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MID-PASSAGE—THE NAVAJO TRIBE AND ITS FIRST LEGAL REVOLUTION

Stephen Conn*

Introduction

Scholars who study law as a social process are necessarily concerned with the motivating forces which lead to elaboration of new institutions, new jobs in law, and new ways of processing disputes. How is it that law came to be encased in institutions and the special province of specialists? What figures in the transformation of dispute adjustment from an unspecial activity on the part of persons who draw upon the commonly accepted values of the society to a kind of craft among crafts performed by persons accorded special authority to make their wisdom prevail upon disbelievers?

Some scholars suggest that law follows society's needs, and "so long as informal controls work smoothly, societies can do without formal controls."¹ Law as a highly structured form of social control drives out less structured forms of social control tied to ongoing relationships characteristic of primitive, preliterate and simple societies when those same relationships undergo greater differentiation.² When societies are simple, law is simple. Legal process is

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1. L. FRIEDMAN, *THE LEGAL SYSTEM, A SOCIAL SCIENCE PERSPECTIVE* 99 (1975) [hereinafter cited as FRIEDMAN].

2. D. BLACK, *THE BEHAVIOR OF LAW* 38-40, (1976) [hereinafter cited as BLACK]. In fact, Black sees the final impact of differentiation as curvilinear in its impact on the quantity of legal activity when symbiotic interdependence becomes extreme. *Id.* One could argue that the relationship between Indian traders and Navajos provided an early example of symbiosis which many attempts at legal intervention by tribal attorneys, poverty lawyers, and federal agencies could not influence. See Conn & Reichbart, *The Trading Post*, in VICENTI, et al., *THE LAW OF THE PEOPLE (DINE BIBEE HAZAANI)* 64 (1972) [hereinafter cited as VICENTI], for a portrait of the trader as "the embodiment of the entire market economy: jobs, goods and sources of credit."

said then to follow society; when societies become complex, law becomes complex.³

All elements of every society do not have an equal say in the definition of law. Some theoreticians place special emphasis on economic forces as the driving element in the change of legal systems.⁴ Others focus upon the particular needs of the state to enforce instrumentally its definitions of appropriate conduct.⁵ But nearly all students of law in society confirm that the system which evolves springs from internal disputes which are recognized as unresolved according to some segment of the society. Law is a product of a particular society, a product of its allocation of power, perhaps a product of its definitions of right and wrong, or at least the product of an element within the society which is instrumental in defining for others, problems of societal importance entitled to resolution in a manner appropriate to at least a portion of the society. The consumers of law will prevail in directing the origin, shape, and direction of the law of their society.⁶

Students of law are rarely on the scene when law emerges. They must couple their observations to a theory of law in order to describe the whole of legal process from their own two-dimensional view of the present.⁷

If law follows society it must reflect the particular design for living outlined by nonlegal expressions and acts of members of the culture. Friedman concludes, "Each distinctive culture seems to generate a legal system in its image, one that suits its own style

3. Scholars demonstrate that the regular use of non-kin advocates (counsel) and specialized norm enforcers (police) join mediation as fixtures of the legal systems in more complex societies. Schwartz & Miller, *Legal Evolution and Societal Complexity*, 70 AM. J. OF SOC. 159 (1964).

4. K. MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (1890); WEBER ON LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1925).

5. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1893); POUND, *THE HISTORY AND SYSTEM OF THE COMMON LAW* (1939).

6. See BLACK, *supra* note 2, at 139-64; L. NADER, *LAW IN CULTURE AND SOCIETY* (1969); Nader, *The Ethnology of Law*, 67 AM. ANTHR. 6,67 (1965). For an ongoing account of the literature in the field, see *LAW AND SOCIETY REVIEW* (R. Able ed.) Friedman notes: "Society can contain and control its conflict and competition, so long as people generally agree about *aims* and means what things one may conflict and compete about." FRIEDMAN, *supra* note 1, at 145. This is not to say that all legal chance reflects the desires and aspirations of all consumers. Laura Nader and Harry F. Todd, Jr., suggest that one of the problems "in using conflicting and changing systems of law, often imported wholesale, often based on an alien value system," is that "[t]hose who often suffer are the preliterate, the illiterate, the common people closest to urban centers—people whose indigenous systems of law are sabotaged under pressures for modernization." L. NADER & H. TODD, JR., *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* 2 (1978).

7. M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955).

and own needs like a costume cut to specifications."⁸ Choices available to a society in the definition of its legal process may not be as broad as this. Sitting in a modern Navajo court, for example, and listening to Navajos licensed by a tribal bar examination⁹ offer arguments to a Navajo judge in a black robe,¹⁰ one can assume that change in Navajo society dictated this transformation of law by chapter officers or headmen into law by Anglo-American court procedure.¹¹ Within the Navajo communities the assumption is validated by the number of problems previously dealt with at the community level and now appearing on a court docket.¹²

Glowing reports of the court system,¹³ the legal services program and the police lead one to assume that the Navajo population prevailed upon its elected councilmen to establish this kind of court, police force and advocacy system.

A study of the history of Navajo law, facilitated by extant records, suggests that the Navajos did not define their own legal

8. FRIEDMAN, *supra* note 1, at 142.

9. The first bar examination administered by the court system of the Navajo Nation took place in December, 1976. Any Navajo or non-Navajo was allowed to take it without regard to language skills, knowledge of custom, residency, or education attained. The purpose of the exam was to screen and control those who practiced in tribal court in anticipation of the court's eventual assumption of jurisdiction over non-Navajos and to protect consumers from slipshod practitioners. Interviews with Stephen Gudac, General Counsel, Tribal Court System, Apr. 3, 1977, Window Rock, Ariz. Although this move to professionalize practitioners took place under circumstances not covered in this paper, the reasons offered for it are similar to those offered to the Tribal Council for professionalization of the judges and the police. See text accompanying notes 107, 133 *infra*.

10. Tribal courts hear violations of the tribe's adopted version of the Federal Law and Order Code, usually cast as misdemeanors in state courts, civil actions where the defendant is a Navajo and found within the territorial jurisdiction of the court, and domestic relations cases between Indians. 7 Navajo Tribal Code § 133 (1970). See note 26 *infra*.

11. There are many excellent studies of Navajo law ways. See, e.g., Van Valkenburgh, *Navajo Common Law*, 9 MUSEUM NOTES, MUSEUM OF NORTHERN ARIZONA (Flagstaff), 17-22, 51-54 (1936), and in Vol. 10, 39-45 (1938); or, for a modern account, M. SHEPARDSON & E. HAMMOND, *THE NAVAJO MOUNTAIN COMMUNITY* 128-36 (1970) [hereinafter cited as SHEPARDSON & HAMMOND].

12. The most recent anthropological study by Shepardson and Hammond, *supra* note 11, based on fieldwork accomplished in 1961-63, suggested that attempts were made to resolve matters by mediation between kin or within communities and outside of the courts. Only some unresolved matters were cast as criminal or civil complaints and reported to police: "The threat of turning the case over to the Navajo Tribal Court, with its sanctions of fines, paid not to the injured party but to the impersonal court, and imprisonment, acts as a strong pressure for agreement." *Id.* at 131. Shepardson adds that it is a mistake to exaggerate the influence of this threat.

Present-day tribal court advocates report that traditional law ways prevail in family and in land cases, especially in more rural areas of the reservation. Advocates, themselves, are called upon to handle many intra-familial disputes outside of the court. Interviews with Daniel Deschinny and Zunie Yellowhair, Apr. 1, 1977, Window Rock, Ariz. [hereinafter cited as Yellowhair Interview].

13. See, e.g., Judicial Branch of the Navajo Nation, Annual Report (1975).

system.¹⁴ The specifications were developed and refined in non-Navajo society. Only in specific instances did the system reflect a perceived need to treat complex problems then untreatable by the prevailing system of customary law. It did not reflect a special antipathy by non-Navajos for customary law as barbarism or a special desire to educate the Navajo population to Anglo-American law.¹⁵ The motivations of the Navajo were tied not to the reform of the internal relationships between law and problems within their society, but to the external relationships between their governmental structure and the more powerful legal instruments of the federal government and of the states.¹⁶

Navajo Development of An Anglo System of Law

From 1948 to 1959, the Navajo Tribe,¹⁷ through its council,¹⁸ constructed a large Western-type police and court bureaucracy, staffed, funded, and identified as tribal. If measured in dollars or in the number of tribal members who came to work as police or judges in communities both on the reservation and in Navajo communities on Indian lands, its law system was the clearest and most independent expression of governmental authority.¹⁹

14. Transcripts of Navajo Tribal Council Meetings [hereinafter cited as NTC] are located in the offices of the area superintendent, Window Rock, Ariz.

15. *Contra*, Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, ARIZ. L.J. 161, 173 (1969).

16. See text accompanying notes 35-47 *infra*.

17. The tribe, the largest single group of American Indians (est. 135,000 members) resides on the 25,000-square-mile reservation in northern Arizona and western New Mexico, as well as on the 3,000-square-mile "checkerboard" of allotted or tribally owned enclaves denominated off-reservation Navajo communities. In addition, Navajos, not subject to the law and order services delivered by tribal or federal agencies unless they return to the reservation or Indian country, live in Anglo border towns and other cities.

18. The Tribal Council was not a fixture of traditional Navajo social organization. It was created by federal officials to sign oil leases and was viewed for years thereafter as a rubber stamp for federal officialdom. DOWNS, *THE NAVAJO* 124 (1972). However, by the time the issues arose which comprise the focus of this paper, the Council had been reorganized so that its members were elected from local districts. C. KLUCKHOHN & D. LEIGHTON, *THE NAVAJO* [hereinafter cited as KLUCKHOHN & LEIGHTON]. The Council was still "foreign," but its members were regularly apprised of grassroots opinion as the debates discussed below will substantiate.

19. The tribe's \$8,000 contribution to law and order services in 1952, services delivered by a small federal agency, became a \$1,305,749 contribution nine years later. R. YOUNG, *NAVAJO YEARBOOK* 281 (1961) [hereinafter cited as *YEARBOOK*]. The number of Navajo police doubled. *Id.* at 284. The court system was reorganized with a chief judge and appellate court. Additional funds were expended to refurbish and extend the jail and court facilities throughout the reservation. New candidates for judgeships were screened for their competence in English by the Anglo head of the Navajo police department with the assistance of the Council's law and order committee. See Davis, *Court Reform in the Navajo Nation*, 43 AM. JUD. SOC. (1959); Fahey, *Native American Justice: The Courts of the Navajo Nation*, 59 AM. JUD. SOC. (1975); 1958 *YEARBOOK*, at 141.

The Navajo Tribe committed limited resources and supplied tribal personnel to a legal system that was still foreign to the majority of its members as a vehicle for the resolution of intra-tribal disputes. The tribe built a police force which by 1957 had arrested nearly a third of the adult Navajo population on at least one occasion.²⁰ The Navajo police did not replace soldiers or federal agents as Navajo police had previously done in the quarter-century after the return from Fort Sumner. Instead, they expanded the presence of police power at the hogan level at a time when police were associated with the infamous stock reduction program and the earlier seizure of children for removal to distant boarding schools.²¹

Tribal members undertook the responsibilities of judgeships within the tribal legal system.²² However, these Navajo judges were criticized for their inability to read and interpret the Federal Code which had been adopted as the Navajo Code for tribal courts. The penalties they meted out to defendants were also disfavored in a system where fines went into tribal coffers and jail terms were spent in tribal jails.²³

This transformation of a small federal activity into a large Navajo legal system occurred when the federal government had not formally relinquished its own professed responsibility to provide law and order services as a means to educate Navajos to

20. 1958 YEARBOOK, *supra* note 19, at 40.

21. The first police on the Navajo Reservation were soldiers. In fact, the Navajo word for policeman (*silao*) is said to be derived from the word for soldier (*tsilaso tsoi*). Some Navajo headmen saw that their appointment as police would allow them to replace soldiers and act as a buffer between the people and the government. Indian agents, for their part, saw police as an extension of their authority to aid in daily tasks and compete with the military. Although much has been written about the anticultural purposes which prompted the funding of Indian judges and police, much less stress has been placed on the way that Navajos exploited the dependence of the agent on his police to convey to him information about crimes, resolve disputes, and often to punish offenders.

