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Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation

Michael D. Lieder

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NAVAJO DISPUTE RESOLUTION AND PROMISSORY OBLIGATIONS: CONTINUITY AND CHANGE IN THE LARGEST NATIVE AMERICAN NATION

*Michael D. Lieders**

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* B.A. 1977, Haverford College; J.D. 1984, Georgetown University Law Center. I am indebted to many people in connection with the preparation of this article. Navajo Nation Chief Justice Tom Tso, Associate Justice Raymond Austin, Associate Justice Homer Bluehouse, District Court Judge Wayne Cadman, then-Navajo Nation Court Solicitor Claudine Sattler, Navajo Nation Court Administrator Edward Martin, and Attorneys William Battles, Bruce Fox, Thomas Hynes, Frank Lally, and James Mason all consented to lengthy interviews. Professors Henry Bourguignon and Norman Hawker commented on an early draft. Cheryl Meyers provided excellent and enthusiastic research assistance. Finally, I wish to dedicate the article to Lefty and Abe Weissbrodt, who first introduced me to federal Indian law.

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I. Introduction

Several times a year, a law review publishes an analysis of the jurisdictional boundaries separating federal, state and tribal governments.¹ Studies of *federal* Indian law² and the application of general laws to Native Americans³ are just as prevalent. Conversely, very few authors focus on *Indian* law: Native American dispute resolution techniques and substantive laws.⁴

1. See, e.g., Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Frank Pommersheim, *Tribal-State Relations: Hope for the Future?* 36 S.D. L. REV. 239 (1991); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989). Many recent articles criticize the United States Supreme Court's recent decision in *Duro v. Reina*, 495 U.S. 676 (1990), denying tribes criminal jurisdiction over Indians who are not members of that tribe. See, e.g., Philip S. Deloria & Nell J. Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After Duro v. Reina*, 38 FED. BAR NEWS & J. 70 (1991); Peter Fabish, Comment, *The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina*, 66 WASH. L. REV. 567 (1991). The *Duro* decision, and the reaction of the Navajo judiciary to it, is discussed below. See *infra* notes 252-59 and accompanying text.

2. "Federal Indian law" refers to federal statutory and case law dealing primarily or exclusively with Native Americans. Volume 25 of the United States Code contains the statutory law. Recent articles dealing with federal Indian law include Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Thomas H. Pacheco, *Indian Bedlands Claims: A Need to Clear the Waters*, 15 HARV. ENVTL. L. REV. 1 (1991); Rachael P. Paschel, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991).

3. For example, many articles published during the past few years take issue with the United States Supreme Court's decision in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), that the free exercise clause does not require a state to exempt the sacramental use of peyote by members of the Native American Church from its prohibition against the use or possession of controlled substances. See Robert N. Clinton, *Peyote and Judicial Activism: Neo-Colonialism and the Supreme Court's New Indian Law Agenda*, 38 FED. B. NEWS & J. 92 (1991); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991); Sara Juster, Comment, *Free Exercise — Or the Lack Thereof? Employment Division v. Smith*, 24 CREIGHTON L. REV. 239 (1990). But see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (acknowledging questionable use of prior precedents, but defending theory underlying decision).

4. Most of the published materials focus primarily on procedural issues, using that

Scholars' apparent lack of interest is surprising. Indian law significantly affects the lives of many Americans, both natives⁵ and others. Moreover, study of the development and role of law among Native American tribes can provide valuable information to scholars interested in the role of law in "third world" societies.⁶

term broadly to encompass issues such as the structure of the tribal courts and the training and performance of tribal court judges and advocates. Of these, the two most comprehensive are SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE* (1978) (criticizing the quality of native judicial systems, and recommending that those systems be disbanded in favor of state and federal court adjudications) and NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N LONG RANGE PLANNING PROJECT, *INDIAN COURTS AND THE FUTURE* (1978) (suggesting improvements to native justice systems). Several articles have focused specifically on the Navajo justice system. See Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989) [hereinafter Tso, *Decision Making in Tribal Courts*]; Tso, *The Tribal Court Survives in America*, JUDGES' J., Spring 1986, at 22 [hereinafter Tso, *The Tribal Court Survives*]; James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

These texts contain little analysis of substantive law in the native courts. The few articles that have considered substantive issues of civil law in the tribal courts focus primarily on two issues: (1) judicial review of executive and legislative acts, including the waiver of sovereign immunity, see Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986) (advocating tribal use of methods of partial waiver of sovereign immunity that will not endanger tribe's fiscal solvency); Alvin J. Zientz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1 (1979) (analyzing desirability of tribal judicial review in light of United States Supreme Court's decision that federal courts generally lack jurisdiction to resolve Indian Civil Rights Act disputes); Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991 (1991) (stating that tribal courts should engage in judicial review based at least in part on tribal traditions) [hereinafter Brandfon, *Tradition & Judicial Review*], and (2) the use of tribal customs and traditions in the tribal courts, James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984) (focusing on development of Indian common law in tort suits before Native American courts); Brandfon, *Tradition & Judicial Review*, *supra*. None attempts to analyze a concrete body of substantive law in the context of the particular conditions—historical, social, or otherwise—in which it develops.

5. This article generally uses the term "Native Americans" to refer to peoples often called "Indians." The phrase "Native Americans" admittedly is somewhat unsatisfactory because the "natives" are not really native to the Americas. It is believed that they crossed to Alaska from Siberia in several waves beginning at least 25,000 years ago. Neal Salisbury, *American Indians and American History*, in *THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY* 46, 47-48 (Calvin Martin ed., 1987) [hereinafter *THE AMERICAN INDIAN*]. The term "Indians," however, is more misleading. It derives from Christopher Columbus' erroneous belief that he had reached Asia, instead of a continent unknown to him. Robert F. Berkhofer, Jr., *Cultural Pluralism Versus Ethnocentrism in the New Indian History*, in *THE AMERICAN INDIAN*, *supra*, at 35, 38.

6. Scholars of the role of law in third world societies have concentrated primarily on Asian, African, and Latin American societies. See Carl A. Auerbach, *The Relation of Legal Systems to Social Change*, 1980 WIS. L. REV. 1227, 1227 n.2 (identifying about 60

Native American courts⁷ and laws, however, vary from tribe to tribe, posing an obstacle to study. The Navajo Nation⁸ is a logical place to start. It has more members subject to tribal laws and courts than any other tribe;⁹ the Navajos, or the *dine'é* (the word, generally translated into English as "the people," that Navajos use to refer to themselves),¹⁰ have retained a strong tribal identity,¹¹ their judicial

articles and books concerning the role of the legal system in the modernization process; except for the general studies, all, or virtually all, of the articles and books concern the modernization process in Asian, African or Latin American countries).

7. In the 1970s, tribal courts existed on between 60 and 120 reservations, depending on one's definition of "courts" and "reservations." BRAKEL, *supra* note 4, at 5.

8. The Navajo Tribal Council has directed that the name "Navajo Nation" be used by governmental officials to describe the lands and people of the Navajo Tribe. NAVAJO TRIB. CODE tit. 1 § 301(a) (1977). The self-reference as a "nation" is correct under federal Indian law. Early in United States history, Chief Justice Marshall described tribes as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), and later explained that, under international law, a "weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832).

9. A larger number of people claim to have Cherokee blood than Navajo. Census data from 1980 show the three largest tribes, based on self-identification of respondents, to be Cherokee (232,000), Navajo (159,000) and Sioux (79,000). U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CENSUS BUREAU RELEASES REPORT OF AMERICAN INDIAN TRIBES at CB 90-22 (1990) [hereinafter CENSUS BUREAU REPORT]. Most Cherokees do not live near their reservations, however. Bureau of Indian Affairs (BIA) figures for 1989 show that about 186,000 Navajos live on or sufficiently near the Navajo Reservation to fall within the BIA's service population, while about 87,000 Cherokee live on or near their Oklahoma agency and another 6000 live on or near the Eastern Cherokee Reservation in North Carolina. BIA, INDIAN SERVICE POPULATION AND LABOR FORCE ESTIMATES tbl. 3, at 8, 13, 14 (1989) [hereinafter BIA REPORT]; see also NAVAJO NATION DIV. OF COMMUNITY DEV., CHAPTER IMAGES: 1989 (1990) [hereinafter NAVAJO NATION REPORT] (estimating Navajo population in 1989 at 219,000, with 169,000 on reservation, 25,000 near the reservation and 25,000 elsewhere). The Navajo population represents almost 20% of the 949,000 Native Americans within the BIA's service population. BIA REPORT, *supra*, tbl. 1, at 1; *id.* tbl. 3, at 14. Only those living near their reservations are likely to be affected by tribal law.

10. The word "Navajo" is Spanish in origin, and does not exist in the language of the *dine'é*. CLYDE KLUCKHOHN & DOROTHEA LEIGHTON, *THE NAVAHO* xv (rev. ed. 1974).

11. Several years ago, two scholars noted:

One immediately apparent difference [from other Native Americans] was that although Navajos and Anglo-Americans have lived side-by-side in the San Juan Valley for a hundred years, there has been little social mixing of the populations. The boundaries separating the two communities were anything but ambiguous. One was either a Navajo or an Anglo-American, and only a few people of mixed ancestry were subject to confusions of allegiance. Equally striking, all Navajos except children and an occasional young adult spoke Navajo. We were also surprised to find that they showed little interest

system is the most sophisticated, by Anglo standards, of any tribe's;¹² and they publish an official reporter and the tribal code, facilitating research.¹³

To analyze all fields of Navajo law in a single article would be impossible. This article will focus on disputes concerning promises and the institutions in which promissory disputes are resolved. Resolution of promissory disputes involves those institutions, especially the Navajo tribal courts, in critical policy determinations.

As the *dine'é* have assumed increasing control of their own affairs from the Bureau of Indian Affairs (BIA)¹⁴ during the second half of the twentieth century, their government has struggled to formulate rules governing companies doing business with Navajos. The average tribal member is very poor and unemployment on the reservation is very high;¹⁵ therefore, the nation's leaders have sought to encourage

in or even curiosity about other tribes or Anglo-Americans.

GARRICK A. BAILEY & ROBERTA G. BAILEY, *A HISTORY OF THE NAVAJOS: THE RESERVATION YEARS* 5 (1986) [hereinafter *BAILEY*].

The *dine'é* also consider themselves distinct from other Native American groups:

By the 1950s many Native Americans were subordinating their tribal identity to their identity as Indians. While acknowledging the cultural and historical differences between tribes, they saw a commonality in their experience that overrode what, by that time, had become superficial tribal distinctions. The Navajos, on the other hand, did not think of themselves as members of the larger Indian community. They considered their history to be unique and their culture, unlike that of many tribes, to be very much alive.

Id. at 6.

12. See Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 236 (1987) (stating that Navajo Nation has "flagship tribal judicial system, pre-eminent because of its size"); Ziontz, *supra* note 4, at 18 ("The Navajos have what is probably the most highly developed and sophisticated tribal judicial system among the tribal governments in the United States").

13. Five volumes of the Navajo Reporter, containing appellate and selected district court opinions from 1969 through 1987, have been published. The Navajo Community College intends to soon publish volume 6, containing decisions from 1988 through 1990. The 1977 edition of the Navajo Tribal Code and a 1984-85 cumulative pocket part also have been published. Practitioners desperately need an updated version of the code. Telephone Interview with Frank Lally, Attorney, Gallup, N.M. (July 9, 1991).

14. See FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 117-21 (Rennard Strickland et al. eds., 1982) [hereinafter *COHEN*] (tracing evolution of federal government agencies in charge of Indian affairs).

15. Census data for 1980 show unemployment among the Navajos, regardless of location, at 52%, median family income of about \$9,900, and 45% of Navajos living in poverty. CENSUS BUREAU REPORT, *supra* note 9. Tribal and BIA figures for Navajos living within the BIA service area reflect approximately a 50% unemployment rate during 1988. BIA REPORT, *supra* note 9, at 14; NAVAJO NATION REPORT, *supra* note 9, at 3. All unemployment statistics in the Navajo Nation, however, are problematic, see NAVAJO TIMES TODAY, July 25, 1985, at 1, col. 4, and some reports contain lower figures. See Sandra Atchison, *Bad Day at Window Rock*, BUS. WEEK, Mar. 6, 1989, at 32 (estimating

business development.¹⁶ On the other hand, they also have tried to guard against exploitative businesses and to preserve the *dine'é*'s culture, which business development arguably might undermine.¹⁷

The Navajo judiciary faces the same quandary. A businessperson who perceives the nation's dispute resolution mechanisms and transactional law favorably is more likely to operate on the reservation and to deal with the tribe and individual Navajos. The *dine'é*, however, have traditional means of resolving disputes, involving mediation by respected community leaders,¹⁸ and traditional customs concerning promissory obligations.¹⁹ To the extent that the courts follow Anglo-American procedures and laws, they may undermine Navajo traditions; to the extent that they reject Anglo-American procedures and laws, they may exacerbate the already difficult economic conditions.

This dilemma is similar to that faced by third world countries seeking to incorporate elements of the economic and cultural life of Western societies. Part II of this article identifies various approaches to the analysis of the role of law in this "development" process. No analytical approach adequately explains the role of the legal system in the process, but the available information does illuminate the challenges and choices facing any particular "developing" society, including the Navajos.

Parts III and IV draw heavily on historical and anthropological research on the Navajos. Part III focuses on traditional Navajo society and dispute resolution, and part IV on the economic and political changes that have occurred over the last 125 years. Primarily in the period after World War II, the *dine'é* have transformed themselves from a decentralized herding society to one with a powerful national government in which wage-earning has become the central economic

40% unemployment rate); Joseph P. Shapiro, *Up by the Bootstraps Is an Uphill Fight for Indians*, U.S. NEWS & WORLD REP., Feb. 22, 1988, at 26 (estimating 35% unemployment rate).

16. See, e.g., Atchison, *supra* note 15, at 32 (stating that Peter MacDonald was elected as Chairman in 1986 on promise to bring jobs to reservation, and then delivered); William Raspberry, *The Navajos Reach for the Dream*, WASH. POST, Oct. 31, 1987, at A21 (interviewing Navajo Chairman Peter MacDonald); *Business Development Next Tribal Priority*, *Says Agency Director*, NAVAJO TIMES TODAY, Oct. 3, 1985, at 1, col. 4.

17. See Raspberry, *supra* note 16 (stating that "the very culture of the Navajo" is at risk in encouraging business development). One Anglo-American lawyer who lives off the reservation but has a substantial practice in the Navajo courts said, "They want to have it both ways: they want to have their cultural identity, but they want to have all the advantages of the twentieth and now about to be the twenty-first century, and they want economic development." Interview with Thomas Hynes, Attorney, in Farmington, N.M. (May 13, 1991) [hereinafter Hynes Interview].

18. See *infra* notes 62-78 and accompanying text (describing traditional dispute resolution).

19. See *infra* notes 80-103 and accompanying text (discussing traditional promissory relationships).

activity. Many traditional societies have experienced similar changes, often with wrenching results. The *dine'é*, however, have made the transition relatively smoothly, incorporating many facets of Anglo-American culture while preserving a strong sense of tribal identity and essential elements of their traditional culture.

Finally, parts V and VI discuss current Navajo dispute resolution and promissory law. Traditional customs were suited to the needs of the Navajos' rural communities, but not to many facets of the changing postwar society. Exhibiting their ability to incorporate aspects of foreign culture selectively, the *dine'é* have created essentially two systems of dispute resolution and two systems of promissory liability law. The courts, invariably the repository of disputes in which at least one of the parties is a non-Navajo, apply rules of contract, commercial, and consumer law similar but not identical to those in state and federal court. Meanwhile, disputes between two Navajos, including disputes over broken promises, often still are mediated in a traditional, or modified-traditional, manner. This dual system has strains, some of which are discussed, but appears to be a prudent resolution of the dilemma posed by the coexistence of a strong traditional society and pressures for development.

II. *The Role of Law in the Transformation of Traditional Societies*

During the twentieth century, scholars from many disciplines have studied the interaction between "Western" and "third world" countries and the processes by which many third world countries have acquired some of the attributes of Western countries. Until the last decade, these scholars could be categorized — very broadly — into two groups.

The first advocated modernization theory. These authors tended to divide the world into traditional, modernizing and modern societies, with Western countries and their political and economic systems serving as the models of modern societies. Under modernization theory, societies evolved from traditional through modernizing to modern. Several of these scholars advised leaders of third world countries about methods to facilitate the evolutionary process, while largely ignoring the tremendous differences among traditional societies which might undermine the efficacy of their prescriptions. The movement fell into intellectual disrepute as the scholars' advice proved ineffective and critics highlighted the ethnocentric nature of the theory.²⁰

20. See KÓJMÁN KULCSÁR, *MODERNIZATION AND LAW (THESES AND THOUGHTS)* 12-14 (1987) (describing early modernization theory); Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 *LAW & SOC. REV.* 723, 724-28 (1980) (criticizing modernization theory). Despite the problems which modernization theory encountered in Third World countries, many scholars and politicians are now advising Eastern European countries concerning the conversion from communist to Western systems. The advice probably has little, if any, greater chance of success than that given earlier to Third World countries.

A subset of scholars and lawyers focused on the role of law in the modernization process. Law and development theorists believed that modernization required modern, by which they meant Western, law. The attacks on modernization theory as ethnocentric and ineffective were equally valid with respect to law and development theory.²¹

The other group, dependency theorists, consisted largely of Marxists. In general, they believed that the imperialist activities of developed countries made the underdeveloped countries dependent.²² Although seemingly escaping from the ethnocentrism of the modernizers, they substituted a form of issuecentrism by emphasizing economics, and specifically economic imperialism, over all other issues. This emphasis led them to downplay the historical and cultural differences among the underdeveloped countries.

Scholars recently have attempted to transcend the deficiencies of both approaches. This article draws heavily on a recent book by a Hungarian, Kálmán Kulcsár.²³ His approach avoids the problems of Western ethnocentrism and economic issuecentrism. He focuses on a society's ability to adapt to "changing external and internal conditions."²⁴ Traditional societies resist change, while modern societies are open to, and capable of, reform to meet changing conditions.²⁵ Modernization involves the transformation of a society from resistant to change to coping with change.

Although many countries have tried to use law to hasten and facilitate the modernization process, Kulcsár concludes that most have had only limited success. "[E]xtra-legal factors and processes," including a society's economic, political and cultural conditions, provide the frame in which modernization can occur and the legal system can operate.²⁶ The legal system can take many shapes, but none significantly changes the frame.²⁷

Kulcsár's emphasis on the wide variety of extralegal factors that influence modernization and the effectiveness of legal systems means that each society must be analyzed separately. His approach, therefore, probably will not lead to any significant cross-societal theory explaining the development process or the role of law in that process. The most that can be expected are detailed analyses of individual societies and

21. See David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 4-11, 16-21 (1972) (describing law and development movement).

22. See Snyder, *supra* note 20, at 737-42, 747-61 (describing views of underdevelopment theorists).

23. KULCSÁR, *supra* note 20.

24. *Id.* at 12.

25. *Id.* at 10-16.

26. *Id.* at 123.

27. *Id.* at 123-24.

generalizations about the experiences of various societies. Many Western scholars, who consider the natural sciences the model for social sciences, will consider the probable inability to generate explanatory theory a drawback to Kulcsár's approach.²⁸ Given the many obstacles to devising a cross-societal theory explaining the processes of significant social change, however, his more modest approach is realistic.²⁹

Kulcsár's definitional distinction between traditional and modern societies based on the ability to adapt to changing conditions is problematic, however, for at least four reasons. First, even traditional societies change, although more slowly than nontraditional ones. Often traditional societies broke down when they were conquered and colonized by countries peopled by Europeans or European descendants. Without conquest and colonization, traditional societies might have adapted successfully to changing conditions, albeit at a slower pace than Western countries. Second, nontraditional countries, such as the former Soviet Union, also do not always successfully adapt to changing conditions. Third, Kulcsár has proposed no adequate means of measuring ability to adapt. Finally, his definition contains unwarranted normative implications. If modern countries adapt better to changing conditions, it is desirable for countries to be modern.

A better approach is to treat a slow pace of change as one of the many characteristics typical of traditional societies, and a more rapid pace as typical of nontraditional ones. The slow pace of change joins other characteristics typical of traditional societies, such as kinship and community as the primary social ties, the village as the normal form of settlement, consensus as the normal means of uniting for joint action, agriculture as the primary economic activity, and widespread economic poverty as compared to nontraditional societies.³⁰ A society may be categorized as traditional even though it does not have all of the typical characteristics; none is essential.³¹

This article also uses a tripartite classification of societies. To signify the rejection of both Kulcsár's use of a society's ability to adapt as *the* distinguishing characteristic between traditional and modern soci-

28. See RICHARD J. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* 3-54 (1976) (discussing views of scholars seeking to model social sciences after natural sciences).

29. See Auerbach, *supra* note 6, at 1234. Auerbach's conclusions concern only the impact of Western legal systems because we lack "the kind of documentation or the necessary models or typologies to warrant generalizations that are not trivial about the function of legal systems" across different types of social systems. *Id.* See generally BERNSTEIN, *supra* note 28 (using various alternative theoretical perspectives to critique efforts to achieve "scientific" explanations of social phenomena).

30. See KULCSÁR, *supra* note 20, at 7, 24-25 (identifying several typical characteristics).

31. This approach does not eliminate the problem posed by the lack of an adequate means of measuring the ability to adapt, but eliminates or reduces the impact of the other deficiencies in Kulcsár's distinction of a traditional society.

eties and the rejection of the normative component within his terminology, societies are labelled as either traditional, intermediate, or nontraditional. Intermediate societies possess too many characteristics of both traditional and nontraditional societies to be meaningfully characterized as either. Obviously, any classification with only three classes lumps together societies with gross differences in salient characteristics, but it is adequate for purposes of this article.

Using these definitions, the Navajos formed a traditional society prior to contact with forces of the United States, even though they did not have all of the typical characteristics. Like many present-day third world nations, the *dine'é* have become an intermediate society during the twentieth century. They have incorporated many nontraditional elements into their society as a response to changing economic and political conditions, while retaining important components of their traditional culture. This article examines the efforts of the Navajos to cope with the pressures caused by this transformation, with primary emphasis on the methods of dispute resolution and the rules governing promises and promissory liability.

III. *Traditional Navajo Society and Dispute Resolution*

A. *Early History*

The predecessors of the *dine'é* migrated to the Southwest United States from what is now Alaska and western Canada prior to 1500. The early Navajos probably subsisted primarily through hunting, gathering and simple agriculture. They lived in scattered small bands, and did not have a distinct cultural or political identity.³²

When the early Navajos arrived in the southwest, they encountered the Pueblos, Native Americans who lived in relatively large permanent communities with sophisticated religious rituals and agricultural practices, including animal husbandry. Subsequently, Spaniards entered the area from the south and subjugated the Pueblos. During the late seventeenth century, thousands of Pueblos, fearing Spanish reprisals for a revolt, fled their towns and settled among the *dine'é*. The Pueblos brought their knowledge of agriculture and crafts such as weaving and pottery making, their religious and social concepts, and their livestock, primarily sheep and goats. Inter-marriage and fusion of the cultures quickly transformed the Navajos.³³

Influenced by the Pueblos among them, the *dine'é* became primarily dependent on sheep and goat herding during the eighteenth and early

32. See BAILEY, *supra* note 11, at 11-13.

33. See *id.* at 13-15; EDWARD H. SPICER, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960*, at 212 (1962).

nineteenth centuries, while farming, hunting and gathering declined in importance. Raiding, primarily on Pueblos and Spaniards, increased dramatically as a means of supplementing livestock numbers. The transformed economy apparently was a success: the Navajos' numbers increased and their territory expanded.³⁴ By the mid-nineteenth century, the *dine'é* occupied much of what is now northwestern New Mexico, northeastern Arizona, southeastern Utah, and southwestern Colorado.³⁵

The Navajos' incorporation of Pueblo agricultural practices and religious beliefs was the first known demonstration of an uncharacteristic ability for traditional societies. Most traditional societies resist change.³⁶ The *dine'é* have been much more open, readily incorporating elements of foreign cultures. No scholar has offered a completely adequate explanation for this ability, although at least two factors have probably contributed. The lack of centralized religious or political leadership has permitted greater opportunity for varied responses to a crisis,³⁷ and the domination of active verbs in the Navajo language reflects and reinforces the view "that things are constantly undergoing processes of transformation . . . and that the essence of life and being is movement."³⁸ Regardless of the full explanation, the ability to incorporate elements of foreign cultures has continued into the twentieth century.³⁹

In 1848, the United States acquired most of what is now the southwestern United States by virtue of its victory in the Mexican War, thereby inheriting the problem posed by Navajo raiding. Fifteen years later, federal troops and New Mexico volunteers conducted a major campaign throughout Navajo territory, destroying crops and seizing herds. Facing starvation, many of the *dine'é* surrendered during the winter of 1863-64.⁴⁰ Eventually 8500 were forced to make the "Long Walk" to a reservation in eastern New Mexico. "[S]ick Nav-

34. See BAILEY, *supra* note 11, at 16-21; SPICER, *supra* note 33, at 213-15.

35. Navajo Tribe v. United States, 23 Indian Cl. Comm. 244, 254, 272 (1970). The Indian Claims Commission was a quasi-judicial commission created in 1946 that, among other things, awarded tribes damages for the acquisition by the United States of their aboriginal lands.

