambiguous ruling on governmental powers.⁴¹⁹ In an opinion that was something of a Navajo *Marbury v. Madison*, the court in *Halona v. MacDonald* established the right of the Navajo courts to review Tribal Council actions.⁴²⁰ The power of judicial review, the court said, was based on

a traditional and abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo People did not learn this

413. *Id.* at 250, 254.

414. *Id.* at 253.

415. 1 Navajo Rptr. 95 (Navajo Ct. App. 1974).

416. *Id.* at 100.

417. *Id.* at 98.

418. For example, the tripartite structure of government certainly does not derive from Navajo tradition. See KLUCKHOHN & LEIGHTON, *supra* note 91, at 122-23 (noting that Navajos were, prior to 1868, so loosely organized that it is questionable whether they actually constituted a "tribe"); see also Tom Tso, *Looking to the Future*, ARIZ. ATT'Y, May 1992, at 9, 10 (discussing the transition to a tripartite governmental structure in the Navajo Nation); VINE DELORIA, JR., & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 82-89 (1984) (discussing traditional forms of tribal government).

419. 1 Navajo Rptr. 189 (Navajo Ct. App. 1978).

420. *Id.* at 205-06.

principle from the white man. They have carried it with them through history.

. . . [T]he People through their Council have delegated the ultimate responsibility for [the dispensation of justice] to their courts.⁴²¹

Halona clearly based the independence and authority of the Navajo courts on traditional law, thereby averting any potential challenges to that authority.⁴²² At the same time, however, the decision acknowledged the court to be a creation of the Tribal Council and, presumably, therefore subject to destruction by the Tribal Council and replacement with some other "impartial adjudicatory process."⁴²³

Some of the powers and duties of the Navajo courts have been held to be based on Navajo common law. The court of appeals in 1984 noted that a court was empowered under a "common rule" to correct judgments and reopen cases where "justice and equity clearly requires it to do so."⁴²⁴ Again, however, whether the common rule is taken from Navajo common law or some other body of law is unclear. Judge Tom Tso from the Window Rock District Court in 1983 asserted that the Navajo courts had the duty under Navajo common law to protect the property of the Navajo Nation and could therefore determine whether sales of that property were in the best interests of the Navajo people.⁴²⁵

D. Remedies and Punishments

1. Criminal

a) Restitution

Restitution was traditionally the remedy of choice for almost all offenses committed between Navajos.⁴²⁶ Indeed, Judge Marie Neswood of the Crownpoint District Court in 1982 found that restitution was "central to Navajo tradition" and that, in criminal cases,

421. *Id.*

422. *See also* Yazzie v. Navajo Tribal Bd. of Election Supervisors, 1 Navajo Rptr. 213, 215 (Navajo Ct. App. 1978) (reaffirming that judicial review of Tribal Council actions is mandated by Navajo tradition and custom).

423. *See* Richard P. Fahey, *Native American Justice: The Courts of the Navajo Nation*, 59 JUDICATURE 10, 13 (1975) (noting that "[a]s the courts of the Navajo Nation derive their power from the tribal council, they are legislative rather than constitutional in origin").

424. Navajo Eng. & Constr. Auth. v. Noble, 5 Navajo Rptr. 1, 1 (Navajo Ct. App. 1984).

425. Tome v. Navajo Nation, 4 Navajo Rptr. 159, 159-61 (Window Rock Dist. Ct. 1983); *see also* Jones, 5 Navajo Rptr. at 256 (quoting Tome, 4 Navajo Rptr. at 159).

426. *See* Van Valkenburgh, *supra* note 2, at 43-45 (indicating that restitution was the traditional remedy for rape, robbery, seduction, theft, trespass, homicide, etc.); 2 VICENTI, *supra* note 16, at 159.

the central ideas of punishment were to put the victim in the position he or she was [in] before the offense by a money payment, punish in a visible way [by] requiring extra payments to the victim or the victim's family (rather than the king or state), and give a visible sign to the community that [the] wrong was punished.⁴²⁷