The former theme is well set forth in W. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTATION IN ACCULTURATION AND CONTROL (1966). The latter can be gleaned only from reports of Indian agents in REPORTS OF THE INDIAN COMMISSIONER 1890-1920 and unpublished notes of R. Van Valkenburg, on file, U.S. Federal Archive, Calif.

Indian agents could not sustain Navajo police because of low wages. Further, the two tasks of seizing children and seizing sheep were especially hated by police and non-policemen alike. See W. DYK, OLD MEXICAN: A NAVAJO AUTOBIOGRAPHY (1947), for an account of one Navajo's refusal to work as a policeman when it meant rounding up children. The seizure of sheep about thirty years later in an attempt by Indian Commissioner Collier to institute a program of range management caused the tribe to reject other federal plans for reorganization under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and to throw out their Council. COLLIER, FROM EVERY ZENITH 252 (1963) [hereinafter cited as COLLIER].

22. The judge (*'anihwill 'aahii*) is in Navajo "one who issues punishment."

23. See text accompanying notes 166-187 *infra*. Navajo Tribal Council Res. CJA-1-59 (Jan. 6, 1959).

Anglo legal ways.²⁴ At the operational level, the federal government had done little more than mount a symbolic legal system. It did not educate; neither did it provide services to any meaningful degree. The federal government in its own right was hardly successful in imposing an Anglo-American legal system on the Navajos.²⁵

The Interior Department and the federal courts were left the burden of dividing among themselves criminal law misdemeanors and felonies for Indians.²⁶ Congressional appropriations for this activity were sparse, even when Indian tribes made special appeals to Washington for help.²⁷

Termination had become the professed congressional policy for dealing with Indian groups as cultural minorities. Congress was prepared to facilitate and to encourage the implantation of state criminal and civil law systems upon Indians. States could make a token extension of their court and police systems onto the Indian reservations with little effort. The dollars involved were not comparable to the amount necessary to extend the state educational system and other services.²⁸ Therefore, *de jure* state jurisdiction did not necessarily mean *de facto* police protection or court services.²⁹

24. At least this was the rationale of these strange fixtures of Indian administration called "courts" as applied to them by court cases which antedated the first courts on the Navajo Reservation established by Indian agents in 1892. See *United States v. Clapox*, 35 Fed. 575 (D.C. Ore. 1888).

25. See note 27 *infra*. For a survey account of federal law and order administration, see 1 L. MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* 757-75 (1928) [hereinafter cited as MERIAM].

26. An outraged Congress removed prosecution of serious crimes from the hands of Indians when a federal court held in *Ex parte Crow Dog*, 109 U.S. 556 (1883), that tribal justice, in this case remuneration for a killing, was the only penalty to be levied unless Congress said otherwise. The original Seven Major Crimes Act, 23 Stat. 362, 385, placed murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny in federal and not tribal courts. The Major Crimes Act as amended 18 U.S.C. § 1153 (1964) includes embezzlement, incest, assault with a deadly weapon, and robbery.

27. See NTC Minutes, Feb. 18, 1947, at 84, for one such futile account. Felonies were dismissed or fed back into the reservation court system as misdemeanors. For example, 12 or 14 cases presented for prosecution as manslaughter in 1957-58 were handled in the Court of Indian Offenses, as were 12 of 14 rape cases, 45 of 48 assaults with a deadly weapon, and 16 of 18 burglaries in the same period. 1958 YEARBOOK, *supra* note 19, at 350. While at least one scholar argues that the tribes continue to share jurisdiction over these serious crimes with the federal government, the decisions of the United States Attorney have created this situation as a matter of fact. See Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 89 (1959).

28. For a survey of health, educational, and law and order problems in the epoch, see THE PHELPS-STOKES FUND, *THE NAVAJO INDIAN PROBLEM* (1939). Problems of working with rather than for Indians were noted at 123.

29. See comments by Billy Becenti, NTC Minutes, Jan. 23, 1953. 543-44.

Law and order are services typically proffered by a sovereign entity. The abrasive influence of law, employed as a "weapon of denial"³⁰ had been the foremost lesson for Navajos who sought a reading of the allocation of power between the tribe, the states, and the federal government. Law was not merely articulated policy; law and police power combined constituted the symbolic demonstration of the power and the authority of the state.³¹

Navajos were aware that they could lose the inherent powers of self-government by default. The right to self-government inherent in Indian semi-sovereign states was subject to reinterpretation by Congress.³² Tribal action was essential to prove their capacity to govern and therefore retain the inherent power.³³ To govern within the realm of law and order meant to bring social control to bear through police and judges. Other forms of social control in-

30. "Law (*bee haz' aani*) in the Navajo language is distinguished from 'a way of living' in the religious sense (*mahagha*) or the way that people think or plan (*nahat' a*). Anglo law is not, then, a code that one addresses himself to when he decides how to act or tells other people how to act, as it may well be for the middle-class white person . . . Thus, while an Anglo might say to a child seen removing an object from a pick-up, 'Don't do that, Johnny. That is against the law,' a Navajo might say 'Don't do that son. That is not how to act.'

"Anglo law is best understood by Navajos as the forceful activity of the courts, the police and others upon whom the authority has been placed. It is descriptively the function of these institutions. It is not the business of ordinary people." VICENTI, *supra* note 2, at 156-57.

31. Chee Dodge explained the legal relationship between Navajo people and other Americans in an address to 2,000 Navajos published in a county newspaper: "The President has given you a long rope so that you may graze wherever you please. If a man has a good horse and pickets him out he gives him a long rope in good grass and lets him graze as far as he can; but if he has a mean horse he gives him a short rope with his head tied close to a post so he can get but a little feed. The President has given you a long rope. Some of you have a very long rope; you live very far from the Reservation; others who live nearer the Reservation have a shorter rope; but the President has a rope on every one of you, and if you do not appreciate the good treatment you are given, if you try to make trouble, he will pull on all the ropes and draw you fellows all together in a tight place. . . . You will lose your stock and you will be wiped out, and you will be guarded by troops, and everybody will laugh at you and say 'See what a large tribe this was and this is all that is left of them'." A. WILLIAMS, *THE NAVAJO POLITICAL PROCESS* 14 (1970).

32. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 64 (1973); *United States v. Kagama*, 118 U.S. 375 (1886).

33. Activity by the tribe created for them a strong argument in court and in Congress that state action would interfere with "the internal and social relations of tribal life," or the right of Indians to make and be governed by their own laws. A good example of this was the exemption by Congress of the Red Lake Reservation of Minnesota, the Warm Springs Reservation of Oregon, and the Menominees of Wisconsin from Public Law 280 because they had legal systems and organizations "functioning in a reasonably satisfactory manner." S. REP. NO. 699, 83d Cong., 1st Sess. 5, 6 (1953), *cited in* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535-94 (1975). [hereinafter cited as *Goldberg*.] See also *Williams v. Lee*, 358 U.S. 217, 220 (1959) and *United States v. Mazurie*, 419 U.S. 544 (1975), *cited in* Goldberg, "The Prospects for Navajo Taxation of Non-Indians," Lake Powell Research Project Bull. No. 19, at 19 (Mar. 1976).

tertwined with lesser institutions of society were perceived then (as now) as mere anarchy by outsiders.³⁴

Navajo Strategy

Retrospective accounts of the Navajo assumption of the legal system in 1959 ignore critical intermediate decisions which built and empowered an Anglo legal system that was not tribal or customary.³⁵ One account suggests that the tribe, like one of the original colonies, responded to pressures by the federal government with a "Declaration of Independence" which assumed titular responsibility for law, courts, and police.³⁶ A proclamation of independence would have been impossible, however, given the continuing strength of terminationist feeling in Congress and the capacity of the states to elicit congressional support when tribal and state interests collided.³⁷ The tribe's approach to the problem of law and order was indirect, and its power to act was finally a product of indirect rule.³⁸

The tribe first attempted to underwrite and improve those law and order services in federal hands.³⁹ The maneuver was largely defensive, not merely against law violators, but against federal inaction and state aspirations. The tribal attorney lobbied for and Congress allowed the tribe to adopt a constitution grounded in an amalgam of federal and tribal powers.⁴⁰ The Tribal Council rejected this restatement of its authority, just as it had rejected an earlier opportunity to reorganize as a constitutional entity under the Indian Reorganization Act of 1934.⁴¹

The tribe chose a course of action that relied first upon fleshing out police and courts under federal control. Only when the limits of this approach had been reached did it take over the legal

34. BLACK, *supra* note 2, at 2.

35. See O. ONLEY & D. GETCHES, *INDIAN COURTS AND THE FUTURE* 2 n.39 (1978).

36. See, 'Equal Protection of the Law' Sought by the Tribal Judicial Department, *Navajo Times*, Apr. 4, 1974, B6 to B7, for a history of the tribal takeover which analogized to an American colony broken from British authority with a resolution.

37. In the 1950's, "termination" was manifested in the removal of protective trust status from Indian land in the cases of the Ute, Western Oregon, and Menominee tribes. Public Law 280 placed all Indian country under state criminal and civil jurisdiction in Alaska, California, Wisconsin, Nebraska, and (with exceptions) Oregon and Minnesota. These latter states were mandatorily directed to take jurisdiction. Other states were given the option to do the same thing. See Goldberg, *Public Law 280*, *supra* note 33, at 563, 567.

38. See note 24 *supra*.

39. This began with resolutions passed on July 24, 1946 and Feb. 21, 1947, to supplement salaries of Navajo law and order personnel. Navajo Tribal Council Resolutions 1922 -55, Window Rock, Ariz., 211-12 (1952).

40. See NTC Minutes, Aug. 10, 1949, at 40.

41. 25 U.S.C. §§ 461-708 (1970).

system. The tribe received favorable appraisals of its sovereignty as measured by the working law and order system which it grafted onto a Court of Indian Offenses.⁴² Tribal attorneys gained the attention of the courts and state officialdom.⁴³

While creating an Anglo legal system, the tribe emphasized the cultural distance separating Anglo law from the Navajo people. The *Navajo Yearbook* set forth the tribe's official position to Public Law 280 and captured the two elements of its position:

It is the general belief of the Navajo Tribal Council and a majority of the Navajo people that the extension of State Law and State Court systems to the Reservation would be premature at the present time because of the cultural peculiarities that distinguish the Navajo from the non-Navajo population. In order to meet the special requirements of the Reservation area, the tribe is willing to support the law enforcement and the judiciary systems despite the high annual cost involved.⁴⁴

The record does not suggest that the tribe placed its money and personnel into a federal-then-tribal legal system in order to address the "cultural peculiarity" of Navajo society.⁴⁵ While "cultural

42. The Courts of Indian Offenses, established at 25 C.F.R. § 1.2 (1976) have a strange history. They were developed in 1890 to institutionalize judicial hearings not within the state or federal court system but within the Office of Indian Affairs and the Department of Interior. Congress never sanctioned them except indirectly through appropriations. W. WASHBURN, *THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY* 470-75 (1973); Rules issued by the Commissioner of Indian Affairs to the Secretary of the Interior 1892 (Washington) at 25-31. First, agents were to employ the courts to abolish scalp dances, war dances, plural marriages, practices of medicine men, burial customs involving destruction of property, and other "barbarous rites." *Id.* at 29. Second, they were to be employed to bar use, sale, or transfer of intoxicants among Indians. *Id.* at 30.

The purpose of the courts was viewed by leading commentators and the courts as mere educational and disciplinary instrumentalities of the federal government. *United States v. Clapox*, 35 Fed. 575 (D. Ore. 1888). See also F. COHEN, *FEDERAL INDIAN LAW* 148-49 (1942).

Although Cohen and others attempted to embellish the courts with a better set of regulations, criticisms of the gap between how regulations define the court and the criminal and civil needs of the Indians have been regular themes of students of Indian law. See, for example, MERIAM, *supra* note 25, at 46, 766, 769; Barsh & Henderson, *Tribal Courts, The Model Code, and the Police Idea in American Indian Policy*, 40 LAW & CONTEMP. PROB. 25, 55 (1976).

43. Norman Littell was retained in 1947 and hired additional attorneys as assistants throughout the era.

44. 1958 YEARBOOK, *supra* note 19, at 143.