36. See *supra* text accompanying notes 24-25.

37. See BAILEY, *supra* note 11, at 293. For the past half-century, the Navajos have had a centralized government which has steadily grown in power. This development may impede their adaptive ability in the future.

38. GARY WITHERSPOON, LANGUAGE AND ART IN THE NAVAJO UNIVERSE 48 (1977).

39. See *Navajo Suburbia Develops*, ARIZ. REPUBLIC, Mar. 12, 1989, at A1 (stating that whereas other native cultures have been destroyed, "the amazing thing about the Navajos is their ability, built into their culture, to adapt and change"); WASH. POST, Feb. 9, 1989, at A3, col. 1 ("the Navajo resemble the Japanese in their skill at melding traditional culture with new ideas borrowed from elsewhere").

40. See BAILEY, *supra* note 11, at 9-10.

ajos, too weak to go on, were shot and left to die; . . . pregnant women, slow afoot, were stabbed by bayonets."⁴¹

Within four years, the government admitted the disastrous nature of its imprisonment of the Navajos. Many had died and the remainder subsisted on rations, at great expense to the government. A treaty was concluded June 1, 1868, and subsequently ratified by the United States Senate,⁴² creating a reservation for the Navajos within their aboriginal homeland and permitting them to return.⁴³

The relatively short confinement profoundly affected the *dine'é*. It damaged their pride and instilled feelings of fear and mistrust of Anglo-Americans.⁴⁴ On the other hand, for the first time the *dine'é* saw themselves as a single political unit, unified by common characteristics that made others treat them as a single group.⁴⁵

Upon returning to their homeland, the *dine'é* had to reestablish their traditional life. The balance of part III describes certain aspects of that life. The portrait is oversimplified. For the most part, it is written as if there were only one traditional Navajo way of life. In reality, traditional customs apparently vary somewhat from community to community, and undoubtedly have changed over time.⁴⁶ Moreover,

41. Sandy Tolan, *Showdown at Window Rock*, N.Y. TIMES, Nov. 26, 1989, § 6 (Magazine), at 28, 36.

42. Treaty Between the United States and the Navajo Tribe, June 1, 1868, 15 Stat. 667.

43. See BAILEY, *supra* note 11, at 9-11; SPICER, *supra* note 33, at 219-20.

44. The impact has been described in vivid terms:

Probably no folk has ever had a greater shock. Proud, they saw their properties destroyed and knew what it was to be dependent upon the largess of strangers. Not understanding group captivity and accustomed to move freely over great spaces, they knew the misery of confinement within a limited area. Taken far from the rugged and vivid landscape which they prized so highly, they lived in a flat and colorless region, eating alien foods and drinking bitter water which made them ill.

. . . One can no more understand Navajo attitudes — particularly toward white people — without knowing of [their captivity] than he can comprehend Southern attitudes without knowing of the Civil War.

KLUCKHOHN & LEIGHTON, *supra* note 10, at 41.

45. PETER IVERSON, *THE NAVAJO NATION* 10 (1981): It was during the Long Walk era

that the Navajos were dealt with as one people by the U.S. government and equally that they began to view themselves politically as one unit. Previously, the Navajos had had things in common culturally, but politically there had been little centralization. They had lived in widely scattered locations, and authority was vested solely in local headmen. . . . But now things would be altered. They had gone through the common crucible of the Long Walk experience. . . . Their political boundaries had been established: the Navajo Nation had begun.

Id. (footnote omitted).

46. See *infra* note 52 (discussing different practices concerning "outfits"). Since the

a much larger percentage of Navajos lived in a traditional manner in 1880 than in 1980. Nevertheless, the practices among traditional Navajos have been sufficiently similar despite the geographical and temporal variances and sufficiently distinct from nontraditional societies to justify the uniform description.

B. Kinship and Community

Traditional Navajo life revolves around the extended family and the geographically dispersed community. Navajos consider themselves related to members of their nuclear family, extended family, outfit, and clan.⁴⁷

Traditional extended families, composed generally of mother, father, unmarried children, married daughters⁴⁸ and their spouses and unmarried children, and miscellaneous unattached relatives, generally live "within shouting distance."⁴⁹ Together with their component nuclear families, extended families form the core socioeconomic units. Each member of the extended family is expected to contribute to common enterprises and can expect assistance from the others. Nuclear and extended families also are the chief transmitters of Navajo culture from older generations to children.⁵⁰ In isolated rural areas, the structure and roles of the nuclear and extended families are little different today than a century ago. In other areas, however, the transformation of the Navajo economy since World War II is separating many Navajos from their extended families.⁵¹

The other forms of kinship have had less importance throughout the reservation period. Outfits are two or more extended families, often neighboring, which occasionally work together on major projects.⁵² The approximately sixty clans create the broadest kinship af-

1930s, many Navajos have joined the Native American Church and/or Christian denominations. Most converts, however, do not believe that they must reject traditional Navajo beliefs; rather, they incorporate selected elements of the new beliefs into the traditional ones. See BAILEY, *supra* note 11, at 279; KENDALL A. BLANCHARD, *THE ECONOMICS OF SAINTHOOD: RELIGIOUS CHANGE AMONG THE RIMROCK NAVAJOS* 225 (1977). Membership in these churches, therefore, has not dramatically altered Navajos' traditional beliefs.

47. See KLUCKHOHN & LEIGHTON, *supra* note 10, at 100-13.

48. Traditional Navajos are primarily matrilineal, that is, a newly married couple generally resides with the wife's family. See *id.* at 102-04.

49. *Id.* at 109.

50. See *id.* at 100-05; MARY SHEPARDSON & BLODWEN HAMMOND, *THE NAVAJO MOUNTAIN COMMUNITY: SOCIAL ORGANIZATION AND KINSHIP TERMINOLOGY* 45 (1970); William T. Adams, *New Data on Navajo Social Organizations*, 30 *PLATEAU* 64, 64-65 (1958).

51. KENNETH GILBREATH, *RED CAPITALISM: AN ANALYSIS OF THE NAVAJO ECONOMY* 84 (1973).

52. See KLUCKHOHN & LEIGHTON, *supra* note 10, at 109-11 (discussing outfits, based on study during the 1930s and 1940s); cf. SHEPARDSON & HAMMOND, *supra* note 50, at 65-66 (stating that no group at Navajo Mountain corresponds to the "outfit"); Adams, *supra* note 50, at 66 (stating that groups in the Shonto region similar to "outfits" are only historical, not functional, groups).

filiations. The principal functions of the clans are to regulate marriage (one cannot marry within one's own clan) and "to provide a wide-spread network for hospitality."⁵³

The various forms of kinship help to bind people living within a geographic area. The *dine'é* live in a dispersed pattern, unlike many other Native Americans, including their neighbors the Pueblos. Vast distances often separate the members of one extended family from the next. Nevertheless, the *dine'é* have considered themselves members of far-flung communities,⁵⁴ sometimes stretching over hundreds of square miles.⁵⁵

The ties to the community are more than social. The *dine'é* revere their rugged, desert land, now larger than the state of West Virginia.⁵⁶ "[A]lmost every topographical feature plays a vital role in their religion. Many rocks, mesas, canyons, springs, mountains, and ponds are reminders of heroic legends or other deeds of religious significance . . ."⁵⁷ They have a special bond, however, for the land within their local community, a bond created at birth.⁵⁸

53. SHEPARDSON & HAMMOND, *supra* note 50, at 52; see KLUCKHOHN & LEIGHTON, *supra* note 10, at 112-13; Adams, *supra* note 50, at 66.

54. See KLUCKHOHN & LEIGHTON, *supra* note 10, at 117-22 (discussing functioning of community).

55. The Navajo Mountain Community, for example, consisted of about 600 people in the early 1960s living on approximately 688 square miles of land. SHEPARDSON & HAMMOND, *supra* note 50, at 10-13.

56. Their main reservation encompasses about 24,000 square miles, about the size of West Virginia, and other lands owned by the United States for the benefit of Navajos total another 6000 square miles. GILBREATH, *supra* note 51, at 3. Most land possessed by Native Americans throughout the United States actually is owned by the government in trust.

57. *Id.* at 86. The opinions of the Navajo courts recognize the importance of the land to the people. See, e.g., *In re Estate of Nelson*, 1 Navajo Rptr. 162, 165 ("Land is of primary importance to the Navajo people"); *Brewster v. Benaly*, 1 Navajo Rptr. 128, 131 (Navajo 1977) ("Land is our people's life and heritage").

58. Parents bury the placenta within the area used by the family and subsequently bury a child's cradleboard beneath the tree from which it came. Charles Miller, Comment, *The Navajo-Hopi Relocation Act and the First Amendment Free Exercise Clause*, 23 U.S.F. L. REV. 97, 113 (1988). Navajos, who have for many years fought removal from land declared by the federal court to belong to a neighboring tribe, the Hopis, have voiced their attachment to the land:

When you remove us away from our land, you take away our religion, our way of life. We cannot practice our religion anywhere else, only at our birthplace where we know the spiritual beings . . . If you force us to go elsewhere we would get sick and we couldn't heal ourselves, we would not survive. You would be sentencing us to die.

Id. at 114 (quoting Affidavit of Violet Ashkie in Support of Plaintiffs' Motion for Preliminary Injunction at 6, *Manybeads v. United States*, No. 88 Civ. 0181 (D.D.C. filed Jan. 26, 1988)).

The kinship and community allegiances necessitated leadership at both levels. When possible, decisions were made within kinship units. Communal decisions, however, were made at meetings led by the local headman (*naat'anii*). The *naat'anii* were selected on a nonhereditary basis by local communities and had no powers of coercion. Rather, they had to try to persuade community members to follow their suggestions — decision by consensus was the goal.⁵⁹ The *dine'é* had no tribal-wide political or religious leadership; leadership was exclusively local.⁶⁰

The importance of family, community and consensus in traditional Navajo life is typical of traditional societies throughout the world, and often serve as important criteria for distinguishing traditional from nontraditional societies.⁶¹ Thus, although the *dine'é* are open to change, they share many important characteristics with traditional societies.

C. Dispute Resolution

Like many traditional societies,⁶² the *dine'é* historically have not vested individuals with adjudicatory powers. When a dispute occurs, the extended families involved (disputes that would be between two individuals under the Anglo-American judicial system are deemed to involve all members of their families⁶³) try to resolve it themselves.⁶⁴ If they are unsuccessful, the families bring the dispute to one or more respected members of the community, often the *naat'anii*, for mediation.⁶⁵ The disputants represent themselves, all of the people present may speak, and sessions frequently last for several days.⁶⁶ The mediators provide advice, moral exhortation and instruction about Navajo

59. See KLUCKHOHN & LEIGHTON, *supra* note 10, at 118-20; Tso, *The Tribal Court Survives*, *supra* note 4, at 24; Van Valkenburgh, *Navajo Common Law I: Notes on Political Organization, Property and Inheritance*, 9 MUSEUM NOTES: MUSEUM OF N. ARIZ. 17, 17-19 (1936) [hereinafter 1 Van Valkenburgh]. The *naat'anii* also played an important role in dispute resolution, discussed below. See *infra* text accompanying note 65.

60. Leadership patterns have changed more rapidly since World War II than kinship and community ties. See *infra* notes 146-80 and accompanying text.

61. See *supra* text accompanying note 30.

62. See KULCSÁR, *supra* note 20, at 37-38; Brandfon, *Tradition and Judicial Review*, *supra* note 4, at 995.

63. See Interview with Judge Wayne Cadman, in Chinle, Navajo Nation, Arizona (May 15, 1991) [hereinafter Cadman Interview].

64. SHEPARDSON & HAMMOND, *supra* note 50, at 129.

65. KLUCKHOHN & LEIGHTON, *supra* note 10, at 120-21; Tso, *The Tribal Court Survives*, *supra* note 4, at 24.

66. Comment of Navajo Nation Chief Justice Tom Tso, in Interview with Chief Justice Tom Tso, Associate Justice Raymond Austin, and Associate Justice Homer Bluehouse, of the Navajo Supreme Court, in Window Rock, Navajo Nation, Ariz. (May 13, 1991). Hereinafter citations to this authority will be shortened to "Interview with Justices," followed by the name of the particular justice who made the comment to which reference is made, e.g., "Interview with Justices (Tso)."

traditions. The result, generally, is that the parties reach an agreement by consensus, often involving a payment in kind.⁶⁷

This procedure has significant benefits. Everyone has a chance to speak, avoiding the frustration that parties in Anglo-American courts often feel in not being able to tell their stories in their own ways.⁶⁸ The decision is reached by mutual agreement, reducing the resentment which arises from adjudications which one party perceives to be unfair.

The process, however, also has drawbacks. It requires all parties to feel a responsibility to the community to reach a consensus, and is less efficacious when an outsider causes an injury.⁶⁹ It works in part because the community places strong informal pressure on its members to cooperate and compromise,⁷⁰ possibly penalizing the more conciliatory disputants.⁷¹ When the parties nevertheless fail to reach consensus, the aggrieved has no recourse, the matter is dropped as too "heavy," and resentments sometimes smolder.⁷² In short, when parties are strongly committed to resolving the dispute, the process generally serves to reaffirm group identity by reestablishing harmonious relationships according to community values.⁷³ When they are not, the aggrieved may have no remedy at all.

67. See Tso, *The Tribal Court Survives*, *supra* note 4, at 24, 25; Van Valkenburgh, *Navajo Common Law III: Etiquette-Hospitality-Justice*, 10 MUSEUM NOTES: MUSEUM OF N. ARIZ. 39, 39-42 (1938) [hereinafter 3 Van Valkenburgh].

According to one Anglo-American attorney:

[W]hen I first got here [1960s] there was definitely a system of paying for your wrong. I can remember in criminal cases where you would have two Navajo, a Navajo victim and a Navajo defendant, and one of the things you tried to do was say, can you solve this in the Navajo way. . . . The Navajo way was I'd give you four goats and five sheep and we'll call it even and the person who was wronged lots of times would take that [A]lthough they would have formal charges pending against them . . . the prosecutor simply said we'll work this out in the Navajo way

Hynes Interview, *supra* note 17.

68. Interview with Justices (Tso), *supra* note 66; see RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* 26, 42, 164-65 (1978) (recounting frustration of plaintiffs in two recent prominent contract cases over inability to tell their stories without interruptions).

69. See *infra* text accompanying note 211 (discussing inadequacy of system to deal with misdemeanors committed by young adults without ties to the community).

70. SHEPARDSON & HAMMOND, *supra* note 50, at 131; cf. Zion, *supra* note 4, at 98, 100-01 (using judicial power to force Navajos to mediate disputes could result in a return to violence and oppression in bringing about supposed consensus); Brandfon, *Tradition and Judicial Review*, *supra* note 4, at 995 (stating that the ability of native groups "to come to a consensus may be seen as the ability to wield power as a group").

71. Cf. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (stating that mandatory mediation of child custody disputes may disempower women, largely because their sense of self generally may be more "relational" than men's).

72. See SHEPARDSON & HAMMOND, *supra* note 50, at 132-33.

73. See Brandfon, *Tradition and Judicial Review*, *supra* note 4, at 994-97 (discussing native dispute resolution in general).

Although the community has no means of enforcing mediated agreements, the offending family normally performs.⁷⁴ The willingness to adhere to the mediated result despite the lack of formal enforcement powers demonstrates both the residents' commitment to community values and the community's power to impose its will through informal means.

The central concept in Navajo socioreligious thought,⁷⁵ *hózhq*, provides the ideological foundation for the *dine'é*'s ability to resolve disputes without an adjudicatory system. This concept is almost impossible to render into English because it incorporates moral and esthetic concepts within an all-encompassing framework.⁷⁶ "We can say that *hózhq* refers to the positive or ideal environment. It is beauty, harmony, good, happiness, and everything that is positive, and it refers to an environment which is all-inclusive."⁷⁷ According to the Chief Justice of the Navajo Supreme Court, *hózhq*, which he translates as "beauty" and "harmony," "brings peace and understanding. It brings youngsters who are mentally and physically healthy and it brings long life. Beauty is people living peacefully with each other and with nature."⁷⁸ Members of a community generally strive to regain the harmony which is lost during a dispute by reaching consensus on a resolution.

As discussed below, Navajo use of mediation to resolve disputes has declined and the process itself has been altered during the past decades as the court system has gained increasing acceptance.⁷⁹ Traditional dispute resolution, however, remains a viable means of resolving disputes even today.

D. Customs and Attitudes Concerning Disputes over Broken Promises and Economic Success

Navajo community members have resolved a wide variety of disputes by traditional mediation techniques. Many of the disputes have in-

74. See SHEPARDSON & HAMMOND, *supra* note 50, at 132.

75. Navajos have no word equivalent to the English word "religion." KLUCKHOHN & LEIGHTON, *supra* note 10, at 179. What Anglo-Americans would identify as Navajo religion permeates their entire culture. Religious beliefs are inseparable from social or economic beliefs. The Navajos' "world is still a whole. Every daily act is colored by their conceptions of supernatural forces, ever present and ever threatening." *Id.* at 178-79; see also GILBREATH, *supra* note 51, at 85-86 ("religion is all pervasive in [the Navajo's] daily affairs . . . religious elements are not separated from the secular elements"). Many traditional societies, like the Navajos, have a relatively undifferentiated system of socio-religious rules that cover all aspects of life. See KULCSÁR, *supra* note 20, at 36-37.

76. See WITHERSPOON, *supra* note 38, at 23-24.

77. *Id.* at 124. But see JOHN R. FARELLA, THE MAIN STALK: A SYNTHESIS OF NAVAJO PHILOSOPHY 31-38 (1984) (disputing that *hózhq* has a moral component, at least in the sense that Westerners understand morality).

78. Tso, *Decision Making in Tribal Courts*, *supra* note 4, at 233.

79. See *infra* notes 191-205 and accompanying text.

volved actions that Anglo-Americans would classify as criminal, such as murder, battery, and sexual crimes; the *dine'é* traditionally had no prosecutors, no jails and no distinctions between civil and criminal.⁸⁰ United States courts would not have considered other disputes, such as over accusations of witchcraft, at all.⁸¹ Only a small percentage of disputes apparently have arisen from what United States courts would consider to be broken contracts.⁸² For example, of the 596 disputes over thirty-three years in one Navajo community tabulated by two researchers, only four, for debt, certainly involved promissory liability. Three of those were resolved in the tribal courts and one by self-help — none by mediation.⁸³

Even to speak of Navajo customs concerning broken promises imports foreign concepts. As was typical in traditional cultures, the *dine'é* did not have a body of customs for breach of contract separate from the customs for other types of wrongs.⁸⁴ Nevertheless, some understanding of the traditional attitudes which Navajos bring to a contention that a promise has been broken is necessary in order to appreciate the differences between the Navajo customs and the contract, consumer, and commercial law currently being applied in the Navajo courts.

One reason for the relatively small number of disputes over broken promises, compared to Anglo-American experience, is that, until after World War II, Navajos engaged in relatively few transactions that could generate such disputes. Navajos did not buy or sell real estate, because neither individuals nor families could convey their customary use rights to land.⁸⁵ Individual family members, including wives and

80. See SHEPARDSON & HAMMOND, *supra* note 50, at 134, 138; 3 Van Valkenburgh, *supra* note 67, at 39-42.

81. See SHEPARDSON & HAMMOND, *supra* note 50, at 138.

82. Interview with Justices (Bluehouse), *supra* note 66; see Cadman Interview, *supra* note 63 (stating that of the over fifty cases in Judge Cadman's peacemaker courts, see *infra* notes 191-201 and accompanying text, only four have involved promissory liability, each for failure to repay a debt).

83. SHEPARDSON & HAMMOND, *supra* note 50, at 138-39. Several other disputes may have involved broken promises, such as those classified under "property," "land dispute," and "fraud." *Id.*

84. Cf. HENRY MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 355-60 (Frederick Pollock ed. 1906) (stating that primitive jurisprudence gave priority to the concept of *delict*, comparable to the modern concept of tort). James Zion pointed out in private correspondence to the author that Navajo customs did not distinguish broken promises from other types of wrongs.

85. See KLUCKHOHN & LEIGHTON, *supra* note 10, at 106-07; 1 Van Valkenburgh, *supra* note 59, at 20-21. In recent decades, the Navajo Nation and the BIA have worked to replace customary use rights with a system of permits which can be alienated or conveyed by will or intestate succession. See NAVAJO TRIB. CODE tit. 3, §§ 781, 784 (1977); 25 C.F.R. §§ 167.8, 167.9 (1990).

children, did own, and could convey, property which Anglo-Americans would classify as personal.⁸⁶ The limited division of labor, however, generated little incentive for conveyances of personal property: most extended families were self-sufficient through the same type of enterprise, stock raising.

Even when transactions occurred, they were less likely to result in disputes than in Anglo-American society. Because the *dine'é* had no currency, most transactions involved the barter of goods.⁸⁷ Substantial time generally does not pass between the time of promise and the time of performance in barter transactions, reducing the possibility for disputes arising because circumstances change after the promise is made but before performance is due.

Despite the relative infrequency of promissory disputes, the traditional economy did give rise to some requiring mediation. Various customs probably influenced the resolution of the disputes. A Navajo strives to keep his promises,⁸⁸ because relationships between community members are built on trust.⁸⁹ Gossip quickly spreads the word if an individual's promises are of little worth, inhibiting future dealings.⁹⁰ A Navajo does not, however, keep his promises because it is morally "wrong" to break them. The *dine'é* are practically oriented, and explain the ethics governing their behavior in terms of pragmatic, immediate concerns.⁹¹ Their precepts conform to normal behavior, not

86. See KLUCKHOHN & LEIGHTON, *supra* note 10, at 105-09. An individual's ability to convey productive personal property, such as livestock, however, was restricted. In times of hardship, stock owned by each member of the family would be slaughtered for food, and an owner who instead sold stock to satisfy a personal whim faced severe criticism. Only with respect to unproductive personal property, such as clothing or ceremonial equipment, was an individual unrestrained in her freedom to convey. *Id.*

87. Barter remains an important component of the Navajo economy. For example, when the Navajo Nation adopted four of the articles of the Uniform Commercial Code, the Tribal Council added a section excluding barter transactions in which the aggregate market value of the goods and services involved does not exceed \$10,000, so that tribal customs and usages will apply to "the types of transactions found in the traditional Navajo economy." U.C.C. § 1-110 & official comment.