Neswood noted that robbery that resulted in injury traditionally required the payment of "blood money" to the immediate family of the victim, as well as compensation for the stolen property.⁴²⁸ Theft was similarly dealt with by requiring restitution.⁴²⁹ Applying these principles of Navajo common law to the juvenile armed robber before the court, Neswood imposed an order requiring restitution by the offender and held that the remedy of restitution "should be presumed to be required in any juvenile disposition."⁴³⁰

b) Probation and Parole

Associate Justice Homer Bluehouse, in a 1992 Navajo Nation Supreme Court solicitor's opinion, is cited as noting that the Anglo-style probation and parole system of the Navajo Nation did not exist in traditional Navajo society and that, therefore, Navajo common law could only be applied obliquely to questions about how such a system should work.⁴³¹ The solicitor's opinion itself concludes that Navajo common law demanded that all persons, whether criminally convicted or not, be accorded at least a minimum level of respect for their privacy.⁴³² As a result, Navajo common law dictated against allowing unrestrained random alcohol testing to be imposed as a condition of parole or probation.⁴³³

In an earlier opinion, however, the court's solicitor in 1983 concluded that banishment was an acceptable condition of probation under Navajo common law.⁴³⁴ "Shunning," or the deliberate ostracizing of an offender by the community, was a traditional Navajo method of dealing with "those who repeatedly offended or flaunted the will of the community."⁴³⁵ Banishment, therefore, was essentially an extension of a time-honored Navajo practice.⁴³⁶

c) Punishment

The use of punishment as a means of dealing with criminal offenders is in

427. *In re Interest of D.P.*, 3 Navajo Rptr. 255, 257 (Crownpoint Dist. Ct. 1982).

428. *Id.* at 257 (citing Van Valkenburgh, *supra* note 2, at 45).

429. *Id.*

430. *Id.* at 257-58.

431. Random Alcohol-Use Testing of Parolees and Probationers, Op. Solic. Navajo Tribal Courts, No. 92-05, slip op. at 6-7 (Sept. 30, 1992).

432. *Id.*, slip op. at 13.

433. *Id.*, slip op. at 14.

434. Op. Solic. Navajo Tribal Courts, No. 83-3, slip op. at 5 (Jan. 31, 1983).

435. *Id.*

436. *Id.*

some ways foreign to Navajo common law. The Navajo Nation Supreme Court has acknowledged that "actual coercion or punishment were actions of last resort in Navajo common law,"⁴³⁷ and Associate Justice Homer Bluehouse confirmed in 1982 that restitution was traditionally the favored solution.⁴³⁸ Banishment of an offender as a punishment for particularly egregious crimes is grounded in Navajo common law, however, as noted above.⁴³⁹ The supreme court in 1991 noted that "Navajos would shun a repeat offender, or one who committed a particularly heinous crime."⁴⁴⁰ The court has not discussed Navajo common law notions of punishment beyond these statements, however.⁴⁴¹

2. Civil

a) Restitution

Restitution as a remedy in civil cases was upheld under Navajo common law by the Window Rock District Court under Judge Robert Yazzie in the 1986 decision, *In re Estate of Benally v. Navajo Nation*.⁴⁴² Citing to expert testimony and a published work on Navajo law, Yazzie held that "[c]ompensation for wrongful death of a human being is and always has been recognized at Navajo common law."⁴⁴³ In general,

the "Nalyeeh" (a paying back of restitution), seems to be used today mostly in connection with what would be considered civil matters, but in the past this symbolic restitution was usually all that would be required of the person who committed a criminal act, as well.

437. *Navajo Nation v. Platero*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049, 6050 (Navajo 1991). For an anthropological perspective on the Navajo aversion to punishment, see JOHN LADD, *THE STRUCTURE OF A MORAL CODE* 287-88 (1957).

438. Op. Solic. Navajo Tribal Courts, No. 83-3, slip op. at 4-5 (Jan. 31, 1983). The conclusion that restitution was the predominant traditional form of punishment of criminal offenders was also drawn by Judge Marie Neswood in a 1982 decision of the Crownpoint District Court, *In re Interest of D.P.*: "The offender was given the means to return to the community by making good his or her wrong. Surely this is a far better concept of justice than to leave the victim out of the process of justice and . . . with no means of healing the injury done." *In re Interest of D.P.*, 3 Navajo Rptr. 255, 257 (Crownpoint Dist. Ct. 1982).

439. Op. Solic. Navajo Tribal Courts, No. 83-3, slip op. at 5 (Jan. 31, 1983).

440. *Platero*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 6050.

441. Widely noted in the anthropological literature is the traditional Navajo view that witchcraft and incest were the most horrific of all crimes. See, e.g., Richard Van Valkenburgh, *Navajo Common Law II: Navajo Law and Justice*, 9 MUSEUM NOTES: MUSEUM OF N. ARIZ. 51, 51-54 (1937). Both crimes (and apparently only these two crimes) were sanctioned by execution. *Id.* at 52, 54. Homicide, on the other hand, was traditionally dealt with by requiring restitution from the killer to the victim's family. *Id.* at 52. Because the criminal jurisdiction of the Navajo tribal courts is limited to non-major crimes, these aspects of the traditional law are not likely to be confronted anytime soon. See 18 U.S.C. § 1153 (1988).