45. There is a continuing assumption that independent Native American law systems, built on Anglo models by American law school and police academy-trained Native Americans, will manifest cultural diversity if allowed to do so by the federal government. See Barsh & Henderson, *Tribal Courts, The Model Code and the Police Idea in American Indian Policy*, 11 LAW & CONTEMP. PROB. 25, 56-60 (1976). The Navajo experience suggests that matters of a purely cultural nature (e.g., witchcraft cases) will find a forum in a tribal

peculiarity" probably did underlie disputes concerning who should police or judge and the ties that Navajo police and judges should have to local communities, those who suggested overtly that non-Anglo approaches to conflict should be incorporated into this legal system were in an insignificant minority.⁴⁶

In their debates, the Tribal Council did not consider institutions or roles distinct from those proffered by the state legal systems and by its guides, professional attorneys. The Council recognized that the principal purpose of an active legal system in Navajo communities was to avoid the systems of others. Navajos and non-Navajos recognized that although the traditional community-based system of law was often at variance with the norms and process of state law, traditional law continued to serve as a guide where Navajos were tied to kin and clan groups.⁴⁷ The Council and its attorney-advisers concluded that only a legal system which resembled the state legal system, replete with legal specialists and institutional arrangements, could block implantation of a system in state hands.⁴⁸

Knowledgeable observers expressed concern about the conflicts inherent in forcing Anglo-American law upon non-Anglos. Their protests were helpful in fending off state takeovers.⁴⁹ However, the Council and its attorneys appear to have been convinced that the only legal system which would be recognized as valid was a system modeled after state and federal design. Justice was unobtainable, at least in the Anglo sense under Navajo custom, despite the fact that disputes had been effectively resolved up to this time. The Navajos were concerned with the establishment of a legal

court only when well disguised as torts or criminal complaints. Yellowhair Interview, *supra* note 12. This does not mean, however, that real complaints were always so redefined that no desired relief was obtained by Navajos in court or by police.

Family complaints were resolved by Navajo police and Navajo judges under each domain. Whether relief was granted depended primarily on the policeman or judge's propensity to deal with the problem, however cast, in a traditional Navajo way.

It remains to be seen whether adoption of improved American institutional models and roles in the 1950's and decades thereafter within the context of an independent Navajo legal system broadened or narrowed the diversity of the legal process. For a pessimistic appraisal of American law and cultural diversity, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 15 (1973).

46. See text accompanying note 158 *infra*.

47. See SHEPARDSON & HAMMOND, *supra* note 11, at 55-56, 135-36.

48. See text accompanying notes 144 and 153 *infra*.

49. *E.g.*, the resolution by anthropologists Clyde Kluckhohn and Dorothea Leighton states that the mechanism of Navajo social control was too fluid to be readily understood by white people who think of authority in terms of courts, police, and legislative assemblies. C. KLUCKHOHN & D. LEIGHTON, *THE NAVAJO* (1946).

forum which would be accepted by those who would challenge the tribe's ability to govern.⁵⁰

Tribal councilmen recognized that social change created problems outside the continuing realm of social control based on kin, outfits, and clan relationships within a localized sheep and livestock economy. The system of restitution and individualized justice was insufficient to deal with the dangers of drinking, especially during social occasions related to the new economy of income-by-check. Young men returned from the war with exposure to ways that traditional ceremonies could not reconcile with the old life; stock reduction and the land base would not allow an incorporation.⁵¹ Violence associated with drinking emerged as an endemic problem, especially when tied to large gatherings such as squaw dances or when railroad or relief checks were distributed.⁵² Police were needed to protect people, and communities requested that local men be deputized in order to control and focus the work of the police upon Navajo problems and Navajo remedies. Because the federal government would not provide funds for these requests, the tribe supplied the funds with the concurrence of the Secretary of the Interior.⁵³

The Council was concerned about the foreign nature of the legal system and its laws; however, this peculiarity was taken for granted in most internal discussions.⁵⁴ Of greater importance to the Council was the issue of *control* of the system. While there was an early consensus that the system would not be a state system, there was vigorous debate on the issue of control within the federal-tribe-community system which comprised the Navajo political environment. For example, the Navajos could not enforce their antipeyote ordinance when the federal police had been ordered by their commissioner not to enforce the ordinance.⁵⁵ The Navajos funded police for the Indian Service who could enforce

50. Only political and legal anthropologists, among non-Navajos, have been consistently cognizant of dispute processing by clans, chapter officers, and in informal meetings. See SHEPARDSON & HAMMOND, *supra* note 11, at 55-56, 129-33.

51. J. DOWNS, THE NAVAJO 132 (1972). Downs's view is confirmed by Navajo advocate Zunie Yellowhair, who cites this group as the source of continuing problems which find the way to legal services offices. Yellowhair Interview, *supra* note 12.

52. See NTC Minutes, Jan. 11, 1955, at 59, *id.*, Jan. 12, 1955, at 68, 72, 96.

53. *Id.* at 66.

54. Regarding the Law and Order Code, Chairman Paul Jones said (in support of a resolution to appoint a law and order committee to make administrative suggestions); "None of us here, as far as I know, are capable of making any changes in this Code because it is legal and technical. . . ."

55. See NTC Minutes, July 25, 1946, at 37 and D. ABERLE, PEYOTE RELIGION AMONG THE NAVAJO 110-21 (1966).

the ordinance.⁵⁶ Should judges be non-English speaking and elected and thereby tied more closely to their home communities, or should they be educated, appointed, and professionalized so as to reflect control by the Council and the image of modernization that the tribe sought to offer to the states?⁵⁷ Should police be locally elected and traditional, or young and less traditional?⁵⁸ Debates in these terms were the real conflicts over the direction and content of the system.⁵⁹

Although the pace and formality of the legal system were determined in part by the presence or absence of young or older personnel and their ties to local communities, there was a recognition that other norms and fixtures of state legal systems were being appropriated. Navajos were already confronting these same elements of foreign law as they entered the markets and labor pools off the reservation.⁶⁰

In sum, the system constructed was more than an expensive front to conceal and protect a society, its customs and resources from outsiders. Navajo investment of scarce resources in the system was expected to provide needed services and allow Navajos to educate other Navajos to newly relevant laws. While manifesting sovereignty to outsiders by encouraging and then assuming a neglected federal responsibility, the legal system was also designed to prove to people who were in fact only loosely organized as a tribe that a centralized tribal government could be trusted to govern.⁶¹

56. NTC Minutes, *supra* note 55, at 40.

57. See text accompanying note 107 *infra*.

58. See text accompanying notes 122-123 *infra*.

59. This is not to say that there was a sharp division between a traditional and modern viewpoint among Navajos in this epoch. Older Navajos joined with veterans in encouraging younger members of the tribe to contribute to the police system experience gleaned off the reservation to the police system. Younger Navajos joined with older Navajos to seek older judges. See VICENTI, *supra* note 2, at 185.

60. See Graves, *The Personal Adjustment of Navajo Indian Migrants to Denver, Colorado*, 440-66, in H. BAHR, et al., *NATIVE AMERICANS TODAY: SOCIOLOGICAL PERSPECTIVES* (1972).

61. Arbury Williams suggests that accommodation by both Navajos and the federal government led to a decrease in radical opposition to the cultural content of leadership by a central tribal council. "Accommodation among Navajos has come, in part, from a greater awareness of the function of American Government via education in Anglo-American schools, exposure to American ways during military service for the Government, and as a result of contact with Americans in wage paying jobs away from the Navajo reservation. In like manner, Americans working with Navajos . . . have learned something of how Navajos maintain social control, the importance Navajos attach to consensus, and how leaders gain and maintain their positions. The Government reduced the intensity of opposition in allowing the Navajo Tribal Council to select its own legal advisor as general counsel in 1947. The objections to a central, tribal-wide political structure with the authority to act on behalf of all Navajos has decreased in recent years as revenue from mineral resources on

Impact of the Fernandez Amendment

Any Navajo or Anglo who viewed the state of affairs which confronted the tribe in June 1949, during its discussion of the Fernandez amendment, would have believed that no opportunity existed for Navajos to construct their own legal system, either on Anglo or non-Anglo models. Every agent of power was closed to the idea.⁶²

During this time Congress attempted to impose state civil and criminal laws on the Navajos as a condition for the passage of the Navajo-Hopi Rehabilitation Act.⁶³ This Act provided for a decade-long economic development plan leading to assimilation of Navajos into the larger society. The Interior Department yielded to Congressman Fernandez's threat to block authorizing legislation for the Navajo-Hopi Rehabilitation Act if his amendment was not attached to the bill, then pending in his Indian Subcommittee of the House Public Lands Committee.⁶⁴ The amendment to the aid package provided that states would be granted concurrent jurisdiction over cases then heard in tribal courts on the Navajo and Hopi reservations. In this fashion, the amendment proclaimed, Indians "shall have access to courts of such states for the enforcement of their rights and the redress of wrongs to the same extent and in the same manner as any other citizen thereof."⁶⁵

The amendment specified that tax exemptions would continue "until otherwise provided by Congress."⁶⁶ The responsibility for public education would also be left to the federal government.

Norman Littell, tribal attorney since 1947, presented the amendment for discussion, along with the substance of several telephone conversations with Congressman Fernandez. Littell addressed the situation in terms of its several realities, the amendment's near certainty of passage, the current state of native rights as established by the courts and, finally, the current state of the Navajo legal system in federal hands.⁶⁷

Littell reminded the Council that complaints about Indian courts were constant and described complaints which had come to his attention:

tribal land... has been continually considered as an economic asset which belongs to all Navajos." A. WILLIAMS, *THE NAVAJO POLITICAL PROCESS* 61 (1970).

62. See text accompanying notes 63-78.

63. 25 U.S.C. § 636 (1954).

64. COLLIER, *supra* note 21, at 370.

65. NTC Minutes, June 9, 1949, at 38.

66. *Id.*

67. *Id.* at 39-40.

The defendants don't have a jury or the right to a jury or a lawyer. [The defendant] stands up before an Indian judge, who to my knowledge, does not know English and so the representative of the Bureau reads him the regulations and interprets and tells the judge what the penalty is and the judge tells the defendant what the penalty is. The situation has haunted me but the problem is just too staggering for me to do anything about it. It is all over the reservation and there isn't money to reform the thing.⁶⁸

In 1948 the Navajo military veterans had criticized the system on several grounds: lack of access to the rules or codes, lack of educated judges, and the lack of sympathy on the part of judges with "more modern thinking of the more educated members of the Navajo tribe."⁶⁹

The police and court system subsisted on tribal authorizations in 1946 and 1947. Complaints about salaries taken to Congress by Chairman Chee Dodge had been greeted with laughter in the committee room.⁷⁰ The Council records were replete with criticisms of police for their lack of education, personal conduct, and illegal arrests.⁷¹ The consistent response of the area superintendent was that one could expect little more in the way of organization when such low wages were paid.⁷²

Councilman Howard Gorman reported that his attempt in the 1930's to assist in modifying the Federal Code, along with the efforts of Tom Dodge and Felix Cohen, had resulted in few noticeable adoptions of tribal recommendations.⁷³ Little substantive improvement in the structure of justice or the quality of personnel appeared despite the contribution of Navajo money to double the salaries in 1946⁷⁴ and to increase them again in 1947. The

68. *Id.* at 49.

69. NTC Minutes, Mar. 18, 1948, at 94-95. Older Council members supported their plea for reform of federal Indian courts but were met by a response from the court's head, the area superintendent, who said bluntly that, as with horses, you get what you pay for. *Id.* at 100.

70. NTC Minutes, Feb. 18, 1947, at 87. Complaints to Washington over inadequate wages to police and judges did not begin with the Tribal Council. A disgruntled Indian agent in 1883 said: "I have had no police. Navajos cannot be had for such a sum as \$5 a month. The right to fix the pay of police should be vested in the Secretary of Interior and not be arbitrarily named by men who have no conception of the duties required." ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 121 (1883).

71. NTC Minutes, Mar. 18, 1948, at 97, 98.

72. *Id.* at 98.