88. Words of commitment, when first uttered, may not constitute a binding promise. Traditionally, a statement or promise must be repeated four times before becoming a commitment. See GLADYS REICHARD, *NAVAJO RELIGION: A STUDY OF SYMBOLISM* 130, 133 (2d ed. 1963).

89. See 1 DAN VICENTI ET AL., *THE LAW OF THE PEOPLE: DINE' BIBEE HAZ'AANII* 16 (1972) [hereinafter cited as 1 VICENTI]; Interview with Justices (Bluehouse), *supra* note 66.

90. See SHEPARDSON & HAMMOND, *supra* note 50, at 129.

91. See BLANCHARD, *supra* note 46, at 189; KLUCKHOHN & LEIGHTON, *supra* note 10, at 297-98. Kluckhohn and Leighton explain:

The difference in the presentation of these ideals [truth and honesty] by whites and Navahos lies in the reasons advanced. The Navaho never appeals to abstract morality or to adherence to divine principles. He stresses mainly the practical considerations: "If you don't tell the truth, your fellows won't

an idealized vision of how people should act.⁹²

A promise customarily is binding even without Navajo analogues to the Anglo-American concepts of offer, acceptance, and consideration.⁹³ Nevertheless, their pragmatism generally ensures mutuality of obligation: "The thought of giving without expectation of return is absurd."⁹⁴

Promises concerning transactions in traditional Navajo society differ greatly from the form contracts which are a major part of the Anglo-American commercial world. Because the *dine'é* lacked a written language, all promises (at least until recently) were oral. Their oral nature virtually ensures that, in traditional culture, promises typically contain few express terms.⁹⁵ Navajos also rarely address issues of risk allocation, because they believe that thinking of and planning against unwelcome contingencies make them more likely to occur.⁹⁶ Traditionally, a promisor may be held to express representations, but otherwise a purchaser bears the risk for inspecting goods for defects prior to purchase.⁹⁷ Finally, the time of performance is much less important than in Anglo-American contracts, and probably often is not addressed at all.⁹⁸

When a dispute arises, the parties are expected to be flexible in agreeing to a solution.⁹⁹ For example, if a debtor is unable to perform

trust you and you'll shame your relatives. You'll never get along in the world that way." Truth is never praised merely on the ground that it is "good" in a purely abstract sense, nor do exhortations ever take the form that the Holy People have forbidden cheating or stealing.

Id. at 297.

92. See REICHARD, *supra* note 88, at 130 (stating that a Navajo does not expect others to act differently than he would; "ideal and practice are the same").

93. See VICENTI, *supra* note 89, at 27.

94. BLANCHARD, *supra* note 46, at 192. Ceremonial singers, for example, are always paid because "a [religious] ceremony could not possibly be efficacious if nothing were paid." REICHARD, *supra* note 88, at 126.

95. See Interview with Justices (Tso), *supra* note 66.

96. WITHERSPOON, *supra* note 37, at 29. Navajos believe that "if one thinks of good things and good fortune, good things will happen. If one thinks of bad things, bad fortune will be one's lot." Planning in advance against unwelcome contingencies will cause those contingencies to occur. Similarly, bad dreams are bad thoughts "likely to be realized unless treated and transformed through ritual action." *Id.* at 28.

97. See 1 VICENTI, *supra* note 89, at 16 ("What the [seller] said, and what the thing bought looked like, counted for everything").

98. *Id.* at 19. In general, Navajos place little importance on time or punctuality. See GILBREATH, *supra* note 51, at 94; Hynes Interview, *supra* note 17 (stating that when court proceedings are running late, Navajos frequently joke about matters running on "Navajo time").

99. Interview with Justices (Bluehouse), *supra* note 66. The pressure to be flexible in contract disputes is consistent with the emphasis on compromise in all types of dispute. See *supra* notes 69-73 and accompanying text.

a contract in a timely manner, the parties normally work out an arrangement permitting performance, such as repayment of a debt, over an extended time period.¹⁰⁰ The typical remedy is restitutionary in nature,¹⁰¹ unlike under Anglo-American law, where the promisee's expectations typically provide the measure of damages.¹⁰² The restitution to which the parties agree becomes the obligation, not only of the promisor, but of the promisor's family.¹⁰³

Considered as a whole, traditional Navajo "promissory law" is consistent with *hózhq*. Harmony is maintained by a system which enforces promises, affords only limited remedies (judged by Anglo-American standards), but provides familial assurance of payment. The same desire for harmony underlies Navajo attitudes toward wealth and economic pursuits. The *dine'é* applaud moderate accumulation. "[T]o be poor without obvious reasons implies that a person is lazy or cruel or destructive and often evokes ridicule from fellow Navajos."¹⁰⁴ Willingness to work hard, necessary for survival in pastoral pursuits in the rugged desert, is valued highly.¹⁰⁵

Other beliefs, however, discourage substantial capital formation. Navajos are jealous of others' economic success.¹⁰⁶ Often wealthy Navajos are suspected of witchcraft.¹⁰⁷ Witches have the power to cause economic harm and physical injury or death to their victims. Navajos use rituals to turn the witch's evil back on the witch and

100. Interview with Justices (Bluehouse), *supra* note 66.

101. See SHEPARDSON & HAMMOND, *supra* note 50, at 131; 3 Van Valkenburgh, *supra* note 67, at 43.

102. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* 871-72 (2d ed. 1990). This difference is unsurprising. The expectation measure is designed to give the promisee the profits expected if the contract had been performed. The Navajos place little value on profit maximization, see *infra* notes 106-10 and accompanying text, and will therefore see less need to protect the promisee's expectations, as opposed to the promisee's reliance damages. Judges sharing this attitude may be reluctant to award large damages based on frustrated expectations. See *infra* text accompanying notes 339-40.

103. Interview with Justices (Austin), *supra* note 66. See *supra* text accompanying note 74 (discussing family contribution toward payment required of liable party in all types of disputes).

104. GILBREATH, *supra* note 51, at 93.

105. *Id.* at 91; KLUCKHOHN & LEIGHTON, *supra* note 10, at 299. As one government superintendent wrote:

No task is so dirty, no task is so hard, no condition so unpleasant as to cause them to refuse. . . . I have seen them working for themselves, performing, with worn-out tools, tasks that seem impossible. . . . The ability, combined with a great desire, to labor is one of the outstanding characteristics of the Navajo. From their earliest infancy they are taught to labor and to save.

BAILEY, *supra* note 11, at 160.

106. Cadman Interview, *supra* note 63.

107. GILBREATH, *supra* note 51, at 88; KLUCKHOHN & LEIGHTON, *supra* note 10, at 247.

sometimes kill the suspected witch without waiting for the ritual to work.¹⁰⁸

Navajos also are expected to share their wealth with poorer members of their extended families and often with more distant relatives as well. For example, many expect relatives who own businesses to share merchandise, and those who refuse risk ostracism and charges of witchcraft.¹⁰⁹

Finally, although Navajos value willingness to work hard, work should not become an end in itself or result in immoderate property accumulation. "Working for work's sake or acquiring money for money's sake . . . do[es] not motivate the Navajos to work."¹¹⁰

During the late nineteenth century, as discussed below,¹¹¹ the *dine'é* began to come into contact with the market economy of the United States. Certain Navajo customs and beliefs¹¹² were conducive to acceptance of a market economy and Anglo-American transactional law. Others, however, such as the beliefs discouraging property accumulation, were not.

The Navajos could not neatly excise the doctrines which were counterproductive to participation in the Anglo-American society and keep the rest. The differences between the relevant Anglo-American and traditional Navajo attitudes and customs run deep. They reflect fundamentally divergent visions of the role of the individual in society. For traditional Navajos, as for many traditional peoples, an individual has relatively little freedom to attempt to better himself economically

108. KLUCKHOHN & LEIGHTON, *supra* note 10, at 187-89. The two anthropologists wrote, "[w]itchcraft belief is extraordinarily persistent. Navajos who seem to be completely 'emancipated' from other aspects of their religion will still show tremendous fear of witches. . . ." *Id.* at 129. Witches play an important role in the detective novels of Tony Hillerman, the primary source of information about the Navajos for many Americans. See TONY HILLERMAN, *SKINWALKERS* (1986); TONY HILLERMAN, *THE BLESSING WAY* (1970).

Many Native American tribes believed in witchcraft. Witchcraft accusations served to define the boundaries of the consensual group, and the witch frequently was expelled or killed, thereby reinforcing the definition. Brandfon, *Tradition and Judicial Review*, *supra* note 4, at 996.

109. See GILBREATH, *supra* note 51, at 82-83; see also KLUCKHOHN & LEIGHTON, *supra* note 10, at 247. One non-Navajo attorney believes that Navajos frequently have no assets even though they have a good salary because "it's just a constant requirement that you have to help your friends or your relatives," Hynes Interview, *supra* note 17. Another observes that Navajos pawn jewelry or other valuables partly to permit them regretfully to decline when a relative asks to use that property. Interview with James J. Mason, Attorney, Gallup, New Mexico (May 15, 1991) [hereinafter Mason Interview].

110. GILBREATH, *supra* note 51, at 91.

111. See *infra* notes 118-21 and accompanying text.

112. See *supra* text accompanying notes 88-94, 104-05. The customs and beliefs discussed above include the pragmatic orientation, the expectation that transactions will involve an exchange of values, the value placed on hard work, and the enforceability of promises.

by his own efforts and contracts.¹¹³ Instead, the status of his family largely determines his position in society. The family's status may improve, but only slowly lest witchcraft charges follow. Anglo-American society, by contrast, elevates the freedom of the autonomous individual.¹¹⁴ The "self-made" man is a hero.

The next part contains a historical summary of the impact on the *dine'é* of their collision with Anglo-American society. Given these areas of compatibility and conflict in beliefs, it is unsurprising that the *dine'é* have integrated partially, but only partially, into the United States economy.

IV. The Transformation of the Navajo Economy and Government

A. The Herding Economy: 1868-1930

During their first approximately sixty years on the reservation, the *dine'é* largely continued their traditional way of life and flourished, especially in comparison to other Native Americans. Between 1868 and 1930, the population approximately quadrupled to 39,000,¹¹⁵ whereas native populations overall declined.¹¹⁶ For most of the period, the Navajos generally were self-supporting.¹¹⁷

A resurrected and intensified herding economy fueled their success. During the nineteenth century, herding was primarily subsistence-oriented (providing milk and meat), although it had a significant market component as well.¹¹⁸ The industry became primarily market-oriented during the next century, although this change in orientation was more the product of federal government policy and the desires of white traders than it was the Navajos' own choice.¹¹⁹

The *dine'é* worked hard for their prosperity. Despite their hunger during the early reservation years, they did not butcher their productive animals for food, preferring to build herd numbers.¹²⁰ Many supplemented their stock income with income from crafts, principally rug weaving and silversmithing.¹²¹ In addition, during the 1920s, as income

113. See *supra* notes 84-86, 106-10 and accompanying text.

114. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 40-41 (1979).

115. See BAILEY, *supra* note 11, at 9, 105.

116. See ALAN L. SORKIN, *AMERICAN INDIANS AND FEDERAL AID* 4 (1971).

117. See BAILEY, *supra* note 11, at 50 (the period until 1890); *id.* at 100-04 (the 1890s); *id.* at 184 (stating that the Depression of the 1930s ended the period of Navajo self-sufficiency). In 1890, the Navajos were considered one of the two wealthiest tribes in the country. *Id.* at 96.

118. See BAILEY, *supra* note 11, at 36-45; *infra* notes 128-45 and accompanying text (discussing roles of traders).

119. See BAILEY, *supra* note 11, at 124-39; LAWRENCE D. WEISS, *THE DEVELOPMENT OF CAPITALISM IN THE NAVAJO NATION: A POLITICAL-ECONOMIC HISTORY* 83-84 (1984).

120. See BAILEY, *supra* note 11, at 36-45.

121. See *id.* at 50-56, 150-55.

from herding and crafts proved insufficient to support the ever-growing human population, Navajos, especially men, began to accept off-reservation seasonal employment, primarily unskilled labor on the railroads and in the agricultural fields.¹²²

As a result of the Navajos' success and their pattern of scattered settlement over a vast territory, the government made little attempt to undermine their beliefs and social structure and replace them with elements of Anglo-American culture, as it did on other reservations.¹²³ Schooling was only a partial exception. Whereas most native children on other reservations were forced into government-run schools,¹²⁴ only about 3% of school-age Navajo children attended school by 1898, and less than 1% of Navajos could speak English.¹²⁵ The government constructed more schools and Navajo resistance to Anglo-American education declined somewhat during the early twentieth century, but as late as 1930 only about 40% of school-age children attended school.¹²⁶ That same year, 71% of the tribe spoke no English and only 10% spoke it "reasonably well."¹²⁷

Although government agents had relatively little influence on the Navajo, one group of Anglo-Americans, the traders, did. The first trading post was established around 1870; the number increased to seventy-nine on and around the reservation by 1900 and to 154 by 1930.¹²⁸ Historically, what families could not produce themselves they had obtained by barter with other Navajos or by trade with members of other tribes. By 1930, however, traders had almost completely supplanted intertribal trade and displaced much intratribal trade.¹²⁹

122. See *id.* at 155-60; WEISS, *supra* note 119, at 84-93.

123. Until approximately 1870, the government primarily sought to remove natives to areas that other Americans would not want, where they were largely left alone. By 1870, it was apparent that the entire continent from the Atlantic to the Pacific would be settled, and the government increasingly created enclaves, or reservations, for the natives. On these reservations, natives became dependent on the federal government, which in turn strove to destroy tribal leadership, religious beliefs and culture and assimilate individual natives into the national culture. Individual natives were allotted small parcels of land on many reservations, and surplus lands were opened to settlement by non-natives. See generally COHEN, *supra* note 14, at 127-43; FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

124. See generally HOXIE, *supra* note 122, at 53-70 (discussing development of educational policies for Native Americans).

125. See BAILEY, *supra* note 11, at 63-66, 169.

126. See *id.* at 168-71.

127. KLUCKHOHN & LEIGHTON, *supra* note 10 at 91 (1946). Native Americans of other tribes were much more familiar with English. Nationwide, in 1930, only 17% of Native Americans over ten years old were unable to speak English. LEONARD A. CARSON, INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 201, at tbl. A.21 (1981).

128. WEISS, *supra* note 118, at 51, 73.

129. See BAILEY, *supra* note 11, at 50-62, 147-50; WEISS, *supra* note 118, at 53-61, 72-75.

Two factors largely explain the traders' displacement of traditional commerce. First, the Navajos increasingly accepted and desired the products of Anglo-American material culture. By the early 1900s, a growing number began to live in cabins instead of the traditional *hogans*, use Anglo-American furniture and equipment, and wear Anglo-American clothing.¹³⁰ Second, traders extended credit to the Navajos to permit purchase of those goods. Credit was necessary because the *dine'é* had no currency¹³¹ and their economy was cyclical — herding produced goods for trade only twice a year, wool in the spring and lambs in the fall.¹³²

The relationships between Navajos and traders differed greatly from the relationships between most Anglo-American merchants and consumers. Until after World War II, Navajos generally had no choice but to deal with a particular trader. Once Navajos began to switch from purely subsistence herding to commercial herding and had acquired a taste for Anglo-American goods, traders represented the only accessible market for their products and the only accessible source of Anglo-American goods. Moreover, Navajos could not pick and choose among traders: most were tied to a particular trader by geographic monopoly and by debt.¹³³ Reciprocally, the trader was bound to the Navajos of the community in which the trading post was located; if the trader did something to alienate those Navajos, he could not attract other customers because of their ties to other traders.¹³⁴

Consequently, a successful trader entered into a never-ending series of credit-based transactions with each of his repeat customers, few if any of which involved money, at least until after World War II. The trader maintained a running account for each of the families who did business at the post. Most families purchased on credit, which they repaid twice a year, in the spring with the wool from shearing and in the fall with lambs.¹³⁵ To earn additional credit the women of many families wove rugs for market according to the trader's specifications and using materials purchased from the trader on credit. Traders required some customers to secure their credit with pawned goods,

130. See BAILEY, *supra* note 11, at 173-78; KLUCKHOHN & LEIGHTON, *supra* note 10, at 86-90.

131. See Stephen Conn & Richard Reichbart, *The Trading Post*, in 1 VICENTI, *supra* note 89, at 75 [hereinafter Conn & Reichbart] ("The trader was inevitable" as "the intermediary . . . between a monetary and a non-monetary society.").

132. See BAILEY, *supra* note 11, at 50-62; WEISS, *supra* note 118, at 48-61.

133. See WEISS, *supra* note 118, at 53-61.

134. See Hynes Interview, *supra* note 17 (stating that the trader had to maintain a benevolent attitude toward the Navajos).

135. Few statistics are available concerning the extent of debt, but one trader reported in the 1950s that two-thirds of all wool production in his area was transferred to him to satisfy past debts. WEISS, *supra* note 118, at 139.

usually jewelry; others, generally wealthier, were granted unsecured credit, based on the trader's knowledge of their herds.¹³⁶

Navajos' long-term relationships with traders resembled their traditional relationships with each other in many ways.¹³⁷ Agreements typically were oral. The relationship did not have a clear beginning in offer and acceptance, a performance period, or a discharge upon completion. It was subject to continuous adjustments. If Navajos were unable to pay debts when due, traders generally were willing to extend the time for payment. Traders frequently held onto pawned goods until the owner died, even if the secured debt had been long in arrears, and allowed debtors to take out the pawn, especially jewelry, for big events.¹³⁸

The Navajos' commercial relationships, with each other and with traders, bore little similarity to the type of transaction which formed the paradigm for traditional Anglo-American contract law. This law, with its doctrines of offer and acceptance, consideration, and expectation-based damages, impliedly regards the typical commercial relationship as involving a single, discrete transaction.¹³⁹ By contrast, traders and Navajos often "treat[ed] their contracts more like marriages than like one-night stands."¹⁴⁰

136. Hynes Interview, *supra* note 17 ("The amount of credit that he would extend would depend on what he thought their ability to repay would be, because he knew how many sheep they had, how many cows they had, he knew their ability to earn money").

137. See Interview with Justices (Austin), *supra* note 66 (stating that relationships between a trader and the Navajos of the community in which he lived had many elements similar to promissory relationships among Navajos).

138. Hynes Interview, *supra* note 17; Mason Interview, *supra* note 109. As traders have moved off reservation since World War II, some may have lost the willingness to retain pawn indefinitely. See *Reeves v. Foutz & Tanner, Inc.*, 617 P.2d 149 (1980) (imposing penalties on merchant who tried to circumvent UCC's provisions for resale of pawned jewelry after Navajo debtors defaulted).

139. During the last three decades, several scholars, led by Stewart Macauley and Ian MacNeil, have criticized the orientation of Anglo-American contract law toward discrete transactions and advocated a "relational" perspective. Perhaps the best single source for their views is Symposium, *Law, Private Governance and Continuing Relationships*, 1985 Wis. L. REV. 461, which contains articles by Macauley, Macneil, and thirteen other scholars critiquing their theories or applying them in various contexts. See also IAN MACNEIL, *THE NEW SOCIAL CONTRACT* (1980); Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

140. Robert W. Gordon, *Macauley, MacNeil, and the Discovery of Solidarity and Power in Contract Law*, 1985 Wis. L. REV. 565, 569. Ongoing complex commercial relationships are common in traditional and intermediate societies. For example, Connecticut around 1700 was "something of a backwater," with little commerce outside the local community. Trading relationships "tended to be familial and intimate." Bruce H. Mann, *Rationality, Legal Change, and Community in Connecticut, 1690-1760*, 14 LAW & SOC. REV. 187, 193 (1980). Creditors recorded transactions — largely barter — in a "book," without express terms governing repayment. If the creditor demanded repayment and the debtor refused, the creditor could sue on the book account. This relatively unstructured

These types of continuing relationships, however, have a "dark side": "where the contours of obligations are constantly shifting, the effects of power imbalances are not limited to the concessions that parties can extort in the original bargain," and "can gradually extend to govern every aspect of the relation in performance."¹⁴¹ Many traders exploited the Navajos trapped into doing business with them, taking exorbitant markups on goods sold,¹⁴² charging astronomical interest rates,¹⁴³ and making huge profits on the products purchased from Navajos and resold in the Anglo-American world.¹⁴⁴ They made fortunes while their Navajo customers continued to live at subsistence levels.¹⁴⁵

This process of integrating the Navajos into the larger economy, both through their taste for Anglo-American goods and their production of livestock and crafts for resale by traders into the market, proved to be the first step in the transition from a traditional society. Commonly, merchants make the first inroads into traditional societies.¹⁴⁶ The next step was forced upon the Navajos against their will.

B. Wage Economy: 1930-Present

The pace of change has accelerated rapidly over the past sixty years. The Navajo society is no longer traditional. It is now an intermediate

system depended on trust "that the other will fulfill his promises, not necessarily because of legal coercion, but because not to perform would damage a relationship that each considers worth preserving." *Id.* at 194. During the course of the eighteenth century, Connecticut residents became increasingly involved in the intercolonial economy. Not surprisingly, to the extent that creditors and debtors were no longer tied by "continuing relationships" of trust, legal instruments with express repayment terms replaced books as means of evidencing debt obligations. *Id.* at 194, 201-08.

141. Gordon, *supra* note 140, at 570.

142. See Conn & Reichbart, *supra* note 131, at 69 (stating that one trading post's prices averaged 35% higher for food and 75% higher for clothing and other dry goods than the wholesale prices to the post).

143. The debtors frequently did not understand the impact of the interest rates which the traders charged on the delinquent debt. In the early 1970s, traders off reservation in Arizona could charge maximum interest of 2% per month, traders off reservation in New Mexico could charge up to 4% per month, while traders on reservation could charge any rate they wished. *Id.* at 76. For food purchased on credit during the same time period, most on-reservation traders charged interest of 10% a month (120% per year)! 1 VICENTIL, *supra* note 89, at 36.

144. See Conn & Reichbart, *supra* note 131, at 71 (stating that trader's profit on resale of wool and lambs usually exceeds 100%).

145. Interview with Justices (Tso), *supra* note 66; Hynes Interview, *supra* note 17.

146. See WEISS, *supra* note 118, at 20-22 (discussing typical means by which outside merchants make peasants dependent, which closely track the methods used by traders with the Navajos); Snyder, *supra* note 20, at 750-59 (discussing various ideas of Marxist theorists concerning integration of underdeveloped economies into world economy dominated by developed countries).

society, with significant traditional and nontraditional elements.

Navajos remember the precipitating event with "bitterness and anger."¹⁴⁷ The government imposed a livestock reduction program that was "the most devastating experience in Navaho [*sic*] history since the imprisonment at Fort Sumner from 1864 to 1868."¹⁴⁸

Since before 1900, government officials had observed overgrazing and increasing erosion on the reservation. They did little to rectify the problems, however, until the 1930s, when the BIA established the carrying capacity of the range and "purchased" excess stock at prices which it set. With the Depression wiping out any market for the purchased stock, the government frequently slaughtered the stock — the primary measure of wealth for the Navajos — before the horrified eyes of the *dine'é* and left the dead animals in the fields to rot or bulldozed them into mass graves.¹⁴⁹

The *dine'é* opposed the program strenuously, not believing that any reduction was necessary.¹⁵⁰ The opposition had results probably unanticipated by the BIA officials. Just as captivity during the nineteenth century fostered a sense of tribal identity, the struggle against stock reduction increased Navajo nationalism. This time, however, the new nationalism had a mouthpiece, the Tribal Council.¹⁵¹ The federal gov-

147. IVERSON, *supra* note 45, at 23.

148. *Id.* (quoting Sam Ahkeah, Navajo Tribal Council chairman from 1946 to 1954).

