NAVAJO COURTS and Navajo Common Law

A Tradition of Tribal Self-Governance

RAYMOND D. AUSTIN

Foreword by Robert A. Williams, Jr.

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INDIGENOUS AMERICAS

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For all the Navajo judges of the former Navajo Court of Indian Offenses
and the past, present, and future Navajo judges, peacemakers,
and staff of the Navajo Nation Courts.
These dedicated people make Navajo common law work.

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Foreword

THE TRIBAL LAW REVOLUTION IN INDIAN COUNTRY TODAY

Robert A. Williams, Jr.

In 1941, Karl Llewellyn and E. Adamson Hoebel teamed up to produce their landmark book *The Cheyenne Way* and revolutionized the study of what they called "conflict and case law in primitive jurisprudence." Their legal ethnographic description of the "trouble cases" recalled by their Cheyenne informants, drawn largely from pre-reservation life, demonstrated the "juristic beauty" of one particularly noteworthy American Indian tribe. But their underlying assumption that the Cheyenne were not stereotypical lawless savages but sophisticated legal thinkers and actors showed that the evolution and practice of law among the so-called primitive peoples of the United States was far more advanced and nuanced than had been generally supposed. *Navajo Courts and Navajo Common Law* by Justice Raymond D. Austin promises to launch a similar revolution in the way that scholars, lawyers, students, and those interested in important developments in the field of American Indian law and policy view the work of modern-day tribal courts in the United States. As Justice Austin's book shows, the Navajo Nation courts are in the vanguard of a broad-based, transformative movement among tribes in the United States and among indigenous peoples throughout the world, intently focused on retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues and problems.

At the time when Llewellyn and Hoebel wrote *The Cheyenne Way,* the idea that prior to reservation life Indian tribes possessed their own legal traditions and sophisticated ways of thinking about law and justice as a developmental process would have seemed novel, if not absurd, to many Americans. Raised on dime-store novels and Hollywood westerns, most

Americans viewed Indians as a vanishing race with little in the way of cultural achievement worth studying or even knowing about. So too today, the lesson taught by Justice Austin's book that Indian tribes in the United States are applying their traditions and customs as tribal law in modern-day tribal courts to solve the problems of present-day reservation life may strike many people as novel, and even subversive. As the twentieth-century legal scholar Robert Cover once observed, Americans have always looked with suspicion upon those they consider to be different from the mainstream culture, such as the Amish and Mennonites, or Mormons of the nineteenth century, who assert the rights of jurisgenerative (law-creating) communities, separate, apart, and divergent from the dominant society.

Certainly, the U.S. Supreme Court, at least since the Rehnquist Court era, seems skeptical of the ability or legality under the Constitution of modern-day Indian tribal courts to apply their own customs and traditions as law on the reservation to anyone but their own tribal members. At the height of the civil rights era, the justices initially viewed the growth and development of modern tribal courts as something worth recognizing as an important part of our national judicial legal system, even to the point of extending comity to tribal court proceedings. But that was during the civil rights era, and then the Court changed, and the justices' more recent decisions have voiced deep skepticism, even near-hysterical alarm, that Indian tribes might unfairly impose their strange and alien customs on hapless non-Indians who might get lost on the back roads of the reservation looking for the tribal casino.

It is unfortunate, therefore, that the type of growth, development, and, to borrow from Llewellyn and Hoebel, "juristic beauty" of tribal law as developed by modern tribal courts like those of the Navajo Nation are threatened by the Supreme Court's hostility to the jurisgenerative revolution that is occurring in Indian country today. But despite the mangled decisions and transparently racist precedents of the justices, as *Navajo Courts and Navajo Common Law* attests, the revolution has not been thwarted yet. The long tradition of resistance demonstrated by Indians simply insisting on the right to live as Indians, according to their own customs, traditions, and laws, and then doing so, regardless of what the non-Indian world might think of such "primitive," retrograde yearnings,

lives on. *Navajo Courts and Navajo Common Law* gives witness to one such critical site of resistance, taking place on a daily basis in the tribal courts of the Navajo Nation, every time a Navajo judge applies Navajo common law.

As Justice Austin shows, the U.S. Supreme Court really has no good reason—except for the type of cultural prejudice and stereotypes a book like *The Cheyenne Way* was trying to dispel many years ago—to be afraid of the revolution in the development of tribal common law in modern tribal courts. His perceptive and highly readable book chronicles the vanguard leader in that movement, the Courts of the Navajo Nation, and the skillful and careful job it has done of blending the old with the new to create one of the most—if not the most—respected tribal legal systems in the world.

The Navajo Nation's courts were there literally at the beginning of the modern tribal court movement. In 1959, in the landmark case of *Williams v. Lee,* the Supreme Court ruled that the Navajo Nation's court system, and not that of the state of Arizona, was the appropriate legal forum to hear an action over a debt contracted for on the reservation between a non-Navajo merchant and a member of the tribe. *Williams v. Lee* signaled to the Navajo Nation and to every other Indian tribe that a return to a time when Indians made their own laws and were ruled by them was a real possibility in the United States.

But there was much in the way of hard work and institution building that needed to be done in turning the vision of *Williams v. Lee* into reality. Since that landmark decision nearly half a century ago, the Navajo courts, and the hundreds of tribal courts throughout Indian country inspired by that vision, have committed themselves to the critical nation-building task of developing their tribal courts into effective institutions of tribal self-government. The jurisgenerative revolution in Indian country, represented by the hundreds of tribal courts that are operating as critical and culturally responsive institutions of effective community self-rule over the reservation, has taken hold, despite the lack of encouragement or even understanding of the Supreme Court.

Justice Austin himself has been deeply involved throughout his life and career in this modern-day revolution in Indian country that looks

to tribal courts and tribal law as key institutions for revitalizing and restoring tribal sovereignty, traditions, and values over the everyday legal life of the reservation. He has been at the forefront of the movement to develop tribal courts and tribal law as effective tools of modern Indian self-government, and of recognizing the vital need to use tribal customs and traditions as a common law and tool of restorative justice for the modern tribe. He himself served as a justice on the Navajo Nation Supreme Court for sixteen years before retiring in 2001, and wrote hundreds of opinions applying Navajo common law on a daily basis. Like the great treatise writers of the English common-law tradition, Lords Coke and Blackstone, he writes about the law of the court he knows best from an experienced jurist's perspective. He has taught the Navajo Nation court system and Navajo common law to hundreds of law students over the years as a guest lecturer and visiting professor at such law schools as Harvard and Stanford, and has spoken around the world to indigenous groups and interested audiences on tribal law and tribal courts. He presently serves as a faculty member, Distinguished Jurist in Residence, and my valued colleague at the University of Arizona Rogers College of Law, where he inspires our students with a much different legal vision of the world than the one they have been taught in law school.

Like our students who are fortunate enough to learn from one of the world's most respected tribal jurists, those readers who spend time with *Navajo Courts and Navajo Common Law* will come away with an intimate knowledge and understanding of key Navajo legal concepts such as *hózhǫ́* (harmony), *k'é* (peacefulness and solidarity), and *k'éi* (kinship) and how they are applied as guiding norms and values with deep roots in Navajo custom and tradition by Navajo judges in virtually every important area of legal life in the tribe. But, like our students who take his classes, readers will also come away with a profoundly revolutionary outlook on the transformative possibilities of the jurisgenerative, law-creating process that is occurring in the courts of the Navajo Nation and that Justice Austin describes in his book. To learn how the Navajo Nation courts apply Navajo common law to resolve a dispute or issue on the reservation will change the way you think about tribal courts and their ability to dispense justice, even to non-Indians. It will also change the way you think about

the relationship between law and justice itself. There, in the wisdom distilled from those ancient Navajo tribal customs and traditions as tribal law is a vision of justice capable of restoring what has been lost after a legacy of conquest and injustice perpetuated against Indian tribes in the United States—vibrant, self-governing Indian communities living according to the laws that have always suited them best as Indian peoples. Finally, and this is perhaps the best reason for reading and learning from this remarkable book, it will teach you what it is like to live in a jurisgenerative, law-creating community built upon a unique set of transcendent legal principles that seek to foster harmony, peacefulness, solidarity, and kinship between all living beings and nature in the world.

It would not only therefore be a mistake, but a tragedy (and I mean that), to think that *Navajo Courts and Navajo Common Law* is intended for some highly specialized audience of academic experts and scholars who spend their professional lives studying the intricacies of Navajo culture and ancient folkways. This is not that type of book. Nor is it a book that will only be of use to legal practitioners and advocates who appear in the courts of the Navajo Nation and who need to make an argument, say, on the principle of *hózhǫ́* as applied to an employment law dispute. Although the scholar or student of Navajo culture will find a treasure trove of carefully sifted and analyzed information in this book on core Navajo customs and traditions, and lawyers and advocates will find just about everything they need to know about the foundational concepts of Navajo common law, the significance of this work extends far beyond the expertly distilled body of knowledge it offers on the laws and courts of the Navajo Nation. In analyzing and describing the transformation of ancient Navajo customs and traditions by the Navajo courts into a common law for self-governance on the Navajo Nation today, this book will be of immense reward to anyone who seeks knowledge and wisdom on the intensely difficult challenges of nation building and cultural revitalization confronting Indian tribes in the United States and indigenous peoples throughout the world today. Anyone who wants to understand how the world's largest tribal legal system uses its own customs and traditions to make a modern-day law for the reservation couldn't ask for a better guidebook than *Navajo Courts and Navajo Common Law.* Certainly, every tribal

leader, judge, or lawyer who wants to see how tribal common law is developed out of the foundational norms and values that are still identifiable and meaningful in contemporary tribal life on the reservation will be rewarded, enlightened, and inspired by this book. It is both a "can do" and a "how to" manual for those who desire to see tribal custom and tradition translated into the law of the tribe and become a vital tool for achieving tribal sovereignty.

The breadth and scope of Justice Austin's treatment of Navajo common law represents a monumental achievement in American Indian jurisprudence. For the first time ever, the development and growth of an American Indian tribe's modern law and judicial practice have been carefully sifted and analyzed in a brilliantly written treatise by one of the world's most respected tribal jurists. The book also tells one of the most important stories of modern American Indian law and policy in carefully documenting the growth and development of tribal courts as important institutions of tribal self-governance on the reservation through the historical and jurisprudential lens of the Navajo Nation court system. Located on the largest and most populous reservation in the United States, the Navajo Nation courts and their judges have had to overcome numerous challenges in the struggle for legitimacy among the Navajo people and the surrounding non-Indian society. It is the story repeated on virtually every Indian reservation in the United States today, as Indian tribes continue to fight and struggle to establish their own laws and legal systems in their communities as part of the broader effort to achieve tribal self-determination and do what Indian peoples have always wished to do: to make their own laws and be ruled by them.

Acknowledgments

The ideas for this book have been coming together over several years. Some of them were formed during the long hours I spent with my former colleagues Chief Justice Emeritus Tom Tso and the late Associate Justice Homer Bluehouse discussing court policy, deliberating on cases, and flushing out and analyzing Navajo common law. We were appointed as the founding justices of the Navajo Nation Supreme Court in October 1985. Our goal was to establish a solid foundation for the Navajo Nation Court System so that the Navajo Nation courts would eventually assume their rightful place among the world's dispute resolution systems. Navajo judges, lawyers, advocates, legal scholars, and law students have also voiced to me the need for a reference on Navajo common law and one that would demonstrate ways by which indigenous normative precepts can be used to decide modern legal problems.

The ideas became this book with the perspectives, guidance, and support of several colleagues and friends. I am especially grateful to my friend and colleague Professor Robert A. Williams, Jr., of the Indigenous Peoples Law and Policy Program at the University of Arizona College of Law, for encouraging me to put my ideas into a book and for offering comments and support during my research and writing of this book. I am grateful for the help I received from Professors Joseph Stauss and Manley Begay, Jr., of the American Indian Studies Program at the University of Arizona, and Professors Robert Hershey and James Hopkins of the Indigenous Peoples Law and Policy Program at the University of Arizona College of Law, who all reviewed drafts of this book. I am indebted to four individuals whose recommendations after reviewing the final draft sharpened the focus of

these materials: James W. Zion, attorney, former solicitor to the Navajo Nation courts, and a leading authority on Navajo and American Indian common law; Professor Nancy Parezo of the American Indian Studies Program at the University of Arizona, whose knowledge of Navajo culture and past studies on the Navajo people helped me eliminate errors and clarify my arguments; and attorneys Seánna Howard and Maia Campbell of the Indigenous Peoples Law and Policy Program at the University of Arizona College of Law and members of the legal team for the Maya Villages of Santa Cruz and Conejo of Southern Belize, whose research and fieldwork on Maya customs and traditions contributed to the victory before the Belize Supreme Court in October 2007. I acknowledge my debt to Benjenita Bates, Navajo Nation Supreme Court Clerk, who collected documents in Window Rock and sent them to me, saving me numerous trips to Window Rock. I am grateful to my aunt, Martha Austin-Garrison, who reviewed my spellings of Navajo words. I appreciate the assistance I received from Jason Weidemann, Jace Weaver, and their assistants, editors of the Indigenous Americas series for the University of Minnesota Press: they guided me through each stage of the publishing process.

Finally, my family deserves special thanks for their patience, encouragement, prayers, and loving support.

Modern Issues, Ancient Traditions: Going Back to Fundamental Values

There is a unique side to tribal court jurisprudence in the United States that only a few in the legal field have been fortunate to experience, and even fewer understand. The process involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues and tribal problems. The modern Navajo Nation courts are adept at this way of problem solving. This method is itself a lesson embedded in the Navajo Creation Scripture and Journey Narratives. These narratives are the Navajo people's oral history beginning with the primeval universe.

The relevant part of the narratives, abridged here to highlight the central theme, goes like this: The Holy Beings (spiritual beings)[1] created the Diné ("the People"—the traditional name for the Navajo people) in the White World[2] at a sacred place called Hayoołkáál Bee Hooghan (Dwelling Made of Dawn). The Holy Beings then established several foundational laws for the Diné, including those on language, natural environment, spirituality, kinship, and knowledge, to ensure their perpetual growth and prosperity in all their humanity and guide them on maintaining right relations with all their relatives (all "beings") in creation. As time progressed, and because mortals are naturally weak and fallible, the Diné ignored their laws, neglected their prayers and ceremonies, and failed to instruct each new generation on the foundational knowledge that the Holy Beings had given them as life-sustaining gifts. Soon *naayéé´* (anything that causes disharmony) appeared in various forms and multiplied, causing death, suffering, and misery. Desperate for the tranquil days of old, the leaders spent considerable time in council debating futile solutions. Wisdom eventually prevailed and the People implored the Holy Beings for salvation and to reconnect them to the foundational knowledge they had abandoned.

One day, a boy and a girl who had been playing some distance from the village could not be found. The People learned from their medicine man that the Holy Beings had taken the children to Changing Woman's (the mother of the Navajo people) residence in the west and that they were to follow. A special bright star guided the People westward until they arrived at a place where the land and the wide waters came together. They were instructed to camp there and wait for their children. In the spring following the twelfth winter, Changing Woman and the Holy Beings appeared with the children, who were by then young adults. The children had learned the foundational knowledge and ceremonies that composed the covenant between their ancestors and the Holy Beings. The Holy Beings and Changing Woman had chosen them to teach the foundational knowledge to the Diné.

The People learned the old knowledge and ceremonies on their return journey to their lands between the Four Sacred Mountains. At the base of Dook'o'oosłiid (San Francisco Peaks), the holy mountain of the west, a Grandfather Holy Being conducted a Blessing Way Ceremony (*Hózhǫ́ǫjí*) to sanctify the Diné, the four holy mountains (also called sacred mountains), their lands, and the foundational knowledge. The next day, the Diné entered their homelands, secure in their belief that they possessed the sacred knowledge befitting a great people.

Although this is a Navajo story, it could very well be the traditional story of numerous Indian tribes in North and South America and indigenous peoples around the globe. The destruction of indigenous peoples and their customs, traditions, values, and religious beliefs and practices in the Americas and around the world by European conquest and colonization is a familiar story. In the Americas, the native story line goes like this: deliberate slaughter and enslavement of ancestors; depopulation by European diseases; removal of ancestors from ancestral lands; discriminatory and sometimes genocidal government policies; loss of lands; theft of property; crooked treaties and unconscionable agreements; and destroyed cultures, languages, sacred sites, and religious practices. All this injustice and oppression continue to live on on Indian reservations in the United States today; they are just known by different terms. We now know them as intergenerational trauma, prevalent poverty, poor health,

poor educational achievement, alcoholism, drug abuse, and a multitude of social problems. As humanity embarks on the twenty-first century, injustice and oppression continue to be inflicted on indigenous peoples throughout the Americas and different parts of the world. Nonetheless, as the history of the Navajo people shows, trials and tribulations can strengthen a people's resolve to continue cultural and spiritual ways that they believe are essential to their ways of life.

There is a worldwide movement of indigenous peoples; they are sharing experiences, goals, and strategy as they resurrect, revitalize, and reclaim ancient cultures, languages, religious practices, philosophies, and ancestral property. Philosophies and the traditional ways of life should be accorded permanent places in the strategy to achieve indigenous self-determination, secure rights to ancestral lands and resources, and reclaim religious practices, sacred sites, and cultural property. According them due status assures recognition and use of indigenous normative precepts and ways of life in the policies and decisions of international forums and nation-state courts in the quest to reclaim property, secure human rights, and confront injustice and its consequences. For example, lawyers for the Maya Villages of Santa Cruz and Conejo of southern Belize incorporated Maya customs, traditions, and ways of life into their litigation strategy and won a precedent-setting case before the Belize Supreme Court on October 18, 2007.[3] The Belize Supreme Court's decision affirms the rights of the indigenous Maya communities of Belize to land and resources that they have traditionally used and occupied since time immemorial. Revitalizing and resurrecting ancient customs and traditions and applying them in native governments and communities are ways that indigenous peoples can cast aside the yoke of colonization and its effects and assure themselves of self-determination and control of their futures. These are lessons the Navajo people offer indigenous peoples around the globe.

Culture, language, spirituality, sense of place (i.e., being part of the land), and identity are the core characteristics that distinguish American Indians from other Americans, and those same characteristics are our links to the past and future and to all our relatives in creation. From a legal standpoint, American Indian treaties, federal statutes, federal self-determination policy, and federal court decisions all recognize the Indian

peoples' inherent right to their cultures, languages, spirituality, and lands. American Indians, however, must always be on guard. Although the legal authority is on the shelf, the history of American Indian and U.S. relations shows that federal Indian policies shift with the dominant non-Indian society's political mood; Indian lands promised in treaties continue to shrink in size; Indian treaties go unfulfilled; the First Amendment to the U.S. Constitution barely protects Indian religious beliefs and does not protect Indian sacred sites; the American courts, led by the U.S. Supreme Court, continue to diminish Indian nation sovereignty and deny tribal governments' power over non-Indians at every opportunity; and the states are relentless in trying to expand their powers on American Indian lands.

One day the dominant non-Indian society in the United States will decide that the special relationship with Indian nations should be ended on the pretext that the Indian peoples no longer know their cultures, languages, and religions. Thus, it is important for Indian leaders to listen to traditionalists who speak of the sustaining powers inherent in American Indian cultures, languages, spirituality, and sense of place. Tribes must incorporate their normative precepts into their governing institutions, policies, court decisions, and codes to galvanize those powers and use them to empower their communities. Empowerment through customary ways ensures longevity of Indian nation sovereignty, fosters nation building, and preserves, transmits, and perpetuates culture, language, spirituality, and identity.

Some Indian nations will have to dig deep into the past to uncover fundamental philosophies, values, and customs to apply in their governments and communities and to the various aspects of nation building. The nation-building process, in Navajo thinking, would always return to its power source (i.e., culture, language, spirituality, and philosophy) inside the traditional Navajo hogan to reenergize and develop new approaches to address new and unfinished challenges. Whatever the process of revitalization, simply drafting customs and traditions into tribal codes and tribal court decisions will not suffice. The people and their leaders must supplement text with meaningful discourse and action to ensure full comprehension and employment of the traditional principles in the native context. In addition, the revitalization process should motivate many modern Indians

to relearn how to think like their ancestors or to "think like an Indian." When modern Indians begin "thinking like Indians," many problems on reservations will disappear.

Although it would be a significant and worthy project to compile and analyze the common laws of several American Indian tribes, the topics covered in this book are limited to the Navajo Nation's experiences with its courts, normative precepts or Navajo common law, and self-governance.[4] Navajo judges have used Navajo common law to resolve legal issues for well over a century. Navajo court decisions containing these norms, values, customs, and traditions are published in the *Navajo Reporter* (beginning with 1969 decisions) and readily available to legal practitioners, judges, researchers, and the public.[5] The Navajo Nation Council codified some basic postulates as the Diné Fundamental Laws in 2002 and the Navajo Nation courts and departments of the Navajo Nation government utilize them to resolve issues and formulate policy.[6] Navajo court decisions and the Navajo Nation Code can be found through various online research sources (see note 5) and at university libraries around the country. The Navajo Nation Code is accessible to anyone interested in the statutory laws of the Navajo Nation.

Chapters 1 and 2 of this book provide background information on the Navajo people, the Navajo Nation government and its court system, and the procedural aspects of using Navajo common law. Chapters 3–5 discuss three prominent foundational Navajo doctrines (*hózhǫ́, k'é,* and *k'éí*)—first in the traditional Navajo context, and then in the context of modern Navajo dispute resolution. The case method of analysis is used to explain how the modern Navajo judges incorporate and use the doctrines and their emanating values in a Navajo adjudicatory system that is primarily designed and equipped for American-style litigation.

The three foundational doctrines that form the nucleus of this work are described as follows: *hózhǫ́* (glossed as harmony, balance, and peace); *k'é* (glossed as kinship unity through positive values); and *k'éí* (Navajo kinship or clan system). Although each doctrine is discussed separately in the book, Navajo philosophy treats them as concepts that are intertwined. For example, the *k'éí* doctrine manages an extensive network of relationships that form the Navajo clan system, which in turn must facilitate and

maintain kinship unity through positive values (*k´é*) for Navajo society to function in *hózhǫ́*. The traditional Navajo emphasis on harmony and order also flows through the three doctrines.

The written decisions of the Navajo Nation courts contain a wealth of information on how tribal customs and traditions function as law and as tools for healing relationships. American Indian tribes and other indigenous peoples can look to the Navajo Nation for workable methods that achieve the goal of making ancient principles and ways permanent fixtures in modern self-determination. Of more general importance, use of American Indian common law in tribal government operations, and particularly in dispute resolution, is essential to nation building, helps fortify Indian nation sovereignty, and advances cultural preservation.

The Navajo Nation uses the following general methods to make normative precepts (Navajo common law) an important part of its self-governance: identify common law doctrines; locate common law sources; incorporate common law into dispute resolution processes; shape common law to address modern problems; maintain a traditionally based body of published common law; codify common law principles; and educate the public on application of common law doctrines. In addition, the Navajo Nation formally reintroduced peacemaking, a traditional and original Navajo dispute resolution institution, and annexed it to its modern court system to promote and facilitate holistic use of Navajo culture, language, common law, and spirituality in dispute resolution. American Indian methods of dispute resolution, such as peacemaking, are not alternative dispute resolution methods; they are America's original methods of dispute resolution.

Alcoholism, drug abuse, domestic violence, diabetes, obesity, and other social and physical ills, and poor educational achievement of Indian children, confront Indian leaders on a daily basis. Instead of looking inward for potential solutions to these problems, Indian leaders tend to look to the non-Indian world for remedies. Problems affecting Indian peoples on reservations should be seen as prime opportunities for revitalizing, discussing, and relearning tribal customs and traditions and applying them as community problem-solving tools. American Indian peoples should realize that the potential solutions to their social, health, and educational

problems may not lie in highly touted non-Indian methods, but in their own languages, philosophies, cultures, and spiritual practices. In other words, use the local "tribal encyclopedia," the wise Indian elders and traditionalists, for answers to Indian problems as our ancestors did. This is what I mean when I say, "Think like an Indian."