73. See also Felix Cohen comment, NTC Minutes, July 13, 1945, at 102.

74. NTC Minutes, July 23-26, 1946.

tribal money had purchased more Navajo employees for what many people viewed as an inadequate system.⁷⁵

Access to the state court system was in essence access to something not merely concurrent but entirely superior to the present court system in terms of Anglo-American content. Navajos were persuaded that they would be able to litigate against whites as well as Navajos in state courts.⁷⁶ Congressman Fernandez argued that what the Navajos had was no legal system at all, only the shabby institutions placed there by non-Navajos. Further, he saw individual Navajos persecuted by custom with no opportunity to defend themselves.⁷⁷ When confronted with descriptions of discrimination against Navajos by the state courts and police departments which served border towns where Navajos worked or shopped, Fernandez suggested that armed with the right to vote, young Navajos could be placed in positions of responsibility.⁷⁸

Opposition to the amendment was from the start led by Howard Gorman of Ganado. He focused not on the comparative quality of justice as measured by either Anglo or Navajo standards but rather on the reality of state control of the legal system.⁷⁹ Gorman criticized the BIA for failing to provide education and refusing to take advice offered by Navajos, and weighed the amendment offered by Fernandez:

The amendment he has offered is going to open up the doors for the Outside, maybe those people that vote for him will come out here. The Spanish-Americans will police the reservation. We don't stand in too good for these people. We have been told from time to time that 85% of the people are illiterate, primitive, if you please and when you consider that this thing is going to throw the Navajo tribe in the worst chaos in the history of the Navajo tribe, I think none of these councilmen will see the day when the state courts will take over. We are going to endeavor to travel that direction whether the amendment becomes an amendment or whether it doesn't[;] we are going to reach that some day whether

75. See text accompanying notes 70-74 *supra*.

76. NTC Minutes, July 10, 1949, at 60-61 (Dewey Etsitty).

77. WASHBURN, *supra* note 42, at 2028, 2033.

78. NTC Minutes, June 9, 1949, at 37-38. Littell endorsed this view. *Id.* at 39. Finally, attorney Littell suggested that the amendment would be offset in part by another which provided for a tribal constitution allowing the tribe greater management of its own affairs. *Id.* at 41.

79. See text accompanying note 80 *infra*.

Representative Fernandez has anything to say about that or not. That is the reason we are advocating education among the people. Education will solve the whole thing and even though they build a wall around this reservation, our children are going to climb over and accept the outside. We will finally be assimilated to it. Right now I think it would be a catastrophe to accept anything to go under the state law and order. They will ask for tax money to pay. Navajos will be asked to pay for their services. Also our tribal funds. They are after that money⁸⁰

Gorman suggested that the chasm between Anglo and Navajo society was a fact of life with debilitating results. Where government policy in the name of separatism, denied Navajos the tools necessary to carry on a process of internal change and adjustment to new demands, it also denied Navajos the capacity to pick the moments, pace, and kind of changes which would allow their society to survive. Thus, friends of the Navajo could damage the society with a smothering kind of paternalism as readily as enemies could damage the society with frontal assaults on its capacity to seek its own way. This special appreciation of change as a reality of life and preparation for change as a necessity for preservation of core values was a formula utilized by Navajos.⁸¹

Gorman did not reject out of hand the norms, roles, or institutions of state law. Navajos were not prepared for application of state law by outside legal specialists. Without a further opportunity to develop their own legal specialists, Navajos would not participate in the application of law to Navajo life.⁸²

The role of education as a "magic key" to political power was reiterated time and again in Tribal Council deliberations. The value of education was perceived as even greater than the potential wealth of natural resources in Navajo hands. Once obtained, education could not be plucked away by a new interpretation of law. Developed expertise within the Navajo community had lasting value.⁸³

By a vote of 37 to 20 the Council supported the Fernandez

80. NTC Minutes, June 9, 1949, at 46-47.

81. See KLUCKHOHN & LEIGHTON, *supra* note 18, at 66-67 (rev. ed. 1962), and DOWNS, *supra* note 18, at 129-34.

82. See text accompanying note 8 *supra*.

83. For example, the Council decided to trade unlimited water rights to the Colorado River for a federal endowment of its first community college. See Price & Weatherford, *Indian Water Rights in Theory and Practical Navajo Experience in the Colorado River Basin*, LAW & CONTEMP. PROB. (1976).

amendment.⁸⁴ After a congressional voice vote in favor of the amendment, the advisory council of the tribe reversed its decision, citing widespread grassroots opposition. Ultimately, the Council reversed itself and approached President Truman to request that the entire aid package be vetoed rather than allow the passage of the Fernandez amendment.⁸⁵

Truman vetoed the bill with a message that set forth themes significantly different from those which drew the attention of Council members. Truman responded to the argument raised by ex-Indian Commissioner John Collier that the bill would supersede a distinctive body of tribal customary law.⁸⁶ The Fernandez amendment, said Truman, "might be construed as abrogating these [customary] practices in one fell swoop and imposing upon these Indians a system governing descent and distribution of personal property which they neither want nor understand."⁸⁷ Truman emphasized that he viewed ultimate Navajo acceptance of state jurisdiction as a logical consequence of their social and economic integration with Anglo society. For the present, however, with four-fifths of the tribe non-English-speaking and a majority unschooled, Truman concluded that it was "unjust and unwise to compel them to abide by state laws written to fill other needs than theirs."⁸⁸

The Truman veto addressed indirectly the expressed Navajo concerns with control of the Anglo legal system which they experienced and the quality of their system. Truman created a prolonged opportunity for them to proceed with independent expansion of a legal structure, even though the expansion had little or nothing to do with redefining law in order to treat the disparity between law and custom that so concerned Truman.⁸⁹

The President reiterated what he termed was a long-standing policy of respect for tribal self-government: "The Congress and the Executive Branch have repeatedly recognized that so long as Indian communities wished to maintain and were prepared to maintain their own political and social institutions, they should not be forced to do otherwise."⁹⁰

The Truman veto served several purposes. First, it was accepted by Congressman Fernandez who assisted in securing the bill's

84. NTC Minutes, June 9, 1949, at 65.

85. 5 CONG. Q. ALMANAC 602-603 (1949).

86. COLLIER, *supra* note 21, at 370.

87. PUBLIC PAPERS OF HARRY S. TRUMAN 515 (1964).

88. *Id.* at 516.

89. See text accompanying note 88 *supra*.

90. PUBLIC PAPERS OF HARRY S. TRUMAN 515 (1964).

passage without his amendment in the next congressional session.⁹¹ Second, the veto gave new life to opportunities for Navajo tribal self-government, to the extent that they were prepared to pay their own way, and gave new life to their argument for a separate legal system based on their present cultural difference. Finally, the veto bought time for the tribe to muster its own resources in order to develop a system of law which would meet tests of similarity and not diversity.

Navajo Response

Navajos attempted to graft changes onto the federal system which reflected their own ideas regarding the need for further education, participation by Navajos, and control shared indirectly by communities and the tribe.⁹² On several occasions, councilmen had decried the system of appointment of Indian judges by the agency superintendent. State judges were elected, it was argued, and so Navajo judges should be.⁹³ The first substantive reform passed by the Council in a 1950 election reform resolution was to have judges elected from local districts,⁹⁴ ignoring arguments that justice would be biased by clan relationships.⁹⁵ Deputy police, paid with tribal funds, were elected informally by local communities in chapter house meetings.⁹⁶

The Secretary of Interior approved this resolution and inadvertently enhanced its localizing effect by diminishing funding for circuit riding.⁹⁷ Circuit riding had been employed not only to circulate judges through outlying communities but as an attempt by the Indian Service to rotate judges when they might be influenced by familial relationships.⁹⁸

Arguing that there was a need for centralization, for administrative and for educational purposes, attorney Littell drafted a resolution in 1953, which provided for two major reforms of the Court of Indian Offenses. A Navajo chief judge would be appointed to administer the court but not to hear appeals. The tribal attorney, the area superintendent of the Indian Service, and the

91. 6 CONG. Q. ALMANAC 387 (1950).

92. See text accompanying notes 93-96 and 122-124 *infra*.

93. See comment by Deshne Clah Chischillige, NTC Minutes, July 17, 1977, at 64.

94. Tribal Council Resolution 1922-51, passed Aug. 21, 1951, at 220.

95. KLUCKHOHN & LEIGHTON, *supra* note 18, at 65.

96. NTC Minutes, Jan. 7, 1953, at 89.

97. *Id.* at 91.

98. See L. Mueller, Chief Special Officer, "The Navajo Law and Order Problem" (Aug. 10, 1936), *Hearings, Senate Subcomm. on Indian Affairs, Survey of Conditions of Indians in the United States*, app. 10, 17996, 17998, 75th Cong., 1st Sess. (1937).

federal government's local attorney would act as an appellate court until such time as Navajos schooled in law could take their places.⁹⁹ The purpose of the proposed reforms would be twofold. First, the chief judge would give some structure to the existing court system. Littell argued that at present, "Each judge is a kind of law unto himself, unlike the outside world where, in every court there is more than one judge. Every such court would have a presiding judge, or Chief Judge, who would assign work in an equitable fashion."¹⁰⁰ Littell's argument for a case docket and a line of authority running from elected judges to a chief judge was strengthened by complaints from police that cases were left pending or were dismissed through judicial inactivity.¹⁰¹

John Collier had criticized the control of Indian judges by Indian Service personnel when he attempted to reform the systems by statute and then by regulation.¹⁰² The plan represented a critical philosophical difference between the tribal attorney and the earlier Indian Commissioner.¹⁰³

The Navajos were building a legal service within an Indian Service mantle which was expected to be an eventual fixture within their tribal government along with the adoption of a tribal constitution. The legal system outlined in the constitutional proposal which Congress had mandated in the Navajo-Hopi act would be

99. NTC Minutes, Jan. 7, 1953.

100. *Id.* at 93.

101. *Id.* at 88. Yet, Littell's "law unto himself" argument may have been a misinterpretation of this apparent disorder. From his perspective, a court system required an administrative structure as well as a hierarchy of checks and balances. The fact that the Navajo judges were tied as never before to local constituencies was irrelevant. He never considered that cases might have been dismissed or left pending because communities wanted this result. Consumers of the system may have wanted police intervention without judicial review and punishment.

102. J. Freeman, Jr., "The New Deal for Indians: A Study in Bureau-Committee Relations in American Government" (unpub. Ph.D. dissertation, 1954), at 123; COLLIER, *supra* note 21, at 229.

103. Iverson reports that Littell "sharply disagreed with Collier's notion of traditional Native American life teaching other Americans, saying what Collier wanted was not for 450,000 Indians to 'join the 160,000,000 citizens in the American way of life but the 160,000,000 Americans are to join the Indian in his ancient rites and beliefs!'" P. Iverson, 159 (unpub. Ph.D. dissertation, 1975).

Collier advocated indirect rule as a way to achieve "mutuality between the races, peace to the Indian's heart, and the conservation of ancient Indian values through planting within them new hopes and new practical goals." COLLIER, *supra* note 21, at 345.

Littell saw legal reforms as a means to "throw a bridge across from an isolated society heretofore maintained deliberately as a matter of erroneous policy, as a museum piece, to the broader life of American citizens in the world beyond their reservation." Iverson, *supra*, at 158.

an Anglo legal system with appellate and trial judges.¹⁰⁴ The Navajos had only one available law graduate¹⁰⁵ and no trained police.

Littell concluded that to protect the system, untrained Navajo judges and police would have to be supervised by attorneys and professional police who were not Navajos.¹⁰⁶ Once again, the appearance of the system to outsiders was as critical as the immediate impact of the system on the daily lives of Navajos. The inclusion of a federal attorney and the federal superintendent reflected the uncertain base of authority upon which the tribal system would eventually rest.

Councilwoman Annie Waneuka advocated a reorganization effort similar to the one proposed by Littell. However, she recognized that the 1950 resolution to elect judges reflected a continuing desire on the part of many Navajos to be policed and judged by those who were uninfluenced by Anglo law ways. These people maintained in a somewhat contradictory fashion that "there is no penetration in our heads of foreign language and, nevertheless, we should be allowed on the staff of the Law and Order set up."¹⁰⁷

To place educated non-Navajos at the top of a reconstituted police and court system necessarily reflected a second compromise between elements of the tribe. The Navajo constituency which viewed educated professionals as an *ipso facto* replacement of Navajo law with white man's law were left with judges and police at the local level who were selected by their constituents. Only the higher positions within the system would be modified by the 1953 resolution in a way which would strengthen tribal control, bind tribal and federal authority, and thus meet the challenge of termination.¹⁰⁸

104. NTC Minutes, June 9, 1949, at 40-41. Littell offered his proposed appellate court and tribal court reform as a separate resolution since, in his view, that reform could not await passage of the constitution allowed by the Navajo-Hopi Rehabilitation Act. 25 U.S.C. § 636 (1954). See NTC Minutes, Jan. 9, 1953, at 158-60, for the constitutional proposal.