149. See BAILEY, *supra* note 11, at 184-93; IVERSON, *supra* note 45, at 17, 23-35; Tolan, *supra* note 41, at 36.

The stock reduction program, although administered with incredible insensitivity, was part of a policy designed to strengthen tribal governments and protect tribal resources. From approximately 1870 through the mid-1920s, the prevailing policy of the United States had been to destroy tribal cultures and self-governance and to make natives like all other Americans. See *supra* note 123. John Collier, the commissioner of Indian Affairs during the administration of Franklin Roosevelt, rejected that policy. His administration was instrumental in preserving tribes as distinct entities. See JENNINGS C. WISE & VINE DELORIA, JR., *THE RED MAN IN THE NEW WORLD DRAMA: A POLITICO-LEGAL STUDY WITH A PAGEANTRY OF AMERICAN INDIAN HISTORY 357-60* (1971) (stating that FDR's years as president were "probably the best years in American history for Indians," largely because Collier did his job "with devotion and spectacular results").

150. See BAILEY, *supra* note 11, at 185-86; IVERSON, *supra* note 45, at 27-29.

151. A historian wrote:

Indeed, if the 1868 treaty reservation provided the foundation for the Navajo Nation, the livestock reduction era hastened the evolution of Navajo nationalism. The period represented the most serious disruption of Dineh lives since the 1860s. The era estranged the tribe from the federal government. Relations between Washington and Window Rock [the capital of the nation] would never be the same again. Not only did Collier's other programs suffer, but the Navajos began the long process of becoming a political unit. The tribal government mattered. The people could have boycotted it; they could have shunted it aside as nontraditional. Instead, most of them turned to it as a way of maintaining a separate, integral Navajo way of life.

IVERSON *supra* note 45, at 30.

ernment had formed the council in the 1920s as a puppet to grant approval for the exploration for and exploitation of oil on the reservation,¹⁵² but Navajo politicians hostile to the stock reduction program seized control of the council during the 1930s. They altered the size, structure and powers of the council, making it a more effective unit of government for the *dine'é*.¹⁵³

The council, however, could not reverse the effect of stock reduction. Herding could no longer even come close to supporting all the Navajos. Public works programs during the 1930s and employment opportunities during World War II temporarily hid the impact of the lost agricultural income.¹⁵⁴ After 1945, however, the war-related jobs disappeared, and poverty and hunger spread across the reservation. A new economic system had to replace the old.¹⁵⁵

Wage-earning is the primary foundation of that system. Herding, which held the central economic role for over a century, has become only a minor supplemental income source over the last forty years, although it retains tremendous symbolic importance.¹⁵⁶ By 1960, almost 70% of Navajo individual income came from wage labor, about 14% from welfare payments, and less than 10% from livestock and farming.¹⁵⁷ In the mid-1970s, income from welfare payments had climbed to 24%, while the percentage of income from wages had declined marginally and from herding had plummeted to only about 2% of the total.¹⁵⁸

Unlike other Americans, who work primarily for private employers, Navajos receive well over half of their wages from federal and tribal government sources.¹⁵⁹ The Navajo Nation itself is the largest em-

152. See *Navajo Nation v. MacDonald*, No. A-CV-13-89, slip op. at 17-18 (Navajo Apr. 13, 1989); IVERSON, *supra* note 45, at 20-21.

153. See BAILEY, *supra* note 11, at 196-97; IVERSON, *supra* note 45, at 36-39.

154. See BAILEY, *supra* note 11, at 192-200.

155. See *id.* at 218-21; IVERSON, *supra* note 45, at 49-50, 56.

156. The percentage of families holding permits to graze stock has declined steadily, from 62% in the 1940s, BAILEY, *supra* note 11, at 245, to about 16% today, Tolan, *supra* note 41, at 31. Moreover, stockraising is not the primary income source for even the few families with permits. By 1957, 80% of all stock permits in the Navajo Nation were for between 1 and 100 sheep units, with 400-500 considered sufficient to support a family at subsistence level. See BAILEY, *supra* note 11, at 203-04, 247. Despite the declining economic impact, however, grazing rights and traditional grazing areas remain remarkably important to the people. The Navajo Reporter contains many cases involving disputes over grazing rights; one estimate is that about 75% of court hearings involve land-use disputes, primarily over range rights. WEISS, *supra* note 118, at 141.

157. BAILEY, *supra* note 11, at 257. By contrast, in 1940, even after the stock reduction program was largely completed, about 44% of the total income came from livestock and about 30% from wages. KLUCKHOHN & LEIGHTON, *supra* note 10, at 54.

158. See BAILEY, *supra* note 11, at 260-61; WEISS, *supra* note 118, at 137.

159. See BAILEY, *supra* note 11, at 256.

ployer.¹⁶⁰ The reservation contains valuable deposits of oil, gas, uranium, and coal, and leases of mining rights have provided most of the wherewithal for the growth of tribal government.¹⁶¹

This income has permitted the Navajo government to expand in many directions. Since 1950, "the influence of the BIA over Navajo affairs [has] declined steadily, balanced by a steady growth in the power of Navajo tribal government. . . . The Navajos [have] succeeded in reclaiming much of their political autonomy, at least in regard to the daily management of internal Navajo affairs and programs."¹⁶² The tribal government also has defended its sovereignty jealously against any attempts by state governments to regulate or police affairs on the reservation.¹⁶³ The combination of the need to employ Navajos and the wide scope of governmental activities has produced a large Navajo bureaucracy.

Despite its successes in many areas, the tribal government has been repeatedly frustrated in one area — the development of nongovernmental enterprise on the reservation. In 1970, the surrounding communities supported about five times as many retail establishments and up to twenty times as many service establishments per person as were on the reservation.¹⁶⁴ Moreover, the reservation businesses tend to cluster near BIA or tribal offices or tourist attractions, leaving other areas even more underserved than the overall statistics indicate.¹⁶⁵ As a result of the lack of business on the reservation, Navajos' estimated per capita income in 1970 was less than a third of the estimated figures

160. See KLARA B. KELLEY, *NAVAJO LAND USE: AN ETHNOLOGICAL STUDY* 154 (1986).

161. See BAILEY, *supra* note 11, at 235-37.

162. *Id.* at 244. The return of autonomy, however, is not complete. The tribe may act without federal approval only in areas where Congress has not expressly or impliedly restricted its autonomy. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (holding that Secretary of Interior approval of taxes which the tribe imposed on a non-Indian company was unnecessary; government approval is required only when Congress so specifies). This article discusses several restrictions on the jurisdiction of tribal courts. See *infra* notes 221-29 and accompanying text. In addition, federal officials must approve certain types of tribal actions before they take effect. See *Howard Dana & Assocs. v. Navajo Hous. Auth.*, 1 Navajo Rptr. 325, 327 (Navajo 1978) (holding that approval from HUD, whose funds would be used in project, was necessary in order for housing authority's contract with architect to be binding). Perhaps most significant, agreements of the tribe granting any individual or entity any privilege "relative to tribal lands" require prior approvals of the Secretary of the Interior and the Commissioner of Indian Affairs. 25 U.S.C. § 81 (1988).

163. For example, when Arizona voters decided in 1988 that English is the "official language" of Arizona, the tribe refused to give the law any effect within the Navajo Nation and announced that English-language geographical names would be translated into Navajo. *WASH. POST*, Feb. 9, 1989, at A3, col. 1.

164. GILBREATH, *supra* note 51, at 18-20.

165. *Id.*

for New Mexico and Arizona,¹⁶⁶ and about one-half live in poverty.¹⁶⁷

Among those reservation businesses are fewer trading posts, although they remain important in isolated rural areas. (The shift to a wage and welfare economy has produced only slow changes in settlement patterns. Although the reservation now contains several "urban" areas with over a thousand inhabitants,¹⁶⁸ the great majority of Navajos still live in rural residential patterns similar to those of a hundred years before.¹⁶⁹) Several developments worked against the traders after World War II: the switch to a wage economy reduced the need for a non-cash credit system, and the improvement of the road system in the 1950s and Navajo purchases of motor vehicles broke the geographic monopoly of many traders.¹⁷⁰ Navajos found lower prices and greater selections of Anglo-American products from off-reservation merchants. Consequently, a high percentage of tribal income is spent outside Navajo country.¹⁷¹

The weakness of private enterprise on the reservation has elevated government to an importance probably unparalleled in the Anglo-American world. Theoretically, the Tribal Council holds sovereign power.¹⁷² The *dine'é* do not have a written constitution that creates three branches of government.¹⁷³ Instead, the Tribal Council has created the executive and judicial branches by resolution.¹⁷⁴

166. *Id.* at 4.

167. NAVAJO NATION REPORT, *supra* note 9, at 3. Navajos' average per capita income is the lowest of the ten largest Indian tribes in the country. CENSUS BUREAU REPORT, *supra* note 9. See also *supra* note 15 (discussing unemployment and poverty figures).

168. Figures for what Anglo-Americans would call towns do not exist, because chapters, the basic unit of local government in the Navajo Nation, may encompass both urban and rural areas. The 1989 population estimates for the chapters, however, indicate that the three largest urban areas are Window Rock-Fort Defiance-Saint Michaels, in the southeast corner of the reservation, with about 11,000 Navajo residents; Shiprock, in the northeast corner, with about 8000 Navajo residents; and Tuba City, in the western part, with over 7000 Navajo residents. See NAVAJO NATION REPORT, *supra* note 9, at 4.

169. See WASH. POST, Feb. 9, 1989, at A3, col. 1 ("Most Navajos are still farmers and ranchers, living on farms that frequently house four or more generations of a family").

170. See BAILEY, *supra* note 11, at 268-71.

171. See GILBREATH, *supra* note 51, at 6-7.

172. NAVAJO TRIB. CODE tit. 2, § 101 (Supp. 1984-85).

173. Pursuant to authority granted by the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1988), many Native American tribes adopted written constitutions during the 1930s. Largely because of Navajo antagonism to Collier arising from the stock reduction program, they voted not to adopt the Indian Reorganization Act in 1935. See IVERSON, *supra* note 45, at 33-38. Overall, 189 tribes voted to accept the IRA and adopted constitutions, while seventy-seven voted to reject it. COHEN, *supra* note 14, at 150.

174. See NAVAJO TRIB. CODE tit. 2, §§ 281, 1001 (1977) (creating position of Chairman of the Tribal Council and authorizing Chairman to act as chief executive officer); NAVAJO TRIB. CODE tit. 7, § 201 (Supp. 1984-85) (creating the judicial branch). The Navajo Tribe Organization Chart 1977, which is printed on the pages following NAVAJO TRIB. CODE tit. 2, § 4 (1977), places all units of the tribal government within a flow chart, with the Navajo Tribal Council at the top.

At least until 1989, reality contrasted with theory. The Chairman of the Tribal Council accumulated powers throughout the period after 1950, reaching extraordinary levels by Anglo-American standards. The Chairman headed the executive department,¹⁷⁵ held legislative powers greater than those of the Speaker of the House of Representatives,¹⁷⁶ and was the principal representative of the tribe to the outside world.¹⁷⁷

During 1989, the balance of power shifted. Peter MacDonald, who was serving his unprecedented fourth four-year term as Chairman,¹⁷⁸ was accused in hearings conducted by the United States Senate of accepting bribes and kickbacks from contractors.¹⁷⁹ Within two weeks, he had lost control of the Tribal Council, which placed him on administrative leave pending investigation of the allegations and appointed an interim Chairman.¹⁸⁰ MacDonald fought the leave for five

175. NAVAJO TRIB. CODE tit. 2, § 1001(a) (1977).

176. The Chairman chaired meetings of the Tribal Council (a unicameral body), NAVAJO TRIB. CODE tit. 2, § 284(a) (1977), and of its Advisory Committee, NAVAJO TRIB. CODE tit. 2, § 342(a) (Supp. 1984-85). The Tribal Council had four regular sessions per year, *id.* § 162(a), and the Advisory Committee, among other things, had the authority "to act for" the council when it was not in session and to "develop an agenda for" and "recommend legislation to" the council. *Id.* § 341(b)(1),(3). In addition to the Chairman, the Advisory Committee consisted of 18 council members, which after 1981, were "selected by the [Chairman] with the advice and consent" of the council. *Id.* § 342. Much of the nation's legislative power, therefore, was in a committee handpicked by the Chairman.

177. *Id.* § 1001(a) (1977).

178. The following story illustrates some of the reasons for MacDonald's appeal to Navajos. Seven years before he became Chairman, he attended a Tribal Council session, at which two council members were in heated debate. According to MacDonald, the BIA representative ordered them to stop arguing, and announced, "If you guys continue to act like children, I'm going to throw every one of you out of this council chamber. I'm going to put a padlock on it. And I'm not going to let you back in until you learn to behave like adults!" The council members stopped their debate and sat down. Tolan, *supra* note 41, at 38.

After his election, MacDonald insisted that the BIA deed the council chambers to the tribe. If not, the council would convene outside. The BIA acquiesced, and MacDonald had the locks changed. *Id.*

With title in hand, while presiding at his first Tribal Council session as Chairman, he told the BIA representative, "If I hear any outbursts from you or your staff . . . I will have our police escort you from these chambers. And you won't be let back in until you promise to behave like adults!" *Id.*

179. Jacob V. Lamar, *Letting Down the Tribe*, TIME, Mar. 6, 1989, at 30. The most flagrant alleged abuse concerned the tribe's purchase of a 491,000-acre ranch in Arizona. MacDonald allegedly arranged with a broker that the ranch would be purchased for \$26.2 million by a middleman and then sold to the tribe two days later for \$33.4 million, with MacDonald to receive up to \$750,000 of the profits. MacDonald had received the first \$75,000 at the time of the Senate hearings. *Id.*; Atchison, *supra* note 15, at 32.

180. See *Navajo Leader Out of Power*, ARIZ. REPUBLIC, Feb. 25, 1989, at B1. The Navajo Supreme Court upheld the council's power to place a Chairman on administrative leave, provided that there were adequate grounds and appropriate procedures were followed. *Navajo Nation v. MacDonald*, No. A-CV-13-89, slip op. at 15-29 (Navajo Apr. 13, 1989). The council then appointed an interim Chairman, who eventually served the balance of MacDonald's term. *Election Panel Kills MacDonald's Run*, ARIZ. REPUBLIC, Oct. 25, 1990, at B1.

months, with the courts serving as the arbiter of the dispute between council and Chairman. Finally, he agreed to accept the leave while criminal charges against him and other members of his administration worked their way through the tribal courts where he was ultimately convicted.¹⁸¹

The Tribal Council used the opportunity to restructure the executive and legislative branches of government in December 1989 by stripping the Chairman (renamed the president) of legislative powers and creating a system with greater checks and balances.¹⁸² It is far too early to pass judgment on the efficacy and stability of the new structure. Regardless of its success, however, it appears, as discussed in part V below, that the courts have been accepted as a separate and important component of the Tribe's government.

As this historical sketch has shown, the *dine'é* have undergone remarkable changes during the last sixty years. They have switched from an economy almost exclusively dependent on agriculture and crafts to one primarily based on wage-earning. Whereas before they had no centralized governmental authority, they now have a centralized government with a large bureaucracy. A formerly self-sufficient people now is reliant in large part on welfare, bringing the problems that often accompany such dependence.

These economic and political developments parallel those experienced by many intermediate societies. Inability of the nonagricultural sector of the economy to absorb those who can no longer support themselves through farming and of traditional governance mechanisms to deal with the changes in society characterize this period in many societies. Frequently, they respond by adopting nontraditional government structures, including a large bureaucracy.¹⁸³

Changes in legal norms and procedures almost always accompany the economic and political transformation of formerly traditional nations. The political and economic changes in Navajo society during the last sixty years have created pressures for the adoption of nontraditional means of resolving disputes and nontraditional principles to

181. See Tolan, *supra* note 41, at 31; MacDonald Taken Off Ballot, PHOENIX GAZETTE, Oct. 25, 1990, at B7.

182. The Tribal Council created the position of Speaker of the Council to preside over council meetings and head the legislative branch, gave the tribal president a veto power subject to override by a two-thirds vote of the council, and reorganized the council committee system to strip the Advisory Committee of disproportionate powers. See Bennett v. Navajo Bd. of Election Supervisors, No. A-CV-26-90, slip op. at 9 (Navajo Dec. 12, 1990) (holding that the Act intended to define and separate powers of political branches); NAVAJO TIMES, Dec. 21, 1989, at 12, col. 2 (stating that Tribal Council approved reorganization by 44-17 vote and discussing provisions); NAVAJO TIMES, Dec. 7, 1989, at 1, col. 1 (discussing provisions of proposed resolution).

183. See KULCSÁR, *supra* note 20, at 24-27.

govern the making, interpretation and enforcement of promises. The final two parts of this article examine the effectiveness with which the Navajos have dealt with these pressures.

V. *Dispute Resolution in the Navajo Nation*

Although intermediate societies have adopted many of the practices or structures of nontraditional societies, they typically have found adoption of ideas, including legal norms, far more problematic.¹⁸⁴ One scholar has even arrived at the "law" of the non-transferability of legal rules."¹⁸⁵ Often, nontraditional laws are superimposed on traditional customs, and societies then struggle, generally unhappily, with the coexistence of the old customs and the new laws.¹⁸⁶

The *dine'é*, however, have a history of successfully incorporating elements of other cultures. They have demonstrated that same ability in altering their dispute resolution mechanisms. Before 1950, disputes generally were mediated in local communities, as discussed above.¹⁸⁷ A rudimentary court system established and controlled by the federal government provided the only alternative. Although traditional dispute resolution continues, a greatly expanded judicial system funded and controlled by the tribe now is the primary forum.¹⁸⁸ Moreover, the tribal courts have established a third institution, peacemaker courts, which mediate disputes in a traditional manner but are backed by the power of the tribal courts.¹⁸⁹

These changes have not eliminated traditional Navajo influences. Rather, Navajos have fused traditional customs with Anglo-American concepts of dispute resolution to produce a unique system.¹⁹⁰

A. *Resolution by Mediation*

Traditional mediated dispute resolution remains as a means of resolving disputes between Navajos.¹⁹¹ Recent developments have affected it in at least three ways, however. First, Navajos use traditional dispute resolution less,¹⁹² and its use presumably will continue to decline

184. *Id.* at 27-28.

185. ROBERT B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 37 (1978).

186. See KULCSÁR, *supra* note 20, at 46-72.

187. See *supra* notes 62-79 and accompanying text.

188. See *infra* notes 206-90 and accompanying text.

189. See *infra* notes 195-205 and accompanying text.

190. See Zion, *supra* note 4, at 92 (stating that the persistence of Navajo legal culture along with the development of a legal system modeled after Anglo-American institutions is one of many "illustrations of strong cultural survival complemented by a canny pragmatism").

191. See Stephen Conn, *Mid-Passage — The Navajo Tribe and its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 331 n.12.

192. Cadman Interview, *supra* note 63.

to the extent that Navajos leave their rural communities and extended families.¹⁹³ Second, lay advocates, a product of the Anglo-American court system, now sometimes serve as mediators.¹⁹⁴ They presumably bring some Anglo-American notions of justice with them. Finally, the courts have created the peacemaker courts, which eventually may become the primary means of resolving disputes by mediation in the Navajo Nation.

Navajo jurists adopted the rules establishing the peacemaker courts in 1982. Under the rules, local governments or judges select individuals as peacemakers. The rules prescribe few procedures; by and large, peacemakers mediate disputes using such techniques as they see fit. The rules, however, specify that attorneys may not represent parties.¹⁹⁵

The rules create four roles for the district courts in the peacemaking process, which distinguish peacemaking from traditional Navajo dispute resolution. First, district court judges may refer any civil or criminal action to the peacemaker courts. Parties who are Navajo must participate in the peacemaker sessions; non-Navajos may decline. If the peacemaker proceedings fail to produce agreement, the parties may return to the court system.¹⁹⁶ Second, the courts exercise supervisory powers over the peacemakers, and may issue protective orders against undue pressure to participate and compromise.¹⁹⁷ Third, the courts may subpoena witnesses to appear at peacemaker proceedings.¹⁹⁸ Finally, any mediated outcome may be entered as a judgment and accorded the same dignity as a judgment of the Navajo court system.¹⁹⁹ These measures permit mediation to function even when the parties are not members of the same community, reduce the danger of untoward pressures to cooperate and compromise, and eliminate the potential, although seldom realized, problem of enforcement of the mediated result.²⁰⁰

Implementation of the peacemaker court system varies among the seven judicial districts. The fourteen peacemakers in the district of Judge Cadman, who has implemented the system more fully than any

193. See *supra* notes 51, 168-69 and accompanying text.

194. Conn, *supra* note 191, at 331 n.12.

195. See Zion, *supra* note 4, at 97-99, 102-03; JAMES ZION & NELSON McCABE, NAVAJO PEACEMAKER COURT MANUAL: A GUIDE TO THE USE OF THE NAVAJO PEACEMAKER COURT FOR JUDGES, COMMUNITY LEADERS AND COURT PERSONNEL 8-9 (1982) [hereinafter MANUAL]. If the parties are unable to reach a mediated solution, they may agree to the peacemaker acting as arbitrator. *Id.* at 9-10.

196. Zion, *supra* note 4, at 101-02, 104; MANUAL, *supra* note 195, at 7-8, 11.

197. Zion, *supra* note 4, at 100-01.

198. MANUAL, *supra* note 195, at 10-11.

199. See Zion, *supra* note 4, at 101; MANUAL, *supra* note 195, at 11.

200. See Zion, *supra* note 4, at 100-01. See *supra* notes 69-74 and accompanying text (discussing extent to which those problems exist in the context of traditional mediation).

other judge,²⁰¹ vary widely in background,²⁰² but follow certain similar procedures: members of the extended families of the two primary disputants attend peacemaking sessions, everyone is allowed to speak, and the sessions often last for many hours until a consensus is reached.²⁰³ During the period from 1986 through 1990, Judge Cadman referred about fifty-three cases to peacemakers. Of these, mediation failed to resolve only two.²⁰⁴ This record suggests that the peacemaker courts can effectively meld traditional methods and nontraditional powers and protections.

With incomplete implementation of the system, however, the peacemaker courts have played a relatively minor role in resolving disputes, including contractual disputes. Moreover, even if the peacemaker court system is fully implemented at some time in the future, Navajos will need an alternative to mediation. At most, traditional mediation and peacemaker courts can become the fora for contractual disputes between Navajos. Non-tribal members are not, and probably never will be, compelled to participate in mediation sessions. Since World War II, Navajos have increasingly done business with Anglo-Americans off the reservation.²⁰⁵ The judicial system must remain the primary forum for resolving disputes arising out of those transactions.

B. Resolution by Adjudication

1. Creation of the Court System

In 1903, the federal government created an alternative to traditional means of dispute resolution on the Navajo Reservation: Courts of Indian Offenses. These courts had little real power. The judges were Navajos appointed by federal officials, few if any of the judges had formal legal education, they operated under rules promulgated by the Commissioner of Indian Affairs, and government agents reviewed their decisions.²⁰⁶ The courts primarily resolved petty criminal matters,²⁰⁷

201. Interview with Edward Martin, Administrator of the Navajo Judicial System, in Window Rock, Navajo Nation, Ariz. (May 10, 1991) [hereinafter Martin Interview].

202. They include a traditional Navajo who knows little English and a high school teacher, a Christian pastor and a traditional Navajo singer. Cadman Interview, *supra* note 63.

203. *Id.*

204. *Id.*

205. See *supra* text accompanying notes 170-71.

206. See Tso, *The Tribal Court Survives*, *supra* note 4, at 25; see also BRAKEL, *supra* note 4, at 10-11 (stating that on all reservations that had Courts of Indian Offenses, the judges were appointed by and responsible to the federal government).