442. 5 Navajo Rptr. 209, 213-14 (Window Rock Dist. Ct. 1986).

443. *Id.* at 212.

Nalyeeh, traditionally, has power to correct wrongs of any kind.⁴⁴⁴

Yazzie noted that restitution traditionally came in the form of livestock and other valuable goods, and that these commodities were of practical and not merely symbolic value.⁴⁴⁵ Accordingly, monetary awards were appropriate in wrongful death actions, especially in light of the diminished economic value of the traditional items of *nalyeeh*.⁴⁴⁶ Under Navajo common law and the Navajo Nation Tribal Code, Yazzie ruled, restitution could be awarded in the form of special damages, general damages, damages for pain and suffering, and damages for the worth of the life of the decedent.⁴⁴⁷

While *Benally* was a wrongful death action, the restitution arguments of that opinion were later cited by Judge Yazzie in a case involving a tortious injury.⁴⁴⁸ Similarly, in the 1990 decision *Kuwanhyoima I*, the Tuba City District Court awarded restitution damages, under Navajo common law, to the victim of a sexual assault.⁴⁴⁹ Acting as judge in *Kuwanhyoima I*, Associate Justice Homer Bluehouse also noted that common law allowed "in some instances" for compensation to the family or clan of the victim.⁴⁵⁰ This aspect of *nalyeeh* — the spreading of restitution awards among the relatives of the plaintiff — has yet to be clearly explained by the Navajo courts.

b) Equity

The responsibility of Navajo courts under common law to employ principles of equity has been noted briefly by the Navajo high court in at least two decisions.⁴⁵¹ The court has never discussed what those principles might be, however, and the influence of Navajo common law in this area is unclear.

c) Garnishment

The remedy of court-imposed garnishment of wages, at least in a child support situation, was upheld under Navajo common law by the Navajo Court of Appeals in 1983.⁴⁵² Without discussing whether garnishment was specifically permitted under common law, the court noted at the outset of its opinion that the remedy would only be applied if not "found to be contrary to . . . Navajo common law (either decisional or customary)."⁴⁵³

444. *Id.* at 212 (citation omitted).

445. *Id.* at 213.

446. *Id.*

447. *Id.* at 213-14.

448. *Cadman*, 5 Navajo Rptr. at 230.

449. *Kuwanhyoima v. Kuwanhyoima*, No. TC-CV-344-84, slip op. at 3 (Tuba City Dist. Ct. Apr. 9, 1990) (*Kuwanhyoima I*).

450. *Id.*, slip op. at 3.

451. *Begay v. Keedah*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6021, 6023 (Navajo 1991); *Navajo Eng. & Constr. Auth.*, 5 Navajo Rptr. at 2.

452. *Navajo Tribal Util. Auth. v. Foster*, 4 Navajo Rptr. 86 (Navajo Ct. App. 1983).

453. *Id.* at 87.

X. Conclusion

Tribal courts, of course, are in a sense only one more manifestation of the forced imposition of Anglo-American culture and values on Native American societies.⁴⁵⁴ No such institutions existed in North America before European contact,⁴⁵⁵ and the original tribal courts were perceived by the aggressors as "mere educational and disciplinary instrumentalities" designed to eradicate the last vestiges of Indian culture in the name of "civilization."⁴⁵⁶

The nature of tribal courts has changed over the past century, however. While the institution itself may still be intrinsically offensive to traditional Native American ideas of how justice ought to be administered, and may still exist in part to ease the minds of Americans convinced that justice can be administered in no other fashion, tribes are increasingly employing the courts as tools in the struggle for sovereignty and cultural independence. Perhaps the most promising of such efforts has been to bring tribal common law into use and thereby to begin the process of institutionalizing traditional norms and values.

The courts of the Navajo Nation have been building a common law jurisprudence for nearly a quarter of a century. As discussed above, that jurisprudence has touched many areas — from probate to contract law, family to tort law, criminal to civil law.⁴⁵⁷ Clearly, some of the areas have been developed more than others. Twenty-four decisions have been handed down applying Navajo customs and traditions to family matters such as marriage, divorce, child custody, and adoption; only two decisions have dealt with traditional Navajo crimes.⁴⁵⁸ The area of individual rights has received considerable attention from the Navajo Nation Supreme Court, but only since 1987 has Navajo common law been acknowledged and used as a foundation for those rights; on the other hand, the tribal courts have been applying Navajo common law in probate matters at least since the first publication of decisions in 1969.⁴⁵⁹ The reasons for these differences in timing and pace

454. See Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 52-53 (1988).

455. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 230 (Rennard Strickland et al. eds., 1982).