105. Tom Dodge, son of Chee Dodge, was an Indian Service employee. See also NTC Minutes, Jan. 8, 1953, at 110.

106. Littell was no romantic about perpetuating custom in a modern world; neither was he unaware that the basis of tribal authority which would stem from that constitution would be subject to judicial and legislative interpretation by foes of tribal governments. Both his professional grounding and his political sensitivity must have told him that if this element of the tribal government was to survive scrutiny by the states, the courts, and Congress, it would have to have more than the shape of an Anglo court and police system. To ground this or any other branch of tribal government upon inherent powers only, ignoring the veto power implicit in congressional legislation, would have been folly. Thus, a triumvirate was created which attempted to bind the two sources of governmental power, federal and tribal, upon which tribal authority could be explained. See note 103 *supra*.

107. NTC Minutes, Jan. 7, 1953, at 96.

108. "Tribal Appellate Court," unnumbered Navajo tribal resolution, NTC Minutes, Jan. 8, 1953, at 106-107.

Acting on a request from the off-reservation community of Crownpoint and a 1945 resolution which had approved tribal legal activity on off-reservation Indian country, the Council paid to have six policemen and a tribal judge serve in the eastern Navajo "checkerboard" region.¹⁰⁹ This was to be no more than one of a series of tribal appropriations accepted by the federal government which allowed Navajos increased leverage on selection of personnel and determination of their location. By 1953, about half of the 30-man force as well as the judges of the Court of Indian Offenses were paid from tribal funds.¹¹⁰ Tribally paid police and judges, supervised by the Federal Indian Service, established law and order in off-reservation communities where state law and not federal law was inactive or discriminatory.¹¹¹

The Indian Commissioner rejected the resolution calling for the establishment of an appellate court of Anglo professionals, the only law and order resolution ever rejected by the Department of Interior in Navajo history.¹¹² Commissioner Dillon Myer stated that these were, after all, not Navajo tribal judges but judges of the Court of Indian Offenses with authority derived from the Secretary of Interior. He would offer no objection if the tribe wished to establish a tribal court and undertake complete revision of law enforcement activities on the reservation.¹¹³

Commissioner Myer, by his rejection, withdrew federal authority for the first court reform, which implied professionalization of the Indian justice system on a par with the states. The tribal attorney had attempted to build a legal system upon federal power as well as inherent tribal authority. The Court of Indian Offenses could be funded by Navajos, but as courts of the Department of the Interior, improvements which would have discouraged states' aspirations to take over criminal and civil jurisdiction could not be made.

Commissioner Myer could not overtly remove the option pro-

109. 1953 YEARBOOK, *supra* note 19, at 280-81.

110. NTC Minutes, Jan. 8, 1953, at 103-104.

111. *E.g.*, on failure of the city of Gallup to live up to promises to clean up the city's jail conditions or control liquor sales, *see* comments of Hoskie Crane Meyer, NTC Minutes, June 22, 1955, at 269-70. *See also* comments of Billy Becenti (Crownpoint) NTC Minutes, Jan. 13, 1955, at 130; Interview with Jeanette Saunders (Mariano Lake, N.M.), in VICENTI, *supra* note 2, at 350, 358; L. KELLY, THE NAVAJOS AND FEDERAL INDIAN POLICY 189 (1968). *See* earlier comments on the situation in MERIAM, *supra* note 25, at 764. The chairman assessed the situation as a law and order setup "previously run by the government" and "done away with and thrown in our laps." *Supra* note 110, at 95.

112. Navajo Tribal Code tit. 7, § 31 (1962), at 358; Letter of Mar. 3, 1953 (Law and Order 879-53, 880-53) quoted in Resolution Co-69-58.

113. *Id.*

vided by the Navajo-Hopi Rehabilitation Act to establish a court and police system under the constitution promulgated pursuant to the Act. But by vetoing the resolution, he could remove all federal resources and the impression of federal cooperation with the reform. If the court was to be reformed, it would require an exclusive tribal undertaking, accomplished by Navajos who were not trained.

In the end, further consideration of court reform under a tribal constitution was mooted by tribal rejection of the entire constitutional mode of organization including its appellate court provision.¹¹⁴ Tribal court records show no further attempts by the tribal attorney to reform the court structure for five years.¹¹⁵

In anticipation and in response to state court and agency scrutiny, the Council adopted state traffic laws, state adoption procedures, and other elements of the state's criminal and civil codes.¹¹⁶ The Council continued to appropriate money for police, but now urged that younger men be hired.¹¹⁷ This attempt to place power into the hands of those who had experienced law off the reservation resulted in increased arrests. However, complaints directed at the police also mounted. Jewelry was pawned for bail and fines when relatives came to retrieve the arrested individuals. Arrested persons were taken to distant jails and released far from their home communities. By 1954, the courts showed a backlog of 1,700 cases.¹¹⁸

A resolution to extend police and court services to Ramah, a second off-reservation community, and the appearance of an Anglo

114. Littell wrote Mary Shepardson in 1960: "No constitution has been adopted and it is not anticipated that one will be for sound practical and legal reasons which have developed since the Navajo-Hopi Limitation [*sic*] Act containing a compromise provision on a constitution which would increase rather than decrease the powers of the Secretary [of the Interior]." Cited in M. SHEPARDSON, *NAVAJO WAYS IN GOVERNMENT* (1963). Shepardson comments that another view is that some decisions which the Council can make without referral to the electorate would have to be so referred under a "limiting" constitution. *Id.*

The better view is that events and especially more expansive interpretations of sovereignty in the latter part of the decade made further attempts to pass a constitution counterproductive. Littell had, after all, continued to urge a constitution on the Council after the Navajo-Hopi act was passed. The rejection was its rejection, not his.

115. See text accompanying note 166 *infra*.

116. For example, Tribal Resolution 7-55-53 imposed traffic laws and regulations, modeled after New Mexico's and Arizona's, in order to accomplish competent coordination of Navajo traffic law and state traffic law. 14 Navajo Tribal Council Resolutions 68, 74 (1958). Resolutions had been previously passed to incorporate state law in order to persuade Navajos to stay out of state court, *e.g.*, concerning divorce. NTC Minutes, July 17, 1944, at 17-18, 21.

117. NTC Minutes, Jan. 12, 1955, at 93 (retrospective account). This zeal was tempered by a second decision that Navajo deputized police ride horseback as had their predecessors in the 1930's and, even earlier, in the days of Manuelito. *Id.*

118. NTC Minutes, Jan. 13, 1955, at 113.

head of police sparked a renewed inquiry into the business of law and order. The investigation which followed was to become the longest sustained discussion to date of the subject in Council chambers.¹¹⁹

Patrick Nelson, head of the federal branch of law and order, met a barrage of questions and complaints. Two councilmen told of unlawful arrests at the hands of police. One had been picked up in a case of mistaken identity and transported across the reservation to Tuba City, where he was held overnight in jail until released by the court. The other had been beaten.¹²⁰

Many communities petitioned for part-time police to handle their liquor problems. Few of these requests could be honored. Transfers of men by the new chief and the problems experienced by the councilmen seemed to some to contradict a tacit agreement that the Council had made with the local law and order personnel and with the area superintendent that "the community would choose and recommend their own police and then they would know who they had for police and what kind of man they would have for police."¹²¹

The Council learned that its desire to see younger men employed had resulted in the purge of non-English speakers or their transfer from fulltime to part-time positions as special deputies on horseback. Younger men did not know the communities nor were they well trained in the law. With neither community loyalty nor training to guide them, their actions were viewed as excessive and arbitrary.¹²²

Inattention on the part of the federal law and order chief did not create confusion in the direction of this coalition of 76 fulltime police and special deputies. Instead, the chief's problem stemmed from conflicting messages received from the Council and from the communities as to what police should do and who they should be.¹²³ Nelson and the councilmen shared an appreciation of the liquor problem which plagued the reservation. Both Arizona and New Mexico had by this time repealed state prohibitions against sale of liquor to Indians. This facilitated the flow of liquor onto the reservation where possession and use were still prohibited by federal law. Bootlegging was facilitated not only by increased sup-

119. NTC Minutes, Jan. 11-13, 1955.

120. *Id.* at 55, 110.

121. *Id.* at 57.

122. *Id.* at 93, 110.

123. *Id.* at 53. Forty-four policemen were federally paid. Thirty-two policemen were tribally paid regular officers and deputies.

ply but, ironically, by improvement of the road network into the reservation as a result of the Navajo-Hopi Rehabilitation Act.¹²⁴

Among consumers of liquor were young Navajo males, unemployed or employed seasonally, and often detached from the sheep-herding society and its social controls. Some young males who had replaced older Navajos as fulltime police fell victim to peer pressure and drank.¹²⁵ They were terminated as police and replaced by other young Navajo men. Young men who were English-speaking were trainable, Nelson argued, as others would argue on behalf of younger English-speaking judges and advocates in the years that followed.¹²⁶

Hogan-level Navajos prized the experience which education could bring to Navajo society through its younger people. However, in matters of social control, they valued also the wisdom of age and the influence of the family structure.¹²⁷ Dismissal of court cases for failure of the officer to appear or to present an adequate case not subject to dismissal when he did appear was an Anglo law problem and not necessarily a problem perceived by Navajo communities.¹²⁸

To Navajo communities, an absence of police at large public gatherings meant that problems occurred. Prevention of trouble by a figure attached to the community but now also tied to the power of the federal and tribal governments was what many Navajos believed they had been purchasing by underwriting law enforcement in federal hands.¹²⁹

124. *Id.* at 66, 68.

125. *Id.* at 54.

126. *Id.* at 61, 77.

127. Maturity meant several things. Older police, whether grounded in Anglo definitions of police work or not, were prepared to do more than make arrests. They were prepared to arbitrate complaints when they arose at squaw dances; they were prepared to talk to intoxicated persons and take steps to protect the individuals. Criminal law problems were not necessarily criminal law problems at all in the Navajo community. Some Navajo judges and police understood this situation. Yellowhair Interview, *supra* note 12; Interview with Tribal Court Judge Tom Becenti, VICENTI, et al., in 2 LAW OF THE PEOPLE 218 (1972).

128. See VICENTI, *supra* note 2, at 162-63.

129. See, e.g., the statement of Councilman Chavez Coho on the interplay of custom and law services funded by the tribe. "Sometimes we have some kind of an ailment where we need some kind of medical assistance, like we may want to hire our own medicine man, we still are in trouble in order to inform him of the condition we are in. The same is true of a Doctor when we need assistance. We usually tell the Doctor what is ailing us. Sometimes we do not bother about it. We hesitate about going and consulting them about it, thinking by its own natural cures, we may overcome it and get well again and, consequently, it begins to accumulate on us until it gets so big. Such is the situation regarding our Law and Order in my area. Heretofore we have been isolated from our part of the Tribe. We have been handicapped along that line and have tried to keep those things under control by presenting them and talking to our people. Sometimes we get the Chapter Officers to take care of these things and sometimes we appoint someone to attend to these cases, but it got

Older Navajos, presumably untrainable, had been relegated to the part-time positions.¹³⁰ While communities could petition for these positions, their candidates were scrutinized by Anglo standards for past law violations and for education. Fulltime police were out of Navajo control. The small group of police and their limited resources were utilized in a way appropriate to Anglo law enforcement.¹³¹

The gap between Navajo intent and professional intent could have been narrowed had the federal government provided funds sufficient to add personnel, equipment, and facilities. The newly formed law and order committee reported on the abysmal quality of courts and jails. Suggestions were made to condition the further funding of police in Ramah on matching federal contributions.¹³²

In the end, a compromise was reached. The tribe's law and order committee would recommend to the chief where police would be stationed and what qualifications tribal persons should meet within the law and order branch. From its inception, the compromise was unsteady. Because English-speaking Navajos were necessary in order to be trained by English-speaking instructors, it was still not likely that older police would be appointed as fulltime officers.¹³³ Tribally paid police filled the needs of off-reservation communities. Deputies who were locally hired were paid from tribal funds.¹³⁴

Sam Gody pointed out that the tribe was left to enforce a code

to a point where we could not do anything with it and the reason for that was that people were beginning to use outside legal help against our own way of trying to do these things so that we have to go and call on you people for help along that line, and what we need there most is a Judge located there with a police officer so that they can take care of this situation. We, the people who are living out on the edges of the Navajo population, where we are kind of out of reach from the interior, feel very much handicapped along this line in lots of ways. Not only that, but in lots of ways we seem to have been forgotten on lots of things, so far just wishing and hoping that some time you people will take notice of it and help us out some way to remedy these things out there for us and start from the bottom and work upward and try to straighten out a lot of these problems for us and that is our thought out there. That is the thought of the Navajo people living out there on the edge of the Navajo Reservation." NTC Minutes, Jan. 12., 1955, at 82-83.