207. The federal government prosecuted major crimes in federal court. See *infra* text accompanying note 222.

and seldom resolved civil disputes.²⁰⁸ Underfunding made even their law and order role largely symbolic.²⁰⁹

The tribe replaced the bare-bones federal court system with a more developed tribal system during the 1950s for several reasons. Intratribal considerations partly motivated the action. A successful tribal court system would strengthen the developing tribal government vis-à-vis the communities by making it the provider of law-and-order and the dispenser of justice.²¹⁰ Moreover, traditional dispute resolution could not deal adequately with the law-and-order problems, often alcohol related, posed by young adults. These individuals had weak community ties, had lived off the reservation during World War II and had to adapt to a wage-earning economy because of the inadequacy of the range.²¹¹

External relations, however, were probably even a more important spur to action. Navajo leaders feared that, if they did not have a legal system modeled on Anglo-American law, the states would assume jurisdiction on the reservation.²¹² The case of *Williams v. Lee*²¹³ highlighted the threat. A reservation trader sued a Navajo couple residing on the reservation in Arizona state court to enforce a debt. The Arizona Supreme Court upheld the state court's jurisdiction,²¹⁴ and the Navajos appealed to the United States Supreme Court.

The Tribal Council decided that it was important to show the highest Anglo court that its own court system offered a viable means of debt collection. The council assumed all costs of law enforcement on the reservation and created a new court system. The Chairman was given the power to appoint the jurists — seven trial judges and a chief justice. The court of appeals consisted of the chief justice and two trial court judges called by the chief justice to serve on specific cases. A jurist would serve until the age of seventy, subject to a two-year probationary period.²¹⁵

The Tribal Council's foresight proved accurate. The United States Supreme Court reversed the state court judgment, holding that the tribal courts had exclusive jurisdiction over the contract action when both parties resided on the reservation.²¹⁶ It stated: "The tribe itself

208. 3 Van Valkenburgh, *supra* note 67, at 43.

209. See Conn, *supra* note 191, at 334.

210. *Id.* at 340. See *supra* notes 159-63 and accompanying text (discussing growth of tribal government).

211. Conn, *supra* note 191, at 339. See *supra* notes 153-57 and accompanying text (discussing changes in economy).

212. See IVERSON, *supra* note 45, at 74-75; Conn, *supra* note 191, at 338-40.

213. 358 U.S. 217 (1959), *rev'g*, 319 P.2d 998 (1958).

214. *Williams v. Lee*, 319 P.2d 998, 1001-02 (1958), *rev'd*, 358 U.S. 217 (1959).

215. See IVERSON, *supra* note 45, at 75-76; Conn, *supra* note 191, at 359-65; Tso, *The Tribal Court Survives*, *supra* note 4, at 53.

216. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

in recent years greatly improved its legal system through increased expenditures and better trained personnel. Today [the courts] exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants."²¹⁷

The basic structure of the Navajo judicial system established in the late 1950s remained virtually intact until 1985.²¹⁸ By that year's Judicial Reform Act,²¹⁹ the Tribal Council rewrote much of the code concerning the legal branch, including replacing the court of appeals with a three-member supreme court.²²⁰ The changes wrought by that act are still in effect.

The mere fact that the Tribal Council created a judicial system reveals almost nothing about its impact or acceptance. The courts' jurisdiction provides one possible limitation on their influence. The narrower the jurisdiction, the fewer people and issues the courts may influence.

2. Jurisdiction

Navajo courts assert jurisdiction over disputes as broadly as permitted by federal law. That law tightly constrains the jurisdiction of all Native American courts over criminal prosecutions. It bars tribal courts from exercising power over non-Indians who commit crimes on the reservation.²²¹ Federal law also gives federal courts jurisdiction over thirteen specified felonies committed by a native defendant,²²² possibly foreclosing tribal jurisdiction over the same offenses.²²³ Finally, it prohibits tribes from imposing criminal penalties on their own members in excess of one year and a \$5000 fine.²²⁴

Federal law imposes fewer restrictions on the civil jurisdiction of tribal courts.²²⁵ As *Williams v. Lee* established, tribal courts have

217. *Id.* at 222; see Conn, *supra* note 191, at 354-63. The Supreme Court's decision in *Williams* has been described as the opening of "the modern era of federal Indian law" and as a "watershed." CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 1 (1987).

218. In 1978, the Council created a Supreme Judicial Council, which was abolished in 1985. See *infra* notes 262-67 and accompanying text.

219. Res. CD-94-85 (codified at NAVAJO TRIB. CODE CODE tit. 7 (Supp. 1984-85)).

220. NAVAJO TRIB. CODE tit. 7, § 301 (Supp. 1984-85). See generally U.S. COMM'N ON CIVIL RIGHTS, *ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT: HEARING HELD IN FLAGSTAFF, ARIZONA, AUGUST 13-14, 1987*, at 111-16 [hereinafter 1 HEARING] (testimony of Albert Hale, attorney, the principal author of the act).

221. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). In 1990, the United States Supreme Court also held that tribes could not exercise jurisdiction over nonmember Indians who commit crimes on reservations. *Duro v. Reina*, 495 U.S. 676, 684-88 (1990). That decision and the congressional action it spawned to fill the jurisdictional void it created are discussed below. See *infra* notes 253-59 and accompanying text.

222. 18 U.S.C. § 1153 (1988).

223. *Duro*, 495 U.S. at 680 n.1.

224. 25 U.S.C. § 1302(7) (1988).

225. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

exclusive jurisdiction over civil claims against tribal members arising on the reservation.²²⁶ Also, federal law generally does not prevent tribal courts from exercising jurisdiction over civil claims against nonmembers arising from activities on a reservation.²²⁷ Jurisdiction in other situations, such as a member's claim against a non-Indian arising from a contract entered and allegedly breached off-reservation, is more uncertain under federal law.²²⁸ Regardless, as a matter of comity, if a claim is filed in tribal court, a federal court must give that court the first opportunity to determine its jurisdiction by requiring a non-Indian defendant to exhaust all tribal remedies before the federal court reviews the tribal court's jurisdictional determination.²²⁹

Although federal law permits tribes to assert civil jurisdiction over claims against nonmembers, many tribes have declined to extend their courts' jurisdiction that far.²³⁰ The *dine'é* have shown no such reluctance. Broad exercise of jurisdiction expresses the power of the tribal government over its members and asserts Navajo sovereignty vis-à-vis other governments.²³¹ Assertion of jurisdiction over disputes in which one party is not a tribal member extends tribal court protection to tribal members doing business off the reservation.

The Tribal Council has given Navajo courts jurisdiction over "all civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation."²³² The only subjects excluded from the jurisdictional grant are certain actions against the tribe itself.²³³ The

226. 358 U.S. at 223; see COHEN, *supra* note 14, at 342 & n.106.

227. "Civil jurisdiction over such activities [activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *LaPlante*, 480 U.S. at 18. *But see* *Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians*, 866 F.2d 971, 972 (8th Cir. 1989) (court divided 5-5 on whether tribal court had jurisdiction over breach of contract claim by Indian subcontractor against non-Indian general contractor for work done on-reservation, thereby reinstating district court decision that tribal court lacked jurisdiction).

228. See COHEN, *supra* note 14, at 342, 354-57.

229. *LaPlante*, 480 U.S. at 15-16, 19; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

230. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 210 (1983).

231. See, e.g., *Sells v. Espil*, No. A-CV-15-89, slip op. at 11 (Navajo Aug. 14, 1990) ("In the process of litigation [over which tribal courts have exercised jurisdiction], Navajo law and Navajo sovereignty are strengthened"); *Deal v. Blatchford*, 3 Navajo Rptr. 159, 160 (Navajo 1982) ("the source of authority for tribal courts is the inherent sovereignty of their respective tribes . . . tribal court authority is coextensive with sovereignty of the Indian nation itself").

232. NAVAJO TRIB. CODE tit. 7, § 253 (Supp. 1984-85); see *Plummer v. Brown*, No. A-CV-03-89, slip op. at 4-5 (Navajo Mar. 23, 1989).

233. Amendments to the Navajo Sovereign Immunity Act, Res. CMY-28-88 (May 6, 1988) (to be codified at NAVAJO TRIB. CODE tit. 1, § 351), cited in *Plummer*, No. A-CV-03-89, slip op. at 5-10.

courts' territorial jurisdiction extends outside the reservation to, in many cases, land owned by non-Navajos.²³⁴

The courts' personal jurisdiction over defendants is similarly broad. The tribal code authorizes "personal jurisdiction over non-resident defendants to the extent allowed by Navajo due process."²³⁵ Although that due process protection arises under the Navajo Bill of Rights²³⁶

234. See *Sandoval v. Tinian, Inc.*, 5 Navajo Rptr. 215, 218 (Navajo D. Ct. 1986) (holding that the court has subject matter jurisdiction over claim against non-Navajo arising partially or entirely on fee-owned land, because land was located within eastern Navajo Agency and within a dependent Navajo Indian community).

235. *Plummer*, No. A-CV-03-89, slip op. at 6. The relevant code section was quoted above. See *supra* text accompanying note 232.

236. Because the United States Constitution does not apply to native tribes, *Talton v. Mayes*, 163 U.S. 376, 384 (1896), Congress passed the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341 (1988), in 1968 to require tribes to afford to their members many of the individual rights guaranteed in the Constitution and Bill of Rights. Several protections, including those provided by the Establishment Clause and the second, third, and seventh amendments, were excluded. 25 U.S.C. § 1302 (1988); see COHEN, *supra* note 14, at 666-70; DELORIA & LYTLE, *supra* note 230, at 126-30.

Like many tribes, the Navajo Nation opposed adoption of the ICRA, believing it to be "an intrusion upon tribal sovereignty." The Navajo Tribal Council adopted the Navajo Bill of Rights in 1967, Res. CO-63-67 (Oct. 9, 1967) (codified at NAVAJO TRIB. CODE tit. 1, §§ 1-8 (1977)), in part to try to forestall passage of the ICRA. See *Bennett v. Navajo Bd. of Election Supervisors*, No. A-CV-26-90, slip op. at 7-8 (Navajo Dec. 12, 1990).

After passage of the ICRA, individuals flooded the federal courts with suits against tribes alleging violations of its provisions. The United States Supreme Court, however, ended most of those suits by its decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). It reasoned that tribes were protected against suits in federal court by their sovereign immunity, unless Congress expressly limited or abrogated that immunity. The only federal relief granted by the ICRA is by a writ of habeas corpus, which is available only in instances of unlawful detention. Otherwise, tribal courts are the only possible avenue for enforcement of alleged violations of the ICRA. *Id.* at 58-59, 69-70. Subsequently, the Navajo Supreme Court held that the ICRA also did not explicitly authorize suits in tribal courts, and that sovereign immunity bars claims under the ICRA in tribal courts as well. See *TBI Contractors, Inc. v. Tribe*, No. A-CV-28-85, slip op. at 7-8 (Navajo Aug. 12, 1988).

About nineteen years after passage of the original Navajo Bill of Rights and about two years before the Navajo Supreme Court decided that claims under the ICRA were barred, the council rewrote and expanded the rights under the Navajo Bill of Rights. Res. CD-59-1986 (Dec. 11, 1986) (to be codified at NAVAJO TRIB. CODE tit. 1, §§ 1-9), reprinted in U.S. COMM'N ON CIVIL RIGHTS, ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT: HEARING HELD IN FLAGSTAFF, ARIZONA, JULY 20, 1988, at 145-46 [hereinafter 2 Hearing]; see *Bennett*, No. A-CV-26-90, slip op. at 8-9 (discussing amendment). The tribal law now includes almost all of the rights in the federal Bill of Rights (the only two excluded are the protection against forced quartering of troops and the right to presentment or indictment of a grand jury), modifies some (the right to bear arms is "for peaceful purposes"), and adds others (sex equality and rights to the benefits of membership in the tribe). See 2 HEARING, *supra*, at 145-46. The tribal law also guarantees rights not protected by the ICRA, including appointment of counsel for indigent criminal defendants. Cf. 25 U.S.C. §§ 1302-1303 (1988).

The Navajo courts have only limited power to award monetary compensation for

instead of the due process clauses in the amendments to the United States Constitution,²³⁷ the Navajo Supreme Court uses a minimum contacts analysis consistent with that employed by the United States Supreme Court to determine whether a tribal court's exercise of jurisdiction is appropriate.²³⁸ Under this type of analysis, Navajo courts are likely to assert personal jurisdiction over all tribal members who are sued for breach of a contract, and over non-tribal members when the plaintiff resides on the reservation or the performance contemplated in the contract would occur partly on the reservation or affect the reservation's resources or people. Unlike traditional mediators and peacemakers, therefore, tribal courts routinely resolve disputes arising out of broken promises when only one of the parties is a tribal member.

Simply asserting jurisdiction over transactional disputes, however, does not satisfy the Tribal Council's purposes in creating the court system. Aggrieved parties must file actions in the Navajo tribal courts for broad assertions of jurisdiction to make any difference. This will not happen unless aggrieved parties have confidence in the courts.

The lack of on-reservation business makes it especially important for the Navajo judicial system to instill confidence in off-reservation businesspeople. Business confidence in a legal system stems largely from the predictability of its decisions.²³⁹ Merchants, like any people making decisions requiring forecasts of the behavior of others, require universal rules that are applied consistently. The goal of consistent application of universal rules is one of the distinguishing characteristics of nontraditional legal systems.²⁴⁰ The last two sections of part V discuss two issues related to the consistent application of legal rules. Part VI analyzes the Navajo rules related to promissory disputes.

violation of the Navajo Bill of Rights, see *Plummer*, No. A-CV-03-89, slip op. at 18-21, but full authority to award declaratory, mandamus or injunctive relief. NAVAJO TRIB. CODE tit. 1, § 354(g) (Supp. 1984-85) (to be recodified as § 354(f)).

237. U.S. CONST. amends. V, XIV.

238. See *Sells v. Espil*, No. A-CV-15-89, slip op. at 7-11 (Navajo Aug. 14, 1990) (holding that although there may not have been many contacts, when the plaintiffs, both of whom were nonresidents and one of whom was a tribal member, contracted to provide brokerage services to the defendant nonresident Anglo-Americans in connection with the sale of land to the tribe, and when each of the defendants made at least one trip to the reservation in connection with the sale, sufficient contacts had occurred for the district court to have jurisdiction over the defendants).

239. See *Trubek*, *supra* note 21, at 6-7, 13.

240. See *id.* at 11-15 (describing Weber's theories concerning Western legal systems and their role in the development of capitalism). Obviously, courts may fall short of the goal, but many traditional societies have few if any universal rules and no means of obtaining consistent application of those rules which do exist.

3. Training and Education

In 1959, few Navajo advocates or judges had any legal training.²⁴¹ If that were still true, businesspeople would have little confidence in the system.

Even today, few Navajos have completed law school. Two legal aid services²⁴² founded during the 1960s, however, provided systematic training for non-lawyers, called advocates. Advocates' improved advocacy required the judges in turn to learn more Anglo-American law.²⁴³

Practice in the Navajo courts now requires membership in the Navajo Nation Bar Association and passage of the Navajo bar examination. To sit for the bar examination, a candidate must be a member of a state bar or, if a Navajo, must have graduated from a law school or a certified Navajo bar training course or served at least a six-month apprenticeship.²⁴⁴ The bar exam has become much more difficult over the last two decades, and the passage rate of new advocates is declining.²⁴⁵

The background and training of the jurists have changed in a similar direction. The Judicial Reform Act of 1985 spelled out qualifications for judicial appointment, including at least two years' work experience in a law-related area.²⁴⁶ One associate justice and one district court judge have law degrees,²⁴⁷ and many of the jurists had lengthy experience as advocates before appointment.²⁴⁸ After Tom Tso became

241. In the early 1950s, the tribe had only one law school graduate, and he was a government employee, not a judge or practitioner before the courts. Conn, *supra* note 191, at 348 & n.105.

242. One of them, Dinebeliina Nahiilna Be Agaditahe (DNA), which roughly translated means "Lawyers for the Development of the People," Richard P. Fahey, *Native American Justice: The Courts of the Navajo Nation*, JUDICATURE, June-July 1975, at 10, 15, played an especially important role in the development of Navajo law and in representing Navajos in the local state and federal courts. See IVERSON, *supra* note 45, at 92-95.

243. See Fahey, *supra* note 242, at 15; Tso, *Decision Making in Tribal Courts*, *supra* note 4, at 231.

244. See Tso, *Decision Making in Tribal Courts*, *supra* note 4, at 229; Tso, *The Tribal Court Survives*, *supra* note 4, at 54.

245. Cadman Interview, *supra* note 63. Judges and attorneys generally praise the work of advocates, although not unreservedly. See *id.* (stating it is uncertain whether attorneys have an advantage; generally, practitioners are more aware of Navajo tradition than Anglo-American attorneys, but attorneys have an advantage in technical cases); Interview with William P. Battles, Attorney, in Window Rock, Navajo Nation, Ariz. (May 15, 1991) [hereinafter Battles Interview] (stating that many lay advocates are better trial advocates than are some of the attorneys); Lally Interview, *supra* note 13 (stating that advocates are of mixed quality; the work of some is equivalent to attorneys, others do inferior work).

246. NAVAJO TRIB. CODE tit. 7, § 354(4) (Supp. 1984-85).

247. Telephone Interview with Edward Martin, Administrator of the Navajo Nation Judicial Branch (July 2, 1991) (stating that Justice Austin and Judge Yazzie have graduated from law schools).

248. For example, recently retired Chief Justice Tom Tso acted as an advocate for

chief justice in 1985,²⁴⁹ the quality of the judiciary has improved markedly. He instituted or formalized programs of sending new appointees to training sessions, providing continuing education opportunities for all jurists, and conducting annual evaluations of all district court judges, whether or not they had probationary status.²⁵⁰ The educational background of the Navajo practitioners and judges certainly does not match, and their training may not match, that of lawyers and judges in local state and federal courts, but the gap is narrowing.

The improved training and education of the Navajo professionals, however, does not mean loss of their traditional beliefs.²⁵¹ For example, they may retain their pragmatic orientation,²⁵² as shown by the outrage which Navajo jurists expressed over the United States Supreme Court decision in *Duro v. Reina*.²⁵³ In *Duro* the Court held that Congress had not intended for tribal courts to have criminal jurisdiction over nonmember Indians who commit crimes on Indian reservations,²⁵⁴ despite the Court's uncertainty over whether either state or federal courts have jurisdiction over most such crimes. The issues of state and federal court jurisdiction were not before the Court; therefore, it refused to address the possible jurisdictional void.²⁵⁵

Whereas the United States Supreme Court dissenters argued that the majority erred in its interpretations of congressional intent and prior precedents,²⁵⁶ Navajo jurists took a much more pragmatic ap-

eleven years before being appointed the judge for the Window Rock District in 1981 and the Chief Justice in 1985, NAVAJO TIMES TODAY, Oct. 15, 1985, p. 1, col. 2, and Judge Wayne Cadman worked as an advocate and prosecutor for twelve years before being appointed the judge of the Chinle District in 1985. Cadman Interview, *supra* note 63.

249. See NAVAJO TIMES TODAY, Oct. 15, 1985, at 1, col. 2.

250. See Tso, *Decision Making in Tribal Courts*, *supra* note 4, at 229; Tso, *The Tribal Court Survives*, *supra* note 4, at 53-54.

251. But see Conn, *supra* note 191, at 369 (stating that as Navajo legal specialists have become professionalized, they also have become relatively immune from pressures from the community).

252. See *supra* notes 91-92 and accompanying text (pragmatic nature of Navajo socioreligious beliefs). See *infra* notes 339-40 and accompanying text (manifestation of pragmatic orientation in transactional law disputes).

253. 495 U.S. 676 (1990).

254. *Id.* at 684-88.

255. *Id.* at 696-98. The dissenters argued that the existence of a void was directly relevant, because Congress probably did not intend to create a void in which no sovereign could exercise power. If, as they believed, state and federal courts lacked jurisdiction over minor crimes committed by nonmember Indians, then Congress must have intended tribes to exercise jurisdiction. *Id.* at 705-06 & n.3 (Brennan, J., with Marshall, J., dissenting).

256. *Id.* at 698. Justices Brennan and Marshall presented a stronger doctrinal argument than did the majority. The majority relied primarily on the Court's prior holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribes lacked criminal

proach. Many nonmember Indians reside on the Navajo and other reservations,²⁵⁷ and the decision created a law enforcement nightmare. The Navajos wondered how the high court could hand down a decision with no apparent concern about the practical consequences.²⁵⁸ Tribal leaders, including Navajo jurists, expressed their outrage to Congress, which responded by passing legislation allowing tribal courts to exercise criminal jurisdiction over nonmember Indians.²⁵⁹

4. Judicial Independence

Since the 1950s, Navajo political leaders have realized that the perception that the judiciary is independent of the political branches and the electorate would help to instill confidence in Anglo-Americans.²⁶⁰ If judges followed the dictates of the political branches or the electorate when a contractual dispute arose, businesspeople could not feel confident in a predictable result. Accordingly, the council provided in 1959 for permanent tenure (until retirement age) for jurists, subject to a two-year probationary period, instead of making the positions subject to reelection or reappointment.²⁶¹

Despite the provision for permanent appointment, in its early years, the court system was clearly subordinate to the other branches of

jurisdiction over non-natives, and on its prior reasoning in *United States v. Wheeler*, 435 U.S. 313 (1978), permitting a tribe and the United States to prosecute a tribal member for the same offense without offending the double jeopardy clause. *Duro*, 495 U.S. at 684-90. The dissenters pointed out that both of those decisions rested on interpretations of congressional acts, and that a series of acts indicated a congressional intent to treat non-natives differently than nonmember Indians for purposes of a tribe's criminal jurisdiction. *Id.* at 700-06.

257. The Navajo Nation estimated in 1989 that over 11,000 nonmembers resided within its territorial jurisdiction. *NAVAJO NATION REPORT*, *supra* note 9, at 4. A large percentage are probably nonmember Indians as opposed to other Americans.

258. Interview with Justices (Tso, Austin, Bluehouse), *supra* note 66; Cadman Interview, *supra* note 63.

259. Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.C.A.N. (102 Stat.) 646 (making permanent the one-year amendment of 25 U.S.C. § 1301 effected by Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 1990 U.S.C.C.A.N. (101 Stat.) 1856, 1892-93).

260. See *IVERSON*, *supra* note 45, at 76. When considering the resolution that created the Navajo judicial system council, members recognized that "[i]t is very important that politics not play a part in our judicial system or in any way influence them to make decisions." *Id.* (quoting from minutes of debate).

261. See *supra* text accompanying note 215. The decision not to subject jurists to reelection or reappointment is applauded to this day. See *Battles Interview*, *supra* note 245 (stating that a major reason that Navajo courts are superior to other tribal courts is that the judges receive life-time appointments, thereby removing much of the political influence); cf. *DELORIA & LYTLE*, *supra* note 230, at 137 (stating that many native judges do not possess the independence of Anglo-American judges: they are appointed and serve at the pleasure of political leaders, and "[c]omplaints of political interference are commonplace and recalls and impeachments are not infrequent").

government. Jurists, perhaps accustomed to BIA review of their decisions,²⁶² frequently asked the Tribal Chairman or his aides how they should rule in particular cases.²⁶³

In the late 1970s, the political branches quashed the judiciary's initial attempts to achieve autonomy and treatment as a coequal branch of government. The Court of Appeals handed down three controversial decisions in quick succession.²⁶⁴ Two invalidated highly publicized and politicized Tribal Council actions despite the lack of a written constitution that the actions could have violated,²⁶⁵ and the third held that the executive department could not dismiss an employee of the judicial branch.²⁶⁶

On May 4, 1978, the Tribal Council responded by creating the Supreme Judicial Council, consisting of five council members and three judges.²⁶⁷ It was empowered "to hear challenges of Navajo Court of Appeals rulings regarding the validity of any action of the Tribal Council or its advisory committee"²⁶⁸ and the council retained the "ultimate authority to overturn a decision of the Supreme Judicial

262. See *supra* text accompanying note 206.

263. Battles Interview, *supra* note 245.

264. See generally IVERSON, *supra* note 45, at 208-11; Ziontz, *supra* note 4, at 18-23.

265. See *Yazzie v. Navajo Tribal Bd. of Elections*, 1 Navajo Rptr. 213, 217 (Navajo 1978) (rejecting council's redistricting plan which "may have satisfied minimum federal requirements but in no way . . . satisf[ied] the unique requirements of the Navajo electorate"); *Halona v. MacDonald*, 1 Navajo Rptr. 189 (Navajo 1978) (invalidating council's decision to pay the legal fees of F. Lee Bailey, who had successfully defended MacDonald against federal charges of misappropriation of funds, because the council had violated due process by ignoring its own preexisting procedural rules).