Making Indian common law a significant and daily part of modern Indian life on reservations across the country will not happen unless we educate Indian leaders, Indian peoples, and eventually non-Indians. American Indians must understand the intricacies of their own traditional ways and the powers inherent in their philosophies, customs, and traditions in order to garner benefits from them. Eventually, Indians must confront and eradicate non-Indian misconceptions, stereotypes, and fear of Indian common law. For example, Navajo common law heals relationships and communities, and protects individual rights, rights of kinship groups, family rights, community rights, and rights to property on a par with (and in some cases better than) the Bill of Rights of the U.S. Constitution. There is nothing mysterious, strange, or alien about Navajo common law. Like customary law around the globe, Navajo common law is just human common sense. Thus, non-Indians who litigate in Navajo Nation forums should never have to worry about fairness or "unwarranted intrusions on their personal liberty."[7]

The overall goal of this book is to encourage American Indians and other indigenous peoples to move into the future by drawing on their own cultural norms, values, and traditional institutions.

> The Navajo experience is one of going back to fundamental values. Given the disruptions of non-Indian schools, the wage economy, destruction of tribal land bases, alcohol, and an overbearing federal bureaucracy exerting daily dominance, Indians have many barriers to overcome. All those influences have eroded traditional values. However, so long as Navajos preserve their language, religion, traditions, and culture, they retain the framework for successful modern approaches. Navajo common law is not something quaint or curious—it is alive and vibrant. It adapts to the present, and it will adapt to the future. As Navajos use their values and discuss their relevance to the present, they will be able to step into the future. . . .
>
> This is a process of going back, but Indians are going back to their own law—back to the future.[8]

My own traditional Diné education, taught to me by my maternal grandparents and knowledgeable elders, informs much of the traditional analysis in this book, including my treatment of the three doctrines and their emanating values and traditional stories. Traditional Navajo concepts are broad, flexible, and difficult to translate into the English language. For this reason, the word *gloss* is used several times to describe Navajo terms. Moreover, there is no official agreement on spellings of Navajo words. Another bilingual Navajo, well versed in Navajo philosophy, may see things I have overlooked; interpret Navajo words or phrases differently; draw different conclusions; and spell Navajo words differently.

Different perspectives are appreciated and needed. The process of using Navajo normative precepts to solve modern problems is not limited to dispute resolution and Navajo Nation governance, but touches every area of Navajo society, life, and lands. Moreover, the goal of generating diverse viewpoints is in line with the reasons for this book. It is hoped that this book will advance understandings of American Indian common law, and bring indigenous customary law ways and methods into the general discourse on law. After all, indigenous ways of making injured persons whole, or defining property, or handling community offenders are just as important and effective as Western tort law, or property law, or criminal law. When all has been said and done, all American Indian peoples want is the right to live as Indians in their own country.

ONE

The Navajo Nation Court System

Brief Navajo History

Navajo jurisprudence is better understood if one has some basic knowledge of the history, language, culture, and spirituality of the Navajo people. The word *spirituality* is used instead of the word *religion* because the Navajo language does not have a word that literally translates to the English word *religion.* The constituent elements driving Navajo society, including language, culture, spirituality, philosophy, and governance, are part and parcel of what the Navajo people call the Diné Life Way (*Diné bi´í´ool´įįł*). This chapter serves as a brief introduction to the Navajo Nation, Navajo people, the people's catastrophic war with the United States, and the eventual formation of a Western-style Navajo Nation government and court system. This chapter is not intended to present a comprehensive history, or even detailed demographics, of the Navajo people. The purpose of this chapter is to establish a brief historical background against which contemporary Navajo jurisprudence, including norms, values, customs, traditions, and ways of life, can be discussed, analyzed, and offered for understanding.

Demographics and Contact

The terms Diné and Navajo are used interchangeably to refer to the Navajo people. The Navajo people call themselves Diné (The People) in their own language. According to the Navajo Creation Scripture and Journey Narratives, the Holy Beings created the Diné and named them, "Nohokáá´ Dine´é Diyinii" (Holy Earth Surface People). The Navajo people speak a language of the Athabascan family. Athabascan languages are also spoken

by the Hupa and Tolowa tribes in northern California, the Apache tribes of the American Southwest, and several Indian tribes in northwestern Canada and interior Alaska. The Navajos and Apaches are Southern Athabascans, and, as linguistic cousins, can converse in each other's tribal language and understand each other.

The present land base of the Navajo Nation (Diné Bikéyah) or Navajo Indian Reservation extends over northeastern Arizona, southeastern Utah, and northwestern New Mexico. The Navajo Nation owns fee and trust lands that are separate from the main Navajo Indian Reservation. These separately owned lands form the reservations located at Ramah, Alamo, and Tójajiileeh in New Mexico, and the private land that is the Big Boquillas Ranch near Seligman, Arizona. Navajo Nation lands total nearly twenty-seven thousand square miles.[1] The 2000 United States Census shows that 298,197 individuals identified themselves as Navajo.[2]

The first Europeans the Navajos encountered were Spaniards (Naakaiiłbáhí), near present-day Albuquerque, New Mexico, in 1541.[3] From the latter part of the sixteenth century to the time Anglo-Americans (Bilagáana) entered Navajo country in about 1846, the Navajos engaged Spaniards, Mexicans (Naakaii), and New Mexico territorial settlers in war, slave and livestock raiding, trading, and treaty-making.[4] The Navajo people suffered severely in a war with the United States from 1863 to 1868, a period commensurate with Anglo-American expansion into present-day Arizona and New Mexico.

*Fort Sumner (*Hwéél dih*)*

Beginning in summer 1863, the U.S. cavalry and Indian allies under the command of Colonel Kit Carson waged a brutal and destructive military campaign against the Navajo people. Navajo oral accounts describe Carson's military campaign as "t´áá ałtso anaa´ silį́į´" (when everything—humans, plants, animals—turned enemy). Anthropologists Garrick and Roberta Bailey similarly conclude that America's war against the Navajos "proved to be one of the most violent and decisive military campaigns ever waged against a major North American Indian tribe."[5]

Carson marched his troops through Navajo country in the fall and winter of 1863–64, attacking and killing Navajos at their homes, slaughtering

livestock, burning hogans and crops, and virtually destroying any property and food supply that the Navajos would need and use to survive and wage war. The brutal scorched-earth campaign worked. Approximately 8,500 starving, freezing, and ragged Navajos surrendered over several months and were death-marched in four separate large groups, and a number of smaller groups, for more than four hundred miles to a barren reservation established for them and the Mescalero Apache Tribe at Fort Sumner in east-central New Mexico, along the Pecos River. The reservation at Fort Sumner is called the Bosque Redondo Reservation; Navajos call it Hwéél dih. The forced march to Fort Sumner is popularly known as "The Long Walk," although it was not a single march. On the Bosque Redondo Reservation, the Navajos tried to survive on a barren patch of unproductive land as prisoners of war, under military guard from March 1864 to June 1868. The imprisonment of the Navajo people at Fort Sumner conformed to the federal government's policy of that time, which was to remove Indian tribes from ancestral lands to distant, unfamiliar, and unattractive lands that Anglo-Americans eschewed as wastelands.

Beginning with the first month of confinement (March 1864), General James H. Carleton, commanding officer of the Department of New Mexico, bemoaned the tremendous burden of feeding and keeping the imprisoned Navajos alive with scant funding and support from Washington.[6] The following year, on April 26, 1865, the military officers convened and devised a plan to transform the Navajos from a scattered, pastoral people into village-dwelling, self-sustaining farmers.[7] The officers either did not consider or it did not matter to them that the land and water on the Bosque Redondo Reservation were not suitable for farming. Realizing that the traditional Navajo political system consisted of several independent bands, the officers decided to divide the Navajos into twelve villages, located a half-mile apart, each headed by a principal chief (Roessel, *Pictorial History of the Navajo,* 22). The twelve-village concept came from the officers' belief that twelve principal Navajo leaders were imprisoned at Bosque Redondo with their bands (ibid.). Each village would be structured so its farm was prominently displayed in front (ibid.), no doubt to demonstrate the tribe's advancement in civilization to government officials who came to inspect.

With only four hundred soldiers to guard more than eight thousand Navajo and Mescalero Apache prisoners, the officers realized that it would be in their best interests to let the traditional band leaders exercise limited authority over their people. The high-ranking officers, ignorant of Navajo culture, saw the Navajos as a lawless, savage people. An Anglo-American form of criminal laws was drafted to school the Navajo prisoners on respect for authority and law and order. Each principal chief, with assistance from subchiefs, would be held responsible for enforcing the criminal laws and maintaining general law and order in his village (22, 23). The commanding officer undoubtedly retained ultimate authority over all decisions of the principal chief.

The plan called for the principal chief and his subchiefs to establish an American form of military trial court to try criminal charges. The twelve principal chiefs and a military officer as presiding judge would compose a military-style appellate court (23). In case of jury trials, the fort's commanding officer (or a specially appointed military officer) would serve as the presiding judge and the chiefs would serve as jurors (ibid.). The appellate court would have jurisdiction over serious offenses (murder, theft, property damage, and leaving the reservation without permission) (24).

The seven criminal offenses that were recommended for the Navajo prisoners of the Bosque Redondo Reservation, which were punishable by fines, hanging, whipping, imprisonment, and hard labor, were murder, theft, absence from or refusal to work, destroying or losing tools, destroying the reservation's trees or farm produce, missing curfew, and absence from the reservation without permission (ibid.). Although some military officers expressed reservations about applying Anglo-American laws of punishment to the Navajo prisoners, they nonetheless saw it as imperative to the overall process of civilizing the Navajo people. The officers preferred inflicting graduated punishment on individual lawbreakers as a way to teach all the Navajo prisoners respect for law and order, a virtue of civilized society (23–24).

The government structure the military recommended was not fully implemented, because the Navajo prisoners stubbornly refused to part with their customs, traditions, and a lifestyle rooted in a complex kinship structure.[8] The federal government's reports on the Bosque Redondo

Reservation after April 26, 1865, do not mention the proposed court system or criminal provisions, raising questions about the effectiveness of their implementation.[9] The Navajo Nation Court System is now called Diné Bigóóldih. Some Navajos claim that this term is a Navajo pronunciation of the words "court day" and may have originated from the officers' announcement of "court day" at the Bosque Redondo Reservation.[10]

Although they were under continuous guard at Fort Sumner, the Navajos performed their spiritual ceremonies in secrecy, particularly the rituals that implored the Holy Beings to return them to their homelands. Likewise, medicine people from among the several thousand Navajos who did not surrender and remained in Navajo country performed ceremonies to ensure the freedom and return of their kinsmen from Fort Sumner. A well-known story from this period tells of a Coyote Way Ceremony that was performed after the first day of treaty negotiations to negate General William T. Sherman's recommendation that the Navajos should move to Indian Territory in Oklahoma:

> A group stood away from the [treaty] negotiations, and while the Coyote way chants were sung, a coyote entered the circle. He ran around inside it, and at one point during the chant, he broke the circle and ran to the west. That was an indication that Navajos would return west, back to *Diné Bikeyah* (Navajo country), rather than to the east and Indian Territory.[11]

The U.S. government's experiment of indoctrinating Navajos with Anglo-American ways at the Bosque Redondo Reservation ended in total failure. To the Navajo people, the Bosque Redondo Reservation is synonymous with misery, starvation, disease, and death. More than two thousand Navajos died at the concentration camp.[12] An unknown number also died during the war and from lingering sickness and injuries after the people's release from Fort Sumner. Add to the physical deaths the undetermined amount of cultural loss, including priceless cultural knowledge and ceremonies that perished, and this period in Navajo history was no doubt catastrophic for the Navajo people. The federal government's attempts to turn Navajos into agriculturists in the Anglo-American mold were complete disasters; the desert wasteland proved unsuitable for farming, the water had high alkali content, and funding was never adequate.[13]

By the time of the treaty negotiations, government plans were already being prepared to move the Navajos farther east to the Indian Territory on the Great Plains. Navajo headman Barboncito accomplished a diplomatic feat during the first day of treaty negotiations when he doomed the federal government's scheme to exile the Navajo prisoners to Indian Territory in Oklahoma. General William T. Sherman, the American negotiator, had proposed that the Navajos should move to the Indian Territory near the Arkansas River and invited some of the Navajo headmen to look at the country. To this suggestion, Barboncito, the chief Navajo negotiator, replied, "I hope to God you will not ask me to go to any other country except my own. It might turn out another Bosque Redondo. They told us this was a good place when we came here but it is not."[14]

Seeing that the Navajos could not be coaxed into moving to Indian Territory, the United States, represented by General Sherman, signed a treaty with the Navajo Nation. The Navajo Treaty of 1868 (Naaltsoos Sání) between the Navajo Nation and the United States of America, which emancipated the Navajo prisoners from the Bosque Redondo Reservation, was signed by the negotiators on June 1, 1868. The Navajo people see the 1868 Navajo Treaty as equal to their covenant with the Holy Beings: both are binding sacred agreements that must be respected and honored continuously and in perpetuity.

The 1868 Navajo Treaty reaffirms and guarantees to the Diné their socially distinct group character and political character as a sovereign nation, with all sovereign powers appertaining thereto, within the larger sovereign United States. The Navajo people bought the federal government's promises contained in the 1868 Navajo Treaty with their lives, property (including lands rich in natural resources), and hardships. Therefore, any attempt by the United States to unilaterally abrogate the 1868 Navajo Treaty should be held unenforceable or at least scrutinized with a presumption against abrogation.

Contrary to popular non-Indian belief, Indian treaties did not give anything to Indian nations. Indian treaties essentially recognize the preexisting sovereign status of Indian nations, a status that predates the United States itself, and contain certain promises the United States made in exchange for Indian nations' giving up nearly the entire United States. Many

American Indian treaties are cession treaties; these treaties ceded, often under coerced or questionable circumstances, millions of acres of aboriginal lands to the United States. By the mid-1800s, a provision ceding tribal lands to the United States was common in Indian treaties.

The Navajos suffered great trauma and tragedy, probably unequaled in their history, in the war leading to their exile and subsequent imprisonment at the Bosque Redondo Reservation. Navajo Nation President Joe Shirley summarized well the modern Navajo emotions on their ancestors' tribulations during the dedication of the Bosque Redondo Memorial on June 4, 2005:

> Etched into the collective memory of every Navajo alive today is the terrible trauma of the tragedy that began at Bosque Redondo—Hweeldi—141 years ago. It doesn't matter that we who are alive today were not there at that time. The stories continue to come down to us, and those stories keep what happened alive.
> . . . .
>
> The period known as the Long Walk, and our brutal imprisonment at Fort Sumner, marked us. It scarred us. It hurt us terribly and deeply, like nothing before and nothing since. Like a blood stain over an entire people, it indelibly changed us from who we were in the 1800s to set the stage for who we are today.
> . . . .
>
> This is our history. And this is why we call the Long Walk the Navajo holocaust. Yet the determination and resilience that made us strong, proud, and feared before 1863 is what got us through this fearful time.
> . . . .
>
> Ever since, many have asked how Navajos endured that incredible hardship. It was our prayers, our ceremonies, our ancient way of life that brought us back from the precipice of genocide. That way of life is still a part of us today although we lost many of our songs, ceremonies, and medicine men during that terrible time.[15]

The Navajos kept their ceremonies, sacred narratives, and values close to their hearts at the Bosque Redondo Reservation and relied on them to beat death and win an eventual return to their homelands. As educator and author Robert Roessel explained:

> Few nations in the world have endured such hardships as have the Navajo. Yet, instead of being broken, crushed and bitter by this concentration camp experience

> the Navajos grew stronger and their roots went deeper. This increased strength of the Navajo in the face of such tribulation can be attributed mostly, perhaps entirely, to Navajo religion and to the faith the Navajo people had in their Holy People.[16]

The core values that the people retained became the cornerstone for law and procedure used by the modern Navajo Nation government, particularly the Navajo Nation Court System.

At least three factors that helped shape the modern Navajo political system can be attributed to the Navajos' Fort Sumner experience. First, although the structure of government proposed by the military officers (the twelve-village plan) did not materialize, the beginning of the end of the traditional Navajo governing system was set in motion when the military and federal government dealt with the Diné collectively, rather than as several independent bands. Furthermore, the goodwill, trust, and respect the people had for their traditional band leaders eroded when their leaders became subservient to the military officers and the military power structure. Death, illness, stress, famine, vulnerability to enemy attacks, having no way to defend against attacks, and all the hardships of imprisonment further weakened the traditional leadership. As a result, the traditional governing structure did not reemerge to its pre–Fort Sumner eminence in the decades following the people's release from the Bosque Redondo Reservation. The traditional political factors that survived the Fort Sumner period were subsumed by the tribal council type of government that was imposed by the Bureau of Indian Affairs in 1923.

Second, the Navajos were introduced to and experienced the Anglo-American version of hierarchical and coercive power. The proposed court system at the Bosque Redondo Reservation, if implemented, would have used force and punishment, practices that are foreign to traditional Navajo society. The Navajos saw that the Anglo-American power structure made a single individual an all-powerful decision maker, a practice at odds with the Navajo version of consensual decision making through community participation. During the treaty negotiations, for example, Barboncito observed of General Sherman: "It appears to me that the General [meaning Sherman] commands the whole thing [has complete power] as a god."[17] Oral accounts, however, suggest that the Navajo prisoners quickly detected

faults in the Fort Sumner power structure when they discovered that certain Navajo leaders were granted special benefits and privileges in exchange for loyalty and furthering the federal government's goal to civilize the people.

Third, the United States limited the sovereignty of the Navajo Nation. The military at Fort Sumner prohibited the Navajo Nation from exercising power that went beyond defensive means, which allowed neighboring tribes and Mexicans freedom to prey on the Navajo prisoners at will. While the Navajo people still maintained self-government after their release from the Bosque Redondo Reservation, the federal government ensured a strong presence among them through the federal Indian agent and eventually the Bureau of Indian Affairs. On the positive side, the 1868 Navajo Treaty reaffirmed the Navajo Nation's political status as a sovereign Indian nation.

The Fort Sumner experience and the subsequent resettlement in Navajo country started the Navajo people on the road to incorporating Anglo-American values and practices that they found useful into their culture. The Navajo people were no longer isolated and beyond the reach of Anglo-Americans and the authority and power of the United States. Periodic adjustments to culture, spiritual beliefs, and relationships with non-Indians were necessary because of the pervasive non-Indian presence in reservation border towns and as traders, teachers, doctors, and missionaries on the Navajo Reservation. In spite of their brutal treatment at the Bosque Redondo Reservation, the Navajo people retained in large measure their traditional ways, which they drew on to rebuild their lives and society.

Traditional Navajo Government

The Navajos returned from Fort Sumner knowing that their lives and society lay in ruins and needed rebuilding. The primary task of rebuilding—or, more appropriately, nation rebuilding—fell to the traditional Navajo leaders and other men and women who came to prominence in the latter 1800s and early 1900s. A traditional Navajo leader was fluent in the Navajo Creation Scripture and Journey Narratives, the oral history from the primordial creation to the settlement of the Navajo people on the lands bounded by the Four Sacred Mountains. A Navajo leader is *naat'áanii,* a term that

describes a leader's skill at persuasion through speech, gestures, and *k´é* (reinforcing relationships using positive values).

The warfare parts of the Navajo Creation Scripture and Journey Narratives, particularly those recounting the battlefield exploits of Monster Slayer (Naayéé´ Neizghání) and his twin brother, Born-for-Water (Tó Bájíshchíní), underlie separation of war and peace functions in traditional Navajo society. All war-related matters, including planning and defense, fell to the war leaders (*hashkééjí naat´áah*), who drew on their battle experiences and extensive knowledge of war ceremonies and warfare passages from the Navajo Creation Scripture and Journey Narratives to lead. The peace leaders (*hózhǫǫjí naat´áah*), in contrast, not only possessed extensive knowledge of the traditional history but also the Blessing Way Ceremony and used *k´é* in everyday interactions with people to lead. The peace leaders exercised broad authority over Navajo civil society by guiding the day-to-day activities of the people through thoughtful planning and persuasion. While the functions of war and peace in traditional society derived from two distinct ways of knowledge, they coalesced to form a solid foundation on which Navajo society functioned.

Scholars generally agree that the Navajo people did not utilize a centralized political organization (e.g., a leader or a body of leaders) before creation of the Navajo Tribal Council in 1923.[18] Instead, Navajo political power was dispersed among several independent bands, each headed by a respected and influential leader. Men who were eloquent, wise, and skilled community planners became band leaders through consensus of the group. The band form of government functioned primarily as an economic and subsistence unit, although it exercised powers of war when necessary.[19] Respected elders (*hastóí* [elder men] and *sáanii* [elder women]) advised the band's headman regarding the general safety and welfare of band members.

Although the band type of Navajo government is what Spaniards, Mexicans, and Anglo-Americans saw and dealt with from contact to the formation of modern Navajo government in 1923, the concept of centralized leadership is not alien to Navajo knowledge, but is an important and integral part of traditional Navajo philosophy.[20] The Navajo Creation Scripture and Journey Narratives, which is the foundational source of traditional

Navajo education, points to extensive use of centralized leadership, and even centralized political organization, by the primeval beings and the ancient Diné. In several passages relating the survival of the primeval beings, the Navajo Creation Scripture and Journey Narratives underscores centralized leadership as the key to surmounting obstacles caused by immorality and violations of foundational laws.

The Navajo Creation Scripture and Journey Narratives holds that First Man was the head leader, and First Woman his subordinate, as they led the primeval beings (First Beings) through catastrophe and destruction in the first three worlds (Black World, Blue World, and Yellow World) and during the stabilization of the Fourth World (the Glittering World of the White World). In the Third World (the Yellow World), a world destroyed by a Great Flood, four subchiefs advised First Man. The four subchiefs directed the day-to-day village activities of the First Beings (male and female) while they resided at a place called "The Two Rivers That Flow Past Each Other" (Tó ałnaosdłii).[21] Navajo oral traditions, which serve as stabilizing forces in Navajo culture, politics, and spirituality, suggest that the entire tribe was united under centralized leadership in ancient times when the population was much smaller. The Naachid, a tribe-wide assembly that is not practiced today, may have manifested those ancient political structures, functions, and practices.[22]

According to scholars, aged Navajo informants related that the last Naachid was held in 1859 at Tsin Sikaad (Lone Tree), twelve to fourteen miles northeast of present-day Chinle, Navajo Nation (Arizona).[23] The Naachid is described as a "regional gathering of Peace and War leaders"; it brought together the tribe's twelve peace leaders and twelve war leaders.[24] The word *Naachid* has two possible meanings: First, it may refer "to gesturing with the hand," in which case it would complement the word *naat´ááh* (which means leader, but describes head movements and eye contact to make a point while speaking). To understand *naat´ááh* better, visualize the speaker standing in the center of a circle formed by his audience. While speaking, the speaker shifts to face different sections of his audience so that when he finishes speaking he has made facial contact with the entire audience. The other meaning may refer to "renewal or healing" of Navajo society, or everything that encompasses the Diné Life

Way, at periodic intervals. As to the second interpretation, the term might be better spelled "Na´chid."