130. NTC Minutes, Jan. 11-13, 1955, at 111.

131. Testimony of Chief Patrick Nelson before the Tribal Council, NTC Minutes, Jan. 11, 1955, at 52-55.

132. *Id.* at 92. There was little or no likelihood that the Congress would provide funds for these improvements. Attorney Littell and the area director discouraged the Council. The Navajos were moving in a direction that other Indian tribes had not taken. The Department of Interior had funded only one Zuni policeman and one Hopi. *Id.* at 123. C. Hodge & W. King, "Indians and the Law," at 50 (unpub. dissertation on file at Bureau of Ethnic Research, Univ. of Ariz. 1958).

133. See comments by Nelson, NTC Minutes, June 22, 1955, at 266.

134. NTC Minutes, Jan. 11. 1955, at 55, 57.

of laws which it had not passed as its own. "Until the law is changed we are just being told 'you want to spend your money for something over which you have no authority.'"¹³⁵ Eugene Gordy asked, "I wonder why they hesitate to do something for us, because we are still wards of the Government and, as such, they should be concerned about us, but they do hesitate to do something for our Tribe. Is it because we have a [17 million dollar] tribal fund or that they do not care so much what happens to our people?"¹³⁶

The answer to Gordy's question may have been that Congress and the Interior Department were awaiting initiatives by the states which would transfer the problem of law and order on the reservation to them. Several new developments seemed to support this theory.

State Jurisdiction

Anticipating the burden of state and city responsibility for law and order, the city of Gallup asked the tribe to provide funds to handle Navajo offenders in its city.¹³⁷ The Tribal Council rejected the request and the tribal attorney began a pattern of litigation which would result in new changes in the power of tribal courts.¹³⁸

In *Williams v. Lee*,¹³⁹ a trader on the reservation sought to enforce a debt against Paul Williams incurred on the reservation by means of a state court order. If state courts had jurisdiction over the civil claims against the Navajos, it was conceivable that a blow would be struck to the tribal government of far greater significance than any which had preceded it. State courts would be able to seize Navajo personal property and sell it in order to collect debts. Jurisdiction over civil matters would be obtained regardless of whether the state assumed responsibility for all services under Public Law 280.¹⁴⁰ Such selective incorporation was favored by Arizona¹⁴¹ and other states who desired something

135. NTC Minutes, Jan. 11-13, 1955, at 91.

136. *Id.* at 96.

137. NTC Minutes, June 22, 1955, at 271.

138. See text accompanying notes 139-142 *infra*.

139. 83 Ariz. 241, 319 P.2d 998 (1958). The Arizona Supreme Court upheld the power and authority of a county sheriff to serve process and the state court to hear the debt action. Williams appealed the case to the United States Supreme Court with the help of the tribal attorney.

140. *Id.*

141. Arizona apparently had to amend its constitution in order to take advantage of Public Law 280. However, Arizona did later assume jurisdiction over air and water pollution matters in what may prove to be a questionable interpretation of its authority. See

other than the all-or-nothing responsibilities of Public Law 280.¹⁴²

It was the problem of judicial debt collection that returned the question of law and order, including the role of courts and police, to the Council floor on July 17, 1956. At issue was a Tribal Council resolution to amend the powers of the court so that judgments could be executed upon and tribal police could seize property to satisfy judgments of the Indian courts.¹⁴³ The resolution was long and replete with legalese. The tribal chairman said, noting "the long faces and shut eyes of his colleagues," that it was "one of the most uninteresting subjects that this Council has at any time ever discussed."¹⁴⁴ However, boredom was not the reaction to the resolution; instead, hostility to the implications of the resolution was evident. Providing the court with police power to seize personal property of Navajos for tribal or for Anglo creditors raised anew the specter of the 1930's stock reduction program.¹⁴⁵

Goldberg, *supra* note 33, at 569.

142. During 1959 the Department of the Interior reacted to this point of view by supporting piecemeal assumption of jurisdiction either geographically or in certain types of cases. ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR 239-40 (1959).

143. "Providing for Execution of Judgments by Navajo Court of Indian Offenses in Civil Cases" NTC Minutes, July 17, 1956, at 38-43.

144. *Id.* at 52.

145. See comments of Councilwoman Annie Wanueka, NTC Minutes, July 17, 1956, at 57-58: "This material that has been presented here in this Reservation to authorize our police force to go out and gather up property, sheep and other chattels of our Navajo peoples and dispose of them by sale, I do not believe that is right. These police are not involved in trying to control grazing on the Navajo Reservation, but they are criticized for the way they are doing their own work they are already assigned to do. Those of us who are on the Grazing Committee are faced with enough criticism by our people for trying to tell them how they should graze their stock. To authorize policemen to go out and gather up some poor woman's few head of sheep and dispose of it, I do not know of any good reasoning behind it. We are in crying need for water. The present conditions do not allow us to enjoy anything but the immediate needs from day to day because we have had no rains. It is too dry. Our stock are suffering and we are thirsty so why impose a regulation such as this on our poor people?"

Compare D. PARMAN, *THE NAVAJOS AND THE NEW DEAL* 65-67 (1976): "The massive antagonism toward the second herd reduction was based on the complex and profound attachment Navajos held for their sheep and goats. Glimmers of their thinking were apparent from the older council members' repeated remarks equating their attachment for livestock to whites' lust for money, but Collier, despite his sympathy for Navajo culture, did not fully comprehend how deeply the tribe felt about the subject. Equally remarkable, he never commissioned a study on the subject, although he subsidized several investigations of other cultural topics

"Despite their suspicion of persons who have acquired wealth too quickly, Navajos largely determine social status by the amount of stock a family owns. Thus Chee Dodge was venerated only in part because of his past experience and ability to deal with federal officials. He and other prominent leaders were additionally respected because they possessed horses, sheep, jewelry, and blankets. In fact, the Navajos' economic concepts came amazingly close to approximating the puritan work ethic of whites. James F. Downs, an anthropologist, found in his interviews that 'single families will tell with pride how their immediate ancestors began life with only a few sheep but increased the herd through

Certainly no recorded encounter between an Anglo attorney (here Laurence Davis, the assistant to Littell) and the Tribal Council demonstrated more clearly how far apart their motivations for reform of the legal process were. Davis argued that if the Court of Indian Offenses was not empowered to act on civil judgments, outside creditors who could not collect their debts would press the state legislatures to intervene with their court systems.¹⁴⁶ Not only Anglo creditors but the tribe needed this power to collect money from tribal members by seizing and selling their property, Davis reasoned. With the increased royalties from oil and gas leases, the tribe had established a revolving loan fund for Navajos. Surely, the attorney argued, Council members would realize that all debts incurred must be paid.¹⁴⁷

To the Navajos, debt relationships were secured traditionally by families as well as by individuals. They generally arose out of ongoing relationships between creditor and debtor, be they Navajo and white trader or Navajo and Navajo.¹⁴⁸ The installment salesmen who were then only beginning to besiege the Navajo for business were to be given less credence. Said Councilman Paul Begay:

Where installment buying is encouraged by salesmen that is not our fault. We do not want to flood our Courts with these cases in the event the Navajos should not take care of their payments. They go on the radio and advertise that "You can take everything you want under our installment plan." So why should we be concerned about making collections for them? We do not need to flood our courts with their problems.

perseverance, the proper exercises of ritual power, and right living.' . . . Prior to New Deal livestock regulations, Navajo parents customarily set aside part of the increase of their herds for their children as patrimony when they married. With all members sharing ownership, the herd became a focal point for the entire extended family. Each day the flock was driven out of the pen near the hogan and herded by youngsters under the careful supervision of adults. Even the grand matron of the family might herd, either trudging behind the sheep and goats with a staff and rattling a tin can filled with pebbles, or, in a more regal manner, astride a horse. Lambing, shearing, castrating, and moving the herd to new pastures united the family, and members normally absent because of outside work or marriage appeared to help on such occasions Operating without individual ownership of land and having no strong taboo against financial insolvency, the Navajos still sensed that herd reduction would disrupt the very fabric of their existence, threaten some of their most central social and religious values, and raise questions for the future that federal wages could not answer (footnotes omitted)."

146. NTC Minutes, July 17, 1956, at 44.

147. *Id.* at 52.

148. See Conn & Reichbart, in VICENTI, *supra* note 2, at 64-76.

In the case of one Navajo owing another Navajo, one individual to the other, the same thing will be true. We are going to have more indebtedness cases filling our Courts and do we have enough Courts to take care of these matters? I believe it is up to the Councilmen to encourage repayment of any debts owed by their people. In my case I have to do that. I feel that I am responsible in seeing that my people do not go into debt beyond their ability to repay, thereby we keep out of debt in my area.¹⁴⁹

Where tied to the community or local economic cycles, debts were repaid. In this realm, social control by the family or by chapter officers was strong enough without law. The tribe's loan program was built upon this local base. Loans were screened by individuals in local communities. The tribe lost only seven-tenths of 1 per cent of nearly \$700,000 disbursed.¹⁵⁰ The scope of the resolution was viewed as excessive. How could *all* property be made subject to seizure by police?¹⁵¹

In response, the tribal chairman and Howard Gorman posed the threat of Public Law 280. "Our two states," said Chairman Jones, "are still likely to do anything on it and we do not want to give the States any chance to use it for their own benefit . . . if we do not go anywhere near pleasing the State, they will do their way and we cannot do anything about it."¹⁵² Concluded Gorman,

Even though we do not like to hear it said here, Public Law 280 is staring us in the face. Yes, it is true that we have not got money and it is pretty hard to get it but taking into consideration what the authorities are planning to do, we have to do something about it. You remember the Fernandez Amendment . . . If it had become law, we would have been under the State now. We would not have any jurisdiction over our police force.¹⁵³

The chairman agreed with other Council members that the resolution should be tabled until it was reworded to narrow the scope of property which could be seized and prohibit the police from seizing on behalf of Anglo creditors. The attorneys returned two days later with a resolution which deleted money, jewelry, firearms, and ammunition from items to be taken. Seventy-five

149. NTC Minutes, July 17, 1956, at 53-54.

150. COLLIER, *supra* note 2, at 254.

151. NTC Minutes, July 17, 1956, at 56.

152. *Id.* at 55.

153. *Id.* at 67.

sheep per person were also protected.¹⁵⁴ The police were not mentioned in the amended resolution. The attorneys explained that police, not loan committee members, had to take the property because the police were deputized.¹⁵⁵

Some councilmen were not pleased with the compromise. Paul Begay withdrew his motion and Annie Waneuka withdrew her second. Begay promised that, "When it beomes law, you will hear all kinds of complaints and criticism from our own people."¹⁵⁶

The plight of the off-reservation areas, subject to state as well as tribal law, was reiterated. It appears that the Council's concern that police would be used as bill collectors did not stem from any bias against police in their usual reservation role. In the same session, the absence of police service in off-reservation Navajo communities, subject to state as well as tribal law, was addressed and remedied.¹⁵⁷ Even before the tribal treasury was filled by oil and gas royalties,¹⁵⁸ the Council had provided police for these areas when the state provided no police protection.

The tribal attorneys must have known that the critical issue of state jurisdiction over Indians raised in *Williams v. Lee* had at its factual core an obvious question sure to be raised in the Supreme Court of Arizona and, later, in the United States Supreme Court. Outside courts and outside creditors were mollified by the passage of the resolution. In oral arguments of *Williams v. Lee*, the United States Supreme Court asked the tribal attorney to provide an account of the number of civil actions for debts brought by non-Navajos in tribal court.¹⁵⁹ The attorneys provided statistics to show that courts had become vehicles for these civil claims.¹⁶⁰ In fact, few Navajos used the court for collection of their debts. Until the emergence of lay advocates in the 1960's, civil cases were largely those debt cases of non-Navajos and divorce or support cases urged upon Navajos by welfare agencies.¹⁶¹ Navajos could still seek damages or claims by using chapter officers and other figures in the home communities.¹⁶²

154. NTC Minutes, July 19, 1956, at 130.

155. *Id.* at 137.