456. *United States v. Clapox*, 35 F. 574 (D. Or. 1888). For discussions of the culturally destructive aims of the CFR courts, see DELORIA, JR., & LYTLE, *supra* note 387, at 115; Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, in *AMERICAN INDIANS AND THE LAW* 25, 36-39 (Lawrence Rosen ed., 1976). See also Zion, *supra* note 2, at 265; Wright, *supra* note 1, at 1400.

457. See *supra* notes 128-453 and accompanying text.

458. See the appendix following this comment. See *supra* notes 137-41 and accompanying text.

459. See the appendix following this comment.

of the courts' explication of the tribal common law are undoubtedly several,⁴⁶⁰ but the result is clear: the common law is now firmly established as the law of choice in the courts of the Navajo Nation.⁴⁶¹ Given that reality, Navajo common law jurisprudence will continue to develop, offering other tribes and non-Native Americans alike the opportunity to not only observe the emergence of a new written body of law, but to consider the unique aspects of that law with an eye to serious moral, philosophical, and legal introspection.

460. *See supra* notes 129-32, 319-20 and accompanying text.

461. *See supra* notes 42-43 and accompanying text.

APPENDIX
Navajo Common Law Jurisprudence, 1969-1992¹

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Family	<i>In re Marriage of Daw</i> , 1 Navajo Rptr. 1 (Navajo Ct. App. 1969)	●				●
Probate	<i>In re Trust of Benally</i> , 1 Navajo Rptr. 10 (Navajo Ct. App. 1969)	●				
Probate	<i>In re Estate of Lee</i> , 1 Navajo Rptr. 27 (Navajo Ct. App. 1971)	●				
Gov't, Property	<i>Dennison v. Tucson Gas & Electric Co.</i> , 1 Navajo Rptr. 95 (Navajo Ct. App. 1974)	●				
Property Gov't, Civ.Pro.	<i>Halona v. MacDonald</i> , 1 Navajo Rptr. 189 (Navajo Ct. App. 1978)	●				
Gov't	<i>Yazzie v. Navajo Bd. of Election Supervisors</i> , 1 Navajo Rptr. 213 (Navajo Ct. App. 1978)	●				
Probate	<i>In re Estate of Benally</i> , 1 Navajo Rptr. 219 (Navajo Ct. App. 1978)	●				●
Family	<i>In re Marriage of Ketchum</i> , 2 Navajo Rptr. 102 (Navajo Ct. App. 1979)	●				●

1. While this listing is an attempt to bring together all of the published Navajo tribal court decisions bearing on Navajo common law, it is necessarily less than exhaustive. Some decisions are unclear in setting forth the legal basis of the ruling; others mention customs and traditions but apparently do not make use of them or explain their usage; and still other possible candidates for inclusion are not opinions, but Navajo Nation Supreme Court "orders" of uncertain precedential status. Finally, the author unfortunately did not have the opportunity to conduct a search of the district court files for relevant unpublished opinions. *See supra* note 26 of this comment.

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Family, Property	Johnson v. Johnson, 3 Navajo Rptr. 9 (Navajo Ct. App. 1980)	●				
Family, Property	Earl v. Earl, 3 Navajo Rptr. 16 (Navajo Ct. App. 1980)				●	
Other ²	Bryant v. Bryant, 3 Navajo Rptr. 194 (Shiprock Dist. Ct. 1981)					
Mediation	<i>In re</i> Marriage of Allison, 3 Navajo Rptr. 199 (Window Rock Dist. Ct. 1982)	●				
Family	<i>In re</i> Marriage of Slim, 3 Navajo Rptr. 218 (Crownpoint Dist. Ct. 1982)	●				
Family	Goldtooth v. Goldtooth, 3 Navajo Rptr. 223 (Window Rock Dist. Ct. 1982)	●				●
Family, Custom	Lente v. Notah, 3 Navajo Rptr. 72 (Navajo Ct. App. 1982)		●	●		
Property	Shirley v. James, 3 Navajo Rptr. 83 (Navajo Ct. App. 1982)	●				
Family, Custom, Contract	Apache v. Republic Nat'l Life Ins. Co., 3 Navajo Rptr. 250 (Window Rock Dist. Ct. 1982)		●			
Criminal, Remedies	<i>In re</i> Interest of D.P., 3 Navajo Rptr. 255 (Crownpoint Dist. Ct. 1982)	●	●			
Family	Tom v. Tom, 4 Navajo Rptr. 12 (Navajo Ct. App. 1983)	●				

2. The district court in *Bryant* established the right of jurors to take into account Navajo culture in making decisions. *Bryant v. Bryant*, 3 Navajo Rptr. 194, 194 (Shiprock Dist. Ct. 1981).