266. *Gudac v. Marianito*, 1 Navajo Rptr. 385 (Navajo 1978). Under Anglo-American standards, each decision rested on shaky legal ground. In *Halona*, the Court of Appeals grounded its right of judicial review on violation of the due process guarantee in the federal Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1988). See *Halona*, 1 Navajo Rptr. at 209. The court did not adequately explain, however, why the council's failure to follow its own earlier-adopted procedural rule amounted to a violation of due process. See Ziontz, *supra* note 4, at 20-22.

The court could not even rely on the federal act in *Yazzie*, because it acknowledged that the council's reapportionment plan may have satisfied federal standards. *Yazzie*, 1 Navajo Rptr. at 217. It appeared merely to be substituting its own political judgment for the council's. *Id.* ("Any plan adopted for the Navajo Nation must take into account chapter boundaries, agency boundaries, district grazing boundaries and other geographic symbols of the traditional clan relationship of the Navajo people.").

Finally, *Gudac* did not consider that the Tribal Council had created the court system. Presumably, with the power to create went the power to determine who set the terms for employment of judicial branch employees.

267. Ziontz, *supra* note 4, at 24; see also 1 HEARING, *supra* note 220, at 71 (testimony of Peter Iverson) (stating that *Yazzie* was a significant factor in the creation of the Supreme Judicial Council); *id.* at 85-86 (testimony of Richard Hughes) (stating that *Halona* "led almost directly" to the creation of the Supreme Judicial Council).

268. Ziontz, *supra* note 4, at 24.

Council.”²⁶⁹ Later in 1978, Chairman Peter MacDonald discharged the trial judges who had decided *Halona* and *Yazzie*, both of whom were still on probationary status.²⁷⁰ Finally, in 1979, MacDonald named Nelson McCabe, a former council member and political ally, as acting chief justice.²⁷¹

These measures apparently succeeded. The Supreme Judicial Council did not meet after 1979,²⁷² apparently because there was no need. The courts did not assert the right of judicial review of council action again for over ten years.

In 1978, MacDonald had controlled the executive and legislative branches.²⁷³ The political situation had changed dramatically by 1989, when the Navajos’ highest court again championed the judiciary’s autonomy and right to review the actions of the political branches. Early in the year, the crisis following the exposure of MacDonald’s bribery and kickback schemes erupted.²⁷⁴ Time and again, MacDonald and the council, the majority of whose members had turned against him, looked to the tribal courts, and ultimately to the Navajo Supreme Court, to determine their rights.²⁷⁵ The Navajo Supreme Court even-

269. *Id.* (quoting Res. CMY-39-78 (May 4, 1978)).

270. See 1 HEARING, *supra* note 220, at 89-91 (testimony of Richard Hughes); *id.* at 97-98 (testimony of former Judge Merwin Lynch); *id.* at 109 (written statement of attorney Eric Eberhard).

271. *Id.* at 124 (testimony of Daniel Deschinny, Navajo lay advocate and representative of McCabe); see also Battles Interview, *supra* note 245 (stating that McCabe was a political flunky).

272. See 2 HEARING, *supra* note 236, at 59 (written testimony of current Chairman Peterson Zah). During the less than two years in which it was active, the Supreme Judicial Council heard only about three cases. 1 HEARING, *supra* note 220, at 112 (testimony of Albert Hale, attorney).

273. See *supra* notes 175-78 and accompanying text (discussing power of Chairman and MacDonald’s charisma).

274. See *supra* notes 178-81 and accompanying text (discussing MacDonald’s suspension as Chairman and conviction on criminal charges).

275. The various judicial decisions are far too numerous, and the surrounding events far too complicated, to discuss in this article. The initial court decisions, however, are illustrative.

After the Tribal Council placed MacDonald on administrative leave on February 17, 1989, *A Tribe at War; Amid Charges of Graft, a Battle for Chieftdom Wounds Navajo Tradition*, CHI. TRIB., Mar. 27, 1989, at § 5, at 4, he filed an action to enjoin enforcement of the resolution on February 21. The judge of the Kayenta District Court, the brother-in-law of MacDonald’s wife, granted a temporary restraining order that day. See *Plummer v. Brown*, No. A-CV-03-89, slip op. at 2 (Navajo Mar. 23, 1989); *Navajo Leader Out of Power*, ARIZ. REPUBLIC, Feb. 25, 1989, at B1. On March 2, the supreme court vacated the restraining order, dismissed the suit under the Navajo Sovereign Immunity Act as involving an action against the Navajo Nation, and prohibited the trial judge from presiding over any other proceeding in which MacDonald had an interest. *Plummer*, No. A-CV-03-89, slip op. at 2-3, 5-10.

MacDonald, however, refused to submit to administrative leave, contending that the

tually ruled that the Chairman's authority was derived from the Tribal Council, not from the electorate, as MacDonald had argued, and that the council could withdraw or limit that authority, even to the extent of placing MacDonald on administrative leave.²⁷⁶

Perhaps emboldened by the deference paid to it during the crisis, the Navajo Supreme Court handed down two decisions designed to bolster the judiciary's autonomy and authority. First, it creatively reinterpreted relevant provisions of the tribal code to eliminate a Tribal Chairman's discretionary power over probationary judges. The supreme court's interpretation gave the central role in deciding whether a probationary judge should be made permanent to the Judiciary Committee of the Tribal Council in conjunction with the chief justice.²⁷⁷

Second, the Navajo Supreme Court again expressly asserted the right of judicial review of council actions,²⁷⁸ the same assertion which had caused the political branches to rein in the courts in 1978.²⁷⁹ This time, however, the court found firmer legal footing. It held that the

council lacked the power. *Navajos Ask Ruling on Leader; Tribal High Court May Decide Today*, ARIZ. REPUBLIC, Mar. 1, 1989, at B1. The Attorney General's office, which supported the Tribal Council's position, filed an action in the Window Rock District Court to enforce the resolution. MacDonald petitioned the supreme court to block the district court from considering the action, arguing that the Navajo Sovereign Immunity Act precluded jurisdiction, just as it had barred jurisdiction over his suit against the Tribal Council. *MacDonald v. Yazzie*, No. A-CV-08-89, slip op. at 2 (Navajo Mar. 24, 1989). The supreme court disagreed. Whereas MacDonald's suit had been against council members performing their authorized legislative functions, the complaint filed against MacDonald alleged that MacDonald was continuing to perform duties over which he had been stripped of authority. The former was against council members acting in their official capacities; the latter against an official allegedly acting *ultra vires*. *Id.* at 3.

276. *Navajo Nation v. MacDonald (In re Certified Questions II)*, No. A-CV-13-89, slip op. at 20-23 (Navajo Apr. 13, 1989).

277. *See id.*, slip op. at 3-10. Under the code, the Chief Justice recommends to the Judiciary Committee whether a probationary judge should be retained, and then the Judiciary Committee makes its recommendation to the Chairman. The code provides that if the Judiciary Committee recommends that a probationary judge be terminated, the Chairman "may" do so. The decision reinterpreted "may" to mean "shall." *Id.*, slip op. at 3-5. The code also provides that once the Judiciary Committee has recommended whether to make a probationary judge permanent, "the Chairman, at his discretion, may appoint any judges recommended by the Judiciary Committee to permanent positions." NAVAJO TRIB. CODE tit. 7, § 355(d) (Supp. 1984-85), *quoted in MacDonald*, No. A-CV-13-89, slip op. at 5. The court stated that this meant that the Chairman could disclose his reasons for recommending against appointment to the Tribal Council, but if the council followed the recommendation of its Judiciary Committee, the Chairman could not refuse to appoint. *Id.*, slip op. at 7-10.

278. *See Bennett v. Navajo Bd. of Election Supervisors*, No. A-CV-26-90 (Navajo Dec. 12, 1990).

279. *See supra* notes 264-72 and accompanying text.

Tribal Council intended certain organic acts, including the Navajo Nation Bill of Rights,²⁸⁰ to have precedence over conflicting laws, even if the conflicting laws were passed subsequently.²⁸¹ Having grounded judicial review in these acts, the Navajo Supreme Court then held that the requirement that a candidate for President or Vice President "[m]ust have served in an elected Navajo tribal office . . . or must have been employed within the Navajo tribal organization" violated the rights embodied in the Navajo Nation Bill of Rights to due process and equal protection.²⁸²

These two recent decisions have not provoked a strong adverse reaction. Apparently, the courts, at least for the indefinite future, have won their independence.

This independence is not a victory for the Anglo-American principle of separation of powers. In trying to formulate a convincing argument for judicial independence and the right of judicial review, the Navajo courts have not been able to draw heavily on either Navajo or Anglo-American traditions. The *dine'é* traditionally did not have an independent judiciary; the *naat'aanii* acted as both political leaders and mediators of disputes.²⁸³ Many tribes, possibly with similar traditions, still have little if any separation between their political and judicial bodies.²⁸⁴ Constitutional governments do not provide a more useful model, because the constitution is invoked as the basis for autonomy and judicial review.²⁸⁵ The Navajos also have not followed the British courts which, in the absence of a written constitution, do not assert the power of judicial review over acts of Parliament.²⁸⁶ Instead, the Navajo Supreme Court has fashioned its own rationale for review,

280. See *supra* note 236.

281. *Bennett*, No. A-CV-26-90, slip op. at 10-11.

282. *Id.*, slip op. at 13-19 (due process); *id.*, slip op. at 20-22 (equal protection).

283. See *supra* text accompanying notes 59, 64. This has not prevented the courts from engaging in revisionist history:

Our right to pass upon the legality or meaning of these actions has been questioned in certain places but never by the Council or its Chairman. That is because they have 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 principle from the white man. They have carried it with them throughout history.

The style and the form of problem-solving and dispensing justice has changed over the years but not the principle. Those appointed by the People to resolve their disputes were and are unquestioned in their power to do so.

Halona v. MacDonald, 1 Navajo Rptr. 189, 205-06 (1978).

284. See *Brown v. Rice*, 760 F. Supp. 1459, 1460 (D. Kan. 1991) (stating that the Tribal Council for the Prairie Band of Potawatomi Indians is also the tribe's court and executive); Brandfon, *Tradition and Judicial Review*, *supra* note 4, at 106-07.

285. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803).

286. See, e.g., *Ziontz*, *supra* note 4, at 16.

which gains support from the recent events demonstrating the importance of a strong and independent judiciary.

C. *Evaluation of Navajo Dispute Resolution*

As a strategy for incorporating elements of foreign dispute resolution while preserving important components of their own, the Navajos have established two systems of dispute resolution. In one, disputes between Navajos are resolved by mediation, whether through traditional means or in the peacemaker courts. In the other, open to both intratribal disputes and disputes in which at least one party is not a tribal member, disputes are resolved through litigation.

Offering two alternative types of dispute resolution does not guarantee that Navajo dispute resolution is effective. In many traditional societies, the great majority of the populace rejects efforts to impose foreign judicial systems or rules. Any attempt to enforce the novel rules, whether by traditional or nontraditional institutions of formal dispute resolution, often results in the break down.²⁸⁷

No statistics are available to determine whether Navajos on the whole are pleased with mediation-based dispute resolution, although the record of the peacemaker courts in Judge Cadman's district suggests that those who use it emerge reasonably content. Because the *dine'é* have not attempted to impose nontraditional laws in traditional dispute resolution, and because no person is forced to mediate before a community leader, those who choose to resolve disputes in the traditional manner almost certainly believe that it works. Peacemaker courts will remain a relatively unimportant means of resolving disputes, however, until they are established throughout the Navajo Nation.

Whereas no data show the level of Navajo satisfaction with mediation-based dispute resolution, a study completed in 1990 by a federal judge and an academic concluded that Navajos give high marks to their court system. Although Navajos engaged in "healthy debate" over individual issues, "no Navajo interviewed by the task force condemned the system as it exists today."²⁸⁸

Attorneys who are familiar with Navajo and non-Navajo courts generally agree with the conclusions of the populace. They unanimously state that the quality of justice rendered in the Navajo courts has improved tremendously during the 1970s and especially the 1980s.²⁸⁹

287. See KULCSÁR, *supra* note 20, at 144-45.

288. NAVAJO TIMES, July 19, 1990, at 1, col. 1.

289. See 1 HEARING, *supra* note 220, at 83 (testimony of Richard Hughes, former director, Dinebeilina Nahilna Be Agaditahe (DNA) (stating that during the 1970s, "the quality of the Navajo judiciary and the Navajo justice system overall improved enormously"); Battles Interview, *supra* note 245 (stating that when he started practicing in the Navajo courts 16 years ago, it was barely a legal system; now it is a strong institution

They disagree on whether the tribal system provides a level of justice equivalent to Arizona and New Mexico state courts;²⁹⁰ any comparison, however, may be meaningless, considering the different needs of the state and tribal systems. The important point is that the Navajo court system has made tremendous strides in a little more than thirty years, and, as a still-novel institution, will probably continue to improve, regardless of the measuring stick used.

VI. *Promissory Liability in the Navajo Nation*

In addition to its means of dispute resolution, a legal system is judged by the substantive laws or customs which govern behavior. Navajo leaders believe that they must create an environment favorable to non-Navajo businesspeople, while maintaining sufficient protections against exploitation. Effective promissory laws and customs must help to achieve these goals. This part of the article analyzes these laws and customs.

Of course, well-crafted contract or commercial laws are insufficient by themselves to achieve the goals of the leadership. The Navajo Nation faces many obstacles to development. Some obstacles are non-governmental, including attitudes that inhibit capital accumulation among Navajos.²⁹¹ Others could be corrected, at least in part, by the Tribal Council. It needs to improve education, allow commercial enterprises to acquire secure real estate interests that could be mortgaged to lenders,²⁹² streamline procedures for obtaining the permits necessary

helping to hold the tribe together); Hynes Interview, *supra* note 17 (stating that when he started practicing in the early 1970s, there was "not much organization, not much training, it was purely a political job and it has improved substantially since then"; Justices Tso and Austin have "brought a lot to the bench as far as the ability to write decisions"); Lally Interview, *supra* note 13 (stating that the quality of the judicial system has improved tremendously since 1978, especially since Tso became chief justice); Mason Interview, *supra* note 109 (stating that the quality of the judicial system and judges has improved substantially over the last ten years).

290. Compare 1 HEARING, *supra* note 220, at 83 (Hughes testimony) ("[I]n many of the Navajo courts on the reservation one could have as good a hearing of an important or complex case as one could expect to get in the average State court in New Mexico.") and *id.* at 108 (written testimony of Eric Eberhard) ("[T]he courts of the Navajo Nation are as competent as or more competent than the New Mexico state courts on a case-by-case basis") with *id.* at 167-68 (testimony of attorney Larry Yazzie) (stating that judges do not have adequate training) and Hynes Interview, *supra* note 17 (stating that although the quality of the supreme court justices has improved tremendously, the quality of the district court judges remains very uneven).

291. See *supra* notes 106-10 and accompanying text.

292. See GILBREATH, *supra* note 51, at 60, 73; Mason Interview, *supra* note 109 (stating that the only real estate lien that a lender can obtain is on the commercial borrower's tenant's interest (because the tribe owns the land), and lenders place little value on a leasehold mortgage).

to open a business on the reservation,²⁹³ and expand the waiver of sovereign immunity. The present exceptions to the immunity are not generally applicable to breach of contract actions against the government.²⁹⁴ Because the tribal government plays such a major role in the economy and beneficially owns so many assets, including all the land of the reservation, sovereign immunity poses a major obstacle to business development.²⁹⁵

A. *Traditional Promissory Customs*

Navajo customs applicable to disputes over broken promises were discussed above.²⁹⁶ Regardless of how well those customs work to regulate intratribal transactions, merchants would find them totally

293. See Shapiro, *supra* note 15, at 26 (describing businessman who was able to obtain loan for off-reservation business in 30 minutes but who has been struggling for six years to obtain all approvals and guarantees to build a fast-food restaurant on the reservation); NAVAJO TIMES TODAY, Oct. 2, 1985, at 1, col. 4 (stating that current commercial lease approval process takes 2-10 years).

294. NAVAJO TRIB. CODE tit. 1, § 354(b), (c), (f) (Supp. 1984-85). The only exceptions possibly relevant to breach of contract actions are for actions explicitly authorized by federal or tribal law and those covered by the tribe's liability insurance. No general law authorizes breach of contract actions against the tribe, see *TBI Contractors, Inc. v. Navajo Tribe*, No. A-CV-28-85, slip op. at 7-9 (Navajo Aug. 12, 1988), and the tribe has not been covered by liability insurance against breach of contract actions. See *TBI Contractors, Inc. v. Navajo Tribe*, No. A-CV-28-85 (Navajo Aug. 12, 1988); 1 HEARING, *supra* note 220, at 150-51, 155-57 (testimony of attorney Robert Wilson) (stating that managers of arts and crafts trading post were barred by sovereign immunity from bringing breach of contract claim against the tribe arising out of events occurring in early 1983, and when the tribe sued them for breach of contract and tort, they could not assert a counterclaim for breach of contract); Hynes Interview, *supra* note 17 (stating that tribe breached construction management contract with his client and asserted sovereign immunity as a defense against threatened lawsuit, placing his client "in a bad, bad bargaining position").

295. The Navajo Supreme Court has joined the chorus of voices urging the Tribal Council to waive sovereign immunity for contract disputes because of the effect on development. While ruling against a contractor's claim against the Navajo Nation because of sovereign immunity, the court stated:

One of the most severe problems facing the Navajo Nation is that of unemployment caused by the lack of economic development within the Navajo Nation. One path in which the Navajo Nation may strengthen its economic base is by drawing companies onto Navajo Indian Country. If the Navajo Nation is to compete with the states for industrial and business contracts, the Navajo Tribal Council must allow for contractual waivers of the tribe's immunity from suit. The Navajo Tribal Council may achieve this contractual waiver of immunity from suit through an amendment to the Navajo Sovereign Immunity Act, or through the inclusion of individual waivers written into each contract. The Navajo Nation must realize that private corporations will not choose Navajo Indian Country to do business on, unless they know that they will have a forum in which they will receive a fair hearing in the event of a contract dispute.

TBI Contractors, No. A-CV-28-85, slip op. at 12.

296. See *supra* notes 88-103 and accompanying text.

unacceptable. The absence of defined rules would make it difficult for merchants to predict the outcomes of disputes with sufficient certainty. The Navajo courts, therefore, cannot simply incorporate traditional customs in deciding promissory disputes if they wish to encourage business with Navajos.

B. Transactional Law in the Courts

The Navajo tribal courts instead have adopted an Anglo-American model of transactional (contract, commercial, and consumer) law, with relatively few incorporations of traditional promissory law. The first subsection below discusses the reasons for the adoption of Anglo-American transactional law, the second the extent to which traditional Navajo principles remain, and the final subsection a possible modification of the Navajo Nation's transactional laws, designed to accommodate traditional promissory customs in the courts.

1. Reasons Behind Adoption of Anglo-American Transactional Law

Since the tribal courts came into existence, the tribal code has directed that courts choose from the possible sources of substantive law in the following order of priority: applicable federal law, tribal statutory law, tribal customs, and last, if the courts elect, the laws of the state in which the dispute arises.²⁹⁷ When no statute controls, selection of the substantive law to be applied to a particular dispute forces Navajo courts to choose whether to adopt a Navajo custom as a rule of law. The same type of choice frequently faces courts of all intermediate nations.²⁹⁸

Despite the tribal code's source of law provision, court advisors, almost all Anglo-American, discouraged judges from looking to Navajo customs to decide cases during the courts' early years.²⁹⁹ As a result,

297. NAVAJO TRIB. CODE tit. 7, § 204 (1977 & Supp. 1984-85).

298. KULCSÁR, *supra* note 20, at 109-17.

299. One author wrote:

The codification and enunciation of custom as law was given lip service but not meaningful encouragement. Judicial advisors and tribal attorneys instead retreated to encouragement of informality at stages of litigation that the advisors apparently thought would allow the tribal court to implement traditional Navajo ways, concepts of harmonization that the advisors had heard about. . . .

. . . .
It seems fair to say that Navajo leaders were badly advised in their wholesale acceptance of Anglo-American common law. Clearly, they have not been shown the opportunities available to them to change that substantive law to meet expectations of Navajo people that were still relevant to them on a day-to-day basis. The theme enunciated at the judicial training sessions and the portrayal of white law as *the* law had clearly the contradictory effect

the early reported decisions contain few references to Navajo customs.

That is no longer true. The reported decisions reflect an increasing use of customs during the 1980s, in almost all fields of law. The courts have relied on Navajo customs in establishing the Navajo common law concerning many, probably most, family law issues.³⁰⁰ In the tort area, the courts have permitted wrongful death actions and adopted comparative negligence principles by extrapolating these doctrines from traditional practices.³⁰¹ Property interests frequently derive from traditional customs.³⁰² During the process, customs are transformed into common law, as happened in England centuries ago.³⁰³ By endorsing the customs as law, tribal courts help to preserve tribal cultures and values against "the ever-encroaching norms and procedures of the dominant (white) majority."³⁰⁴

of convincing sincere and perceptive Navajo leaders that acceptance of Anglo-American substantive law was a requisite to maintenance of Tribal independence from intrusion of the state and federal systems.

1 VICENTI, *supra* note 89, at 182-83, 184-85, *quoted in* Conn, *supra* note 190, at 211.

300. See Brandfon, *Tradition and Judicial Review*, *supra* note 4, at 1009 nn.109-12 (citing four decisions of the Navajo Supreme Court from the 1980s applying Navajo customs to family law matters).

301. See *Cadman v. Hubbard*, 5 Navajo Rptr. 226 (Navajo D. Ct. 1986) (adopting "pure" comparative fault doctrine by interpreting code language and referring to traditional idea of compensating victims for loss); *Benally v. Navajo Nation*, 5 Navajo Rptr. 209 (Navajo D. Ct. 1986) (applying the traditional doctrine of restitution when a Navajo accidentally kills another to require full compensation in the event of wrongful death).

302. See, e.g., *Hood v. Bordy*, No. A-CV-07-90, slip op. at 11-12 (Navajo Feb. 22, 1991) (holding that although the Navajo Nation owns all of the land on the reservation, someone who builds an improvement has ownership rights in it such as the rights of sale or other disposition, removal of the improvement, and denial of access to others); *In re Estate of Waunaka*, 5 Navajo Rptr. 79, 81 (Navajo 1986) (holding that a Navajo has a possessory use interest in the land within her ancestors' customary use area); *In re Estate of Apachee*, 4 Navajo Rptr. 178, 181-82 (Navajo D. Ct. 1983) (Tso, J.) (dividing personal property into productive and nonproductive goods for purposes of inheritance).

303. Then-District Court Judge Tso quoted from *Blackstone's Commentaries* in describing the transformation:

When I call these parts of our law *leges non Scriptae* [unwritten law], I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth . . . But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice in books of reports and judicial decisions, and in the [treatises] of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and their universal reception throughout the kingdom.

In re Estate of Apachee, 4 Navajo Rptr. 178, 180 (Navajo D. Ct. 1983) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 63) (St. George Tucker ed., 1803).