156. *Id.* at 138. In the end, the Council approved the compromise by a vote of 50 to 16.

157. *Id.* at 139-40.

158. The tribe received 33 million dollars in oil and gas lease royalties in 1956. 1956 YEARBOOK, *supra* note 19, at 242.

159. Appeals record, *Williams v. Lee*, 385 U.S. 217 (1959).

160. *Id.*

161. In the last year of the Navajo Court of Indian Offenses, the court handled 9,555 criminal cases and 690 civil actions. Mary Shepardson reported that one judge in the 1960's handled 2,216 criminal and only 275 civil cases, Shepardson, *Problems of the Navajo Tribal Courts in Transition*, 24 HUMAN ORGANIZATION 250-53 (1960).

162. SHEPARDSON & HAMMOND, *supra* note 11, at 21, 133, 135.

Court Reorganization

In that same 1956 session, the tribal attorneys had requested and received authority to develop a plan of court reorganization.¹⁶³ The Council was prepared to spend ten times that of other Arizona Indian tribes to mount a large law and order campaign both on and off the reservation to avoid state intervention.¹⁶⁴

The Council was not prepared to consider resolutions in the manner of lawyer-legislators. Members usually deferred to their attorneys. They could pinpoint dominant Navajo values that the lawyers overlooked. The lawyers were skilled at reading the perceptions of non-Navajos who posed a threat to Navajo self-government. They were not interested in traditional approaches to conflict adjustment whether employed outside the court or inside the courtroom. For them, only judges in the Anglo mold were to be developed.¹⁶⁵

In 1958, the tribal attorneys were prepared to present to the Council a plan of court reform which granted Navajo control of the system. The plan was coupled with resolutions making the federal code of Indian offenses the Navajo tribal code and establishing a Navajo police force.¹⁶⁶ *Williams v. Lee* was pending in the United States Supreme Court.¹⁶⁷ Interior Secretary Seaton had "clarified" the Department's termination policy by deemphasizing it.¹⁶⁸ However, the threat of Public Law 280 was still the major persuasive device employed by assistant tribal attorney Davis to sell the features of a plan that implied further change in direction for the legal system.¹⁶⁹ Judges would no longer be elected and candidates for judgeships would be young men who could be trained.

Davis argued that the age qualification could be lowered from thirty-five to twenty-one in order to reach into a larger pool of Navajos who had benefited from secondary education and even

163. NTC Minutes, July 18, 1975, at 109.

164. HODGE & KING, INDIANS AND THE LAW 52 (1958).

165. See, e.g., comments by Davis, NTC Minutes, Oct. 15, 1958, at 253, 254, on employment of seasoned Navajo attorneys. But see contrary position by Davis on question of appearance by attorneys before tribal court in NTC Minutes, Oct. 17, 1958, at 335.

166. NTC Minutes, Oct. 16, 1958, at 323-25.

167. NTC Minutes, Oct. 15, 1958, at 257.

168. In a Sept. 18, 1958, radio address, Secretary of Interior Fred Seaton stated that, "no Indian tribe or group should end its relationship with the Federal government unless such tribe or group has clearly demonstrated, first, that it understands the plan under which such a program would go forward, and, second, that the tribe or group affected concurs in and supports the plan proposed." W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES 996 (1973)

169. NTC Minutes, Oct. 15, 1958, at 257.

college. He recognized that the Council might want to raise the limit to twenty-seven, reflecting the possibility that a Navajo boy would have attended college, law school, and received some seasoning as an attorney by that time.¹⁷⁰

Davis also argued that an appointive system was then favored as a state approach and would allow some ongoing measure of authority over judges by the Council if the judges failed to do their jobs. The judges were still not enforcing orders against debtors. Davis concluded:

If merchants can't find any place where they can enforce a debt against a Navajo Indian they are going to the State Legislature and they are going to get the State Legislature to extend its jurisdiction as sure as shooting. These merchants have considerable influence with the State Legislature.¹⁷¹

The present court of Indian Defense ([sic]) are working pretty well as far as petty crimes are concerned, but in regard to civil actions they are not working at all.¹⁷²

"Since the *Lee* case came up," added Davis, "the Tribal legal staff has pretty well succeeded in keeping other traders from suing Navajos in State Courts, but they have been doing that by saying 'If a Navajo owes you money go to tribal court'." Otherwise, the courts where justice could be dispensed cheaply and justly would be lost and replaced by state courts where justice was expensive and where many Navajos who were not English-speaking would be barred from juries.¹⁷³

Credit might be denied to Navajos. Davis read a letter from a furniture dealer who sold on installment. When the dealer came to tribal court, the defendant was not there. The judge said that he could do nothing. Many other merchants had called the tribe's legal aid attorneys with the same complaint.¹⁷⁴ After all, Davis reminded them, all Navajos could not have a paid-for lawyer in state court as had Paul Williams.¹⁷⁵

The price of legal independence for councilmen and their communities was set even higher by the reorganization plan and Davis' argument. While Davis described no significant problem with the courts handling the day-to-day complaints of Navajos, he

170. NTC Minutes, Oct. 14, 1958, at 248.

171. NTC Minutes, Oct. 15, 1958, at 258.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 257.

argued that outside participants who criticized court operations posed a threat to the system.¹⁷⁶

Davis assumed that judges too independent of tribal court by their lack of education or by their means of selection would not act in the tribal interest against Navajo debtors or on behalf of Anglo (or tribal) creditors.¹⁷⁷

Councilmen appeared to have been skeptical of this apparent binding together of interests of individual Navajo defendants and the tribe's need to proffer an independent judiciary for outside creditors. One councilman inquired whether Navajos would be able to have representation by attorneys in tribal court based on their use outside.¹⁷⁸ Davis responded that in light of their cost, it would be better to bar attorneys.¹⁷⁹ Davis added that to provide counsel for a petty crime or for a civil case would be doing something that most states do not do for indigent defendants.¹⁸⁰ Yet Davis employed the state analogue again when he urged that a 1945 tribal resolution requiring jurors to be thirty years old be lowered in order to obtain a cross-section of the community.¹⁸¹

Councilman Howard Sorrell pointed out that the age of police had been raised from twenty-one to twenty-five at the Council's urging.¹⁸² The Council quickly adopted a motion to keep the minimum age for judges at thirty-five years.¹⁸³

Several councilmen asked whether the reforms meant that Navajos could not bring cases against non-Navajos. Davis responded that the Indian Commissioner would never approve such an attempt.¹⁸⁴ The Council asked if judges presently in power would be retained on probationary status. The people would be consulted by the chairman in judicial selection, replied Davis.¹⁸⁵

Generally, the Council was overwhelmed by the changes promised, including, for example, rules of court and rules of evidence. Frank Bradley said:

There are nine pages to this proposed resolution and I don't understand a single thing in it. I don't know what was ex-

176. *Id.*

177. *Id.* See also NTC Minutes, Oct. 16, 1958, at 328, on removal of judges who failed to live up to tribal interests.

178. NTC Minutes, Oct. 17, 1958, at 334.

179. *Id.* at 335.

180. *Id.* at 337.

181. *Id.* at 334.

182. NTC Minutes, Oct. 15, 1958, at 261.

183. By a vote of 46 to 17, *id.* at 262.

184. NTC Minutes, Oct. 16, 1958, at 332.

185. NTC Minutes, Oct. 17, 1958, at 345.

plained as we went through it. But the proposal here is to appoint tribal judges rather than to elect them, so I am asking this question: Why are we making such a change? What is wrong with the present judges that we have? What have they committed or what have they done that we should appoint new judges? . . . I have no ill feeling against them, although I may appear before them ever so often.¹⁸⁶

The next day Annie Waneuka argued for reform on behalf of the tribal attorney and moved for the resolution's adoption. "There is no proper control," she said, "and if we adopt this resolution then we will have a better method of control."¹⁸⁷ Although the Council voted 61-1 to adopt the resolution, the Secretary of Interior returned the resolution in January 1959, for what an assistant tribal attorney explained were minor revisions. "In our original resolution, we courteously requested the Secretary to transfer his authority; in the revised resolution we don't," he explained.¹⁸⁸

The Supreme Court in *Williams v. Lee* had accepted the argument that Arizona courts had no jurisdiction over Navajos with respect to any cause of action arising on the reservation.¹⁸⁹ The Court rejected a much more conservative position argued by the Solicitor General on behalf of the federal government that use of its court or any court by traders was prohibited in any event by federal regulations which made extension of credit at the risk of traders.¹⁹⁰ The federal government had argued further that tribal courts were what decisions of a hundred years before had called them, merely educational and not really courts at all.¹⁹¹

The Supreme Court chose to measure the tribal court's authenticity independently of this narrow federal interpretation by viewing the institution as it then existed, as a component of a *de facto* tribal law and order system. It requested and received a memorandum from the tribal attorney listing all cases by traders then pending in the tribal court.¹⁹²

The Supreme Court cited glowing reports of the growth of the Navajo law and order system in the *Navajo Yearbook*. The Court

186. *Id.* at 347.

187. *Id.* at 351. Councilman Denetstone expressed fear of the states getting jurisdiction over the Navajo Reservation. According to Dillon Platero, fear of losing his election led to a judge's failure to enforce collection of debts. *Id.* at 352-53.

188. NTC Minutes, Jan. 6, 1959, at 18.

189. *Williams v. Lee*, 385 U.S. 217 (1959).

190. *Id.*, Brief of the United States Solicitor General, at 3.

191. *Id.* at 5.

192. Appeals record, *Williams v. Lee*, 385 U.S. 217 (1959).

concluded: "The tribe itself in recent years greatly improved its legal system through increased expenditures and better-trained personnel. Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants."¹⁹³

This description of the law and order courts as a tribal legal system indicated that the Supreme Court was prepared to view tribal funding and tribal staffing as evidence of the tribal exercise of its own sovereign authority and gave little or no weight to the United States Solicitor's description of the court as an educational vehicle of the federal government on the Navajo Reservation.

The tribe's political position in renewing its request for an independent legal system was strengthened. No longer did the tribe need to consider a constitution as a mechanism for welding federal and tribal authority.

The particular threat of state intervention to enforce debts incurred on the Navajo Reservation was dispatched by *Williams v. Lee*.¹⁹⁴ The more general threat of Public Law 280 could be eliminated by repassage of the resolutions to reform and fund the courts, to assume and fund the police operation, and to adopt the federal code of Indian offenses as the tribal code.

In the second Tribal Council deliberations of January 1959, the tribal attorney presented a unilateral "compromise" on the question of age. He amended the resolution to lower the age of judges from thirty-five to thirty, arguing again that younger men receiving better educations could get appointments.¹⁹⁵ When a councilman suggested that the tribal court system assert jurisdiction over non-Navajos, assistant tribal attorney McPherson reiterated the threat of Public Law 280.

I think it would be a mistake for this Council to undertake to do the impossible and assume the authority to administer the criminal laws with respect to non-Indians because the day you do that the Congress will apply Public Law 280 to the Navajo reservation. You wouldn't have any police force if such is inflicted upon you by the States of Utah, Arizona, and New Mexico. You will reach the point where you must make the choice.¹⁹⁶

However, from the perspective of tribal leadership, the threat

193. *Id.* at 222.

194. *Id.*

195. NTC Minutes, Jan. 9, 1959, at 21.

196. NTC Minutes, Jan. 6, 1959, at 20. The resolution passed 52 to 11. *Id.*

of Public Law 280 was, by 1959, remote despite the fact that the state intervention without tribal consent remained a statutory possibility. The tribal chairman commented:

Whenever the state decides to take over, it will be up to the people of the state to vote on it. That is their choice. But, there are a lot of people in this state who say that they cannot begin to do justice and that they haven't got personnel nor the money to do it with. Meantime, we want to show them that we have a law and order setup that is better than the states and they won't want to interfere with that.¹⁹⁷

The tribe continued to expand its police force, adding 22 new positions to the force and increasing the budget by \$400,000 to over one million dollars.¹⁹⁸

A newly appointed judicial advisor passed out copies of the Canon of Ethics employed in Anglo courts, and spoke expansively of education for judges and the use of a battery of achievement tests to find candidates for newly vacant positions.¹⁹⁹ More than a few councilmen recognized that something other than the issue of control was being addressed by these changes. One councilman said:

Now the thinking is changing. Apparently we are going to use highly-educated and highly-trained Navajos to handle the Judgeships of the Tribe. What is the aim, what is the purpose of such a thing? Are we going to change the language of the Navajos altogether? I don't believe we are at that stage yet. We would still like to use the Navajo way of thinking, the Navajo manner of doing things, and use the Navajo customs at this time, yet. The idea that we are going to change all Navajo thinking, I don't believe stands well for the Tribe.²⁰⁰

While Councilman Becenti's opinion did not change the vote on the resolution for budgetary increases, he expressed the feeling of Council members and community people who supported continued tenure for older and less educated judges. These tribal views figured into the appointment of more educated but still community-oriented tribal judges. No tests were administered.²⁰¹

197. NTC Minutes, June 3, 1959, at 435.

198. *Id.* at 405-406.