The *naat´ááh* way of speaking conforms to the physical setup of the Naachid. The central feature of the arrangement was a large ceremonial hogan, which was enclosed by a fence of juniper boughs.[25] The peace leaders occupied the south side of the ceremonial hogan and the war leaders the north side.[26] The hogans of the war leaders and their families were situated to the south of the ceremonial hogan and within the ceremonial circle, while those of the peace leaders and their families were located on the north side of the ceremonial hogan.[27] These arrangements would be consistent with Navajo spiritual law because the south side of a ceremonial hogan (the door always faces east) is associated with peace and the north side with war. The outside arrangement, the inverse of the arrangement inside the ceremonial hogan, is consistent with Navajo philosophy because peace and war balance each other to produce harmony and each provides spiritual protection to the other. The area beyond the perimeter fence would have been a public area. A central area east of the ceremonial hogan would have been reserved for speakers.

Like the Nidáá´, an extant Navajo ceremony used to purify mind, body, and soul, the Naachid would have served spiritual, social, economic, and political purposes. Any Navajo would have participated in its public functions. The war leaders dominated if the Naachid had been called during wartime and the peace leaders dominated during peacetime.[28] Although information on the actual functioning of the Naachid exists only in fragments today, the ceremony obviously gave Navajos a forum to discuss social, political, economic, and spiritual issues. The Nidáá´ Ceremony, which is held during the summer, provides modern Navajos with a similar forum to voice contemporary issues in a spiritual-social environment.[29]

The Navajo people relied on remnants of their traditional ways of governance through the creation of the modern tribal council in 1923 and its refinement a few years later. The federal government's suppression of American Indian languages, cultures, and spirituality through the Court of Indian Offenses and the Bureau of Indian Affairs Indian boarding school system, and the establishment of the Navajo Tribal Council in 1923, all contributed to the diminishment of the traditional Navajo leadership and

political system. After the Navajo Tribal Council was created, Western governing methods came to dominate eventually and a new political order took hold on the Navajo Nation. Toward the end of the twentieth century, Navajo political institutions looked and functioned like the Anglo-American institutions that were their models.

Modern Navajo Nation Government

Although the Navajo Nation now operates the most complex government among American Indian tribes, the irony is the Navajo people did not participate in the initial establishment of their government. The events that culminated in creation of the Navajo Tribal Council began as local responses to requests by oil companies for exploration leases in the Four Corners area of Navajo country. In May 1921, the Navajo agent for the San Juan Agency called the first "council" of local adult male (notice the absence of women) Navajos to consider requests by energy companies for oil leases, and this same process was followed for subsequent requests because a governing body that represented all the Navajo people did not exist.[30] In January 1922, three prominent Navajo leaders, Chee Dodge, Charlie Mitchell, and Daaghachii Bekiss, formed a business council to consider lease applications.[31] But this ad hoc business council did not represent the entire Navajo Nation.

In September 1922, oil was discovered at Hogback (in northwestern New Mexico), but the exploration lease approved for this area in 1921 by local San Juan Navajos violated a provision in the 1868 Navajo Treaty that required the consent of three-fourths of all adult Navajo males to any "cession" involving Navajo trust lands.[32] To avoid further problems with representation and the treaty provision, Secretary of the Interior Albert Bacon Fall and Herbert J. Hagerman, who Secretary Fall had appointed as Special Commissioner to the Navajo Tribe to negotiate oil leases for Navajo lands, drafted regulations that inaugurated a twelve-member Navajo Tribal Council; the initial regulations received secretarial approval on January 7, 1923.[33] Thus, Secretary Fall, who had friends in the oil business and wanted to open Navajo lands to oil exploration, created the original Navajo Tribal Council primarily to serve the interests of Anglo-American profiteers.[34]

The new Navajo Tribal Council held its first meeting on July 7, 1923, under Hagerman's supervision. As its first order of business, the Council approved a Bureau of Indian Affairs proposal to give Special Commissioner Hagerman power of attorney to sign oil and gas leases on behalf of the Navajo Nation for lands delineated in the 1868 Navajo Treaty.[35] Hagerman promised the Navajo Tribal Council federal assistance on expanding the Navajo Reservation if they approved the power of attorney.[36] Nothing on record suggests that Secretary Fall created the Navajo Tribal Council to encourage or promote Navajo Nation sovereignty or the Navajo people's best interests. Instead, Secretary Fall instituted a centralized Navajo government to satisfy legal formalities so that Navajo lands could be opened to Anglo-American–owned energy companies for oil and gas exploitation.

At a meeting with the Navajo Tribal Council in Tuba City (Arizona) in fall 1933, John Collier, who was appointed Commissioner of Indian Affairs on April 21, 1933, advised the Council to rescind the approval authority it had granted to the special commissioner and handle approval of leases itself.[37] On October 31, 1933, the Navajo Tribal Council rescinded the lease approval authority it had bestowed on the Special Commissioner to the Navajo Tribe ten years earlier and gave that power to the Chairman of the Navajo Tribal Council and the Executive Committee of the Navajo Tribal Council.[38] By rescinding the special commissioner's authority in 1933, the Navajo leaders took an important step toward controlling the Navajo Nation's diverse assets.

The judicious men who composed the original and successive Navajo Tribal Council took to heart broad issues that affected the Navajo people, including natural resources development, financial stability, education, health care, and governance. Although the Navajo Tribal Council operated under the auspices of the Bureau of Indian Affairs, its creation allowed a central government to oversee all matters that impacted the entire Navajo Nation. Since its creation, the Navajo Nation government has overcome numerous challenges, from within and without, and without a written constitution, to arrive at its present level of sophistication.

Commissioner John Collier initiated a policy of Indian self-determination that became the framework for the 1934 Indian Reorganization Act,[39]

a federal law. Signed into law on June 18, 1934, the Indian Reorganization Act authorizes tribes to form constitutional governments and business councils and use them to implement self-determination on the tribes' own terms. The Navajo people, however, associated the Indian Reorganization Act with forced livestock reduction, a disastrous Collier project on the Navajo Nation (some of which took place in 1933–34), and voted not to organize their government under the Act.[40] The Navajo Nation's rejection of governance under the Indian Reorganization Act effectively defeated any plans for the Navajo people to adopt the model constitution proposed by the Bureau of Indian Affairs.

Commissioner Collier, nonetheless, continued to push for Navajo government reform and adoption of a Navajo constitution, claiming that the Bureau of Indian Affairs illegally created the Navajo Tribal Council in 1923.[41] On April 9, 1937, the Navajo Tribal Council established a constitution committee that drafted a proposed constitution and, on October 25, 1937, forwarded it to the Commissioner of Indian Affairs for review.[42] Jacob Morgan, an influential council member who chaired the constitution committee, and his followers refused to support the draft constitution, so the commissioner never acted on it.[43]

The effort to persuade the Navajo people to adopt a constitution continued with passage of the 1950 Navajo-Hopi Rehabilitation Act, which authorized the Navajo Nation to adopt a constitution.[44] The task was assumed by Norman Littell, the Navajo Nation's first general counsel, who drafted a proposed Navajo constitution that resembled the Indian Reorganization Act model constitution and submitted it to the Commissioner of Indian Affairs in 1953.[45] Littell's proposed constitution died when a dispute arose over a constitutional provision that federal officials claimed would permit the Secretary of the Interior to illegally exclude the Navajo Nation from certain federal laws applicable to all Indian nations at the Navajo Nation's request.[46]

In November 1968, the Navajo Tribal Council authorized the circulation of another proposed constitution, but it apparently died for lack of interest.[47] During Chairman Peterson Zah's first administration beginning in 1984, renewed interest in a Navajo constitution arose but the idea garnered little grassroots support. Thus, from the creation of the Navajo

Tribal Council in 1923 to the present, the Navajo people have operated a democratic government without a formal written constitution.

The Navajo Nation now operates a democratic form of government comprised of three branches: legislative (Navajo Nation Council), executive (president and vice president), and judicial (Navajo Nation Court System). Statutes found in Title Two (executive and legislative) and Title Seven (judicial) of the Navajo Nation Code authorize the present structure of the Navajo Nation government. The current three-branch form of government, with checks and balances, was implemented through amendments to Title Two of the Navajo Nation Code in 1989, as a way to reallocate powers between the legislative and executive branches.[48] Amendments were not made to Title Seven in 1989 because the Navajo Nation courts were already a separate branch of government. Prior to the government reorganization, the Navajo Nation operated a two-branch government.

The Navajo people restructured their government in 1989 to stem abuses of power by unscrupulous Navajo officials. The restructuring occurred primarily in response to Chairman Peter MacDonald, Sr.'s, corruption in office. Chairman MacDonald was charged with accepting bribes and kickbacks from business contractors, violating Navajo Nation ethics laws, instigating a riot, fraud, racketeering, extortion, and conspiracy and was convicted in both the Navajo Nation courts and the Arizona federal district court. He was sentenced to fourteen years in federal prison.

The pre-1989 Navajo government had two branches; the Navajo Tribal Council and the chairman's office comprised one branch (the chairman presided over council sessions), and the court system the other. The Navajo experience shows that the two-branch system, which is also the government structure of most Indian tribes organized under the 1934 Indian Reorganization Act,[49] can embolden a chairperson to amass tremendous power. In the Navajo two-branch government, the chairman presided over all Navajo Tribal Council sessions; appointed council delegates to Tribal Council committees; and presided over the Advisory Committee, a powerful minicouncil, which acted for the Tribal Council when it was not in session. The Advisory Committee had the power to approve contracts for the Navajo Nation and recommend legislation and an agenda for the Navajo Tribal Council. Under the two-branch system, a chairman could practically

control the Navajo government by appointing partisan council members to powerful committee positions and boards that oversaw Navajo Nation enterprises and by appointing supporters as judges. The people's desire for accountability in government spurred the 1989 government reforms that resulted in the present three-branch government with checks and balances.

Eighty-eight legislators representing 110 chapters across the Navajo Nation make up the present Navajo Nation Council. Chapters are local governmental units operated by officials (i.e., a president, secretary, and treasurer) who are elected by voters from the community. In 1922, the Bureau of Indian Affairs started organizing tribal members into chapters and farm clubs on Indian reservations to spur economic development.[50] In 1927, the Bureau of Indian Affairs Superintendent for the Leupp Agency on the Navajo Nation introduced the Bureau's chapter system to the Navajo Nation, and the people immediately adopted it because it resembled the traditional system of band government.[51] Chapters are essential institutions of Navajo Nation government today because the Navajo Nation provides services to the Navajo people through these local governmental units.

Voters attempted without success a reduction of the Navajo Nation Council from eighty-eight to twenty-four members through a Navajo Nation–wide referendum in September 2000. In 2007, the Navajo Nation president proposed a new initiative to be voted on in fall 2008 to reduce the membership on the Navajo Nation Council to twenty-four, but litigation has stalled the proposal. Navajo council delegates are not subjected to term limits. The president is limited to two four-year terms. Elections for the offices of council delegate and president are held every four years. The Speaker of the Navajo Nation Council is the head of the legislative branch and presides over legislative sessions of the Council. The Navajo Nation Council elects one of its members to the speaker's position every two years.

The chief duties of the Navajo Nation Council are to approve a budget for the Navajo Nation government and to enact legislation. The president can veto legislation passed by the Navajo Nation Council; however, the council can overturn a presidential veto with fifty-nine votes. The president, as the head of the executive branch, has authority to appoint directors for several divisions that provide services to the Navajo public, including

the Departments of Public Safety, Justice, Health and Social Services, Natural Resources, and Education.

The president of the Navajo Nation appoints each judge and then the Navajo Nation Council confirms the president's appointee with a unanimous vote.[52] Judges must speak the Navajo language fluently and know Navajo culture and traditions because these are used in litigation in the Navajo courts. Nineteen judges serve the Navajo Nation; three are justices of the Navajo Nation Supreme Court. The Navajo Nation judges are at the forefront of all American Indian tribal court judges on use of American Indian common law in tribal court decision making. (There is more discussion on Navajo judges later in this chapter under "Modern Navajo Nation Courts" and "Navajo Court Structure and Judges.")

History of the Navajo Nation Courts

The Navajo Nation judges enjoy a solid reputation for utilizing extant Navajo customs and traditions as law (Navajo common law) and blending the old with the new, that is, a process that meshes Navajo customs and traditions with relevant and beneficial parts of not only Anglo-American legal traditions, but also legal traditions from other parts of the world.[53] The process of blending the old with the new uses a framework that gives primacy to Navajo philosophy and Navajo ways of doing things. Use of Navajo common law by Navajo judges and the Navajo Nation government, which has been described as a Navajo legal revolution,[54] is really the Navajo people defining Navajo Nation sovereignty the Navajo way—by relying on their own philosophy, customs, traditions, language, spirituality, and sense of place.

Use of Navajo common law and blending the old with the new has generated intense study and scholarship by those interested in American Indian methods of dispute resolution and the related topic of use of customs and traditions as law by the world's indigenous peoples. Known as the flagship of American Indian tribal courts,[55] the unique manner by which Navajo courts decide legal problems has earned them preeminent status among American Indian tribal courts in North America. Even the Federal Ninth Circuit Court of Appeals has acknowledged the competence

and sophistication of the Navajo Nation Court System: "The Navajo Nation has a sophisticated body of published laws, and an experienced court system in which trained trial and appellate judges adjudicate thousands of cases per year."[56]

The Navajo people's responses to external political, economic, and social pressures have helped shape Navajo legal traditions and modern Navajo legal institutions. Most external pressures come from Navajo interactions with non-Indians, particularly those involving economic relationships, and cases predicated on non-Indian refusals to submit to Navajo Nation regulatory and adjudicatory jurisdiction. There is also tension between exercise of sovereignty by the Navajo Nation and that of the state and federal governments. Since the 1980s, Navajo Nation judges have injected a healthy dose of Navajo culture, language, and spiritual traditions into the entire Navajo Nation Court System, including its decision-making aspects. The contemporary Navajo legal system, which has roots in the 1892 Navajo Court of Indian Offenses, is constantly developing new ways of using Navajo common law to resolve legal questions and improve its overall efficiency. Opportunities for court improvement always follow challenges to the functioning of the Navajo Nation government by either external forces or the Navajo people themselves.

Beginnings—the Navajo Court of Indian Offenses

Established by the Navajo Tribal Council in 1958, the Navajo Nation Court System, like other Indian tribal court systems in the United States, is relatively young.[57] The Navajo people, however, have been involved with the Anglo-American form of law and courts since at least 1892, when the Bureau of Indian Affairs established the Navajo Court of Indian Offenses for the Navajo Nation.[58] The Court of Indian Offenses came to Navajo country as part of a package of criminal and civil laws created for American Indian tribes by the Bureau of Indian Affairs in 1883. Although adversarial in design and called "court," the purposes for which the Court of Indian Offenses was created belie the impression that it was a court of justice.

In 1888, the Federal District Court of Oregon described the Courts of Indian Offenses that were operating on a few Indian reservations as "mere

educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[59] The federal court then said, "[T]he reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."[60] Devoid of any constitutional basis, the Court of Indian Offenses, also known as CFR Courts (CFR stands for Code of Federal Regulations), apparently sprang "from the reform impulse" of Interior Secretary Henry M. Teller, who was appointed in 1882 to lead the U.S. Department of the Interior.[61]

Shortly after assuming office, Secretary Teller directed Hiram Price, the Commissioner of Indian Affairs, to draft a set of rules that would abolish "the savage and barbarous practices" of the Indians, which have been "a great hindrance to [their] civilization."[62] The rules that Commissioner Price compiled were approved by Secretary Teller on April 10, 1883, and immediately circulated to the Indian agents on the reservations for implementation.[63] The new rules established the organization and procedure of the Court of Indian Offenses and contained a short criminal and civil code that was designed to extirpate what Commissioner Price called the "evil practices" of the Indians.[64]

In 1890, the agent to the Navajos, C. E. Vandever, reported to the Indian commissioner that the Court of Indian Offenses would not work on the Navajo Nation. According to Vandever, the Navajos were inextricably bound to their clan relatives by a complex kinship system that would not allow a Navajo judge of the Court of Indian Offenses to be impartial. Agent Vandever stated his belief as follows:

> There has never been, to my knowledge, a court of Indian offenses here. The tribe is divided into clans, which are widely scattered over a vast territory. If such a court existed the different clans should be represented, and if they were it would be next to an impossibility to get the members together at any one time, or even a small portion of them. On the other hand, in a court composed of a few representatives from a few clans the member of an unrepresented clan would certainly suffer if brought to trial before them, so great is the jealousy existing between them. For these reasons I do not think it desirable to have a

> court; in short, in my experience the offenses committed have been so few and trifling that I do not think a court necessary. If a crime is committed the Territorial courts are amply able to deal with it.[65]

David L. Shipley, a man determined to civilize the Navajos, replaced Vandever as agent to the Navajos in 1891.[66] In his first annual report dated August 31, 1891, Agent Shipley boasted that the Navajos under his charge were on a steady march to civilization: "The Indians are gradually abandoning their old customs; dancing is diminishing, and the heathenish yearly ceremony called the 'hish kohu' dance is waning and will soon be a thing of the past. There is a marked increase in the number of Indians who are adopting civilized dress."[67] Modern scholars of Navajo history, however, conclude that the federal government's attempts to civilize the Navajos were near failures.[68] This conclusion suggests that, in spite of Agent Shipley's myopia, the traditional Navajo way of life remained strong through the end of the nineteenth century.

In 1892, Agent Shipley established the Navajo Court of Indian Offenses on the Navajo Nation. In his annual report for that year, dated August 25, 1892, Agent Shipley had nothing but praise for the founding judges of the Navajo Court of Indian Offenses:

> The court of Indian offenses is composed of 3 judges and meets once a month or more frequently if necessary. The court has done good work and relieved me of considerable business, which, in the majority of cases, can be as well if not better performed by them than by the agent. I can not call to mind a single case of theirs that I have had to reverse.[69]

During the late 1800s and the early 1900s, the Navajo Court of Indian Offenses enforced the Bureau of Indian Affairs's 1892 regulations for the Court of Indian Offenses; courts were operating on several Indian reservations by the late 1800s. The original regulations were approved in 1883 and then reissued on August 27, 1892. The following were listed as crimes in the 1892 reissued regulations: traditional dances; plural or polygamous marriages; practices of medicine men; destroying property of other Indians; immorality; intoxication; and any misdemeanor. In addition, any Indian who does not "adopt habits of industry" or engages in "civilized pursuits or employment, but habitually spends his time in idleness and

loafing" shall be deemed guilty of a misdemeanor and punished by fine or imprisonment.[70]

On June 2, 1937, the Commissioner of Indian Affairs approved new regulations for the Courts of Indian Offenses of the Navajo and Hopi Tribes.[71] Titled "Special Regulations Governing Law and Order on the Navajo and Hopi Jurisdictions in Arizona and New Mexico," the 1937 regulations gave the Navajo Tribal Council some authority over the selection and removal of judges of the Navajo Court of Indian Offenses. According to the regulations, the judges were "appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the Tribal Council and holding office for four years."[72] The Commissioner of Indian Affairs retained authority to suspend, remove, or dismiss any judge upon recommendation of the Navajo Tribal Council.[73] By 1937, the Bureau of Indian Affairs had eliminated the harsh "civilizing" 1883 and 1892 regulations and replaced them with regulations that mimicked state criminal laws and allowed tribes a small voice (probably owing to the 1934 Indian Reorganization Act) in the administration of reservation justice.

The Navajo Court of Indian Offenses started to keep better track of its operations in about 1937.[74] The record from that period shows that the Navajo Court of Indian Offenses handled largely criminal matters, because the Navajo people continued to settle their civil disputes outside the court system, using respected elders and the traditional justice system.[75] Criminal law and civil law are not separate under traditional Navajo justice and both are subject to a community orientation. Apology, forgiveness, and restitution are preferred remedies for injury and wrongs, including crimes, under traditional Navajo justice.

The Bureau of Indian Affairs disrupted the efficacy of Navajo justice concepts when it imposed criminal laws and incarceration as punishment—a sanction incompatible with traditional Navajo justice—and police and courts to enforce them. Navajos initially did not use the Navajo Court of Indian Offenses for civil matters because they associated it with police, jails, and incarceration. Any system that uses coercive authority is antithetical to traditional Navajo justice procedures and consensual decision making. In contrast, resolution of disputes outside the Navajo Court of Indian Offenses reinforced Navajo common law by restoring disputants

and their community to right relations (*hózhǫ́*). For example, Navajos of one community continued to use traditional Navajo justice methods well into the 1960s, and not the Western form of Navajo courts, because "harmony [*hózhǫ́*] has such a high value in Navajo society."[76]

The caseload of the Navajo Court of Indian Offenses for 1937 totaled 557 cases (516 criminal and 41 civil), with the majority of the criminal cases involving alcohol abuse.[77] Although the Navajo Court of Indian Offenses was adversarial in design, the Navajo judges incorporated relevant traditional justice aspects into its proceedings as a way to heal and maintain community and kin relationships. Healing and continuing positive relationships are necessary to maintain harmony (*hózhǫ́*) in traditional Navajo society. During the sentencing phase, the Navajo Court of Indian Offenses used *nályéél,* which allows for apology, forgiveness, and restitution, to require a defendant to compensate any party harmed by his wrongful conduct.[78] The court also summoned headmen to "lecture" wrongdoers on the proper way to maintain relationships within a Navajo community. The Navajo "lecture" is an elder talking to an offender (or young person) using strong, firm words and stressing applicable normative precepts on proper behavior. The Bureau of Indian Affairs Law and Order Code allowed the Court of Indian Offenses to use the tribal custom of restitution by the late 1930s:

> In addition to any sentence, the Court may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured, through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party.[79]

The Navajo Tribal Council eventually adopted the restitution provision and several other provisions from the 1937 Bureau of Indian Affairs Law and Order Code as Navajo Nation statutory law.[80]

The judges of the Navajo Court of Indian Offenses of the 1930s were described as "men of high standing and intelligence" who conducted court proceedings like the traditional community gatherings, which led non-Indian observers to describe the court proceedings as informal.[81] The judges were well acquainted with the Bureau's Law and Order Code,

and when in doubt, most of them applied "the Indian [Navajo] customary law."[82] In one case, the judge asked the interpreter to read section 18 (manufacturing and transporting liquor) of the criminal code to the defendant in Navajo, and when the interpreter erred, the judge corrected the misreading, although he did not have a copy of the code before him.[83]

The judges of the Navajo Court of Indian Offenses exercised an exceptional degree of impartiality during court proceedings and decision making in spite of the traditional Diné kinship rules that demand fidelity to clan relatives. The judges did not permit politics, kinship, or other external pressures to influence their work and they were less manipulated by outside influences than the local white judges.[84] Overall, the Navajo people who conducted business before the Navajo Court of Indian Offenses voiced satisfaction with the way their cases were handled and believed they had received justice.[85]

Although the 1937 Bureau of Indian Affairs Criminal Regulations that the Navajo Court of Indian Offenses used resembled state criminal laws, the Navajo judges frequently drew from Navajo customs and traditional dispute resolution methods to decide cases brought under the Bureau's criminal code. While presiding over criminal cases, the judges followed customary procedures by allowing defendants ample time to tell their version of events that constituted the criminal charges against them.[86] Respected leaders and headmen frequently spoke on behalf of criminal defendants in court.[87] Allowing respected leaders to speak on defendants' behalf in court is a traditional Navajo form of representation that is akin to legal representation and was most appropriate for the Navajo Court of Indian Offenses because most defendants could not afford lawyers.

Punishment included restitution (*nályéél*) as a matter of course in criminal cases in the Navajo Court of Indian Offenses of the 1940s. In a 1942 case, four defendants pleaded guilty to cattle rustling, and each defendant was ordered to give the owner of the two cows they had stolen ten head of sheep to satisfy the restitution part of his sentence.[88] Another common custom the judges used was to allow relatives who were present in the courtroom to speak on behalf of a defendant or a victim as part of the traditional process to arrive at a just and practical decision.[89] A relative's remarks about a defendant in court, even today, are not always

positive. Some remarks point out the defendant's faults, which the relative will use to lecture the defendant on proper behavior within the kinship structure and in the community.