304. DELORIA & LYTLE, *supra* note 230, at 136-37.

The glaring exception is the field of transactional, or promissory, law. None of the reported decisions expressly relies on Navajo custom. Even when rejecting a doctrine of Anglo-American transactional law, the courts have not referred to Navajo traditions, but to current socioeconomic conditions.³⁰⁵

According to the Navajo Supreme Court justices, if the Navajo courts applied traditional Navajo concepts in interpreting contracts, businesspeople would be less willing to lend to individuals or to do business in the Navajo Nation.³⁰⁶ The reservation might be "red-lined."³⁰⁷ The legal rules in other areas do not pose an equivalent danger. For example, Anglo-American merchants do not care whether the Navajos' family law originates in Anglo-American or traditional Navajo concepts.³⁰⁸

The Navajo justices thus have adopted rules of Anglo-American transactional law in large part to achieve certain practical goals. Generally, nontraditional societies use law as an instrument of social change.³⁰⁹ Considering the Navajos' practical orientation, their instrumental use of law is unsurprising.

A second reason for the adoption of Anglo-American transactional law is that attorneys and advocates have not attempted to assert traditional Navajo promissory law as the basis for a transactional claim or defense, at least in any case before the present justices.³¹⁰ A party intending to base a claim or defense on a custom not yet

305. See *Russell v. Donaldson*, 3 Navajo Rptr. 209 (Navajo D. Ct. 1982) (Tso, J.) (interpreting resolution forbidding self-help repossession broadly because Navajo customers frequently are abused, "and the elimination of self-help repossession was an enlightened measure for the protection of the Navajo People"); *Hawthorne v. Wener*, 2 Navajo Rptr. 62 (Navajo D. Ct. 1979) (rejecting Statute of Frauds because it would work a great hardship on people unaware of legal formalities and because of confusion in applying Statute of Frauds provisions of the three different states in which the reservation is located).

306. Interview with Justices (Austin), *supra* note 66.

307. According to one attorney, the fear has substance. After several judicial decisions during the mid-1970s frustrated mobile home merchants in their efforts to repossess homes from defaulting Navajo consumers, "the message got through, 'Alright, you can do it to us but if you do it to us we're going to redline the reservation as far as financing is concerned.'" After that, creditors won several cases that they probably should have lost because of violation of consumer protection statutes. Hynes Interview, *supra* note 17; see also Jesse C. Trentadue, *Tribal Court Jurisdiction over Collection Suits by Local Merchants and Lenders: An Obstacle to Credit for Reservation Indians?* 13 AM. INDIAN L. REV. 1, 44-46 (1987) (stating that lenders report reluctance to lend to Native Americans located in North Dakota because of difficulty in obtaining repossession orders from tribal courts).

308. Interview with Justices (Austin), *supra* note 66. African legal scholars similarly have concluded that their countries should adopt nontraditional concepts of transactional law while adopting traditional customs in other areas as rules of law. KULCSÁR, *supra* note 20, at 115.

309. Trubek, *supra* note 21, at 4-6.

310. Interview with Justices (Austin), *supra* note 66.

incorporated into Navajo common law must indicate that intention in its pleadings.³¹¹ Navajo promissory custom has not been raised as an issue in a timely manner; therefore, no reported decision expressly rejects such a custom in favor of a principle of Anglo-American transactional law.

2. *Extent of Adoption of Anglo-American Transactional Law*

Although the Navajo courts and the Tribal Council have adopted many elements of Anglo-American contract, commercial and consumer law, they have rejected or modified several others. Still other significant doctrines have not yet been addressed.

a) *Contract law*

The Navajo courts have adopted almost all of the basic doctrines of Anglo-American contract law. Contract formation requires an offer and acceptance and consideration.³¹² A contract, otherwise valid, may be unenforceable because of mistake or misunderstanding between the parties³¹³ or because of abuse in the bargaining process, such as fraud or unconscionable conduct.³¹⁴ Probably because of the jurists' desire to reassure Anglo-American merchants of the enforceability of the obligations of Navajo consumers, however, at most one reported

311. See *Apache v. Republic Nat'l Life Ins. Co.*, 3 Navajo Rptr. 250, 251 (Navajo D. Ct. 1982) (Tso, J.).

312. See *Amigo Chevrolet, Inc. v. Lee*, No. A-CV-32-87, slip op. at 6-7 (Navajo Aug. 4, 1988) (recounting how Navajo couple received no consideration for releasing claims against car dealership which wrongfully repossessed their car, when dealership agreed not to accelerate obligations several months after release was executed); *Michael Nelson & Assocs., Inc. v. DCI Shopping Center, Inc.*, 5 Navajo Rptr. 52, 53-54 (Navajo 1985) (letter from sublessee, MNA, to sublessor, DCI) (stating that lease would be terminated upon receipt and letter from sublessor to sublessee accepting the offer to terminate constituted an agreement to terminate effective on the date of the sublessor's letter, and both sides gave consideration by relinquishing rights under the sublease).

In fact, in *Michael Nelson and Assocs.*, the court silently adopted two of the esoteric components of the offer and acceptance doctrine to reach its result. The sublessee, MNA, had sent the initial letter to DCI on December 26, 1980. On January 8, 1981, MNA sent another letter to DCI stating that it wished to continue the sublease. DCI received the second letter on January 12, but *earlier* that day, it had mailed its letter accepting the termination. *Id.* at 53. In order to hold that DCI's January 12 letter constituted a binding acceptance, the court must have put together two doctrines: the mailbox rule that an acceptance is valid upon posting, and the doctrine that the revocation of an offer is ineffective until actually communicated to the offeree. See RESTATEMENT (SECOND) OF CONTRACTS §§ 42, 63(a) (1981).

313. See *Hood v. Bordy*, No. A-CV-07-90, slip op. at 7-8, 9-17 (Navajo Feb. 22, 1991) (holding that if sellers intended to convey an interest in an apartment by bill of sale rather than by deed, as buyers contend, the agreement would be unenforceable because there was no "meeting of the minds"; even if both parties intended the conveyance to be by bill of sale, the agreement would be unenforceable because of mutual mistake when the sellers had no legal interest to convey).

314. See *Amigo Chevrolet, Inc. v. Lee*, No. A-CV-32-87, slip op. at 7 (Navajo Aug. 4, 1988) (dictum) (fraud); *Tome v. Navajo Nation*, 4 Navajo Rptr. 159 (Navajo D. Ct. 1983) (dictum) (unconscionability).

decision excuses consumers from their obligations based on abuse of the bargaining process.³¹⁵ The lack of decisions indicates reluctance to excuse Navajo consumers based on bargaining abuses, because merchants regularly have taken advantage of Navajos' lack of sophistication in the Anglo-American world.³¹⁶

Navajo contract interpretation also follows many of the rules of Anglo-American law. The courts generally start with the words of the contract.³¹⁷ Those words are construed against the drafter, especially when a form contract is involved.³¹⁸

Navajo courts have applied various Anglo-American doctrines concerning allocations of risk, sometimes expressly, other times without reference to the doctrines by name. They have held that a promisor does not have an obligation to perform when an express condition fails to occur³¹⁹ or when the promisee violates a constructive condition.³²⁰

315. The only decision that arguably relieves a Navajo consumer from a contract because of bargaining abuse is *Amigo Chevrolet, Inc. v. Lee*, No. A-CV-32-87 (Navajo Aug. 4, 1988). In that case, a car dealership repossessed a car purchased by the Lees for payment default without a prior court order or the signed written consent of the debtors in violation of the Navajo Tribal Code. Perhaps realizing its mistake, Amigo Chevrolet allowed the husband to reclaim the vehicle, but required him to sign a document releasing the merchant "from any and all claims arising out of the repossession." *Id.*, slip op. at 2-3. The supreme court held that a consumer could release claims arising under the repossession laws, but that the courts would scrutinize any release closely "to insure that the agreements were made openly and fairly." *Id.*, slip op. at 3. Where the "ambiguous[ly]" worded document did not mention the repossession laws and there was no indication that Lee intended to settle any claim arising under them, or even was aware that he had such a claim, the release could not pass such scrutiny. *Id.*, slip op. at 6-7. Somewhat mitigating the power of the holding, however, the release was ineffective on other grounds, such as lack of consideration, *id.*, and Amigo Chevrolet's failure to obtain the wife's agreement.

316. See 1 VICENTI, *supra* note 89, at 9-17, 21-23 (describing various methods merchants use to deceive Navajo consumers).

317. See, e.g., *Wilson v. Begay*, No. A-CV-05-86, slip op. at 9 (Navajo Mar. 8, 1988) (holding that provision relieving rodeo operator of liability for injuries to "any contestant, spectator, or help furnished by [the sponsoring organization]" does not relieve operator of liability to a jewelry vendor who rented space from the sponsor); *Navajo Hous. Auth. v. Betsoi*, 5 Navajo Rptr. 53 (Navajo 1985) (holding that housing agreements create ownership rather than tenant relationships, based on their language and purposes).

318. See *id.* at 9; *General Elec. Credit Corp. v. Becenti*, 4 Navajo Rptr. 34, 36 (Navajo 1983).

319. See *Howard Dana & Assocs. v. Navajo Hous. Auth.*, 1 Navajo Rptr. 325, 327-28 (Navajo 1978) (applying express condition doctrine but not mentioning doctrine by name).

320. See, e.g., *Hall v. Arthur*, 3 Navajo Rptr. 35, 40-41 (Navajo 1980) (holding that sublessor may terminate sublease because of payment defaults of sublessee); *Navajo Tribe v. Jones*, 5 Navajo Rptr. 235, 250-51 (Navajo D. Ct. 1986) (holding that obligations of manager of arts and crafts trading post were terminated by actions of tribe in seizing the vault of that store in which jewelry was stored).

They have also excused performance because of impossibility.³²¹

Finally, Navajo damage rules should be familiar to Anglo-Americans. Courts award damages, including consequential damages, to protect expectations by trying to put the non-breaching party in the same position that he or she would have occupied if the contract had been performed.³²² The non-breaching party has an obligation to mitigate damages.³²³ Damages must be proved with reasonable certainty; mathematical precision is not required, but neither can the proof be overly speculative.³²⁴

Few of the doctrines directly conflict with Navajo promissory customs.³²⁵ For example, although Navajos did not have a custom equivalent to the consideration doctrine, they generally expected a return for a promise or performance. Perhaps the most direct conflict concerns the typical measure of damages: expectation or restitution.

Yet taken as a whole, Anglo-American promissory law and Navajo promissory customs proceed from radically different assumptions about the nature of transactions. Navajos traditionally evaluate contesting parties in light of their overall relationship instead of focusing primarily on the particular transaction, with the ultimate goal being restoration of harmony among the parties and the community. Anglo-American law gives priority to the discrete transaction and the individuals involved. One stresses responsibility to the group, the other individual freedom.³²⁶

321. See *Hood v. Bordy*, No. A-CV-07-90, slip op. at 7-8 (Navajo Feb. 22, 1991) (holding that when the sellers promised to convey an apartment by deed, buyers were excused from obligation to pay purchase price because sellers did not have an ownership interest to convey). The court actually misapplied the impossibility doctrine in this case. See *infra* note 394 and accompanying text.

322. See *Hall*, 3 Navajo Rptr. at 38 (stating that goal is to protect expectations by putting non-breaching party in the position that would have existed but for the breach); *Howard Dana & Assocs. v. Navajo Hous. Auth.*, 1 Navajo Rptr. 325, 326, 329 (Navajo 1978) (consequential damages awarded).

323. See *Hall*, 3 Navajo Rptr. at 38-39 (holding that sublessor cannot recover because of failure to mitigate possible damage caused by sublessee's breach of sublease).

324. See *Wilson v. Begay*, No. A-CV-05-86, slip op. at 10-14 (Navajo Mar. 8, 1988) (overturning damages for lost profits awarded in tort case because of overly speculative basis for calculations); *Navajo Nation v. Jones*, 5 Navajo Rptr. 235, 249-50 (Navajo D. Ct. 1986) (awarding damages based on \$11,000 of lost inventory when tribe could establish only that lost inventory was worth between \$10,000 and \$12,000, because mathematical precision was not required).

325. See *supra* notes 88-103 and accompanying text (discussing those customs).

326. See *supra* notes 113-14, 139-40 and accompanying text. Obviously, Anglo-American transactional law does not completely ignore the larger relationships that provide the background for a particular transaction. The U.C.C., for example, provides for consideration of course of dealing, course of performance and usage of trade in interpreting a contract. U.C.C. §§ 1-205, 2-208 (1987). Those considerations, however, are secondary; the primary focus is on the terms of the particular contract in dispute. See *MACNEIL*, *supra* note 139, at 10 ("neoclassical contract law, such as that of Restatement (Second), treats custom and other non-promissory exchange-projectors as 'only a ripple upon the great sea of promise'").

Wholesale incorporation of Anglo-American contract law would mean adoption of a new view concerning individual relationships.

Navajo courts, however, have not incorporated Anglo-American contract law in all respects. The most obvious example is their treatment of the Statute of Frauds.³²⁷ During the 1970s, the Navajo Court of Appeals held that an oral will is valid under tribal custom when all of the "immediate family" of the testator are present and agree.³²⁸ Relying on the validity of oral wills and interpreting the Tribal Council's failure to enact a Statute of Frauds as a purposeful decision *not* to require contracts to be in writing, a Navajo district court held in *Hawthorne v. Wener*³²⁹ that a contract for the conveyance of ownership of a house need not be in writing.³³⁰

The holding in *Hawthorne* has been limited legislatively. The Tribal Council adopted four articles of the Uniform Commercial Code in 1986, including the Statute of Frauds provisions in sections 2-201 and 9-203.³³¹ This legislative action blocks the application of *Hawthorne* to transactions governed by articles two or nine. Arguably, the adoption of these sections should undermine *Hawthorne's* reasoning more broadly. Nevertheless, the Navajo Supreme Court has recently decided two cases involving oral contracts that many Anglo-American courts would interpret as falling within the scope of the version of the Statute of Frauds adopted by their state legislatures, without analyzing whether the oral nature of the agreements might invalidate them.³³² This suggests that *Hawthorne* remains good law except for transactions within the scope of those two code sections.

Navajo courts do not adhere strictly to other doctrines of Anglo-American contract law, even if they are not expressly rejected. For example, although no reported decision addresses the validity of the

327. Many modern Anglo-American courts share the Navajo courts' hostility toward the Statute of Frauds. See FARNSWORTH, *supra* note 102, ch. 6.

328. See *In re Estate of Benally*, 1 Navajo Rptr. 219 (Navajo 1978); *In re Estate of Lee*, 1 Navajo Rptr. 27 (Navajo 1971). Subsequently, the Navajo Supreme Court reaffirmed the validity of oral wills, but overruled *Estate of Benally* concerning the identity of the members of the testator's immediate family. *In re Estate of Thomas*, No. A-CV-01-87 (Navajo Aug. 12, 1988).

329. 2 Navajo Rptr. 62 (Navajo D. Ct. 1979).

330. *Id.* at 65-66. The court stated that to require certain contracts to be written would work a great hardship on the Navajos, who "are mostly unaware of legal formalities," and therefore would lead to increased litigation. *Id.* at 65. Moreover, if state Statutes of Fraud were applied, lack of uniformity and confusion would ensue, because the statutes of New Mexico, Arizona and Utah differ. *Id.* at 65-66.

331. Navajo U.C.C. §§ 2-201, 9-203 (1986). See *infra* notes 341-42 and accompanying text (describing adoption of U.C.C.).

332. See *Hood v. Bordy*, No. A-CV-07-90 (Navajo Feb. 22, 1991) (agreement to convey ownership interest in apartment); *Sells v. Espil*, No. A-CV-15-89 (Navajo Aug. 14, 1990) (agreement to provide brokerage services concerning sale of real estate).

parol evidence doctrine, in practice it is substantially diluted.³³³ The Navajo people's heritage instills hostility toward a doctrine that would cut off testimony concerning oral discussions preceding or contemporaneous with the execution of a written contract.³³⁴ Navajo culture places great importance on oral speech,³³⁵ and in traditional dispute resolution everyone is allowed to speak.³³⁶ A traditional Navajo would give scant attention to the printed terms on a form contract, such as an installment purchase agreement.³³⁷ Adoption of the Uniform Commercial Code, however, may spark a change; the Tribal Council enacted section 2-202's parol evidence rule verbatim.³³⁸

A potentially greater source of difference between contract law in typical Navajo and Anglo-American courts comes from the interpretation which Navajo jurists give to Anglo-American principles when applying them to concrete factual situations. For example, although Navajo courts have adopted the same general rules as Anglo-American courts,³³⁹ any determination of whether damages have been proved with "reasonable certainty" involves substantial discretion. Given Navajos' practical outlook and ambivalent attitudes toward accumulation of wealth, courts probably will not look sympathetically at hypothetical estimates of lost profits.³⁴⁰

In conclusion, virtually all of the contract law rules which the Navajo courts have adopted are expressly grounded in principles of Anglo-American contract law; none originate in traditional Navajo customs. This orientation is unlikely to change, at least with respect to contracts

333. Lally Interview, *supra* note 13 (stating that evidence that would run afoul of the parol evidence rule is admitted, but judges tend to give the written contract substantially more weight).

334. See *supra* notes 251-59 and accompanying text (discussing impact of Navajo beliefs on Navajo jurists).

335. Navajo deities "thought the world into existence." Those thoughts were not realized, however, "until they were spoken in prayer or sung in song." WITHERSPOON, *supra* note 38, at 15-16, 31. Words "are things of power." KLUCKHOHN & LEIGHTON, *supra* note 10, at 260.

336. See *supra* text accompanying note 66.

337. Interview with Justices (Tso), *supra* note 66. Inattention to the terms of a written form contract, of course, is not limited to Navajo consumers. See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370-71 (1960) (stating that customers do not "assent" to all the terms in a form consumer purchase contract, but only to "the few dickered terms, . . . the broad type of the transaction, and . . . any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms").

338. Navajo U.C.C. § 2-202 (1986).

339. See *supra* notes 322-24 and accompanying text.

340. Interview with Justices (Austin), *supra* note 66; see *Wilson v. Begay*, No. A-CV-05-86, slip op. at 12-14 (Navajo Mar. 8, 1988) (reversing award of consequential damages from tort injury and remanding with instructions about the evidence which injured party must proffer to prove damage to business and lost profits).

in which one of the parties is not Navajo, as long as Navajos must do substantial business with off-reservation merchants. Yet those principles allow substantial room for interpretation. The beliefs and culture of the jurists will influence the application of the Anglo-American contract principles which they have adopted.

b) Commercial Law

After several years of meetings and revisions of drafts, the Tribal Council adopted versions of articles one, two, three, and nine³⁴¹ of the Uniform Commercial Code in 1986. The council sought to encourage business on the reservation and loans secured by property located or to be located in the Navajo Nation by providing the certainty of statutory rules familiar to off-reservation businesspeople, the same motivation which prompted the courts to adopt Anglo-American common law contract doctrines.³⁴²

The drafters of the Navajo code revised many sections of the official version of the code to make it suitable for the tribe. Several of the revisions were designed to avoid imposing duties on unsuspecting Navajos. The Navajo code provides that it does not apply to any "exclusively barter transaction in which the aggregate market value of all goods and services does not exceed \$10,000" so that those transactions "shall be governed by the customs and usages of the Navajo Tribe";³⁴³ defines "merchants" to exclude artists so that artists will not have any of the duties of merchants under the code;³⁴⁴ and removes any implied warranty given by a seller of a farm animal that the animal is free of sickness or disease, unless the seller has prior knowledge that the animal is sick or disabled.³⁴⁵

The courts have yet to see an impact from the adoption of the Navajo Commercial Code. No reported decision applies it, and the justices of the Navajo Supreme Court are unaware of any case in which a party has raised it as a basis for a claim or defense.³⁴⁶

The lack of litigation can be explained. The Navajo Code adopts the provision in the uniform code in providing that where a transaction

341. Although the tribe adopted article 9, it has not instituted a system for filing financing statements. Battles Interview, *supra* note 245.

342. See Navajo U.C.C. § 9-313 (1986) (official comment changes) ("The general policy of the Navajo Nation is to encourage commercial transactions and to enable Navajo debtors to maximize their credit worthiness by maximizing the business property which they can use as collateral"); NAVAJO TIMES TODAY, Oct. 3, 1985, at 2, col. 2 (according to the tribe's Small Business Administration director, "A Navajo UCC will help to financially protect the Navajo business people and commercial banks, it'll get business loans and it'll teach Navajos to live up to their financial responsibilities").

343. Navajo U.C.C. § 1-110 (1986).

344. *Id.* § 2-104(1).

345. *Id.* § 2-316(3)(d).

346. Interview with Justices, *supra* note 66.

bears a reasonable relation to the Navajo Nation and a state, the parties' election of one jurisdiction's substantive law shall govern.³⁴⁷ The form contracts used by off-reservation merchants probably provide that the laws of the state in which the merchants are located control. If that assumption is correct, any litigation in the Navajo courts arising out of an alleged breach of those contracts will be governed by the state's version of the Uniform Commercial Code, not the Navajo Nation's. Because few merchants are located on the reservation, few disputes between merchants and consumers will be governed by the Navajo Commercial Code.

Moreover, even if Navajos' rights under the Navajo Uniform Commercial Code are breached, they are unlikely to sue. For example, no reported decision of a Navajo court addresses allegations that a product was defective in breach of an express or implied warranty. Products sold to Navajos undoubtedly have as many defects as those sold to Anglo-Americans, but many tribal members are unaware of their rights,³⁴⁸ and even if they are aware, they shy away from litigation as expensive, as necessitating the hiring of an attorney or advocate, and as involving confrontation.³⁴⁹

Finally, if a contractual breach caused substantial injury to a Navajo client, most attorneys who practice both in the Navajo courts and in state courts would file the claim in state court. Attorneys believe that they would probably draw a substantially wealthier jury in state court and that wealthier juries give bigger awards.³⁵⁰

347. Navajo U.C.C. § 1-105(1) (1986).

348. Interview with Justices (Tso), *supra* note 65.

349. See 1 VICENTI, *supra* note 89, at 39 (stating that injured Navajos often avoid legal fights); Interview with Justices (Tso), *supra* note 66 (stating that Navajos avoid litigation as expensive and as involving legal representation).

That Navajos have argued in several cases that merchants have violated contract or consumer laws does not undercut the conclusion that Navajos avoid litigation. In each case, the Navajos raised the violation as a defense to an action brought by a merchant for repossession. See, e.g., *Amigo Chevrolet, Inc. v. Lee*, No. A-CV-32-87 (Navajo Aug. 4, 1988); *General Elec. Credit Corp. v. Becenti*, 4 Navajo Rptr. 34 (Navajo 1983); *Smoak Chevrolet Co. v. Barton*, 1 Navajo Rptr. 153 (Navajo 1977); *A-1 Mobile Homes, Inc. v. Becenti*, 2 Navajo Rptr. 21 (Navajo D. Ct. 1977).

350. See Hynes Interview, *supra* note 17 (stating that among other reasons, Navajo claims are not tried on the reservation because "poor people sitting on juries don't give very much money; to a person who doesn't have any money or very much money, a hundred thousand dollars is a huge sum of money, more than they will ever see in their lifetime"); Mason Interview, *supra* note 109.

Arizona and New Mexico courts assert jurisdiction over suits filed in state court against non-reservation residents by Native Americans who reside on the reservation, at least when the claim arose in part off the reservation. See *Johnson v. Kerr-McGee Oil Indus., Inc.*, 631 P.2d 548, 550 Ariz. App. (1981), *appeal dismissed*, 454 U.S. 1025 (1981); *Paiz v. Hughes*, 417 P.2d 51, 52 (1966).