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Family, Property, Rights,	<i>Ration v. Robertson</i> , 4 Navajo Rptr. 15 (Navajo Ct. App. 1983)					
Property, Custom, Gov't	<i>Tome v. Navajo Nation</i> , 4 Navajo Rptr. 159 (Navajo Ct. App. 1983)	●				
Family ⁴	<i>Peshlakai v. Redd</i> , 4 Navajo Rptr. 164 (Window Rock Dist. Ct. 1983)					
Family, Civ. Pro.	<i>In re Adoption of S.C.M.</i> , 4 Navajo Rptr. 167 (Window Rock Dist. Ct. 1983)	●			●	
Remedies ⁵	<i>Navajo Tribal Util. Auth. v. Foster</i> , 4 Navajo Rptr. 86 (Navajo Ct. App. 1983)					
Property	<i>Estate of Joe</i> , 4 Navajo Rptr. 99 (Navajo Ct. App. 1983)	●				
Probate, Custom	<i>In re Estate of Apachee</i> , 4 Navajo Rptr. 178 (Window Rock Dist. Ct. 1983)	●	●		●	
Custom ⁶	<i>Johnson v. Dixon</i> , 4 Navajo Rptr. 108 (Navajo Ct. App. 1983)					

3. The court noted the trial court's ruling that Navajo common law "dictates that a male give up certain property rights upon dissolution of a 'common law' marriage," but declined to consider the question on appeal for lack of ripeness. *Ration v. Robertson*, 4 Navajo Rptr. 15, 15 (Navajo Ct. App. 1983).

4. The district court ordered the parties to submit evidence on the "custom law aspects, both Navajo and Ute, of child custody under the facts of this case," which involved a paternity dispute between a Ute father and a Navajo mother. *Peshlakai v. Redd*, 4 Navajo Rptr. 164, 164-65 (Window Rock Dist. Ct. 1983).

5. The court noted that it would only uphold a garnishment remedy if consistent with Navajo common law. *Navajo Tribal Util. Auth. v. Foster*, 4 Navajo Rptr. 86, 87 (Navajo Ct. App. 1983).

6. The court of appeals noted that the Navajo Tribal Council had intended that the tribal courts "apply Navajo law, consisting of Navajo statutes, the common law (custom) and decisional law" before resorting to state law. *Johnson v. Dixon*, 4 Navajo Rptr. 108, 110 (Navajo Ct. App. 1983).

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Family	<i>In re</i> Interest of J.J.S., 4 Navajo Rptr. 192 (Window Rock Dist. Ct. 1983)		•			
Gov't	Navajo Eng. & Constr. Auth. v. Noble, 5 Navajo Rptr. 1 (Navajo Ct. App. 1984)	•			•	
Family	Pavenyouma v. Goldtooth, 5 Navajo Rptr. 17 (Navajo Ct. App. 1984)				•	
Custom ⁷	Marriage of Garcia, 5 Navajo Rptr. 30 (Navajo Ct. App. 1985)					
Property	<i>In re</i> Estate of Wauneka, 5 Navajo Rptr. 79 (Navajo 1986)			•	•	
Torts, Remedies	Estate of Benally v. Navajo Nation, 5 Navajo Rptr. 209 (Window Rock Dist. Ct. 1986)	•	•	•	•	
Torts, Remedies	Cadman v. Hubbard, 5 Navajo Rptr. 226 (Crownpoint Dist. Ct. 1986)	•			•	
Family, Custom	Sells v. Sells, 5 Navajo Rptr. 104 (Navajo 1986)				•	
Probate	<i>In re</i> Estate of Thomas, 5 Navajo Rptr. 232 (Window Rock Dist. Ct. 1986)				•	
Property, Gov't	Navajo Tribe of Indians v. Jones, 5 Navajo Rptr. 235 (Window Rock Dist. Ct. 1986)				•	

7. While declining to validate a marriage between a Navajo and non-Navajo, the court of appeals mentioned that it "was impressed by the arguments of counsel for the petitioner which recounted a history of non-Navajos adopting a Navajo way of life and becoming a part of their community." Marriage of Garcia, 5 Navajo Rptr. 30, 30 (Navajo Ct. App. 1985).