When relatives speak on behalf of an offender, the probability that the person will commit further offenses is reduced. This is because under Navajo custom, the relatives of the offender assume roles of "traditional probation officers." The relatives closely watch the offender's behavior and reinforce the offender's proper conduct through "traditional lectures," which is the Navajo way of "getting a good talking to," by the clan matriarchs. In a kinship system that requires maintaining positive relationships, it is indeed an embarrassment to have a relative who "acts as if he or she has no relatives," a pejorative Navajo maxim.

Although the Navajo Court of Indian Offenses was an Anglo-American institution forced on the Navajo people as a tool of oppression and assimilation, the judges still found ways to incorporate customary laws and methods into the system so it benefited the Navajo people. Of course, the federal Indian agent to the Navajo people did not realize that his charges were maintaining traditional ways through an institution designed to destroy the very customs the Navajo judges were employing. The inner workings (i.e., use of Navajo language, customary laws, and traditional dispute resolution methods) of the Navajo Court of Indian Offenses are excellent examples of Navajo ingenuity in action. The Navajo people took an institution that was established to destroy their culture and spirituality and gradually reshaped it to fit their needs and eventually used it to establish a highly regarded and efficient modern Navajo Nation Court System.

Navajo Nation Creates Its Court System

Federal Indian policy shifted from tribal self-government to what was referred to as termination in 1945, after the resignation of Commissioner John Collier, the architect of the 1934 Indian Reorganization Act and chief proponent of self-government for Indian tribes. Advocates of the termination policy desired a complete integration of American Indians into the American mainstream as full tax-paying citizens.[90] In 1953, the termination policy received a major boost when Congress passed Public Law 280, a general statute that granted states unprecedented authority to

extend their civil and criminal jurisdictions into Indian country.[91] Public Law 280 authorized states to amend their laws to exercise power on Indian reservations, but many states declined the invitation because they foresaw a huge financial burden associated with providing police, court, and probation services to reservation residents.[92]

The Navajo leadership of that period understood well the congressional termination policy and the potential consequences of Public Law 280 on the sovereign powers of the Navajo Nation. The Navajos had successfully blocked federal efforts to impose state jurisdiction on them in 1949 when Congress conditioned passage of the Navajo-Hopi Rehabilitation Act (a law designed to induce economic development on the Navajo Nation) on the Navajos' acceptance of state civil and criminal jurisdictions on their lands.[93] The prerequisite, known as the Fernandez Amendment to the Navajo-Hopi Rehabilitation Act, would have allowed concurrent state court jurisdiction over reservation-based disputes between Navajos. Faced with a dilemma, the Navajo Tribal Council opted for the federal aid package when it voted 37 to 20 to support the Fernandez Amendment, but the traditional Navajos refused to accept state jurisdiction, which prompted the Navajo Tribal Council to reverse course and ask President Harry Truman to veto the entire Act.[94] On October 17, 1949, President Truman cited the Fernandez Amendment's potential to eliminate Navajo customary law to the detriment of the Navajo people and vetoed the Act.[95] The Navajo-Hopi Rehabilitation Act was reintroduced without the Fernandez Amendment during the next congressional session and was passed and signed into law in 1950.[96]

In 1957, the state of Arizona moved to implement Public Law 280 on the Arizona portion of the Navajo Nation. Then Navajo Tribal Chairman Paul Jones summarized Arizona's scheme and the Navajo Nation's potential response to it this way:

> [Chairman Paul Jones]: First of all, some time ago last year [in 1957], the State Congress [*sic*] of Arizona almost passed a law where our judges would be supplanted by the state judges, and also the Law and Order police, without our knowledge. Mr. Davis [Laurence Davis, Tribal Attorney] informed us just a few days before a decision would be reached by a committee, and we hustled down to Phoenix to make some opposition to the bill that was introduced in the State

> Congress [*sic*]. Thereafter, when they found we were there to object, they didn't even give us a chance to be heard; they finally decided, since there was objection, that they better not do it. It seemed to me that it was sort of done on the sly, but we found out and went over there to oppose, and they wouldn't even permit us to make a protest. They knew what it was we were there for, but they wouldn't let us make a comment. After telling us that the committee would meet and we would be heard, they decided to throw it out, knowing it would be discussed. But, anyway, the State is on the verge of assuming that responsibility as far as law and order, and in order to keep them from us, we think that our law and order setup should be made stronger, for them to enforce the courts' decisions and the like in the manner that the State does; therefore, they could say: "They have got a better law and order setup than we have; leave them alone." That is what we are after.[97]

Although Chairman Jones cannot be faulted for seeing Arizona's move as underhanded, it also demonstrates that in the 1950s a state could act unilaterally under Public Law 280 to extend its power over an Indian reservation. The threat of state unilateral authority under Public Law 280 forced the Navajo Tribal Council and Norman Littell, the tribe's general counsel, to strategize to ward off any further state attempts to meddle in Navajo sovereignty.[98] The plan formed around two core nuclei, both of which involved the exercise of Navajo Nation sovereignty. First, the Navajos had to prove to non-Indian officials that the Navajo Nation had the capacity to govern, and second, the Navajo Tribal Council had to prove to the Navajo people that it could be trusted to govern.[99] The strategy was pursued along two complementary paths. First, the Navajo Nation tapped the federal courts to define its sovereign rights, and second, it took control of police and court functions—services typically provided by sovereigns—that were then under the administration of the Bureau of Indian Affairs.

On January 7, 1958, the Arizona Supreme Court provided the Navajo Nation with the perfect opportunity to test its plan when it ruled that Hugh Lee, a non-Indian owner of the Ganado Trading Post, could sue Paul and Lorena Williams, a Navajo couple living on the Navajo Indian Reservation, in Arizona state court to collect a reservation-based debt.[100] Littell petitioned the U.S. Supreme Court for review, which was granted.[101] On January 12, 1959, the U.S. Supreme Court reversed the decision of the

Arizona Supreme Court by holding that Indian tribal courts have exclusive jurisdiction over non-Indian lawsuits against Indians for claims arising on Indian reservations.[102] Ten months later, on November 17, 1959, the Tenth Circuit Court of Appeals held that the First Amendment to the U.S. Constitution did not apply to the Navajo Nation's prohibition on religious use of peyote on the Navajo Nation.[103] These two landmark federal Indian law decisions, *Williams v. Lee* and *Native American Church of North America v. Navajo Tribal Council,* upheld the Navajo Nation's adjudicatory and regulatory powers, respectively, and significantly clarified and solidified the sovereign powers of Indian nations.

Law and order (police services) on the Navajo Nation had been the responsibility of the federal government since the Navajo people returned from Bosque Redondo in the late summer of 1868. However, federal funding for police functions on the Navajo Nation had, since the beginning, been inadequate. By 1958, the Navajo Nation was providing 93 percent of the funds for police services on the Navajo Nation, although those services were under the direct control of the Bureau of Indian Affairs.[104] When the Navajo people requested more police protection in the outlying areas of the Navajo Nation, particularly to quell alcohol-induced violence at major ceremonies, the Bureau of Indian Affairs responded indifferently. The Navajo Tribal Council then proposed to take over police functions on the Navajo Nation.[105] The Bureau accepted the proposal and the Navajo Nation assumed control of law enforcement over its territorial jurisdiction in the summer of 1958.

The Bureau of Indian Affairs also administered the Navajo Court of Indian Offenses simultaneously with police functions. Although traditional justice methods were vital to conflict resolution in local Navajo communities in the 1950s, the court system that the Navajo Tribal Council adopted in 1958 was completely at variance with those traditional ways. The Navajo Tribal Council's decision, however, was not a case of deliberately favoring a Western-style court system over a Navajo traditional one, but a result forced on it by state (Arizona and New Mexico) threats of extending jurisdiction into Navajo country. In essence, the decision rested on an assumption that a Navajo court system that looked and acted like an Anglo-American court system would be more palatable to non-Indian

policy makers. The states would then leave the Navajo Nation alone to develop its law and justice institutions on its own terms.[106]

Aside from the political fallout that would result from states exercising jurisdiction in Navajo country, the Navajo leaders had to consider the potential impacts of Public Law 280 and the termination policy on Navajo cultural well-being. While World War II had brought the full force of the wage economy and other trappings of the non-Indian world to Navajo lands, the Navajo Nation was still a predominately Navajo-speaking, traditional Navajo society. Thus, the realities of life on the Navajo Nation in the late 1950s also influenced the Navajo leadership to adopt a Western-style court system as a way of keeping state power and the dominating influences of American mainstream culture out of Navajo country.

On October 16, 1958, the Navajo Tribal Council established the "Judicial Branch of the Navajo Nation Government," a branch separate and independent of the Tribal Council and chairman's office to contain the Navajo trial and appellate courts.[107] The Navajo Tribal Council defined the jurisdiction of the newly formed courts; provided for jury trials; established procedures for appointment, retirement, and removal of judges; set the salaries of judges; authorized judges to adopt court rules and schedules for fines and fees; and defined the chief justice's duties.[108] The enabling resolution took effect on April 1, 1959, the date on which the terms of office of the sitting judges of the Navajo Court of Indian Offenses expired.[109] On April 1, 1959, the Navajo Nation courts assumed the caseload of the decommissioned Navajo Court of Indian Offenses and the sitting judges of the former Navajo Court of Indian Offenses started their tenure as the founding group of Navajo Nation judges.

Modern Navajo Nation Courts

Except for the creation of the Navajo Supreme Judicial Council of the Navajo Tribal Council in 1978,[110] the Navajo Nation Court System remained basically unchanged from the time of its creation in 1958 until the Navajo Tribal Council completed court reforms in 1985. From 1958 to the mid-1970s, the Navajo courts were in various developmental stages. Many of the judges were former Navajo Court of Indian Offenses judges, and

law school– and college-educated judges were not appointed until the 1980s. The Navajo courts started writing and recording legal opinions in June 1969. In the 1970s, the independence of the Navajo courts became a major issue, an issue that would lead to substantial court reforms in the next decade.

Navajo Supreme Judicial Council of the Navajo Tribal Council

The Navajo Supreme Judicial Council, created as the Navajo Nation's highest appellate court, originated from ill-conceived ideas. Its creation essentially politicized the Navajo court system and jeopardized the independence the courts had treasured up to that point. Moreover, with the addition of the Supreme Judicial Council, the chairman of the Navajo Tribal Council gained broad power, not only over the court system but over the entire Navajo Nation government.

The Navajo Nation courts did not have an opportunity to decide whether they had the power to review legislation passed by the Navajo Tribal Council (the Council acts through resolutions) during the first twenty years of their existence. The question arose in June 1977 when the Navajo Court of Appeals (renamed the Navajo Nation Supreme Court in 1985) was asked to determine the validity of a resolution that the Navajo Tribal Council had passed to appropriate seventy thousand dollars of public funds for Chairman Peter MacDonald, Sr.'s, legal defense against felony charges in Arizona federal district court.[111] The Shiprock District Court, a trial court, held that public funds could not be used for the chairman's private expenses and enjoined the release of funds.[112] The Navajo Court of Appeals affirmed the trial court's injunction on appeal and established the principle that the Navajo Nation courts have the power to review legislation passed by the Navajo Tribal Council.[113] Chairman MacDonald and his supporters on the Navajo Tribal Council were not pleased with the Navajo court decisions that overturned the resolution. In any other case, the appellate court's decision would have finalized the matter, but *Halona v. MacDonald* was not an ordinary case.

Casting the trial and appellate court decisions as a power grab by the courts, the Judiciary Committee of the Navajo Tribal Council retained Deans Edgar S. Cahn and Jean Camper Cahn of Antioch Law School and

instructed them to find ways to prevent the Navajo courts from overturning Tribal Council resolutions. They recommended establishment of a body that would review select final decisions of the Navajo Court of Appeals, the highest appellate court in 1978.[114] Acting on the Cahns' recommendation, Chairman MacDonald and the Navajo Tribal Council passed legislation that established the Navajo Supreme Judicial Council on May 4, 1978. Chairman MacDonald then selected the judges to the Navajo Supreme Judicial Council, which immediately went into session and reversed the appellate court decision that had prohibited use of Navajo public funds to pay for his private legal defense.

The Navajo Supreme Judicial Council, a quasi-legislative appellate body and arm of the Navajo Tribal Council, was granted jurisdiction only over decisions of the Navajo Court of Appeals that invalidated Tribal Council resolutions.[115] Eight judges sat on the Supreme Judicial Council. Of the eight judges, the chairman appointed seven—two retired Navajo court judges and five sitting Tribal Council delegates.[116] With the power to appoint nearly all the judges to the Supreme Judicial Council, the chairman guaranteed that none of the resolutions he favored would be invalidated. The Navajo chief justice, the eighth member of the panel, presided over proceedings of the Supreme Judicial Council but could not vote on a final decision except in the event of a tie, which was practically impossible.[117] Moreover, at any point in the proceedings of the Supreme Judicial Council, the chairman had the power to intervene "to represent the interests of the Navajo Nation."[118] The Supreme Judicial Council heard only three cases before it was abolished by the 1985 court reforms.

Navajo Court Structure and Judges

The intent behind the Navajo Supreme Judicial Council and its obvious lack of independence were major factors that prompted the 1985 court reforms.[119] The Navajo Supreme Judicial Council was eliminated and the Navajo Nation Supreme Court replaced the Navajo Court of Appeals so that the Navajo court system would be structured like the state and federal court systems. The reforms also designated the Navajo Nation Supreme Court as the court of final resort within the Navajo Nation government to prevent creation of another body like the Navajo Supreme Judicial Council.[120]

The Navajo Nation Supreme Court has appellate jurisdiction over final Navajo trial court decisions and final adjudicatory decisions of certain administrative bodies (e.g., tax commission, election commission, and labor commission). The Supreme Court has original jurisdiction over petitions for extraordinary writs, including mandamus, prohibition, and habeas corpus, and can answer questions certified by the Navajo trial courts and administrative agencies and the state and federal courts.[121] The Court has original and ultimate authority over law practice and bar membership on the Navajo Nation. The Court has appellate jurisdiction over certain final decisions of the Navajo Nation Bar Association, an organization of lawyers and lay advocates licensed to practice law on the Navajo Nation.[122] The Supreme Court has authority to approve all new and revised rules for the Navajo Nation courts. Court rules include rules for civil and criminal procedures; rules for juvenile proceedings; evidence rules; appellate procedure rules; rules on repossession of property from the Navajo Nation; small-claims court rules; and probate procedure rules.

The Navajo Nation is geographically divided into ten judicial districts where the district and family courts (trial courts) are located. Trial courts are located at Chinle, Dilkon, Kayenta, Tuba City, and Window Rock on the Arizona side of the Navajo Nation; at Alamo, Crownpoint, Ramah, Shiprock, and Tóhajiilleeh on the New Mexico side of the Navajo Nation; and at Aneth on the Utah side of the Navajo Nation. Navajo district courts are courts of general jurisdiction and Navajo family courts have exclusive jurisdiction over domestic relations cases.[123]

Annexed to each trial court (district court and family court) is a peacemaking division that oversees Navajo peacemaking (*Hózhǫ́ǫjí Naat'áanii*). Navajo customs, traditions, and traditional procedures are used in peacemaking to arrive at consensual solutions to disputes. Each district court has a small-claims division that businesses use to bring claims worth two thousand dollars or less without the services of a lawyer. The Special Division of the Window Rock District Court, whose three judges are appointed by the chief justice, has exclusive jurisdiction to appoint a special prosecutor to investigate and prosecute ethics and corruption cases involving officials of the Navajo Nation government.[124]

The Navajo Nation president appoints the Navajo Nation judges and the Navajo Nation Council confirms them. The Judiciary Committee of

the Navajo Nation Council has the initial responsibilities of performing background checks, testing analytic skills, and interviewing all applicants for judge positions.[125] The committee scores each applicant on writing and analytic skills and responses to interview questions and sends the names of three applicants with the highest scores to the Navajo Nation president for appointment. The president interviews the three applicants and selects one person who goes before the Navajo Nation Council for confirmation. Each newly appointed judge serves a minimum two-year probationary term. A newly appointed judge completes several units of judicial education at the National Judicial College at Reno, Nevada, or the National Indian Justice Center at Petaluma, California, during the probationary term.[126]

The Navajo Nation Council may grant a judge who has successfully completed probation a lifetime appointment. Each permanent judge serves during good behavior; thus, a judge can be removed for malfeasance or misfeasance in office, serious neglect of duty, mental or physical inability to perform judicial duties, conviction of a felony in a state or federal court since taking office, or substantial misrepresentation of qualifications for a judgeship.[127] All complaints against judges, including those that result in removal, are first reviewed and investigated by the Judicial Conduct Commission. This body is composed of a state or federal judge, a retired Navajo Nation judge, two members of the Navajo Nation Bar Association, and a member of the public. The Judicial Conduct Commission recommends a sanction that the chief justice implements. Removal of a permanent judge requires a two-thirds vote (59 votes) of the full membership of the Navajo Nation Council (88 council delegates) and only after a full hearing before the Council where the judge has a right to legal representation.[128] Any judge undergoing removal has a right to all due process protections, can examine and cross-examine witnesses, and can introduce evidence.

Jurisdiction

Navajo Nation law gives the Navajo district courts original jurisdiction over (1) all crimes listed in the Navajo Nation Criminal Code when committed within Navajo Nation territorial jurisdiction or when committed between Navajos off the Navajo Nation; (2) all civil actions where the defendant resides in Navajo Indian country or has caused an action to occur within Navajo territorial jurisdiction; and (3) all matters pursuant to Navajo

statutory law, Navajo common law, Navajo treaties, and all causes of action recognized in American law generally.[129] The Navajo Nation has status jurisdiction, which allows its courts to exercise civil and criminal jurisdiction over enrolled Navajos regardless of their place of residence and over Navajo children who are eligible for enrollment regardless of where they are found. The criminal jurisdiction provision provides as follows: "The Navajo Nation Courts shall also have jurisdiction over any member of the Navajo Nation who commits an offense against any other member of the Navajo Nation wherever the conduct which constitutes the offense occurs."[130]

The Navajo Nation courts exercise criminal jurisdiction over non-Navajos who marry Navajos and assume tribal relations and live in Navajo Indian country, although the Navajo Nation Supreme Court has not decided whether this kind of criminal jurisdiction extends to non-Indians.[131] Under Navajo customary law, non-Navajos who marry Navajos voluntarily place themselves within the Navajo clanship structure and thereby consent to maintaining right relations with their spouse's clan relatives, other Navajos, and the Navajo Nation as place. The Navajo clan system promotes positive relationships among relatives, and that includes in-laws. The required positive behavior includes freedom from domestic violence within the immediate family and extended family. The Navajo Nation asserts civil jurisdiction over non-Indians who commit offenses in Navajo Indian country, but the sanctions are limited to civil fine, civil forfeiture, restitution, and exclusion from Navajo territorial jurisdiction.[132]

The Navajo territorial jurisdiction statute gives the Navajo Nation courts jurisdiction over all of Navajo Indian country. The statute is based generally on the federal Indian country statute.[133] The Navajo territorial jurisdiction statute defines Navajo Indian country as follows:

> The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian Communities, all Navajo Indian allotments, all land owned in fee by the Navajo Nation, and all land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.[134]

The term "Navajo Indian Reservation" in the territorial jurisdiction statute includes lands set aside by the 1868 Navajo Treaty and all subsequent additions to the Treaty Reservation by federal executive orders and statutes. Territorial jurisdiction in the Eastern Navajo Agency in New Mexico is difficult to pinpoint because the area is a "checkerboard," that is, it contains federal allotments of land owned by individual Navajos, lands owned in fee by Navajos and non-Navajos, Navajo Nation–owned fee lands, and state-owned lands. Within the "checkerboard" area, the Navajo Nation exercises jurisdiction over federal allotments of land owned by individual Navajos, Navajo Nation–owned fee lands, and lands that contain dependent Navajo Indian communities.

The term "dependent Navajo Indian Communities" in the Navajo territorial jurisdiction statute is based on the federal Indian country statute. The extent to which the Navajo term has been modified by the U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*[135] is not clear. The territorial jurisdiction statute gives the Navajo Nation jurisdiction over lands held in trust for or owned by the Navajo Nation or leased by the United States to the Navajo Nation. This part of the law covers private (fee) lands that the Navajo Nation has purchased such as the Big Boquillas Ranch near Seligman, Arizona, and lands leased from the federal government, including the Espil Ranch, which is on the north side of the San Francisco Peaks near Flagstaff, Arizona.

Today, the Navajo Nation Court System is a model of judicial independence. Navajo Nation judges, although appointed through a political process that involves all branches of government and with public participation, are free of political influence from the president of the Navajo Nation and the Navajo Nation Council. Because the Navajo Nation government operates according to law, the judges decide cases without fear of reprisal from elected officials. Anyone, including a Navajo Nation official, who attempts to improperly influence a Navajo Nation judge to gain an advantage in litigation or to influence a court's decision, can be charged with a criminal offense.[136]

Navajos and non-Navajos who litigate in the Navajo Nation courts can expect to have their cases decided fairly and according to law, including Navajo common law; no one should expect anything less from a Navajo

Nation court. The Navajo leaders who completed court reforms in 1985 understood that the Navajo Nation cannot continue to be a respected sovereign unless its courts and judges are independent and free of bias and political influence. An independent and fair Navajo Nation Court System is necessary for the growth of Navajo common law (and American Indian common law in general).

Foundational Diné Law Principles

Returning to Traditional Navajo Laws and Methods

While the Navajo Nation courts have been using customary precepts to decide cases since the creation of the Navajo courts in 1958, the Navajo Nation Council has been slow to enact laws and policies based on Navajo philosophy and the Navajo way of doing things. Although the Navajo courts had been using Navajo common law for quite some time, it was not until the 1980s that use of Navajo common law became official court policy through reinstatement of Navajo traditional peacemaking. Nonetheless, once it became widely known that the Navajo courts were emphasizing use of Navajo normative precepts, the rest of the Navajo Nation government had no choice but to also take up the challenge. This chapter traces the methods the Navajo Nation judges and Navajo Nation Council have used in their attempts to right the imbalance in Navajo Nation law.

Imbalance in Navajo Law and the Response

There is an obvious imbalance in all of Navajo Nation law. Adopted Anglo-American law makes up a significant portion of the twenty-six titles that compose the Navajo Nation Code and the regulations that guide the departments of the Navajo Nation government. In comparison, Navajo common law appears primarily in the written decisions of the Navajo Nation courts. Although the Navajo code matches any state code in terms of subjects covered and complexity, traditional Navajos and a significant percentage of the Navajo population would find their Nation's laws perplexing. Diné custom, tradition, language, and culture have only on rare occasions made their way into the code. Very little Navajo common law in the code

confirms, first, that the Navajo people did not participate in the initial creation of their government[1] (or they would have insisted on incorporating Navajo ways of doing things), and, second, that non-Indian lawyers with little or no knowledge of Navajo culture, language, customs, or traditions drafted most of the statutory laws.

Moreover, shortly after the Navajo Nation established its court system in 1958, the Navajo Tribal Council simply adopted many provisions of the then existing Bureau of Indian Affairs Law and Order Code as Navajo Nation statutory law.[2] The law-and-order regulations promulgated by the Bureau of Indian Affairs for the Court of Indian Offenses are the original sources for the initial Navajo statutory laws on crimes, domestic relations, and courts. Although the Navajo Tribal Council intended to adopt the Bureau's regulations as Navajo law on a temporary basis, many of the adopted provisions remained in the code into the 1980s or became the source of laws presently found in the Navajo Nation Code.

As a necessary exercise of self-government and nation building, contemporary officials of the Navajo Nation must provide sufficient space for traditional Diné ways within a Navajo Nation government that is overly saturated with Western models and laws. Traditional Navajo ways, including philosophy, language, customs, traditions, and sense of place, must significantly influence all aspects of government for the Navajo Nation to maintain its distinct group character, continue its culture, develop a culturally compatible economy, and maintain its sovereign Indian nation status. The same things can be said generally of other American Indian tribes and nations.