The absence of litigation does not necessarily mean that the adoption of the selected articles of the Uniform Commercial Code has had no impact. It may have helped to attract business to the reservation or to resolve disputes short of litigation. Regardless of the impact, if any, adoption of the Uniform Commercial Code stands as another testament to the *dine'é*'s attempts to use Anglo-American transactional law to bring desired change to the reservation.

c) *Consumer law*

The field of consumer law obviously is of great importance to the Navajo government. The Tribal Council created the tribal court system partly to provide a forum for merchants to enforce their remedies upon default by a consumer.³⁵¹ Most of the transactional disputes before the courts involve actions upon consumer debt,³⁵² and the courts have adopted most of the principles of Anglo-American contract law largely to assure merchants that collection is feasible.³⁵³

Nevertheless, the Tribal Council has passed only one consumer protection resolution. It provides that personal property within the nation's territorial jurisdiction may not be repossessed except pursuant to court order, unless the purchaser consents in writing at the time of repossession.³⁵⁴ Under this statute, self-help repossession to which the debtor does not consent is impermissible.³⁵⁵

Off-reservation merchants, used to the availability of self-help repossession,³⁵⁶ have complained of this requirement.³⁵⁷ The prohibition serves

351. See *supra* notes 212-17 and accompanying text.

352. Martin Interview, *supra* note 201 (estimating that 90% of transactional law disputes are consumer collection actions).

353. See *supra* notes 306-08 and accompanying text.

354. NAVAJO TRIB. CODE tit. 7, § 607 (1977 & Supp. 1984-85). Penalties for violations are severe. A business whose employees willfully violate the provision may be prohibited from doing business within the Navajo Nation's territorial jurisdiction, and whether or not the violation is willful, the violator commits a crime with a minimum fine of \$100. *Id.* § 608. The violator also is liable to the purchaser for any damage caused by the wrongful repossession, but not less than "the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price." *Id.* § 609. This is the same liability imposed by the U.C.C. for a secured creditor's violation of a debtor's rights upon default if the collateral is consumer goods, U.C.C. § 9-507(1) (1987), but of course, self-help repossession is permissible under the U.C.C. *Id.* § 9-503.

355. See *Russell v. Donaldson*, 3 Navajo Rptr. 209, 211-14 (Navajo D. Ct. 1982) (Tso, J.).

356. Both Arizona and New Mexico have passed consumer protection laws, but these do not prohibit self-help repossession. See ARIZ. REV. STAT. ANN. § 6-624 (Supp. 1990); ARIZ. REV. STAT. ANN. § 47-9503 (1988); N.M. STAT. ANN. §§ 55-9-503, 56-1-5(C) (1990); N.M. STAT. ANN. § 58-19-7(J) (Supp. 1990).

357. See *Russell*, 3 Navajo Rptr. at 213 ("[M]any businesses whine about our repossession law and use every available means of blocking or frustrating it.").

important functions, however. It permits the consumer to assert any defenses, and to make alternative housing, transportation or other arrangements, before the collateral is removed.³⁵⁸

Perhaps more important, the elimination of self-help repossession gives the district court an opportunity to push for a settlement. In general, Navajo judges strongly encourage settlements.³⁵⁹ The tradition of resolving disputes by agreement between the parties fuels this tendency. In consumer collection actions, Navajo judges often have economic leverage behind their efforts. If the value of the collateral is insufficient to cover the debt, the merchant often cannot collect the deficiency because many Navajos are judgment-proof.³⁶⁰ The code does not provide for garnishment, and exempts from execution any use rights in land,³⁶¹ up to seventy-five sheep units, and personal property with a value of up to \$5000.³⁶² Judges frequently prod creditors facing a loss by proceeding to judgment to agree to a settlement giving the consumer additional time to make payments.³⁶³

Navajo consumers have protections beyond the one provision in the tribal code. Navajo courts must employ relevant federal statutory law;³⁶⁴ in several actions, consumers have defended against repossessions, with mixed success, by asserting violations of the federal Truth in Lending Act.³⁶⁵ Moreover, Navajos also benefit from any additional protections

358. As then-Judge Tso stated:

Self-help repossession is an archaic legal provision. It permits sellers to ride rough-shod over consumers and . . . use the holding of essential property needed for daily life as a means of extorting money from the consumer. True, repossession may be legally justified in most cases, but there is simply no justification for not allowing the consumer to voice his grievances as long as the doors of the courts are open to creditors. The Council minutes repeat many instances of the abuse of Navajo consumers, and the elimination of self-help repossession was an enlightened measure for the protection of the Navajo People.

Id.

359. Interview with Justices (Bluehouse), *supra* note 66. One attorney advises his Anglo-American clients of this tendency, and refuses to represent those clients on the reservation if they consistently want to play "hard ball." Mason Interview, *supra* note 109.

360. Cadman Interview, *supra* note 63; Lally Interview, *supra* note 13. Lally believes that permitting garnishment and reducing the amount of exempt property are the biggest steps the tribe can take to increase the confidence of Anglo-American merchants in their ability to collect, and will result in substantially improved credit terms for Navajos.

361. See *Johnson v. Dixon*, 4 Navajo Rptr. 108, 111-12 (Navajo 1983).

362. NAVAJO TRIB. CODE tit 7, § 711 (Supp. 1984-85).

363. See Interview with Justices (Bluehouse), *supra* note 66; Mason Interview, *supra* note 109.

364. See *supra* text accompanying note 297.

365. 15 U.S.C. §§ 1601-1613, 1631-1641, 1671-1677 (1988). Compare *Smoak Chevrolet Co. v. Barton*, 1 Navajo Rptr. 153 (Navajo 1977) (holding that although merchant violated Truth in Lending Act by not advising consumer on front of contract of hidden interest

afforded by the consumer protection statutes of the state in which they enter the transaction.³⁶⁶

Despite merchants' dissatisfaction with the lack of self-help repossession, the bottom line is that merchants continue to sell to Navajo consumers and take back purchase money security interests in the goods, and they continue to seek enforcement from the Navajo courts. Merchants may decline to extend credit in some marginal cases and may charge higher interest rates to Navajos because of the extra costs imposed by compulsory resort to the courts.³⁶⁷ Overall, however, merchants must believe that they can make money on transactions with tribal members. The consumer law and the courts, therefore, have fulfilled an important function for the tribe — facilitating business activity while protecting against exploitation — albeit at a cost.

C. *Traditional Promissory Customs in the Courts*

Ideally, the norms by which most members of a society live are consistent with that society's laws.³⁶⁸ In intermediate societies, many individuals cling to traditional norms, with the result that inconsistent laws (often imported from nontraditional societies) are ignored.³⁶⁹ The potential for such a conflict among the *dine'é* is obvious. The courts have adopted foreign transactional laws, which conflict fundamentally with traditional customs.³⁷⁰ When Navajo courts apply these rules of law, they risk applying rules inconsistent with the customs followed by many tribal members.

charge created by acceleration of debt, debtor's claim based on that violation is barred by one-year federal statute of limitations) and *A-1 Mobile Homes, Inc. v. Becenti*, 2 Navajo Rptr. 21 (Navajo D. Ct. 1979) (holding that consumer's counterclaim barred by statute of limitations) with *Manygoats v. General Motors Credit Corp.*, 4 Navajo Rptr. 34 (Navajo 1983) (following amended federal law, which permits counterclaims in the form of setoffs beyond the one-year limitation period).

366. See *General Elec. Credit Corp. v. Becenti*, 4 Navajo Rptr. 34 (Navajo 1983) (imposing penalties of New Mexico consumer protection statute because of creditor's willful failure to fill in many of the blanks on the installment contract form).

367. See 1 HEARING, *supra* note 220, at 153 (testimony of attorney Robert Wilson) (stating that car dealerships have taken into account the need to obtain a court order as a cost of doing business, and raise their prices to Navajos accordingly; they do not discontinue doing business, because Navajo consumer business is "extremely lucrative"); Lally Interview, *supra* note 13 (stating that merchants in border towns depend on Navajo business; because of high default rates and collection difficulties, however, they charge high rates of interest).

368. The attempt to eliminate alcohol consumption during the Prohibition period provides an example of the problems which may arise when laws conflict with social norms.

369. See KULCSÁR, *supra* note 20, at 95-98.

370. See *supra* text accompanying note 326.

Despite this risk, there are three reasons why Navajo courts should continue to apply Anglo-American concepts of transactional law to transactions involving a non-Navajo party or in which a merchant is involved. First, those concepts evolved to regulate disputes arising from discrete transactions, such as those between Navajo consumers and merchants, and they work in resolving such disputes, whether or not one of the parties is Navajo.³⁷¹ To the extent that some of the concepts seem inappropriate, Navajo jurists may reject them expressly or interpret them differently than would their Anglo-American counterparts.³⁷² Second, imposition of Navajo promissory customs on non-Navajos, especially those who do not reside within the Navajo Nation, may impose unfair burdens.³⁷³ Third and most important, the Anglo-American merchants, with whom the Navajos need to continue doing business, undoubtedly expect Anglo-American principles to control.³⁷⁴

Use of Anglo-American law when a non-Navajo or a merchant is involved, however, does not necessarily mean use of Anglo-American law in all instances. Navajo transactional law need not be unitary; Navajo courts could apply a different set of principles to promises between two nonmerchant Navajos. These courts have several justifications for creating a dual system of law. They generally decline to apply Navajo customs when one of the parties is a non-Navajo,³⁷⁵ and the traditional economy did not have merchant-consumer relationships, arguably making the traditional customs inapplicable to transactions involving merchants.³⁷⁶ Moreover, the Navajo Commercial Code provides for traditional customs to govern traditional barter transactions, and the uniform law to govern other sales of goods.³⁷⁷ That provision supports the principle that traditional transactions should be governed by traditional customs.

The facts of reported decisions buttress the argument for a dual system. In intratribal transactions, Navajos often seem unaware of principles of Anglo-American law and of the normal practices of Anglo-Americans in similar circumstances.

371. See *supra* note 326 and accompanying text.

372. See *supra* notes 327-40 and accompanying text.

373. An off-reservation merchant who uses standardized forms and engages in numerous transactions each day cannot easily adopt different practices and forms for Navajo and non-Navajo customers. Moreover, if the Navajo tribe imposed that obligation on merchants, the neighboring Zuni, Ute and White Mountain Apache tribes might follow, each with its own unique rules.

374. See *supra* notes 306-08 and accompanying text.

375. See *Lente v. Notah*, 3 Navajo Rptr. 72, 81 (Navajo 1982).

376. See *supra* notes 48-50, 85-87 and accompanying text (discussing traditional economy).

377. See *supra* text accompanying note 343.

Consider *Hawthorne v. Wener*, the decision that rejected the Statute of Frauds.³⁷⁸ On May 21, 1965, the Hawthornes became the assignees of a homesite lease (the tribe was the lessor), but the Weners moved into the house pursuant to an oral agreement with the Hawthornes, the terms of which were in dispute. The Hawthornes alleged that they leased the house to the Weners, in return for which the Weners were to make all mortgage payments and assist in the building of the Hawthornes' church. The Weners claimed that they purchased the house, and the Hawthornes' sole role was to help them obtain the assignment of the homesite lease; instead, the Hawthornes wrongly became the assignees.³⁷⁹

The Weners lived in the house for the next eleven years, until the Hawthornes sued to evict them and the Weners sued to enjoin disturbance of their possession. During that time, the Hawthornes made no repairs, expended no money on the house, had no keys, and made no inspections. The Weners made all mortgage payments, deducting the interest on their income tax returns, while the Hawthornes did not report the payments as income, which they should have done if the payments were rent.³⁸⁰

The district court barred the Hawthornes' claim because of laches, and ruled for the Weners on the equities, awarding them sole possession and ownership.³⁸¹ The Hawthornes alleged that the Weners had first breached the alleged lease in December 1972.³⁸² Although the Hawthornes filed their action well within the applicable six-year statute of limitations, their delay, according to the court, was detrimental to the Weners, who continued to make payments in the belief that they were purchasing the house.³⁸³

The court should not have based the decision on laches. Surely it did not wish to create a rule in which a landlord must evict immediately after a default or risk losing its right to terminate the lease if the tenant continues to make rental payments. Moreover, even if the Hawthornes lost the right to terminate the alleged lease for the December 1972 default by allowing the Weners to continue in possession, the Hawthornes should have retained the right to terminate for any other reason, including the expiration of the lease period. Finally, if the Weners believed that the Hawthornes' sole role was to help them to obtain an

378. See *supra* notes 327-32 and accompanying text (discussing status of Statute of Frauds in the Navajo courts).

379. *Hawthorne v. Wener*, 2 Navajo Rptr. 62, 62-63 (Navajo D. Ct. 1969).

380. *Id.* at 63, 67-68.

381. *Id.* at 66-67. The Weners' equities were superior, according to the court, because they expended money in the belief that they were purchasing the house, while the Hawthornes would not be harmed by a judgment for the Weners because they had expended no money on it. *Id.*

382. *Id.* at 64. The opinion does not specify the nature of the alleged breach.

383. *Id.* at 67.

assignment of the homesite lease, they were just as guilty of laches in not seeking to clear up title for eleven years.³⁸⁴

The mistake was in trying to apply Anglo-American concepts of law or equity to these facts. If the parties had been raised in and governed by Anglo-American traditions, they probably would have placed the agreement into writing, eliminating subsequent questions about whether they intended a lease or a purchase. If the Weners believed that they were purchasing the property, they would have insisted on clear title and would have received confirmation from the mortgagee that they could assume the existing mortgage.

Instead, the parties' continuing relationship, which almost certainly preexisted the 1965 agreement, seems to have governed their behavior. In 1965, the Weners looked to the Hawthornes for help with the government, the Hawthornes to the Weners for help in constructing their church. For eleven years the parties apparently were satisfied with their arrangements. Information about the total relationship before and during the 1965-76 period, including the reasons why a dispute arose in 1976, would have helped in arriving at a result consistent with that relationship. Granted, this information might be irrelevant if the agreement and the breach were considered as a discrete transaction, but the parties almost certainly viewed the agreement as part of a larger whole.

Moreover, a relevant Navajo custom existed. Traditionally, a family acquires use rights in land by living on it; upon abandonment, another family can settle on it and acquire possessory rights.³⁸⁵ Although this custom should not have been dispositive in *Hawthorne* because leases now exist among the Navajos, the Weners' occupancy of the property could have created a presumption for them.

The advantage of Navajo promissory law, however, diminishes when the parties to an agreement do not have a significant ongoing relation-

384. Navajos often seem to put off filing a lawsuit. See *Hall v. Arthur*, 3 Navajo Rptr. 35 (Navajo 1980) (stating that Navajo sublessors and non-Navajo sublessees entered into written three-year commercial sublease on October 1, 1972 and another on February 11, 1977; although sublessees apparently also possessed the premises between October 1975 and February 1977 and although sublessees made only some of the payments required, Navajo sublessors did not file action until May 1979); *Washburn v. McKensley*, 1 Navajo Rptr. 114 (Navajo 1977) (stating that although three-year sublease of irrigated land from McKensley to Washburn expired or was terminated in 1973, Washburn continued in possession of land for several more years, and court refused to award damages for the post-termination period because they were *in pari delicto* as to the confused state of title). See also *supra* notes 348-50 and accompanying text (discussing reasons for relative absence of commercial lawsuits by Navajos).

385. See *KLUCKHOHN & LEIGHTON*, *supra* note 10, at 106-07; 1 Van Valkenburgh, *supra* note 59, at 20-21. The Weners, however, could not have obtained customary use rights in the home vis-a-vis the Hawthornes, because only those who construct an improvement can acquire rights by customary use. *Hood v. Bordy*, No. A-CV-07-90, slip op. at 15 (Navajo Feb. 22, 1991).

ship. In those cases, the individual facts and circumstances should indicate whether Navajo or Anglo-American concepts are more suitable.

Hood v. Bordy,³⁸⁶ the most recent Navajo Supreme Court decision concerning a promissory dispute, involves facts making the value of traditional Navajo promissory law more problematic. The parties had only an incidental relationship outside the contract in dispute. They lived in the same village (with about 100 families) within the same chapter. They knew each other because of this geographical proximity, but had no dealings apart from the contract.³⁸⁷ Moreover, the contractual performance also did not create a long-term continuing relationship, as described below.

The Hoods occupied one apartment in a fifteen-to-twenty-unit building constructed as army housing during World War II and owned by the Navajo Nation in fee simple. The tribe had condemned the building long before the occurrence of the events at issue in the case. It did not manage the property, have leasehold arrangements with, or demand rents of occupants, who were in effect squatters.³⁸⁸

In 1981, the Hoods purchased their apartment from the previous occupant for \$2,500, and in 1987, the Bordys orally contracted to purchase it from the Hoods for the same price and made a \$900 down payment. The Bordys did not realize that the Navajo Nation owned the property and that the Hoods had no ownership or possessory interest to convey to them.³⁸⁹ Indeed, the Hoods probably thought that they owned a transferrable property interest.³⁹⁰

386. *Hood v. Bordy*, No. A-CV-07-90, slip op. at 15 (Navajo Feb. 22, 1991).

387. Lally Interview, *supra* note 13. Attorney Lally represented the Bordys in the lawsuit.

388. *Bordy*, No. A-CV-07-90, slip op. at 2-3; Lally Interview, *supra* note 13.

389. *Bordy*, No. A-CV-07-90, slip op. at 2-3; Lally Interview, *supra* note 13. During the litigation, the Hoods claimed that they told the Bordys that they did not hold title and would provide them with a bill of sale; the Bordys contended that they had not been told that the Hoods lacked title and were expecting title to be conveyed. The trial court believed the Bordys' version of events. *Bordy*, No. A-CV-07-90, slip op. at 3-4. The Bordys' attorney says that his clients did not really understand the difference between a bill of sale and a deed (deeds are not used on the reservation, which the United States owns in trust for the tribe, or to convey off-reservation allotments which are owned by the United States in trust for the allottees), but they did expect a document conveying them permanent ownership rights. Lally Interview, *supra* note 13.

390. At trial, the Hoods argued that such interest arose by customary use ownership. *Bordy*, No. A-CV-07-90, slip op. at 9. Customary use is a valid method of acquiring ownership of improvements, which are privately owned even though the land is owned for the benefit of the Navajo Nation. *Id.*, slip op. at 12-14; cf. Navajo U.C.C. § 9-313 (1986) (stating that a fixture remains personal property as long as its value exceeds the cost of repairing the damage to real property caused by its removal). The Navajo Supreme Court concluded, however, that an individual could acquire a customary use right in an improvement only by constructing it or being in the line of transfer from the original builder. *Bordy*, No. A-CV-07-90, slip op. at 12, 14-15. The Hoods could not satisfy either

After paying the Hoods an additional \$350 pursuant to the oral contract, the Bordys discovered that the property was owned by the tribe and that the Hoods could not convey title. They continued to occupy the apartment but informed the Hoods that they would make no more payments. The Hoods eventually sued, asking the court to restore the apartment to them and compel the Bordys to pay rent for the period after their notice of cancellation of the purchase contract.³⁹¹

The trial court ruled for the Bordys, refusing to order them to vacate and instead ordering the Hoods to restore the \$1,250 already paid.³⁹² The Navajo Supreme Court affirmed, relying on several different Anglo-American contract doctrines (some of which it mislabeled).³⁹³ If the agreement was for conveyance of title, as the district court found, the Hoods could not enforce the Bordys' promise to pay because of the Hoods' own inability to perform their promise to transfer title.³⁹⁴ If the Hoods intended to convey something less, as they testified, then there was no "meeting of the minds,"³⁹⁵ or in the parlance of the *Restatement (Second) of Contracts*, a misunderstanding existed in which neither party knew or had reason to know of the meaning attached by the other.³⁹⁶ Finally, the court stated, any agreement "to sell the condemned property of the Navajo Nation also is void as against public policy."³⁹⁷

Although the major reason for using Navajo customs — the predominance of the total relationship over the individual transaction in the

requirement. *Id.*, slip op. at 15.

When the Hoods had purchased the apartment and then sold it to the Bordys, however, they probably did not think that their ownership rested on customary use rights. They seem to have been as naive about title matters as the Bordys. Lally Interview, *supra* note 13.

391. *Bordy*, No. A-CV-07-90, slip op. at 3-4; Lally Interview, *supra* note 13.

392. *Bordy*, No. A-CV-07-90, slip op. at 4-5. The Hoods, however, appear judgment-proof, making the restitutionary award valueless to the Bordys. Lally Interview, *supra* note 13.

393. *Bordy*, No. A-CV-07-90, slip op. at 7-8.

394. The Navajo Supreme Court stated that the contract was unenforceable by the Hoods because their inability to convey title created a lack of consideration, and because their promise to convey title was impossible to perform. At least under modern contract doctrine as set forth in the *Restatement (Second) of Contracts*, the court misused those concepts. The Bordys received consideration for their promise to pay: the Hoods' promise to convey title. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1986). Impossibility, or as it is now generally termed impracticability, is used as a shield by the promisor, not as a sword by the promisee. *Id.* § 266(1).

The better analysis under Restatement principles would be either that the Hoods failed to provide adequate assurance that they could perform, amounting to an anticipatory repudiation justifying the Bordys' refusal to perform, *id.* §§ 251, 253(2), or that the Bordys' principal purpose was substantially frustrated, *id.* § 266(2).

395. *Bordy*, No. A-CV-07-90, slip op. at 7-8.

396. RESTATEMENT (SECOND) OF CONTRACTS § 20(1)(a) (1981).

397. *Bordy*, No. A-CV-07-90, slip op. at 8.

minds of the parties — is absent in *Hood v. Bordy*, use of Anglo-American principles also is problematic. Clearly, the parties no more attempted to govern their behavior according to Anglo-American law and practices than did the parties in *Hawthorne v. Wener*. Neither party did any type of checking as to title before entering the transaction, even though the low purchase price or the markings on various appliances that they were the property of the Navajo Nation presumably should have alerted them to check the title. Under similar facts, an Anglo-American court might have concluded that, when the purchasers did not use ordinary care to protect themselves, they assumed the risk of a title defect.³⁹⁸ When Navajos lack strong communal ties with each other and also do not understand Anglo-American transactional law and practices, neither Anglo-American laws nor traditional Navajo customs are likely to produce a completely satisfactory resolution. The court should use the system that seems to fit best under the facts of the particular case.

VII. *Summary and Conclusion*

For the past sixty years, wrenching political and economic changes have disrupted the *dine'é*'s traditional way of life. These changes have left the *dine'é* with a strong central government but an economy which cannot support the tribal members or provide them with desired goods and services.

As a response to some of those economic and political changes, the tribal government has created a court system which looks in many respects like Anglo-American court systems. The political branches and the courts have adopted many of the rules of Anglo-American transactional law in an effort to encourage non-Navajos to do business with Navajos. They have been partly successful: off-reservation merchants are willing to sell to Navajos and enforce their contracts in the Navajo courts; on-reservation business, however, continues to lag for reasons outside the control of the courts.

Although adjudicated dispute resolution radically departs from traditional resolution by mediation, Navajos have accepted and approve of their court system to a remarkable degree. People's approval of the courts, however, does not necessarily mean that they have adopted and assimilated all of the laws which the courts apply.

So far, the use of Anglo-American transactional law apparently has not altered the norms by which many Navajos govern their own trans-

398. A court might also have concluded that the Hoods were entitled to retain some of the Bordys' payment under a quasi-contractual theory. The Bordys had received something of value. The Hoods conveyed occupancy rights recognized by other members of the village, even if not by the tribal government, and the Bordys had possessed the apartment for several years at the time of the trial without challenge from the government.

actions. To try to reach decisions that more accurately conform with the parties' understandings, the courts could create a dual system of transactional law: Anglo-American when at least one non-Navajo or a merchant is involved; Navajo in most other instances.

Greater sensitivities to the parties' understandings, however, does not necessarily mean a better system of law. Use of Anglo-American rules of transactional law in all instances may bring more rapid acceptance among the *dine'é* of values and norms conducive to continuing economic development in the Navajo Nation. *If* law can have this type of "forcing" effect among any people, the Navajos are prime candidates, given their demonstrated skill at selectively incorporating elements of foreign culture. The many studies that have been conducted of other intermediate societies, however, do not resolve whether legislative or judicial adoption of foreign law can have this type of impact. The outcome among the *dine'é* remains uncertain.