199. NTC Minutes, June 10, 1959, at 603-605.

200. *Id.* at 628.

201. Tribal Judge Tom Becenti, one of those selected, reports that candidates appeared

Despite judicial education which encouraged judges to stand off from their peers and not shake hands with clan members upon entering the courtroom, an open style of free-flowing testimony prevailed in tribal courts.²⁰² Cases which could not be resolved in local communities could find their way to tribal court under the label of "disorderly conduct," and the judge could probe the complaint to discover the underlying problem.²⁰³

Members of the Tribal Council asked again that attorneys be provided to assure protection of parties in court. The tribal attorneys did not support the introduction of lawyers into tribal court.²⁰⁴ The reforms left the judge in a pivotal position to assess the traditional or modern outlook of the Navajo party before the judge.²⁰⁵ Lawyers would add confusion with technical rules of evidence and procedure that neither judges nor parties understood.²⁰⁶

To believe that partial westernization of the legal process served a constituency with traditional as well as modern expectations in any predictable fashion was illusory. The system created was neither Anglo nor traditional.²⁰⁷

An Assessment of the Decade

The Navajo "revolution" was cautious and pragmatic. Had the tribe not retained an able attorney who could read the political and legal landscapes and had it not possessed resources to build a legal system in a federal shell, the prospects for tribal sovereignty would have been grim.²⁰⁸

Pragmatism made possible the introduction of Navajo lay advocates into the legal process in the 1960's and the professionaliza-

before the entire tribal council and spoke in Navajo and English prior to selection. Becenti Interview, in VICENTI, *supra* note 2, at 192.

202. Shepardson, *supra* note 16, at 250-53.

203. SHEPARDSON & HAMMOND, *supra* note 11, at 139 (145 of 436 cases were cast as disorderly conduct).

204. NTC Minutes, June 10, 1959, at 614-15.

205. See Becenti Interview, in VICENTI, *supra* note 2, at 216.

206. *Id.* at 191-92.

207. *Id.* at 182-85, for a critical assessment of tribal courts from the perspective of the late Leonard Jimson, one of the finest lay advocates to appear in tribal court.

208. See, e.g., comments by the Mayor of Scottsdale, Ariz., against requiring tribal consent prior to the assumption of state civil and criminal law: "Our opposition to the repeal of Public Law 280 is based on the belief that it would in fact enslave them in a cocoon of privilege—that of helping to make laws for others from the jurisdiction of which they could choose to be excluded. How can we have people who vote for representatives to make laws, who vote for judges, then determine whether or not those laws will apply to them, or have those judges hear their cases. Such a proposal is so downright destructive of American principles as to be indecent." VICENTI, *supra* note 2, at 131.

tion of the system in the 1970's with a Navajo bar. Even if the Navajo consumers of justice had been left behind or coerced into subsidization of an Anglo-American legal system, what occurred was ultimately for their own political good.²⁰⁹

The legal system, as a fixture of sovereignty, was equated with tribal power but not with Navajo Indian power. Navajos who questioned acts of the corporate tribe could not find judicial relief. In this sense, the tribal legal system had replaced the Court of Indian Offenses as an improbable source of relief against acts done in the name of the tribe as state. Jurisdiction could not be obtained over non-Navajos, but non-Navajos could sue members of the tribe.²¹⁰

The laws, both written and unwritten, that were applied in the forum were federal and state laws. Custom was difficult to prove, especially to high court judges advised by attorneys who knew little or nothing about Navajo law ways as norms or processes of dispute adjustment. Custom as law was favored by individual judges but not by the system.²¹¹

209. Judge Becenti saw both Anglo and Navajo law as pertinent to his court: "It is better for us that we continue to include this custom law until the day all the Navajo people learn. At that time, I do not know how it should be. Because the way the Navajos think about each other, the way we think about each other, and the way the Pueblos think about each other are different. And then, the way the Anglos think about each other is also a different way. For that reason, for all of us to follow in that direction and set aside our customs, I do not think that it would be right. They should be included and continued to be used. Perhaps our way was better. This is the way they think about it

"According to my way of thinking, I think it's better to have both. Today the way of the Anglo is good. The reason why I think that way is we have come to use and clothe ourselves mostly with what is made by the Anglo. These are things which belong to him. We have picked up some of these things today and are using them. Today, if our own bee haz'aanii became strong, that would be a good thing. It is like this within the Reservation today. Some of those big companies and corporations look onto the Navajo Reservation with a wish to come here, but it is not possible for them because of the law

"This is the way it seems to be. This is what they talk about mostly. But the thing is this. 'If we ever deal with the Navajos, there must be something by which everything can be known.'" VICENTI, *supra* note 2, at 216-17.

210. Navajo Tribal Code, tit. 7, § 63 (1962).

211. VICENTI, *supra* note 2: "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 states 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. Unfortunately, this informality was usually at the expense of the defendant. It was made clear to judges that it should not diminish their role as an authoritative figure." *Id.* at 182-83.

"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 of convincing sincere and perceptive Navajo leaders that acceptance of Anglo-American

Police and judges were not entirely new law jobs on the Navajo Reservation. Yet in numbers and in organization they came to have a pervasive impact on the people. Still, dispute settlement in the communities screened out many complaints which might have found their way to court in Anglo communities.²¹²

In sum, the Navajo revolution allowed the internal legal events of the sixties and seventies to take place. The motivations for this structural change had both the opportunities and the conflicts which emerged again when a federal legal services organization introduced poverty lawyers and Navajo advocates in 1967. These advocates represented interests of individual Navajos with little avowed allegiance for protecting the political interests of the corporate tribe at the same time.²¹³

Writers attempting to describe the movement of societies from informal social control mechanisms to structured legalities, as an evolutionary product, will find little to comfort them in the development of the Navajo legal system.²¹⁴

While the change traced above did parallel a transformation of the Navajo economy from a land-based, sheep-herding economy to one more dependent on credit and cash, the negative implications of this change for Navajo consumers were addressed only in part by building a court and police system.

Liquor problems could be handled by the police. Family problems could be handled in court by judges who tempered their Anglo law training with a Navajo propensity to hear the parties out and then offer advice. Yet the purpose of many reforms was to loosen practices based upon community loyalties, and to replace them with a professional loyalty to the Navajo "state" and to a legal procedure that validated tribal authority.²¹⁵

The Navajo experience suggests that control of direction and content of the legal process can be accomplished in several ways, none of which are entirely determinative. First, one who pays and supervises the players can also lay down basic definitions concerning their roles and purpose. Second, new roles and new institu-

substantive law was a requisite to maintenance of Tribal independence from intrusion of the state and federal systems. This is the portion of the termination policy that remains most harmful and most pervasive." *Id.* at 184-85.

212. SHEPARDSON & HAMMOND, *supra* note 11, at 129-33.

213. See PRICE, *supra* note 15, at 177, for an account of the impact of individual representation against the tribe on the director of the Navajo Legal Service program.

214. See Schwartz & Miller, *supra* note 3.

215. The parallel between the modern Navajo system and colonial legal systems is striking. See Bohannon, *The Differing Realms of Law*, in Nader (ed.) *The Ethnography of Law*, 67 AM. ANTHR. no. 6, pt. 2 (1965), at 33.

tions carry with them new values which must at the very least be addressed and integrated with other values or approaches that the players might consider more appropriate.²¹⁶

The federal government, the tribal government, and tribal attorneys were able to lay down an organizational grid which implied control from the center and from the top. They were able, over time, to weed out more "rebellious" elements by requiring education as a prerequisite to participation. Until recently, education in an Indian context meant that a Navajo left the home community and lived within the paramilitary environment of a boarding school. The student not only learned a second language, but was socialized to follow, at least in part, a different set of values.²¹⁷

On the other side of the equation is the capacity of legal actors to manipulate or adapt these original purposes with an eye to the needs and demands of their second reference group, the Navajo communities in which they resided. Consumers of the legal system at the hogan level encouraged this countervailing process in several ways.

Actors and consumers spoke and shared the same language and legal culture. They shared a lifestyle with prospective law specialists (and with Tribal Council members) that tribal attorneys did not follow. Through their representatives they sought political control of legal specialists. But as the criteria for selection of these specialists effectively screened out many persons tied to local communities, the consumers continued to apply pressure upon the court by selecting for its adjustment disputes which seemed most appropriate for resolution by police or by police and courts.²¹⁸

To look for the institutionalization of custom in the norms, roles, or procedures of the Navajo system or any other Native American court and police system is a misguided search. The pressures to conform in order to possess a state legal system were too great to codify custom.²¹⁹

Instead, the real conflict between westernization and tradition took place at a more fundamental level of daily activity by legal actors. Professionalization and institutionalization meant westernization. To possess the power of a judge or policeman while playing the roles of judge or policeman lightly meant that it was possible to form a loose compromise between the demands of the

216. VICENTI, *supra* note 2, at 183.

217. See MERIAM, *supra* note 25, at 346.

218. SHEPARDSON & HAMMOND, *supra* note 11, at 138-39.

219. VICENTI, *supra* note 2.

state system and the demands of the communities in which the law system performed.²²⁰

Scholars who trace the role of law in society rarely utilize this view of the process of law when they test it for "cultural relevance," but look for "custom courts" or codes of custom as evidence of custom's continuing impact.²²¹ They argue that when governmental social control in the form of legal activity becomes active in a community or state, its legal culture tends to drive into oblivion less powerful forms of social control and, with them, idiosyncratic approaches to dispute settlement.²²²

The byplay of custom and law seems to be more complex. Custom survives outside of legal institutions in the society's design for living, its culture. It presses inward upon the institutions by means of cases brought there and by means of the daily activity of legal actors attuned to custom. This was especially true when Navajos had no trained attorneys or trained advocates who were prepared to recast the complaints in terms of remedies available in most Anglo courts.²²³ The absence of advocates left to tribal judges (and tribal court clerks) the task of recasting complaints to conform to Anglo law or to denying relief to customary problems which could not be reshaped.²²⁴

The social distance between judges or police and their constituencies was not great. Social pressure to do what was right in a community sense as well as in a professional sense was immense. No other person or institution could be blamed for the acts of judges and police in this context. This may explain the inaction by judges when their only response would have been negative by community standards.²²⁵

The end result of professionalism in the Navajo society or elsewhere was to develop a cadre of legal specialists who were relatively immune from pressures by the consumers. They could identify with their professional peers and with their profession when their acts conflicted with their client's expectations.²²⁶

220. Manuelito and other Navajo headmen recognized this as early as 1883 when they took jobs as police offered by the Indian agent. See VICENTI, *supra* note 2, at 165-66 and note 21, *supra*.

221. See T. WERHELST, *SAFEGUARDING AFRICAN CUSTOMARY LAW* (1968).

222. BLACK, *supra* note 2.

223. Judge Becenti remarks, "Whenever there was something that did not seem right, it was always disorderly conduct." VICENTI, *supra* note 2, at 213.

224. *Id.* at 214.

225. See text accompanying notes 101, 145, *supra*.

226. This subject is often discussed in police literature. See L. RADEKET, *THE POLICE AND THE COMMUNITY* 108 (1977).

Although often cast by commentators as a battle for the minds of the consumers of law, it appears, then, that the real battle over content and control of Indian justice was for the minds of the legal actors and not the consumers. The Navajos developed an Anglo legal system in order to survive as a political entity. A centralist tribal authority structure replaced a centralist federal authority structure to keep the state legal actors out of the system. The conflict between law and custom was carried out in the background of this reform. To the extent that legal specialists manifested cultural diversity in their daily handling of disputes, the system manifested diversity.