Research reveals that Indian nations that employ tribal customs and traditions in the governing process exercise effective sovereignty.[3] Effective sovereignty is integral to preserving distinct group character and independent Indian nationhood. "Distinct," as used here, refers to an Indian nation that uses a good amount of its customary ways to govern and in the process distinguishes itself from the governing ways of the United States and the states of the union. Indian customary ways, including those of the Navajo people, have roots in tribal culture, language, spirituality, and sense of place.

For much of the twentieth century, the federal government implemented its Indian assimilation and termination policies through the Bureau of

Indian Affairs. These policies did not support use of traditional Navajo ways in the Western-style Navajo Nation government. The federal government abandoned in practice its termination policy in 1961,[4] but two more decades passed before the political environment became suitable for the Navajo judges to endorse use of customary law ways in the Navajo Nation courts.[5] Although Navajo judges had used customary law and justice methods since the days of the Navajo Court of Indian Offenses, it was not until 1982 that traditional Navajo justice ways became official court policy.[6]

The 1980s began with general consensus among Navajo judges that the Navajo Nation needed an alternative to the Western form of adjudication because of the incompatibility of this system with Navajo ways of life. While reviewing public concerns about the Navajo court system, court officials discovered several problems caused by the inherent incompatibility between traditional Navajo justice ways and Western-style litigation in the Navajo courts. These problems are summarized as follows: (1) The litigious system could not resolve certain kinds of problems in Navajo communities; (2) Navajos complained that the Western form of adjudication was too expensive and time-consuming; (3) Western methods of adjudication confused and frustrated Navajo litigants; and (4) The confrontational style of Western adjudication contravened traditional Navajo justice procedures, which used "talking things out" and consensus to resolve disputes.[7]

The Navajo judges turned to traditional Navajo justice ways for a dispute resolution method that would remedy the problems raised by the public—a method that "would be inexpensive, rapid, simple, and meet the standards of Navajo tradition."[8] Traditional Diné peacemaking was the answer. The judges revived traditional peacemaking and turned it into the Navajo Peacemaker Court in 1982.

The Navajo Peacemaker Court (now called Navajo Peacemaking Division), a traditionally derived dispute resolution system, has surpassed all expectations and is now an essential Navajo justice institution. Navajo peacemaking comports with indigenous justice ways and, as such, is studied around the world as a model of indigenous justice. Several years of experience show that Navajo peacemaking works best when it invokes traditional procedures and *Diné bibee haz´áanii* (Navajo common law).

Diné Bibee Haz´áanii *and Fundamental Laws*

The Navajo Nation Council is a legislative body that enacts laws. In pre-Council days, the traditional Navajo leaders mediated disputes, sometimes using precedent and stern lectures on the norms, but they did not make laws for the whole Navajo people. Traditional Navajos believe in the interconnectedness of all things, so they do not see law as a set of rules detached from daily life. Each day traditional Navajos live their laws with their spirituality, and to traditionalists, any attempt at distinguishing Diné law from spirituality is an improbable undertaking. All spiritual concepts and practices (what non-Indians call religion) are intertwined with the secular into the Diné Life Way, which, according to the Diné Fundamental Laws, is holistic.[9] Norms that produce desirable conditions that include probity, peace, order, and positive relationships are common knowledge among traditional Navajos. In the traditional Navajo world, positive values sustain a condition called *hózhǫ́*—a state where everything is properly situated and existing and functioning in harmonious relationship with everything else (discussed in chapter 3).

Traditional Navajos understand *Diné bibee haz´áanii* as values, norms, customs, and traditions that are transmitted orally across generations and which produce and maintain right relations, right relationships, and desirable outcomes in Navajo society. In the modern Navajo world, the term *Diné bibee haz´áanii* is understood as Navajo statutory law, administrative regulations, court-made law, and Navajo common law (values, norms, customs, and traditions). Thus, the standard translation of *bee haz´áanii* is law and that is how the Navajo courts have described the term.

In 1990, the Navajo Nation Supreme Court explained the legal aspects and legal understanding of the word *bee haz´áanii* in *Bennett v. Navajo Board of Election Supervisors:*

> The Navajo word for "law" is *beehaz´aanii.* While we hear that word popularly used in the sense of laws enacted by the Navajo Nation Council . . . it actually refers to higher law. It means something which is "way at the top"; something written in stone so to speak; something which is absolutely there; and, something like the Anglo concept of natural law. In other words, Navajos believe in a higher law, and as it is expressed in Navajo, there is a concept similar to the idea of unwritten constitutional law.[10]

The Supreme Court went on to explain that Navajo higher law includes "fundamental customs and traditions, as well as substantive rights found in the Treaty of 1868, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989."[11] Although the Supreme Court did not identify any fundamental customs and traditions that would constitute higher law, Navajo thinking would place the doctrines of *hózhǫ́, k'é,* and *k'éí* into that category.

These three doctrines are not basic legal principles in the sense that they can be applied directly to legal questions in litigation. They essentially describe conditions generated through law when we speak of them in the legal context. They also describe other conditions, as, for example, when they are spoken of in the spiritual context. The three fundamental Navajo doctrines are like the Anglo concept of natural law.[12] They are also Diné philosophical doctrines. They are integral to the Navajo Creation Scripture and Journey Narratives and undergird, along with other doctrines, Navajo culture (including customs, traditions, and philosophy), language, spirituality, sense of place, and identity.

Although the modern Navajo conception of *bee haz'áanii* put forth by the Supreme Court provides sufficient understanding of law as applied in the Navajo Nation courts, there remains the core conception of the term that merits elaboration. At its most basic understanding (i.e., how a traditional Navajo might describe the concept), the term *bee haz'áanii* can be glossed in English as "by it which a certain state/condition exists." In the main, the state or condition is *hózhǫ́* and the "it" represents the animating norms, customs, and traditions (or customary laws) that produce or maintain that state. The desired condition, especially when relationships are considered, can also be *k'é* (a person's positive relationship with everything) or *k'éí* (a person's positive relationship with relatives). Under a traditional Diné analysis, law functions as the demiurge that produces or maintains the state of *hózhǫ́* (or *k'é* or *k'éí*). An act that does not disrupt *hózhǫ́* is called *bee haz'ą́* (meaning an act permitted, or, literally, "maintains a positive condition") and that term means "legal act" when used in the legal sense.

As the Navajo Nation Supreme Court said in *Bennett,* the term *bee haz'áanii* includes laws enacted by the Navajo Nation Council. In 2002,

the Navajo Nation Council incorporated traditional Navajo norms and values into the Navajo Nation Code as "the fundamental laws of the Diné"[13] to guide all aspects of government operations and interactions among government officials and among government officials and the public. Moreover, because traditional Navajo knowledge is fading among the Navajo people, particularly the young people, the Diné fundamental laws were codified so they could be used to educate the Navajo populace and thereby perpetuate Navajo culture.[14] A group of traditionalists, who were selected for their fluency in Navajo philosophy, language, culture, spirituality, and sense of place, scrutinized the Navajo Creation Scripture and Journey Narratives and identified several foundational postulates that were appropriate for codification. The fundamental laws are intended to guide the Navajo Nation courts and leaders of the Navajo Nation when they make decisions, laws, and policies for the Navajo Nation. Nonetheless, without a firm grounding in the Navajo Creation Scripture and Journey Narratives, the fundamental laws are difficult to understand and apply in the legal context.

The Diné fundamental laws form four sections in Title One of the Navajo Nation Code: (1) Traditional Law (*Diyin Bits'ą́ą́dę́ę́' Bee Haz'áanii*—laws of the Great Spirit); (2) Customary Law (*Diyin Dine'é Bits'ą́ą́dę́ę́ Bee Haz'áanii*—laws of the Holy Beings); (3) Natural Law (*Nahasdzáán dóó Yádiłhił Bits'ą́ą́dę́ę́ Bee Haz'áanii*—laws of Mother Earth and Father Heaven); and (4) Common Law (*Diyin Nohookáá Diné Bibee Haz'áanii*—laws of the Diné).[15] Several readings of the laws are recommended to glean foundational doctrines (including *hózhǫ́, k'é,* and *k'éí*) and certain customs and traditions because they are not expressly mentioned in the provisions that comprise the sections. Since the sections that constitute the fundamental laws were recently codified, the Navajo Nation Supreme Court has not had much opportunity to discuss them. Thus, the following short and general synopsis of the fundamental laws is offered as a precursor to further discussions of these laws.

Although the words *hózhǫ́, k'é,* and *k'éí* do not appear in the sections that make up the fundamental laws, the three doctrines nonetheless inform its provisions. The provision in section 203(A) that speaks to the people's right to choose their leaders is used here to illustrate this point.[16]

Participatory democracy, a concept central to traditional Navajo governance, flourishes when the Navajo people choose their leaders freely and work with them to solve problems. The *k´é* and *k´éí* doctrines come in to guide discussions (which is participatory democracy in action) anytime the people and their leaders use the principle of "talking things out" to address and solve community problems. Harmony (*hózhǫ́*) is restored when the people working with their leaders solve community problems using consensual decision making. This example also demonstrates that the fundamental laws serve as mechanisms through which *hózhǫ́, k´é,* and *k´éí* are maintained.

Section 201, which declares the foundation of Diné law, also shows that the three concepts inform the fundamental laws. This section, restated, says the Navajos are people of the Great Covenant, created in their ancestors' image, and connected to all things in creation.[17] Section 201 declares these Navajo beliefs: the interconnectedness and interdependence of everything in creation (i.e., Diné connected to Holy Beings, which includes the sacred and spiritual, by covenant); Diné connected to their ancestors through likeness; and Diné connected to all elements in creation (past, present, and future) through *k´é* and *k´éí,* such that when everything is in its proper place and functioning in harmony, there is *hózhǫ́*. The part written in the Navajo language in section 201 describes important aspects of the process used to create the universe, which is also the same process that produced the primordial conditions of *hózhǫ́, k´é,* and *k´éí;* the three are integral to the interconnectedness concept.

Navajos believe that foundational laws like *hózhǫ́, k´é,* and *k´éí* have sources in spirituality. The Diné Fundamental Laws contain this view:

> The Diné have always been guided and protected by the immutable laws provided by the Diyin [Great Spirit], the Diyin Dine´é [Holy Beings], Nahasdzáán [Mother Earth] and Yádiłhił [Father Heaven]; these laws have not only provided sanctuary for the Diné Life Way but have guided, sustained and protected the Diné as they journeyed upon and off the sacred lands upon which they were placed since time immemorial.[18]

Traditional Navajo philosophy holds that the Holy Beings established the foundational doctrines that drive the Diné Life Way. Thus, the Diné

Fundamental Laws enunciate the traditional view that spirituality is the source of foundational principles. The customs and traditions that come from the foundational principles would also have spiritual sources by way of the primary doctrines. A study of Navajo common law should respect the traditional Navajo understanding that spirituality underlies Diné foundational laws.[19]

The view that fundamental Navajo doctrines have spiritual sources does not cause uneasiness among modern Navajo lawmakers when they enact laws for the Navajo people and Navajo homelands. The Navajo Nation Council has tremendous leeway and flexibility to make laws, but those laws should not contravene the primordial principles. The following example illustrates this limitation: Suppose the Navajo Nation Council enacted a law making English the official language of the Navajo Nation. How would a Navajo Nation court analyze this issue on a challenge? The Navajo Creation Scripture and Journey Narratives teaches that the Diné language formed from the Creator's thought process and turned into sound (called the First Word), the sound then became language, and the Holy Beings made the Navajo language a component of Diné identity.[20] Using these accounts, a Council-enacted law that made English the official language of the Navajo Nation would profane the Diné language and Diné identity, both of which connect Navajos to the Holy Beings.

Navajo judges sometimes resort to general propositions that underlie Navajo culture to guide the litigation process. These general propositions would include *hózhǫ́, k'é,* and *k'éí,* and others such as "The Navajo language is sacred" and "Words are powerful." These same principles also apply during peacemaking to heal participants and restore them to harmonious relationships with each other and their kin and community. A twentieth-century American anthropologist, E. Adamson Hoebel, calls similar general propositions social postulates.[21] The Navajo Nation courts prefer to call the extant Navajo social postulates, and the norms, values, customs, and traditions of the Navajo people, Navajo common law. In 1987, the Navajo Nation Supreme Court proclaimed that the customs and traditions that Navajos understand as law are collectively Navajo common law:

> Because established Navajo customs and traditions have the force of law, this Court agrees with the Window Rock District Court in announcing its preference for the term "Navajo common law" rather than "custom," as that term properly emphasizes the fact that Navajo custom and tradition *is* law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law. (emphasis in original)[22]

Although the Navajo Nation courts do not need statutory authorization to use Navajo common law, the Navajo Nation Code has provided such authority in the form of a choice of law statute since 1959. The statute that authorizes use of Navajo common law in the courts has changed little since its predecessor, a regulation of the Court of Indian Offenses, was adopted as a Navajo statute in 1959.[23] The current choice of law statute requires the Navajo courts to apply Navajo statutes and regulations to legal matters first; requires use of Navajo common law to interpret Navajo statutes and regulations; and requires application of Navajo common law to legal matters that are not addressed by Navajo statutes and regulations.[24] Navajo Nation Supreme Court decisions hold that the Navajo Nation courts must follow the requirements set forth in the Diné Fundamental Laws.[25]

Finding and Using Navajo Common Law in Litigation

Navajo common law is not difficult to find and understand. Navajo court opinions are published in the *Navajo Reporter*[26] and the *Indian Law Reporter* and are available through VersusLaw, a commercial online legal research source. The written decisions of the Navajo Nation courts contain generous amounts of Navajo common law with appropriate explanations. Legal and nonlegal literature on the Navajo courts and Navajo culture also contains Navajo common law. Relevant customs and traditions that do not appear in the written decisions of the Navajo Nation courts or are not codified in the Navajo Nation Code remain within the domain of Navajo oral tradition, but even these are readily available through knowledgeable people, usually elders. When working with unwritten Navajo common law, experienced legal advocates locate people knowledgeable on customs and traditions, elicit the relevant common law, interpret it,

and introduce it into litigation. The Navajo Nation Supreme Court underscored the preeminence of customs and traditions in Navajo jurisprudence when it declared Navajo common law as the law of preference in the Navajo Nation courts.[27] The stakes are indeed high because Navajo common law can trump or alter predisposed expectations premised on Anglo-American legal outcomes. For example, in *Ben v. Burbank,*[28] the Navajo Nation Supreme Court used the *k´é* doctrine to reject the argument that the statute of limitations had run out on an oral contract claim.

Navajo elders, ceremonial practitioners, peacemakers, retired Navajo Nation judges, and Navajos who live a traditional Navajo lifestyle are normally well versed in Navajo customary precepts. Beyond the written materials, the precepts that comprise Navajo common law are present in traditional lore, maxims, stories, ceremonies, prayers, songs, and the Navajo language. While working with Navajo common law, it is important to heed the Navajo Nation Supreme Court's caveats: (1) understand the customs and traditions; then decide how they would apply to an issue; (2) customs and traditions may vary from place to place on the Navajo Nation; (3) some customs and traditions may have fallen into desuetude; and (4) parties to a case may not follow customs and traditions.[29]

Although a party may not practice customs or traditions, when any is pleaded in the initial pleadings or anytime thereafter, it becomes relevant and can be considered by the judge and those litigating.[30] Moreover, not all Navajo customs are law,[31] and the individual contributing common-law knowledge may refuse to testify on custom in open court owing to its sacred nature or object on other grounds. Participants should understand that the adversarial process is not a traditional Navajo method of dispute resolution. An in camera disclosure of a sacred custom is a possible solution. Problems sometimes arise when litigants attempt to introduce Indian common law into tribal, state, and federal courts, but under most circumstances any problem can be alleviated through respectful discussion and understanding.

Legal practitioners who are not familiar with Navajo culture, including language, etiquette, and spiritual beliefs and practices, would do well to associate with a court advocate or attorney who is Navajo and a member of the Navajo Nation Bar Association.[32] The Navajo legal practitioner

can help locate sources of Navajo common law, including knowledgeable persons, and advise on introducing customs into court proceedings. Although being Navajo alone does not guarantee knowledge of Navajo common law, Navajo legal counselors are usually culturally embedded. They know Navajo spiritual and social practices, can speak the Navajo language, and possess an experienced insider's view of Navajo court practice. Navajo judges, several of whom are former court advocates, know of the indispensability of Navajo court advocates to law practice on the Navajo Nation:

> Navajo advocates are familiar with the customs and traditions of their people. They can speak the tribal language, thereby communicating with those seeking legal help who rely upon their native tongue. An understanding of the Navajo life-style and culture is indispensable to the practice of law within the Navajo Nation, and Navajo advocates advance the development of a modern judicial system which retains traditional legal norms.[33]

The Navajo Nation Supreme Court set parameters for locating, pleading, and proving Navajo common law in the Navajo Nation courts in *In re Estate of Belone.*[34] First, the Supreme Court established that when "a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim."[35] This rule gives the opposing party notice and an opportunity to challenge the common-law claim. In *Judy v. White,* the Navajo Nation Supreme Court ruled that the Diné Fundamental Laws "expand[ed] the *Belone* rule beyond the initial pleading requirement. . . . Thus, the failure to raise [Navajo common law] in the initial pleading will not lead to exclusion of the claim."[36] Navajo common law can be raised after the initial pleadings have been filed, but the opposing party must still be provided notice that a Navajo common-law claim has been pleaded. The court should still exercise its discretion to guard against late filings of common-law claims that delay proceedings, hamper the rights of litigants, or otherwise cause prejudicial problems.

Second, in addition to oral sources, Navajo common law can be found in written Navajo court opinions, Judicial Branch Solicitor opinions, and literature and studies on Navajo culture, including those by social scientists,

legal scholars, attorneys, and Navajo judges.[37] Navajo judges have expressed generally that writings on Navajo culture by Navajo authors are more accurate than those by non-Indian authors, very likely because Navajo authors are embedded in their own culture. For example, the trial judge in the case of *In re Estate of Apachee* stated that materials written by Navajos on Navajo culture are more reliable than those by non-Navajos because Navajos "are the most accurate commentators on themselves."[38] This observation, however, was made in 1983. There are now non-Navajo authors who have interpreted, analyzed, and discussed Navajo culture and philosophy very well in their books.

Third, Navajo common law can be introduced and proved in court through an expert witness.[39] The *Estate of Belone* decision provides general guidelines on qualifying an expert witness on Navajo common law and admitting expert testimony. The trial court exercises "sound discretion" over the qualifying of a witness as an expert and over admitting expert testimony on Navajo common law.[40] If the claimed custom or tradition is not disputed, the trial court "need not avail itself of experts in Navajo culture" and admit it as evidence subject to relevancy.[41] The party desiring to use an expert witness must satisfy the trial court that expert testimony on Navajo common law is "relevant to the issue before the court" and will help the judge or jury understand the custom or tradition.[42]

A witness must be qualified as an expert on Navajo customs and traditions before offering evidence in that area. Evidence of a witness's qualification to testify as an expert on Navajo common law may come from (1) readings on customs, (2) practicing customs, or (3) understanding of customs derived from oral education, living a traditional lifestyle, long-term interest in and acquisition of traditional knowledge, or reputation as a person well versed in traditional knowledge.[43] If litigants dispute the proffered Navajo custom or tradition, the court may hold a pretrial conference with three experts who will use the traditional Navajo civil procedure of talking things out and identify the appropriate custom to be applied in the case.[44] In the interests of fairness, each side should select an expert and the court can appoint the third expert. The litigants can attend the pretrial conference, but their participation will be "limited to asking questions to clarify the expert witnesses' conclusions."[45] Navajo statutory

law authorizes Navajo judges to seek out knowledgeable individuals to clarify questions on Navajo common law: "To determine the appropriate utilization and interpretation of Diné bi beenahaz´aanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz´aanii."[46]

The Navajo Nation Supreme Court's guidelines in the *Estate of Belone* opinion supplement the trial court's broad discretion over the qualifying of experts and admitting expert testimony on Navajo common law.[47] On appeal, the Supreme Court will review for abuse of discretion—that is, to determine if the proper procedures (the *Estate of Belone* guidelines) on qualifying experts on relevant Navajo common law were followed.[48] Thus, a record must be made of the evidence used to qualify a witness as an expert on Navajo common law.[49] The de novo standard of review should also apply to issues brought before the Navajo Nation Supreme Court that challenge the trial court's application of the proffered Navajo common law.

The notion that a select person can be elevated above others and called "expert" on Navajo ways would not sit well with most traditional Navajos. True, there are Navajos, particularly ceremonial practitioners, who posses vast amounts of traditional knowledge, but they hardly consider themselves experts, because many elderly Navajos and Navajos who have been exposed to the traditional lifestyle know many of the same general concepts. The Navajo Nation Supreme Court should revisit the *Estate of Belone* case and reexamine its guidelines on raising and admitting Navajo common law. Any modifications should comport with traditional Navajo thinking and ways of doing things.

The abuse of discretion standard that the Navajo Nation Supreme Court announced in *Estate of Belone* allows for flexible use of Navajo common law, but the overall process on qualifying experts and admitting expert testimony is more a practice of exclusion of evidence, rather than of inclusion, when considered in light of traditional Navajo justice ways. Traditional justice allows discussion of matters that go beyond what would be considered relevant under modern Navajo rules of evidence. Use of formal evidentiary rules to filter witnesses and proffered evidence may be useful to adversarial litigation, but the filtering process under the guise of

relevancy is wholly incompatible with traditional Diné justice, which values equality, talking things out, and free-flowing oral discourse.

The American litigation practice (in state, federal, and Navajo courts) of trimming evidence to relevancy through evidentiary rules does damage to the broad perspectives contained in Navajo customs and traditions by straining them of meaning and significance. When stripped of meaning through the evidentiary process, the value or norm carries little credibility with court judges, especially non-Indian state and federal judges. Traditional Navajo values, norms, and doctrines encompass broad perspectives that do not do well in an American form of courts (i.e., state, federal, and Navajo courts) where adversarial competition is used to find the "truth" by constraining evidence to narrow concepts. The same may hold true for other American Indian and indigenous customs and traditions.

Finally, most of the traditional normative precepts that make up the modern body of Navajo common law have been identified and developed through the legal doctrine of judicial notice. Navajo judges using the judicial notice doctrine to accept Navajo common law is not a recent phenomenon. Navajo judges have made use of the doctrine since the early days of the Navajo Court of Indian Offenses. When use of customs and traditions in Navajo court litigation became standard practice, judicial notice of Navajo common law also became standard procedure for the Navajo judges.

Modern Navajo court judges rely on the doctrine of judicial notice to identify unwritten customs and traditions and incorporate them into their decisions.[50] The trial court also has discretion to accept an undisputed custom or tradition under the doctrine of judicial notice. Once they have been applied, previously unwritten customs and traditions become part of a unique body of written Navajo common law. In 1983, after Navajo judges had been using the doctrine of judicial notice for nearly a century, a Navajo trial court established written guidelines for use of the doctrine in litigation.[51] The trial court proclaimed that judicial notice can be taken of normative precepts that are generally known within the community or can be found in accurate sources.[52] The accurate sources can be well-researched materials on Navajo culture, language, spirituality, and other areas and do not have to be written by Navajo authors.