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Family	<i>Notah v. Francis</i> , 5 Navajo Rptr. 147 (Navajo 1987)	●			●	
Custom	<i>In re Estate of Belone v. Yazzie</i> , 5 Navajo Rptr. 161 (Navajo 1987)			●		
Family, Rights	<i>Davis v. Davis</i> , 5 Navajo Rptr. 169 (Navajo 1987)	●				
Probate, Custom ⁸	<i>In re Estate of Benally v. Denetclaw</i> , 5 Navajo Rptr. 174 (Navajo 1987)					
Family, Rights	<i>Navajo Nation v. Murphy</i> , 15 Indian L. Rep. (Am. Indian Law. Training Program) 6035 (Navajo 1988)	●			●	
Civ Pro	<i>Halwood v. Estate of Badonie</i> , No. A-CV-09-86, slip op. (Navajo July 1, 1988)	●			●	
Rights	<i>Begay v. Navajo Nation</i> , 15 Indian L. Rep. (Am. Indian Law. Training Program) 6032 (Navajo 1988)	●				
Family, Criminal, Rights	<i>In re A.W.</i> , 15 Indian L. Rep. (Am. Indian Law. Training Program) 6041 (Navajo 1988)	●			●	
Family	<i>Descheenie v. Mariano</i> , 15 Indian L. Rep. (Am. Indian Law. Training Program) 6039 (Navajo 1988)				●	
Probate	<i>In re Estate of Thomas</i> , 15 Indian L. Rep. (Am. Indian Law. Training Program) 6053 (Navajo 1988)	●			●	

8. Although the plaintiff had pleaded that Navajo custom should govern the division of the estate at issue, he did not allege how. *In re Estate of Benally v. Denetclaw*, 5 Navajo Rptr. 174, 176 (Navajo 1987). Thus, the supreme court declined to employ Navajo common law in deciding the case. *Id.*

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Rights	Billie v. Abbott, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6021 (Navajo 1988)	●				
Family	<i>In re Marriage of Francisco</i> , 16 Indian L. Rep. (Am. Indian Law. Training Program) 6113 (Navajo 1989)	●	●			
Other ⁹	Tafoya v. Navajo Nation Bar Ass'n, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6120 (Navajo 1989)	●				
Rights, Gov't	Boos v. Yazzie, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6115 (Navajo 1990)	●				
Family Rights	Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6105 (Navajo 1990)	●	●		●	●
Rights	Plummer v. Plummer, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6151 (Navajo 1990)	●				
Torts, Criminal, Remedies	Kuwanhyoima v. Kuwanhyoima, No. TC-CV-344-84, slip op. (Tuba City Dist. Ct. Apr. 9, 1990)	●			●	
Rights, Custom	Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6009 (Navajo 1990)	●				

9. In *Tafoya*, the supreme court discussed the important role that Navajo advocates play in bringing traditional perspectives before the courts. *Tafoya v. Navajo Nation Bar Ass'n*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6120, 6121 (Navajo 1989). See *supra* note 41 of this comment.

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Property	Hood v. Bordy, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6061 (Navajo 1991)		•		•	
Family	Alonzo v. Martine, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6129 (Navajo 1991)	•			•	
Property	<i>In re</i> Harvey & Begay #2, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6003 (Navajo 1991)	•			•	
Property, Probate	Begay v. Keedah, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6021 (Navajo 1991)	•			•	
Criminal, Remedies	Navajo Nation v. Platero, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6049 (Navajo 1991)	•				
Rights	Navajo Nation v. MacDonald, Sr., 19 Indian L. Rep. (Am. Indian Law. Training Program) 6053 (Navajo 1991)	•			•	
Property	Williams v. Yazzie, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6116 (Navajo 1992)	•				
Property	Yazzie v. Catron, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6125 (Navajo 1992)	•			•	
Family	Nez v. Nez, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6123 (Navajo 1992)				•	

Area of Law	Citation	Source of Common Law				
		Judicial Notice	Treatises	Expert Testimony	Navajo Precedent	Non-Navajo Precedent
Civ Pro, Rights	<i>In re Estate of Begay</i> #2, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6130 (Navajo 1992)				●	