The Navajo Nation Supreme Court adopted the trial court's standards on taking judicial notice of Navajo common law in *Estate of Belone.*[53] In addition to the standards, the Supreme Court declared that if a trial court takes judicial notice of Navajo common law, "it must clearly set forth in its order the custom on which it is relying, so that the basis for its decision is clear" in case of appellate review.[54] The Supreme Court also instructed that a Navajo trial court can take judicial notice of normative precepts as adjudicative facts.[55]

The modern guidelines on the judicial notice doctrine that the Supreme Court established in *Estate of Belone* and the pragmatic use of the doctrine by Navajo judges since the days of the Navajo Court of Indian Offenses illustrate ingenious ways of incorporating Navajo common law into adversarial litigation in the Western-style Navajo Nation courts. Now that the foundational doctrines that comprise the Diné Fundamental Laws are in place, the pace of development of Navajo common law should quicken. Although the Navajo Nation courts make extensive use of American court procedures and doctrines, they continue to focus on the traditional norm of restoring disputants to the desired state of *hózhǫ́* (peace, harmony, and balance), much like the traditional Diné peacemakers of yesteryear.

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Hózhǫ́ (Peace, Harmony, and Balance)

Hózhǫ́ in Navajo Culture

Probably the preeminent doctrine in Navajo philosophy and one of the least amenable to English translation is the doctrine of *hózhǫ́*. This concept is the foundational backbone of Navajo philosophy and can be denominated "the main stalk," because everything else branches from it.[1] The concept pervades everything in the traditional and contemporary Navajo universe, from everyday domestic life, which includes the spiritual and secular aspects, to the most sophisticated philosophical abstraction. Because Navajos believe that everything in the universe is interrelated, interconnected, and interdependent (called *T'áá ałtso ałk'éí daniidlį*),[2] the three doctrines of *hózhǫ́, k'é* (glossed as kinship solidarity), and *k'éí* (glossed as clan system) can be perceived as interdependent. While this chapter makes an attempt, the *hózhǫ́* doctrine's all-encompassing and pervasive nature makes it difficult to accurately define in English. Even the Navajo Nation courts have not attempted to define the doctrine in their written decisions.

Descriptions and Perspectives of Hózhǫ́

Anthropologists have glossed the *hózhǫ́* doctrine as harmony, balance, beauty, goodness, blessed, pleasant, perfection, ideal, and other attributes considered positive.[3] These single word descriptions fall within the realm of the *hózhǫ́* concept, but they do not tell the whole story and the Navajo Nation courts have used them only occasionally. These denotations could be characterized as descriptions of convenience because they aid in comprehension of the concept within a realistic context involving everyday Navajo life, behavior, and interaction.[4]

Gladys Reichard, who spent a lifetime studying Navajo culture, provides a more in-depth translation of *hózhǫ́* and describes it as perfection, a central guiding force that Navajos strive toward during their lifetime.[5] Reichard's translation is a substantial improvement over the descriptions of convenience, although it describes *hózhǫ́* as a constituent element of *Sa´ąh Naagháí Bik´eh Hózhǫ́* (SNBH), another concept that is extremely difficult to translate into English.[6] The concept of SNBH does not have a relevant role in Navajo dispute resolution, so it warrants only passing mention. Gary Witherspoon's translation of *hózhǫ́* provides the better conceptual framework for studying and understanding Navajo common law: "The Navajo concept of '*hózhǫ́*' refers to that state of affairs where everything is in its proper place and functioning in harmonious relationship to everything else."[7] In general, *hózhǫ́* encompasses everything that Navajos consider positive and good; positive characteristics that Navajos believe contribute to living life to the fullest. These positive characteristics include beauty, harmony, goodness, happiness, right social relations, good health, and acquisition of knowledge.

At a higher level of philosophical complexity, or, more appropriately called the universal level here, *hózhǫ́* describes a state (in the sense of condition) where everything, tangible and intangible, is in its proper place and functioning well with everything else, such that the condition produced can be described as peace, harmony, and balance (for lack of better English terms). Moreover, at the universal level *hózhǫ́* describes the abstract "perfect state," although this ideal condition is, quite frankly, imponderable, or, according to Navajo philosophy, a reality beyond mortal experience. Some people will definitely claim that they have experienced the perfect state, but Navajo philosophy teaches that human beings will not know absolute perfection until they die and enter the realm of SNBH.

The word *everything* in the description of *hózhǫ́* means all components that make up the universe; hence the designation, universal level. Thus, "everything in the universe" describes the interconnected, interrelated, and interdependent elements (i.e., air, water, animals, birds, heavenly bodies, and the rest of creation) that form a unified whole, such that the resulting structure might resemble a web. In this structure, human beings compose one facet or one element. In the grand scheme of things, *hózhǫ́* described

at the highly abstract level is more appropriate to Navajo spiritual thinking and ceremonial practice than jurisprudence. This area is within the realm of traditional philosophers, including practitioners of ceremonies, who discuss and dissect important foundational doctrines like *hózhǫ́,* in all their philosophical and spiritual intricacies, under appropriate conditions.

The concern here is with how *hózhǫ́* affects Navajos in the course of everyday life because the choices people make can result in disputes or raise legal questions. Perhaps, with minor exceptions, the ordinary Navajo gives the doctrine little thought because its prevalence in the Navajo social system and culture makes it unassuming. The Navajo people see and engage the world with a communal perspective, although Navajo culture provides ample room for individualism.

Individual pursuits are highly praised and encouraged, but individual freedom and expression must be exercised responsibly. For example, a person has ample freedom of speech, but that does not give him or her free rein to hurl maledictions at an elder, because elders are honored and respected in Navajo culture. Irresponsible exercise of freedoms may result in disharmony or disputes that are not within the realm of *hózhǫ́.* The individualism that is practiced in Navajo culture is not the individualism stressed as an American value. Navajos value an individualism that is tempered by reciprocal duties and obligations to relatives, kinfolks, and people in general.

Navajos strive to live life according to *hózhǫ́,* so the doctrine (normally in concert with doctrines like *k´é*) organizes and guides one's thinking, speaking, behavior, and interactions with people and the natural world on a daily basis. For example, depending on the context within which it is spoken, a Navajo will say "*Shił hózhǫ́*" to mean "I am happy," or it can describe the spiritual state as "I am spiritually at peace." The phrase "*Hózhǫ́ǫgo shił haz´á*" generally means "My domestic affairs are in order," but it can also describe other conditions, again depending on the context within which the expression is used. A traditional Navajo will do everything possible to live life according to *hózhǫ́* because it embodies everything that is considered good.

The Navajo doctrine glossed as disharmony is *hóchxǫ´,* which might be seen as conterminous with *hózhǫ́.* Navajo philosophy normally describes *hóchxǫ´* as the evil (or bad) side of things and beings, which includes disharmony caused by malevolent acts through witchcraft. Navajos are an

empirical, practical people, so their idea of evil covers such events as sickness, personal misfortune, family tragedy, and large loss of property. Ritual, which uses sacred knowledge integrated into prayers, songs, sacred words, sacred practice, and sacred materials, brings things and beings under control.[8] The process is one of identification, isolation, and treatment or negation or exorcism of the bad and restoration to the good. When things and beings return to the state of harmony, it is called *hózhǫ́ nahasdłii* (*hózhǫ́* restored), a phrase also repeated four times to close a traditional Diné prayer.

The process of returning things and beings to the state of *hózhǫ́* normally, but not always, requires the services of ceremonial practitioners who possess enormous traditional knowledge, including the Navajo Creation Scripture and Journey Narratives, sacred words, songs, prayers, sacred materials, and values. Navajos believe that knowledge is power. A person becomes a ceremonial practitioner (and hence a person of knowledge) by studying under a veteran practitioner (called a medicine man by non-Indians and *hataałii* by Navajos), usually an elder, for ten or more years. Upon successful completion of study, the apprentice is initiated as a ceremonial practitioner and then can perform the learned ceremony. A person can also become a person of knowledge through traditional education without going the apprentice route. Ceremonial practitioners and elders with traditional education are the Keepers of the Diné Way of Knowledge (the "tribal encyclopedia"); the Diné Way of Knowledge guides Navajos on the "pollen path in life" or the Diné Life Way.

From the ceremonial perspective, the term "knowledge is power" is understood as possessing the know-how to invoke powers that Navajos believe permeate the universe. Not every apprentice achieves the status of ceremonial practitioner. Navajos say that "If you were not meant to carry sacred knowledge, it will avoid you." This maxim connotes that sacred knowledge, which is property under Navajo common law, is a gift granted by the Holy Beings.

Levels of Knowledge

Degrees of abstraction have been used to categorize Navajo philosophy into three levels of knowledge: taboo, ritual, and synthetic.[9] Plotted on a

continuum, taboo knowledge and synthetic knowledge are on opposite ends and ritual knowledge assumes the middle. Concreteness, which is the least abstract, identifies taboo knowledge, and this kind of knowledge "is limited to an awareness of things that are safe and things that are dangerous."[10] This description of taboo knowledge (awareness of safe and dangerous things), unfortunately, leads some non-Indians to mock or ridicule tribal beliefs, explicitly or implicitly, actions likely attributable to Euro-American ethnocentrism.[11] Mocking and ridiculing Navajo beliefs and calling them superstitions have made many knowledgeable Navajos, particularly elders, reluctant to discuss traditional concepts with anyone. Indigenous beliefs should be discussed and understood within the context of the culture in which they are used.

Ritual, which is the second level of knowledge, refers to ceremonial practice. Ritual knowledge is used to manipulate the forces in the universe to advantage. In a culture that has ritual knowledge as its highest level of abstraction, people become obsessed with not making a mistake; the emphasis is on correctness.[12] For example, a family may believe that a ceremony did not work because it was not done correctly. They would then locate another ritual practitioner in an attempt to ensure that the ceremony is done correctly the second time.

Synthetic knowledge is identified as the third kind of knowledge. Synthetic knowledge is also called theoretical, metatheoretical, or paradigmatic knowledge.[13] Of the three levels of knowledge identified, synthetic knowledge is the most abstract. Synthetic knowledge allows people to think in terms of theories and other high-ordered thinking in an attempt to understand culture and other activities deemed important.

Recently, Navajo philosophers disclosed twelve levels of knowledge (actually four main levels that are each subdivided into three levels to form twelve levels) that a Navajo "person of knowledge" uses to conceptualize and explain accounts of the Navajo Creation Scripture and Journey Narratives, spiritual ceremonies, and philosophy.[14] Knowledgeable Navajos usually rely on the oral historical narratives to explain things in the universe, tangible and intangible, including matters that affect humans and the environment. The four main levels of knowledge are *Hózhǫ́ǫ́jí Hane´* (The Peace Way of Knowledge), *Dyin k´ehjí Hane´* (The Sacred Way of

Knowledge), *Hatáát k´ehjí Hane´* (The Ceremony Way of Knowledge), and *Naayéé´jí Hane´* (The War Way of Knowledge).[15]

Whether the four main levels are hierarchical like the three levels that Farella discusses (taboo, ritual, and synthetic) is not clear, although each of the four levels, like its counterpart three levels, contains its own degree of abstraction. It may be that The Peace Way of Knowledge, the probable elementary level, serves as the foundation for the other three categories. It is highly unlikely that a Navajo who claims knowledge at the highest level of abstraction in any category would possess all the knowledge, including complex abstractions, contained in the other three categories. The twelve levels of knowledge merit further study.

It should not be assumed that each category that comprises a level of knowledge contains a single narrative strand that everyone who possesses that knowledge knows and agrees on (like historians agreeing on facts that constitute the history of the Civil War). There is a diversity of knowledge on the same subject in Navajo philosophy such that there could be, for example, ten narrative variations on a single subject X. Variations can be traced generally to a common root source, usually an activity or event depicted in the Navajo Creation Scripture and Journey Narratives. Also, on subject X, the first person could have learned through the Z way of knowledge, the second person through the Y way of knowledge, and the third person through the Q way of knowledge.

When discussing Navajo philosophy, especially when it involves sacred and ceremonial knowledge, it is highly inappropriate to suggest that another Navajo's knowledge is incorrect. Navajo people of knowledge generally state that different versions or accounts of Navajo knowledge on a single subject matter are all "in the right way," meaning they are all correct. This way of knowing gives non-Indian court judges problems when attributing credibility to Navajo witnesses because they would appear to be telling different stories on the same subject matter. The testimony of the first witness on subject matter X may differ from the testimony of the next witness on the same subject matter. However, different versions of the same subject matter do not necessarily mean that only one is right and the others wrong, as Western thinking would conclude. From

the Navajo perspective, all the versions would be correct, because each person may have acquired knowledge of the same subject matter through different ways of knowing, including through one of the four levels of knowledge just discussed. Legal advocates should discuss these matters with their Navajo witnesses and understand the nature of the testimony to be given before they put them on the stand in order to avoid getting caught in a cultural trap. Moreover, these same concerns may be applicable to the courtroom testimony of other indigenous peoples.

Hózhǫ́ *and* Hóchxǫ́ *Represent Right and Wrong*

Scholars disagree over the intrinsic nature of the *hózhǫ́* and *hóchxǫ́* distinctions. One position holds that the Navajo universe is divisible into two parts, *hózhǫ́* and *hóchxǫ́,* where the forces representing each concept (*hózhǫ́* and *hóchxǫ́*) are involved in a continual struggle, but eventually, with the aid of ceremony, the good (*hózhǫ́*) overcomes the bad (*hóchxǫ́*).[16] On the other hand, an argument has been made that that there is no such duality (*hózhǫ́/hóchxǫ́*) in Navajo philosophy because each concept is part of a whole, so that they exist together.[17]

These differing views illustrate that Navajo philosophy can become highly abstruse when critical analysis enters the realm of foundational principles at complex levels of abstraction. Critical examination, however, is preferred because *hózhǫ́* and *hóchxǫ́* are foundational doctrines that pervade Navajo culture, language, spirituality, and identity. Critical analysis should elicit differing interpretations of Navajo foundational doctrines to provide students of Navajo culture opportunities to ponder diverse viewpoints, which can only result in better understandings of the Diné Life Way. Furthermore, critical examination produces fresh insights into the overall objective of interpreting and intellectualizing Navajo epistemology (the Diné Way of Knowledge).

Although the two doctrines, *hózhǫ́* and *hóchxǫ́,* are not basic legal principles in the sense that they answer legal questions, they are still the wellspring of normative precepts that determine right and wrong, morally and legally, in Navajo society and for jurisprudential purposes, such as those discussed in this book. The two doctrines give Navajos the framework

for thinking, planning, and decision making so that right choices lead to "living life to the fullest." Foundational Navajo doctrines are thus empirical ways of looking at the world and the universe.

Naayéé´ *Disrupts* Hózhǫ́

While the ultimate objective in Navajo life is to live according to *hózhǫ́,* the realities of daily life and the nature of human existence, including stresses, pressures, errors inherent in human affairs, and the trappings of modern life would cause the harmonious state (*hózhǫ́*) periodic disruption. The maleficent forces collectively called *naayéé´* in the Navajo language are the culprits that cause disharmony, friction, and discord in life. When forces that comprise *naayéé´* disrupt *hózhǫ́,* the traditionalists employ a remedial process that follows this general pattern: first, the negative force is identified through specialized divination; second, the negative force is neutralized or eliminated during a painstaking spiritual ceremony or ritual; and finally, things and beings return to *hózhǫ́* through the ceremony or ritual. Depending on a practitioner's knowledge and the nature of the disruption, the entire process can be completed through a single ceremony.

The term *naayéé´* translates literally as "monsters," a concept integral to the legendary exploits of the Twin Warriors (called "Monster Slayer" and "Born-for-Water" in English) in the Fourth World as narrated in the Navajo Creation Scripture and Journey Narratives.[18] The Twin Warriors were born of Changing Woman specifically to extirpate the monsters and their mutations in the Fourth World. The autochthonous, anthropomorphic beings that journeyed in the Third World produced the monsters through their irresponsibility, sexual indiscretion, and self-interests. Navajo traditionalists quickly point to the factors that produced the "monsters" in the Third World as underlying many of the modern social ills on the Navajo Nation. Clearly, Navajos have a unique capacity to link ancient ideas to modern conditions as a way to explain and understand modern problems.

Modern Navajo society uses the term *naayéé´* to metaphorically describe anything that disrupts harmony, balance, peace, order, or goodness in life. It essentially refers to anything that gets in the way of living a normal life each day. Anything that causes disharmony, friction, or discord in

life, including criminal activity, civil disputes, and the multitudinous social and health ills facing the Navajo Nation (e.g., alcoholism, domestic violence, gangs, child abuse, student underachievement, suicide, and diabetes), fits the modern Navajo conception of *naayéé´*. Fortunately, Navajo philosophy holds that any *naayéé´* can be neutralized or eliminated through a controlled process that at its core is really a pragmatic problem-solving method.

Traditional Navajo Problem-solving Model

The traditionalists' fixation on living life according to rules that foster and maintain *hózhǫ́* likewise has produced a pragmatic three-stage problem-solving process that can be illustrated by the following model: *hózhǫ́* (harmony) → *hóchxǫ´* (disharmony) → *hózhǫ́* (harmony restored). The words *harmony* and *disharmony* are used here and elsewhere to explain *hózhǫ́* and *hóchxǫ´* for easier understanding. The prototypical problem-solving model converts to a Navajo ceremony model when the following main stages are observed: (1) the *hózhǫ́* condition exists; (2) negative forces called *naayéé´* ("monsters") disrupt the *hózhǫ́* condition, resulting in *hóchxǫ´* (disharmony); (3) the negative forces (*naayéé´*) are identified/isolated and then matched to a specific ceremony; (4) the ceremony expels or neutralizes the negative forces; and (5) the ceremony returns things and beings (humans included) to *hózhǫ́*. The ceremony is a meticulous process that first neutralizes or eliminates the causes of the disharmony and then restores things and beings to harmony. The end result is called *hózhǫ́ nahasdłii* (*hózhǫ́* restored).

The ceremonial practitioner utilizes esoteric knowledge—prayers, songs, sacred words, sacred rituals, and sacred materials—during the ceremony to neutralize or extirpate negative forces (*naayéé´*) and then uses the ceremony's restoration phase, which also utilizes esoteric knowledge, to return things and beings to *hózhǫ́*. Navajo traditionalists believe that spiritual ceremonies restore one to harmony with life, community, tribe, and all relatives in creation. Navajo philosophy provides the crucial knowledge that is needed to identify and eliminate or neutralize the causes of disharmony and to restore things and beings to *hózhǫ́,* the condition a Navajo needs to refocus on the Diné Life Way.

Before introduction of the American-style court system to the Navajo people in the late 1800s, traditional Navajos used the pragmatic problem-solving method in peacemaking, a traditional process of dispute resolution, to solve disputes among people. The pragmatic problem-solving method, established as the prototypical Navajo problem-solving model here, can be converted to a court decision-making model for use in Navajo jurisprudence. The court decision-making model is hereafter called the Navajo jurisprudence model. Navajo court cases reveal that the modern Navajo judges use the Navajo jurisprudence model to incorporate traditional dispute resolution processes and consuetudinary law into the decision making of the Western-style Navajo Nation courts.

Hózhǫ́ in the Navajo Nation Courts

Theoretical Constructs

Traditional Navajo problem-solving involves three main stages: hózhǫ́ (harmony) → *hóchxǫ́* (disharmony) → *hózhǫ́* (harmony restored). This is called the pragmatic problem-solving model in this book. The pragmatic problem-solving model takes the following form when it is applied in Navajo ceremonial practice and is called the Navajo ceremony model in this book:

> *Hózhǫ́* (harmony/balance/peace) → *Hóchxǫ́* (disrupter [*naayéé́*] causes disharmony; ceremony used to neutralize/eliminate disrupter [*naayéé́*]) → *Hózhǫ́* (harmony restored)

Traditional Navajo ceremonies use the Navajo ceremony model for spiritual blessings and healing patients. The pragmatic problem-solving model takes the following form when used in Navajo dispute resolution and is called the Navajo jurisprudence model in this book:

> *Hózhǫ́* (harmony/balance/peace) → *Anáhóót'í* (problem/issue caused by disrupter [*naayéé́*]; Navajo common law applied and problem/issue solved) → *Hózhǫ́* (human relationships restored; community healed; harmony/balance/peace restored)

The Navajo jurisprudence model is used in adversarial litigation in the Navajo Nation courts and in Navajo peacemaking, a nonadversarial,

traditionally based dispute resolution method. The Navajo jurisprudence model uses the term *anáhóót´i´,* instead of *hóchxǫ´,* which is used in the Navajo ceremony model, to identify disharmony. The term *anáhóót´i´* can be glossed as "the existence of a problem" or existence of a legal issue when used in a legal setting.

Traditional Navajo philosophy describes *anáhóót´i´* as a breach in a person's personal protective shield that encloses the personal state of *hózhǫ́. Naayéé´* gains access to the individual through the breach, thereby causing personal disharmony. Familial disharmony, which is disruption to the extended family, can also result by way of the kinship network. The disharmony is ordinarily a physical illness of some kind. When viewed in the legal context, the disharmony is a dispute that generates legal issues (*anáhóót´i´*). The Navajo jurisprudence model is then used to resolve the legal issues and restore parties to harmony. When judges and peacemakers use the Navajo jurisprudence model, the dispute resolution process becomes a Navajo justice ceremony.

The traditional Navajo framework that applies in dispute resolution, the Navajo justice ceremony, is summarized in *Navajo Nation v. Kelly,*[19] a criminal case that uses Navajo common law to decide a double-jeopardy issue under the Navajo Nation Bill of Rights.[20] The Navajo Nation Supreme Court uses Navajo peacemaking to explain the traditional dispute resolution process because peacemaking best exemplifies the traditional Navajo way of restoring harmony among people and healing the community. Moreover, peacemaking's core concepts can traverse to dispute resolution in the adversarial context. The summary in *Kelly* also identifies the normative precepts the Navajo Nation courts and traditional peacemakers use to resolve disputes and issues:

> The traditional system of resolving disputes lives on today as illustrated by the [Navajo] Peacemaking Program. . . . Peacemaking is premised upon participation by all those affected, including victims. Furthermore, consensus of all of the participants is critical to resolution of the dispute, concern or issue. With full participation (*t´aa ałtso ałhił ka´iijée´go*) and consensus, a resolution is reached with all participants giving their sacred word (*hazaad jidísingo*) that they will abide by the decision. The resolution (guided by *Diné be beenahaz´áanii*), in turn, is the basis for restoring harmony (*bee hózhǫ́ náhodoodleeł*). *Hózhǫ́* is

established if all who participated are committed to the agreement and consider it as the final agreement from which the parties can proceed to live in harmony again. Finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement (*ná bináheezláago bee t'áá łahjį́ ałgha' deet'á*).[21]

Navajo Common Law Informs Legal Interpretations

As part of dispute resolution in the adversarial context, the Navajo Nation Supreme Court consistently emphasizes application of *Diyin Nohookáá' Dine'é bibee haz'áanii* (Navajo common law) to interpret Navajo statutes and decide legal issues. In *Fort Defiance Housing Corp. v. Lowe,* where the issue of whether the appeal should be dismissed or not depended on an interpretation of a Navajo forcible entry and detainer statute, the Supreme Court declared that statutes must be interpreted "in light of the Navajo Bill of Rights, as informed by *Diyin Nohookáá Dine'é Bi Beehaz'áanii* (Navajo common law)."[22] The Court applied *Lowe*'s rule of statutory interpretation in *Thompson v. Greyeyes* and issued a writ of habeas corpus because the statute, 17 N.N.C. § 477 (2005), under which the petitioner was sentenced to imprisonment required only payment of restitution (through the *nályéél* process) as a sanction and not imprisonment.[23]

The Navajo Nation Supreme Court also ruled that Navajo statutes derived from state or federal statutes will be interpreted in a manner that will do justice to Navajo needs and values. A statute "adopted from an outside source does not, by itself, make it illegitimate, as the Navajo Nation Council has made it the law of the Navajo Nation. However, it does require that this Court carefully interpret such adopted provisions consistent with the needs and values of the Navajo people."[24] The Supreme Court's statement again is a way of saying that Navajo common law should inform interpretation of statutes adopted from non-Navajo jurisdictions, and that would include federal, state, and other tribes' statutes and even international laws.

The Navajo Nation Supreme Court's rule on use of customary precepts to interpret adopted statutes applies equally to construction of American common-law doctrines that inform the decisions of the federal and state courts and are presented as authority in the Navajo Nation courts. In *Judy*

v. White,[25] private citizens challenged a Navajo Nation Council resolution that gave each council delegate a ten thousand–dollar pay raise without approval of the Navajo electorate through the referendum process as required by law. The defendants (Navajo Nation officials) relied on federal court interpretations of the standing doctrine to argue that the plaintiffs lacked standing to bring the action.

After reviewing the history of the standing doctrine under federal law, the Supreme Court turned to Navajo common law (as required by *Diyin Nohookáá´ Dine´é bibee haz´áanii*), and not federal case law, to decide the issues:

> The history of the U.S. Constitution and federal courts' justiciability considerations is vast and remarkable, and in its review we are once again sharply reminded that it is not our Diné history, nor that of our own tripartite government.
> . . . .
>
> Our judicial system mimics the American adversarial system in some ways, but we will not interpret unintended limitations on the [Navajo] district courts based on federal court case law or inapplicable U.S. legislation. That is not to say that we do not recognize the doctrine of standing, but that we do so pursuant to our own common values of substantial justice rather than as the term is understood in federal courts. Navajo courts will take their own path in judicial review, as required by the "Navajo higher law in fundamental customs and traditions, as well as substantive rights found in the Treaty of 1868, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989." (citation omitted)[26]

The Court found that the customary doctrine of participatory democracy, which protects community voice and thus is integral to the Diné Life Way, assures plaintiffs, as private citizens, standing to challenge the Navajo Nation Council resolution that authorized the delegates' pay increase:

> It is abhorrent to the Diné Life Way (*Diné bi´ó´ool´iił*) to violate the right of a community member to speak or to express his or her views or to challenge an injury, whether tangible or intangible. This right is protected to such an extent that the right to speak to an issue is not limited to the "real party in interest." Rather, the right belongs to the community as a whole, and any member of that community may speak.[27]

Navajo Nation Supreme Court case law thus assures that customary precepts will be used to interpret or construe Navajo statutes, non-Navajo statutes, and non-Navajo common-law doctrines that are adopted as Navajo law or used as authority in Navajo court litigation.

Goal Is to Restore Hózhǫ́

The Navajo Nation courts use the terms *hózhǫ́* and harmony interchangeably, even though they have not attempted to define *hózhǫ́*.[28] While utilizing the Navajo jurisprudence model, the Navajo Nation courts have stated that the goal of Navajo dispute resolution, which would be both in the adversarial (litigation) and nonadversarial (peacemaking) contexts, is to restore disputants to harmony with each other and their communities.[29] Disharmony (*anáhóót'i'*) is a prerequisite for restoration to *hózhǫ́* as shown by the case of *In re Mental Health Services of Bizardi*.[30] The *Bizardi* case concerned procedures used to involuntarily commit a person to a medical facility for mental health diagnosis. The parties had settled the issue themselves, but nonetheless submitted a stipulation to the Navajo Nation Supreme Court asking it to decide the issue for future reference. The Court denied the request, stating that it does not issue advisory opinions and requires an actual case or controversy (meaning that *anáhóót'i'* is required) to issue a decision:

> We reiterate that mootness is a concept we recognize in our courts. We do so not because of any need to mimic federal courts, but because mootness is consistent with our Navajo values. Our courts serve the purpose of bringing people in dispute back into harmony. Through "talking things out" with respect under the principle of *k'e,* our courts assist in bringing litigants into *hozho*. . . . The necessary prerequisite is disharmony.[31]

The *Bizardi* case was dismissed because the parties had settled it, thereby leaving the Navajo Nation Supreme Court without a dispute to use to return the parties to *hózhǫ́*. The Supreme Court applied general American law to the issue, stating that it does not issue advisory opinions and requires an actual case or controversy to proceed to the merits of a case. The Court's refusal to issue an advisory opinion is sometimes inconsistent with Navajo normative precepts that allow people to seek advice

from leaders (and judges are leaders) on matters of vital importance. The Navajo Nation Supreme Court should create an exception to the case or controversy requirement and allow advisory opinions on extraordinary issues, perhaps those concerning interpretations or constructions of Navajo normative precepts. An exception to the case or controversy rule on matters of exceptional importance to the Navajo people would be in line with the traditional Navajo way of doing things.

In *Morgan v. Navajo Nation,* the Navajo Nation Supreme Court dismissed a case that had been argued and was awaiting a decision when the parties consummated a settlement agreement.[32] The litigants eliminated the prerequisite disharmony through settlement, leaving dismissal as the only option. On the other hand, the Supreme Court allowed a late appeal to proceed in the interest of fundamental fairness and community harmony in a forcible entry and detainer case.[33] Maintaining positive relationships among people within a community would be conducive to community harmony. While the Court cited fairness and harmony as reasons for accepting the case, the Court appears to have prolonged the dispute, superficially at least, by accepting the late appeal and keeping the case active.

In another forcible entry and detainer case, the Supreme Court, again on fundamental fairness and community harmony grounds, refused to affirm the trial court's decision evicting a tenant, because a strict interpretation of a statute that required the tenant to post an appeal bond before filing a notice of appeal would effectively cause disharmony. The Court said, "[c]ourt procedures which result in homelessness have the potential for creating disharmony, not only for the individual and the family, but also for the entire community. Harmony among all concerned cannot be restored if appellate procedures are so onerous that tenants cannot effectively seek review with this Court."[34]

In *Budget and Finance Committee of the Navajo Nation Council v. Navajo Nation Office of Hearings and Appeals,*[35] the Budget and Finance Committee, a committee of the Navajo Nation Council, sought a writ of prohibition against the Office of Hearings and Appeals (OHA), an administrative tribunal under the executive branch, to limit OHA's scope of review, even though the Navajo Nation Council had explicitly prohibited court review of OHA decisions that concerned audits of Navajo Nation

chapters. (Chapters are local governmental units located throughout the Navajo Nation and are operated by locally elected officials.) The Navajo Nation Supreme Court denied the committee's petition, while lamenting that its lack of appellate jurisdiction over the case prevented it from bringing the parties back into harmony with each other:

> Though based on this decision, the Committee lacks a remedy from OHA's allegedly overly broad review in this case, it is the direct result of the [Navajo Nation] Council's denial of appeals. Without the ability of this Court to bring the parties back into harmony, the Committee and OHA must work out their dispute, or the Council should review the statute and reconsider its prohibition on appeals.[36]

The case or controversy requirement—or, in Navajo terms, the prerequisite disharmony (*anáhóót'i'*) requirement—also applies to cases filed in Navajo courts that may eventually end up in federal court contesting Navajo Nation jurisdiction. Sometimes non-Indian litigants raise broad, general questions in tribal court cases as a ploy to exhaust tribal court remedies pursuant to *National Farmers Union Insurance Companies v. Crow Tribe of Indians,*[37] so they could avert tribal court jurisdiction and bring their claims in federal district court. The Navajo Nation Supreme Court addressed this strategy, and its requirement of deciding only issues preserved for appeal, in *Arizona Public Service Co. v. Office of Navajo Labor Relations,*[38] a case that applied Navajo Nation labor laws to a coal-fired power plant operating on the Navajo Nation in northeastern Arizona:

> All too often people come before this Court seeking to raise broad questions so that they may exhaust their tribal court remedies and commence some sort of suit against the Navajo Nation [in federal court]. We reserve the usual judicial function of deciding only that which is placed before us unless there is a compelling need to broaden the scope of an opinion. As it is with most appellate courts, we do not give advisory opinions and we require an actual case or controversy before adjudication.[39]

The issue of whether Navajo Nation labor laws applied to the Navajo Nation government was decided in *Tuba City Judicial District v. Sloan.*[40] In *Sloan,* judicial branch officials argued that the doctrines of separation

of powers and judicial independence prevented the Navajo Nation Labor Commission, an administrative hearing body under the executive branch, from exercising jurisdiction over employment complaints of judicial branch employees.[41] This argument suggested that the judicial branch of government should be the sole arbiter of complaints involving its employees as a way to maintain harmony among the judicial branch "family." The Supreme Court rejected the argument and allowed the commission to exercise jurisdiction over judicial branch employment practices, and in doing so analogized separation of government powers to the traditional Navajo practice of separation of functions, which it said should inform the inner workings of the Navajo Nation three-branch government:

> Separation of functions is a concept that is so deeply-rooted in Navajo culture that it is accepted without question. It is essential to maintaining balance and harmony. For instance, a Navajo medicine man or woman will perform his or her ceremony in a certain way. The manner in which a ceremony is conducted is left to the medicine man or woman performing the ceremony, guided by the holy people. It is not acceptable for one medicine person to tell another how to conduct a ceremony. Any infringement destroys the healing powers of the ceremony. Thus, the prohibition on such intrusions is absolute. Also, when a medicine man or woman oversteps his or her authority and does not perform a ceremony properly, that ceremony is ruined irreparably. The same holds true with our three-branch government. If one branch oversteps its powers, and infringes on the role of another branch, the integrity of the government is ruined.[42]

The ultimate goal of traditional and modern Navajo dispute resolution is returning disputants to harmony with each other, their families, and their communities. Things are in a state of *hózhǫ́* when people are in right relations with each other and with their surroundings. Maintaining positive relationships is a deeply embedded Navajo value. An important doctrine that helps restore people and things to the condition known as *hózhǫ́* is the traditional Navajo doctrine of finality.

*Doctrines of Finality (*Ła´yilyaa*) and Res Judicata*

When there is a dispute, the traditional Navajo civil procedure of "talking things out" is used to identify root causes of issues, release tensions, repair relationships through apology and forgiveness, and find solutions

to problems. When participants have had opportunities to speak and consensus on a solution is reached, the dispute is considered resolved. In the traditional Navajo way, when matters have been settled through the "talking things out" process, they are expected to remain settled. To raise problems previously discussed and settled is highly disrespectful to everyone who participated in the session and to the "talking things out" procedure. The Navajo term for resolution of a matter, issue, problem, or dispute is *ła´yilyaa* (also *ła´yidzaa*), which is the doctrine of finality in the legal context. The Navajo finality doctrine, when applied in traditional practice, has an important component—all participants must have an opportunity to speak on a matter to comport with long-standing problem-solving tradition and notions of traditional Navajo due process.

The traditional Navajo finality doctrine is embedded in Navajo culture and has garnered much respect in traditional Navajo peacemaking and in modern Navajo court decisions. In *Halona v. MacDonald,*[43] a seminal Navajo case, the Supreme Court was asked to decide whether the Navajo courts have the power to review legislation passed by the Navajo Nation Council. In holding that the Navajo courts have such power, the Court acclaimed the traditional finality doctrine and its significance in Navajo dispute resolution:

> The Courts of the Navajo Nation, including this Court, have frequently reviewed and interpreted legislation passed by the [Navajo Nation] Council and executive actions of the Chairman of the [Navajo Nation] Council. (citations omitted)
>
> Our right to pass upon the legality or meaning of these actions has been questioned in certain places but never by the Council or its Chairman. That is because they have a traditional and abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo People did not learn this principle from the white man. They have carried it with them through history.
>
> The style and the form of problem-solving and dispensing justice have changed over the years but not the principle. Those appointed by the People to resolve their disputes were and are unquestioned in their power to do so. Whereas once the clan was the primary forum . . . now the People through their Council have delegated the ultimate responsibility for this to their courts.[44]

The following sentence from the above quote states the traditional finality doctrine: "When all have been heard and the decision is made, it is respected."

The finality doctrine is critical to dispute resolution because once the dispute is settled people can apologize, forgive, make reparations, and repair relationships. The doctrine is crucial to achieving the condition of *hózhǫ́.* Disputes must end as soon as practical and remain settled for people and communities to function in *hózhǫ́.* This lesson is stated in *In re Estate of Kindle,* where the Navajo Nation Supreme Court underscored the importance of the finality doctrine: "The Navajo legal concept relevant to this case is that once parties have had an opportunity to have their say, a decision on the matter is final, and should not be disturbed."[45] The Supreme Court reiterated the significance of the finality doctrine in another case when it said that without the doctrine "losing parties would have a strong incentive to keep litigating their claims until they receive a more favorable judgment" or "disputes would never be resolved," which would perpetuate disharmony.[46]

Under a traditional Navajo analysis, after disputants have had their say and the doctrine of finality has taken effect, a party cannot attempt to reopen the case by raising issues previously decided or matters related to them. A party who fails to take advantage of opportunities to raise matters during the course of "talking things out" is subject to the traditional Navajo principle of *bił ch´íníyá,* which basically means "failure to take advantage of an opportunity." This principle has the same legal effect as the American principle of res judicata.[47] In *Bradley v. Lake Powell Medical Center,* the Navajo Nation Supreme Court stated that "[t]he doctrine of res judicata promotes fairness between parties, and is consistent with the *Diné bi beenahaz´áanii* [Navajo common law] value of finality. Under this concept, once parties have had an opportunity to have their say, the matter is final." (citations omitted)[48]

The Supreme Court in *Bradley,* however, proclaimed that there may be exceptions to the Navajo doctrine of finality when an important Navajo Nation policy is implicated in a case. In *Bradley,* an employee who was fired for willful misconduct applied for state unemployment benefits. The state department of economic security first granted him benefits, but upon

further review found that he had been fired for willful misconduct and withdrew the award. The employee subsequently filed a complaint with the Navajo Nation Labor Commission using the Navajo Preference in Employment Act, claiming that he had been fired from his job without "just cause." The employer asked the commission to grant comity recognition to the state decision and dismiss the complaint on res judicata grounds. The Supreme Court, on review, held that the commission erred when it did not grant comity recognition to the state decision; and after granting comity recognition, it should have decided whether res judicata applied.[49]

On the question of whether the state decision finding willful misconduct should be given res judicata effect, the Supreme Court said the purpose of the state law was different from that of the Navajo Nation law, making application of res judicata in the Navajo forum inappropriate:[50]

> Providing temporary support to the unemployed [per the state statute] is different than awarding damages to employees for their employers' wrongful termination [per the Navajo statute]. It would be patently unfair to prohibit an employee to claim compensation for an employer's wrongful act merely because the employee attempted to receive temporary unemployment benefits. Though finality is an important value, it is not so powerful that it may subvert other important policies of the Navajo Nation, such as, in this case, compensating employees for their employers' unjust actions.[51]

In *Bradley,* an important Navajo Nation employment policy prevented application of the res judicata principle to an employee's complaint under Navajo Nation law for unjust termination. The Navajo doctrine of finality is discussed throughout this book in other contexts, including domestic relations. As the cases discussed show, the doctrine of finality is an important step toward restoring *hózhǫ́.*

Restoring Hózhǫ́ *in Individual Rights Cases*

The Navajo Nation Bill of Rights, which was enacted in 1967,[52] protects individual rights on the Navajo Nation. The Navajo Nation Bill of Rights grants greater rights in certain areas than the 1968 Indian Civil Rights Act.[53] The federal Indian Civil Rights Act tracks many of the constitutional

restraints imposed on the federal and state governments by the U.S. Bill of Rights. The following cases highlight some of the protections accorded to individuals under the Navajo Nation Bill of Rights. In addition, under Navajo customary precepts, community rights or group rights can take precedence over individual rights under certain circumstances.

In *Atcitty v. District Court for the Judicial District of Window Rock,*[54] the applicants claimed that the procedures used to determine their eligibility for public housing benefits denied them due process of law under the Navajo Nation Bill of Rights. While addressing the question, the Navajo Nation Supreme Court declared that Navajo common-law due process, when applied to public benefits cases, "encompasses a wider range of interest than general American due process."[55] Traditional Navajo due process grants greater protection in public benefits cases because the traditional Navajo doctrine of distributive justice demands community sharing of community resources.[56] The Court also said in *Atcitty* that the principle of *k'é* provides foundational support to traditional Navajo due process because *k'é* "promotes respect, solidarity, compassion and cooperation so that people may live in *hózhǫ́* or harmony."[57]

The Indian Civil Rights Act does not require Indian nation governments to provide free legal counsel to indigent defendants in criminal cases, but under Navajo Nation law "criminal defendants in the Navajo Nation court system are entitled to appointment of counsel if they are indigent, and they are entitled to a jury composed of a fair cross-section of Navajo Nation population, including non-Indians and nonmember Indians."[58] The Navajo Nation government funds public defender services that provide free legal counsel for indigent defendants. Members of the Navajo Nation Bar Association are also appointed on a rotating basis to represent indigent defendants free of charge in criminal cases.

The Navajo Nation Bill of Rights grants greater rights than the Indian Civil Rights Act when it comes to the right to jury trial. The federal law permits jury trial, upon request, in criminal cases if the punishment calls for imprisonment, but it does not allow for jury trial in civil cases.[59] In contrast, Navajo Nation law provides for jury trial in both criminal and civil cases: "No person accused of an offense punishable by imprisonment and no party to a civil action at law, as provided under 7 N.N.C. § 651, shall

be denied the right, upon request, to a trial by jury of not less than six persons."[60] Navajos and non-Navajos sit on Navajo court juries in both civil and criminal cases.

The right to jury trial is such an important right in the Navajo Nation that the Navajo Nation Supreme Court readily found an analogous traditional basis for it:

> A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Juries are a part of the fundamental Navajo principle of participatory democracy where people come together to resolve issues by "talking things out." The participation of the community in resolving disputes between parties is a deeply-seeded [*sic*] part of our collective identity and central to our ways of government. As such, we must apply restrictions on the right to a jury trial narrowly, as they turn us away from our traditional ways of dealing with disharmony. (citations omitted)[61]

The declaration that the doctrine of participatory democracy includes the fundamental right to trial by jury in the Navajo Nation was first articulated in *Downey v. Bigman,*[62] where a non-Indian sued a Navajo horseback tour business for injuries allegedly caused by the defendant's employees. The Navajo Nation Supreme Court used the case to establish a procedure for jurors to question witnesses, through the judge, during trial to clarify testimony. After discussing the doctrine of participatory democracy from the Navajo egalitarian perspective, and having established that the doctrine applies to jury process, the Supreme Court set forth a procedure for jury participation during trial:

> A modern Navajo jury continues the fundamental tradition of community participation in the resolution of disputes through deliberation and consensus. A jury consists of members of the parties' community who bring their "experience, culture and community standards into the jury box." The jury engages in deliberations, relying upon persuasion to reach consensus, to reach its verdict. These essential characteristics of a Navajo jury make it a modern expression of our longstanding legacy of participatory democracy.
>
> A reformulation of the jury's duties to permit it to ask questions of the witnesses during trial is more reflective of Navajo participatory democracy. To maintain impartiality, all the questions will be channeled through the judge,

> whose authority to permit or forbid the question is discretionary. This modification of jury trials in the Navajo Nation courts is a natural step back to traditional ways and a means to secure the future. (citations omitted)[63]

As the *Duncan* and *Downey* cases instruct, a jury, which is normally composed of citizens from the parties' community, can return disputants to *hózhǫ́*. During deliberations, the traditional Navajo civil procedures of "talking things out," persuasion, and consensus are used to settle matters (*anáhóót'i'*) in the case. In conjunction with Navajo common law, the civil procedures of "talking things out," persuasion, consensus, and community participation are, as the Supreme Court said in *Navajo Nation v. Kelly,* "the basis for restoring harmony" or *bee hózhǫ́ nahodoodleeł.*[64]

Restoring Hózhǫ́ *in Domestic Cases*

The field of law where restoring *hózhǫ́* plays a crucial role is Navajo domestic relations, particularly in situations involving disruptions of family stability. The *hooghan* (hogan) in Navajo culture symbolizes family, and on a broader metaphoric dimension, the entire field of Navajo domestic relations. The Navajo Nation Supreme Court discussed the sanctity of home (also called *hooghan*) and its centrality in Navajo culture and spirituality in *Fort Defiance Housing Corp. v. Lowe:*

> The Navajo home is not only a roof over one's head, but the place where families are established and children grow and learn; it is the center of all Navajo relationships. Children are conceived in the home. Certainly in the recent past children were born at home and some may still be, even in this modern era of hospitals. In the home, children are given their education and knowledge of who they are and their place in the world. In the home, children learn their responsibilities to themselves and to their family members, and where children learn the concept of *k'e* that will guide their relationships throughout their life.
>
> The home in Navajo thinking is not a mere piece of property in which one holds an equity interest, but *hooghan* rises to a level of spiritual centrality. Navajo families perform sacred ceremonies and say prayers in the home. After successive prayers and ceremonies by the introduction and reintroduction of corn pollen on the retaining beams, the sprinkling of white and yellow corn and the spreading out of soil to the west, the blessedness of the home is compounded, building in power and spirituality. This concept of home is not a mere concept of property ownership. It is much more.[65]

The concept of *hooghan* is inextricably intertwined with family in Navajo society and forms the core of the Navajo Nation's internal relations and thus is fundamental to a Navajo's identity, as both a Diné member and an individual. Moreover, the Navajo Nation's internal relations compose the bedrock structure for its sovereignty. One way of understanding the Navajo view of sovereignty is to conceptualize it as endogenous, a process where sovereignty, including nation building, emanates from inside the *hooghan* (hogan) outwards to the Four Sacred Mountains and beyond.

The Navajo clan system, which individuals use to trace their lineage through their mothers, underlies a Navajo view of family that transcends the nuclear family to extended families and on to clan relationships. The clan system, which Navajos use to identify familial ties, is called *k´éí.* The term *k´éí* is usually glossed as kinship or clanship in English.

The importance that Navajos place on family and clan relatives is addressed in *Davis v. Means,*[66] a case that pitted a non-Indian former husband against a non-Navajo, Indian husband to determine the paternity (both men claimed to be the father) of a child born to a Navajo mother:

> The family is the core of Navajo society. Thus, family cohesion is a fundamental tenet of the Navajo People. It is Navajo customary law—*Dine Bi Beehaz´aanii*—or Navajo common law. . . .
>
> Family cohesion under Navajo common law means there is a father, a mother and children. They comprise the initial family unit and are protected as such inside and outside the blessed home (*hooghan*) by the Holy People. The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity.
>
> Navajo common law on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and the clan relationships. This is inherent in the Navajo doctrine of *ak´ei* (kinship). . . . When the family is complete, there is peace and harmony, which produces beautiful and intelligent children and happiness and prosperity throughout all the relationships. The family is blessed.
>
> Paternity must be established for children, because children must know their father's clan to avoid incestuous relationships when they come of age. Navajo children are "born for" their father's clan. Children are owed obligations by their father's clan, and have obligations to it. Children are the fabric of a clan. Thus, the clan members want to know their children and have a right to know under Navajo common law. (citations omitted)[67]

As the *Davis* case instructs, family stability and cohesion promote *hózhǫ́* in domestic relations. Furthermore, knowledge of one's clan is a necessary precondition to seeking and maintaining *hózhǫ́,* because, as the Navajo Nation Supreme Court said, the kinship system is "essential to a Navajo's identity and must be known for Navajo religious ceremonies. One must know them to seek *hozho* (harmony and peace)."[68] The *Davis* case also discusses an important Navajo custom which holds that Navajo children are children of the clan. Thus, clan members are entitled to know a child's born-of clan (mother's clan) and born-for clan (father's clan). The custom that states that children are children of the clan allowed clan elders to instruct and discipline clan children in more traditional times.

Divorce cases offer a good opportunity to showcase the Navajo jurisprudence model because the court's ultimate goal is restoring the divorced parties and their families and community to *hózhǫ́*. The traditional Navajo principle of finality in Navajo divorce plays an essential part in the restoration process, as explained in *Apache v. Republic National Life Insurance Co.,* a decision known for its exemplary use of Navajo common law (divorce customs) in its analysis.[69] In *Apache,* the husband named his wife as beneficiary on his life insurance policy. After the couple separated, the wife secured a default divorce judgment; however, she did not claim an interest in the insurance policy in either her divorce petition or any subsequent pleading. Shortly after the entry of the default divorce, the ex-husband died in an automobile accident. The insurance company attempted to pay the proceeds to the named beneficiary, the ex-wife, but her former mother-in-law blocked the disbursement, arguing that under Navajo common law "a divorce severs all rights of the former spouse."[70]

The court took judicial notice of Navajo marriage and divorce customs to hold that the decedent's mother was entitled to the proceeds because the ex-wife did not claim an interest in the insurance policy in her divorce petition or afterward and thereby "left the decedent with his remaining property":[71]

> By Navajo tradition, at the time of marriage the husband will normally move in with the wife's clan. Traditionally, the father and any children live with the mother's family, and children are said to "belong" to the mother's clan. When there is a divorce and the couple is living with the wife's family, the husband

> simply returns to his own mother's unit. . . . As to dividing property, the couple keeps what was theirs before marriage and the wife keeps the remainder. . . . Another method of divorce was counseling by the wife's father and, when it appeared there could be no reconciliation, the couple would "split the blanket," dividing equally the goods they acquired during the marriage. Therefore, it would appear that in the absence of an agreement, the wife would take all.
>
> . . . .
>
> Applying these principles of Navajo custom, we can find that there is a custom of finally terminating a marriage by someone moving, the woman keeping the property when the move is made or the couple making an equal division of marital property before going their own ways. The principle of finality requires that the court say there is an event which cuts the ties of the parties, and the event here is the divorce.
>
> Under Navajo custom the woman can simply keep the property of the marriage and send the man to his family, taking only his own property acquired before the marriage. She also has the option of working out an arrangement with the man. In modern times, the woman [can come into court and argue for a division of the property]. The woman left the man and filed a divorce against him. Importantly, she had the option of demanding a property settlement but the decree only provides for child support. She therefore left the decedent with his remaining property.
>
> . . . .
>
> There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common-sense. To permit a former spouse to keep such ties that she or he may be said to be lurking behind the hogan waiting to take a portion of the corn harvest is unthinkable. Each former spouse should return home after making the break and disturb others no more. (citations omitted)[72]

The Navajo Nation Supreme Court cited with approval *Apache*'s principle of finality and the goal of quickly restoring *hózhǫ́* following a divorce in *Naize v. Naize,* where the family court, as part of its spousal maintenance award to the ex-wife, had ordered the former husband "to deliver a truck-load of firewood and coal to the [ex-wife] during the months of November, December, January and February of each year, beginning the fourth year, for an indefinite time period."[73] The Supreme Court did not look kindly on the order's open-endedness and ruled that it contravened

the traditional Navajo principle of finality in divorce. In reversing the open-ended order, the Court said the order violated the "Navajo common law rule which requires finality in Navajo divorces. Harmony in the community and in the lives of the divorced spouses should be restored quickly following a divorce" (citation omitted).[74]

Restoring Hózhǫ́ *through* Nályéél *(Restitution)*

The traditional Navajo principle of *nályéél* is another mechanism that is used to restore disputants to *hózhǫ́. Nályéél* is glossed in English as restitution, reparation, or compensation for an injury or wrong done to a person. *Nályéél* is the end product of a process that uses apology, forgiveness, and "talking things out" to correct a wrong. During the discussions, an agreement is reached on the amount of restitution that will restore an injured party to *hózhǫ́.* Under Navajo customary-law ways, restitution is normally paid to the victim and the victim's family, relatives, and clan, because the injury affects not only the victim, but also the victim's relatives through the kinship network. The *nályéél* principle works well with the Navajo jurisprudence model in the context of civil and criminal litigation in the Navajo Nation courts and in the nonadversarial Navajo peacemaking process.

In *Allstate Indemnity Co. v. Blackgoat,*[75] the Navajo Nation Supreme Court was asked to decide whether the trial court erred when it did not award prejudgment interest as part of its judgment in a case arising from an automobile accident on the Navajo Nation. The trial court refused to award prejudgment interest upon finding that the defendant's insurance company had fulfilled all its obligations to the injured parties under the principle of *nályéél.* The Supreme Court reversed the trial court and in the process explained the concept of *nályéél* and its function of restoring disputants to *hózhǫ́:*

> The Navajo common law doctrine relevant to our analysis is *nályéél* [which] is a unique Navajo doctrine based on the effects of the injury. As the means by which Navajos customarily compensate injuries, Navajo Nation courts use *nályéél* to assess the adequacy of damages in tort claims. As previously discussed, *nályéél* includes the responsibility to respectfully talk out disputes. While a "flexible concept of distributive justice" depending on the circumstances

> of the injury and the positions of the parties, a central purpose of *nályéél* is to restore harmony between the parties by adequately compensating the injured person or persons. Therefore, the amount of compensation arising out of that process "should be enough so that there are no hard feelings." Based on these principles, *nályéél* incorporates what might be expressed in Anglo terms as a procedural requirement and a substantive result. (citations omitted)[76]

Of course, when a party withholds evidence that might mitigate the other party's damages, the recalcitrant party is hampering the central purpose of *nályéél,* which is to restore positive relations between the parties through adequate compensation for an injury. In other words, the party liable for damages will continue to harbor "hard feelings" if that party pays excessive damages as measured by the *nályéél* principle. The Navajo Nation Supreme Court discussed the issue of a litigant withholding evidence that might mitigate the opposing party's damages in *Casaus v. Diné College.*[77]

In the *Casaus* case, the employee, Casaus, was terminated from her job and given notice to that effect. Shortly after the termination, the employer discovered additional misconduct and amended its termination notice citing the new evidence and served a second termination notice on Casaus. Casaus filed a complaint with the Navajo Nation Labor Commission, claiming that her employer terminated her without "just cause," but did not include the second termination notice in her complaint. Thus, Casaus withheld evidence that could have mitigated her employer's damages. During the administrative hearing, the employer attempted twice to introduce the allegations of misconduct cited in the second termination notice, apparently to reduce its damages, but the commission denied the requests. The commission ruled that Casaus had been terminated illegally and awarded her damages. On review, the Navajo Nation Supreme Court used the *nályéél* principle to hold that a party has a duty to disclose evidence in her possession that might mitigate the other party's damages.[78]

Moreover, the Supreme Court stated that it will not undermine the comprehensive resolution of a dispute between parties by permitting one side to withhold relevant evidence.[79] A party who withholds evidence violates the traditional principle called *ná bináheezláago bee t'áá łahjį́ ałgha' deet'á.*[80] This phrase can be glossed as "A comprehensive agreement made

after consideration of all relevant matters." In other words, a party cannot withhold matters that might be essential to an agreement as a way of gaining an advantage. This principle works with the *nályéél* principle to ensure that an injured party is adequately compensated and made whole after full disclosure and consideration of all relevant evidence.

The principle called *ná bináheezláago* (the first part of the principle in the preceding paragraph) is a general customary rule that is applicable in several areas of the law. Like most Navajo principles, the meaning of this term depends on the context within which it is used. For example, when it is applied to issues involving contracts or agreements, the term *ná bináheezláago bee t'áá łahjį́ ałgha' deet'ą́* would be applicable, as shown in the preceding paragraph. The term *ná bináheezláago,* however, basically means doing things in the open with full knowledge and participation by those with an interest, or doing things without secrecy so that the subject matter is known by the public, or at least by everyone who has an interest. The Navajo Nation courts will likely develop the principle more, but for now the *ná bináheezláago* principle would apply to issues involving ethics (attorney–client relations and government officials), contracts and different forms of agreements, open meetings, evidence, and discovery procedures.

In summary, the traditional Navajo jurisprudence model (*hózhǫ́* → *anáhóót'i'* → *hózhǫ́*) provides the framework for dispute resolution in the Navajo Nation courts. Out of the 59,841 cases decided by the Navajo Nation trial courts in fiscal year 2006 (October 1, 2005–September 30, 2006), only a fraction (73) was appealed to the Navajo Nation Supreme Court.[81] These statistics say much about the ability of the Navajo Nation judges to successfully incorporate Navajo normative precepts into the Navajo Nation Court System so that disputants feel restored to the desired state of *hózhǫ́.*

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K´é (Kinship Unity through Positive Values)

K´é in Navajo Culture

The *hózhǫ́* doctrine describes a condition where everything is in its proper place and functioning in harmonious relationship with everything else. The "harmonious relationship" concept is viewed as a continual thread extending from the time of creation to the present and into the future, and therefore constitutes a central theme of the Diné Life Way. The harmony concept is present in daily life and to perpetuate harmony, Navajos give, share, and support their relatives, which is *k´é* in practice. As this chapter shows, *k´é* guides relationships and interactions in Navajo society and underlies traditional Navajo political ways, notions of equality, and individual and community rights.

A Universe of Relationships

Traditional Navajos refer to the actors, or more appropriately the demiurges, that facilitate and engage in "harmonious relationships" as "beings." Navajo philosophers group the universe's multifarious elements into several categories of beings that are collectively called *Dine´é.*[1] Humans are "earth surface beings," supernatural and spiritual forces are "Holy Beings," feathered creatures are "winged beings," stars, planets, moons, and other heavenly bodies are "star beings," and so on. The universal relations doctrine (*T´áá ałtso ałk´éí daniidlį*), a foundational principle in Navajo cosmology, holds that all beings in the universe are interrelated, interconnected, and interdependent; thus, all beings are relatives in a theoretical sense.

The following examples demonstrate how traditionalists understand and observe the principle of universal kinship: (1) earth, water, and fire

are mother; the sun and heavenly bodies are father; Changing Woman is mother; and male Holy Beings are grandfather; (2) sun and earth complement each other in a continual relationship to produce life on earth; and (3) traditional Navajos pray before hunting and thank the Holy Beings and the "four-legged beings" for a successful hunt—the latter for sacrificing themselves as food for "earth surface beings." The universal relations doctrine is about community and order; all the multifarious elements in the universe constitute a community of relatives that exists in time and space in a harmonious balance. The interlinked nature of all beings is a web of universal relations.[2]

Beings engage continuously in harmonious relationships at different levels of metaphysics. The following are examples of harmonious relationship at three different levels that Navajos observe in daily life and in ceremony: (1) the human level (e.g., relationships among family members, clan members, and tribe members through *k´é* and the kinship system); (2) the universal level (e.g., relationships among elements in the universe through universal laws—or natural laws—such as the sun and earth in unison produce life on earth); and (3) spiritual level (e.g., relationships between Navajos and Holy Beings through ceremony, prayer, ritual, and offering). The mechanisms, or perhaps more appropriately the dynamics, that motivate harmonious relationships that usher in *hózhǫ́* are *k´é, k´éí,* and *nályéél* and their emanating values. *Nályéél* includes atonement for injury or wrong at the human level.

Navajo philosophy accords the term *k´é* a broad perspective. The *k´é* doctrine is an irreversible universal principle that facilitates relationships among beings in the universe such that the universal relations doctrine would stagnate if not for *k´é.* The *k´é* doctrine contains values that connect Navajos to family, clan, nonrelatives, and people in general. *K´é* also encompasses connections to the natural world, including earth, plants, animals, and the rest of creation.

At the human level, the *k´é* doctrine describes the ideal relationship among everyone in the Navajo world where values maintain relationships that produce concord. In Navajo society, *k´é* reinforces the kinship system through values that include respect, kindness, cooperation, friendliness, reciprocal relations, and love. Although *k´é* is a polysemous term, it has

been described as "'love,' 'kindness,' 'peacefulness,' 'friendliness,' 'cooperation,' and all the positive aspects of an intense, diffuse, and enduring solidarity."[3] The Navajo language, traditional stories, ceremonies, and maxims contain and reinforce values that Navajos express through *k´é.*

The universal relations doctrine, in conjunction with the *hózhǫ́, k´é,* and *k´éí* doctrines, frames the Navajo view of the universe as a web of universal relations. The values that come from the *k´é* and *k´éí* doctrines prescribe etiquettes that Navajos follow when interacting with all relatives in creation. These ancient constructs are fundamental to the Navajo conception of an orderly universe functioning according to irreversible principles.

The profound reverence Navajos feel for Mother Earth and its complement, Father Heaven, and the utmost respect they accord animals and plants exemplify adherence to *k´é* norms that prescribe proper conduct toward universal kin or universal relations. For example, before an herb is harvested for medicine, offerings are given to the "inner form" of the plant and prayers are made. This ritual encompasses a humble plea for forgiveness, assistance, and thanks spoken to the "inner form" of the plant. Plants and animals provide Navajos with food, ceremonial paraphernalia, and medicine. Plants, animals, and nature's bounty serve human needs in exchange for pleas and offerings that conform to *k´é* norms. *K´é* norms hold that only enough to serve human needs should be extracted from nature because irresponsible destruction, overharvesting, and polluting cause imbalance (*hóchxǫ́*) in the natural world.

Navajo kinship defines and secures notions of identity, rights, privileges, duties, obligations, reciprocity, and other values among clan relatives. *K´é* is emotional and has been described as "an almost instinctual way of reacting in relationships which are developed through conditioning and acculturation."[4] Navajos learn at an early age the proprieties that perpetuate kinship solidarity and use them to speak, act, and associate with fellow Navajos, clan relatives, and family members. Navajo children learn their clan identity, clan history, and etiquettes (*k´é* norms) that prescribe the acceptable bounds of behavior toward relatives and other Navajos. Children are taught to use kinship terms when addressing parents, grandparents, siblings, aunts, uncles, cousins, and relatives of related clans. As

a matter of respect and honor, a Navajo will also use kinship terms, "my grandmother" or "my grandfather," to address an elderly person, even though they are not related.

For the most part, *k´é* norms work as intended and fulfill expectations in Navajo society. Occasionally, conditions arise, such as questions concerning a person's paternity or biological heritage, that may impede application of *k´é* norms. For example, a Navajo who was adopted as a baby and whose parentage or clans are unknown would have no means of identifying relatives using the Navajo kinship system. The adopted child would be without traditional Navajo identity. In the past, a girl from another tribe who was adopted usually became the progenitor of a new Navajo clan (e.g., the Jemez clan).

In *Davis v. Means,*[5] a paternity case involving a child born to a Navajo mother and a non-Navajo father, the Navajo Nation Supreme Court discussed identity issues that accompany unresolved questions about an individual's pedigree:

> Under the Navajo doctrine of *ak´ei,* the grandparents, other extended family members, and the clan relations have a right to know the biological heritage of a child. The Navajo maxim is this: "It must be known precisely from where one has originated." This means all of the child's relations must know who the parents are, so the child will eventually know who is related and not related to him or her. The maxim focuses on the identity of a person . . . and his or her place in the world. . . .
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> Knowing one's point of origination (meaning the parents) is extremely important to the Navajo people, because only then will a person know which *adoone´e* (clan) and *Dine´e* (people) the person is. Those precepts are essential to a Navajo's identity and must be known for Navajo religious ceremonies. One must know them to seek *hozho* (harmony and peace).[6]

The Supreme Court remanded the case to the trial court with instructions to order blood testing to determine the child's father.[7]

The *k´é* norms prescribe acceptable behavior conducive to harmonious relationships among kin, which in turn maintains kinship cohesiveness. When two Navajos meet, shake hands, and address each other, not by name but by kinship terms, they are using *k´é* norms. Before Anglo names became common among the Navajo people, it was very impolite, even a

transgression of the rules of *k´é,* to use a person's traditional name in his or her presence. A kinsman who overheard the transgression would rip off the perpetrator's necklace or earrings as an act of exoneration. The act, however, was more facetious than serious, but the offender was nonetheless embarrassed and got a lesson on proper behavior. The same act was also reserved for a joker who uses another person's clan kin as the butt of jokes. But again, these were simply facetious acts intended to keep behavior within acceptable bounds. Anglo names, the majority issued by Bureau of Indian Affairs officials at the boarding schools and during census counts in the early twentieth century, apparently do not evoke strong emotions as do traditional names.

A person whose behavior contravenes the rules of *k´é* assumes the risk of being marked with the maxim "He (or she) acts as if he (or she) has no relatives." This maxim insinuates that a person without relatives is a "Navajo witch." A "witch" supposedly has renounced relatives in the normal kinship sense and manipulates negative forces to bring misfortune on a person or family. In the normal course of interaction, however, the maxim describes a wrongdoer and reflects the traditional method of shaming that maintains community order and kinship unity. Today, this maxim likely would not deter some acculturated Navajos from behavior deemed traditionally unacceptable. Formal American education and acculturation by Western culture have made some Navajos treat customary precepts as passé.

Kin Giving, Sharing, and Support

The *k´é* doctrine is the basis for the giving, sharing, and support among clan relatives and reciprocity with nonclan relatives. These positive attributes are reinforced through a sophisticated clan system (glossed as *k´éí*) that on the whole identifies relations and descent. In the matrilineal Navajo world, a child takes the clan of its mother, so the mother's clan, the born-of clan, is the primary identifier. The father's clan is called the "born-for clan" and assumes a secondary role to the mother's clan when identity is considered. Two other clans complete the basic identity paradigm, the paternal grandfather's clan and the maternal grandfather's clan. The grandfathers' clans establish grandparent–grandchild ties and become

significant salutary sources when a grandchild pursues traditional Diné knowledge.

The people who share one or more of a Navajo's four basic clans, which form the basic identity paradigm, compose a group he or she calls *shik´éí* (my relatives). The people identified as my relatives are normally addressed by kinship terms (e.g., my mother, my uncle, and my aunt), and not personal names, in conformance with *k´é* norms. The Navajo clan system identifies relatives by transcending immediate family and blood ties. With a Navajo population on the brink of three hundred thousand, the chances are tremendous that a Navajo would have several thousand relatives, the majority of whom he or she would never meet in a lifetime.[8]

Kinship is indispensable to the Navajo people because clan relatives provide the essentials a Navajo needs for physical, mental, emotional, and spiritual well-being. The option of relying on relatives for sustenance and affective and spiritual support is always available to a Navajo. Navajo *k´é* values, including the cherished values of sharing and giving, no doubt induced a noted anthropologist to proclaim that "[t]he importance of his relatives to the Navajo can scarcely be exaggerated."[9] Duties and obligations and sharing and giving increase in intensity and imperativeness as relations descend from clan to family.[10]

By custom, a Navajo is expected to contribute to the well-being and support of relatives, particularly those of the matrilineal clan. A Navajo fulfills obligations to matrilineal clan relatives by sharing and giving and providing physical, emotional, and spiritual support. Before vehicles became the primary mode of travel in Navajo country, a Navajo was expected to provide shelter and food to a traveling clan relative. Distant clan relatives, especially those with a common maternal grandmother from preceding generations, would visit each other and the host family would give the best of their property—jewelry, animals, produce, or intangible property—as gifts. These two examples illustrate how Navajos comply with *k´é* rules on contributing to their relatives' welfare in the interest of maintaining kinship ties and unity.

A Navajo ceremony, particularly a major ceremony like the *Nidáá´,* that requires extensive labor, food, materials, and spiritual support would definitely not succeed if the clan relatives did not give, share, support, or

cooperate with the sponsoring family. The *Nidáá´,* a ceremony used to cleanse and restore military veterans to *hózhǫ́,* is described superficially here to aid comprehension only. The preparation for the ceremony requires extensive labor to build temporary structures, such as a ceremonial hogan with shade attached and a large ramada for cooking and feasting. The ceremonial grounds must be cleared and prepared to host the social and spiritual events. Enough firewood and water must be available for the weeklong ceremony. Thousands of people attend, which requires tremendous amounts of food and labor, including cooking, cutting firewood, hauling water, and washing utensils. The medicine man and his assistants normally receive fees for services that exceed two thousand dollars. This example shows that *k´é* and *k´éí* play significant roles in the performance of a major ceremony, while simultaneously reinforcing kinship ties and unity.

Political Affairs

The discussions under this section and at various places throughout this work use two phrases that require explanation for better understanding. The phrases "talking things out" and "talking things out process" are not used interchangeably. The second phrase describes the entire process used to address and solve problems (e.g., traditional peacemaking or community meeting), whereas the first refers to unrestricted discussion on points during the "talking things out process." For example, the traditional Navajo dispute resolution process called peacemaking is a "talking things out process" (and includes opening prayer, introductions, instructions, problem identification, discussion of problem, persuasion, consensus, lectures, apologies, and closing prayer), whereas discussion of a specific problem during peacemaking is "talking things out." These two concepts are critical to Navajo political affairs and to Navajo dispute resolution, especially peacemaking.

The *k´é* doctrine plays a prominent role in Navajo political affairs, although more intensely in traditional governance than the modern Western-style three-branch government. This discussion focuses on traditional governance to demonstrate the significance of the *k´é* doctrine to Navajo political affairs. The modern Navajo Nation three-branch government retains and uses some traditional norms, but most of the norms have been

eviscerated to save time and costs in an attempt to meet the demands of a growing Navajo population and an expanding government bureaucracy. The delegates who comprise the Navajo Nation Council still rely on oratory skill and kinship terms to win concessions in legislative debate, but an imposed time limit on debate severely restricts "talking things out," and the council members rarely achieve consensus on legislation and policy.

Of the three branches (executive, legislative, and judicial), the Navajo Nation Council (legislative branch) wields the most power, which suggests that traditional Navajo notions of equality were not used to distribute power in the Western-style Navajo Nation government, although the laws call for equality and checks and balances among the three branches. The preamble to the resolution that restructured the Navajo government in 1989 makes clear the intent to create a government with separate legislative, executive, and judicial functions.[11] The Navajo Nation Council's refusal to share power with the other two branches of Navajo government, which would be consistent with traditional Navajo values (including *k´é*), might be typical of modern Western-style American Indian tribal governments where the politically powerful hoard power at the expense of traditional values. When tribal officials ignore traditional values, the governing process can quickly become fertile for corruption and scandal.

The traditional Navajo political process, which was a practical "talking things out process," used persuasion, "talking things out," and consensus on decision making to solve community problems and establish goals. These components used in the traditional Navajo political process were integral to traditional governance. Traditional leaders were highly knowledgeable and skilled on *k´é* norms and other customary precepts, which they used to earn the trust of the people.

A leader's authority and power came from the trust the people had for the leader. People who became traditional leaders did not seek or run for office; they were selected by the people through consensus. Traditional leaders were selected based on their speaking ability, wisdom, spirituality, and ability to guide the people and plan for the future. Navajos who were adept at "talking things out" became successful leaders and enjoyed long service, a notable achievement in a system where leaders served for only as long as they produced and held the people's confidence. Leaders

also served as peacemakers to help people resolve their disputes using the "talking things out process" or peacemaking.

The traditional dispute resolution process, called peacemaking, used the traditional procedures of persuasion, "talking things out," and consensus to find solutions. These values are now denominated traditional Navajo civil procedures. *K'é* values such as respect, kindness, cooperation, friendliness, and use of kinship terms, flowed freely among the participants during discussion of pressing matters in a traditional peacemaking session.

Traditional Notions of Equality

The traditional "talking things out process" (used as peacemaking and community policy making), including its components of "talking things out," persuasion, and consensus, are framed by traditional notions of equality (egalitarianism) and the value that the people as a whole can make law (participatory democracy). The Navajo concept of egalitarianism comes from harmony and balance inherent in the condition known as *hózhǫ́*. Whereas non-Indian scholars have glossed *hózhǫ́* as harmony, Navajos understand the term as a condition that contains harmony, balance, peace, completeness, happiness, and others. Harmony and balance are integral to the view that all multifarious elements in the universe are situated on the web of universal relations.

Traditional notions of equality (egalitarianism) are reflected in the traditional Navajo system of dispute resolution called peacemaking. Navajo peacemaking is a horizontal system of justice, whereas Western-model court systems are vertical systems of justice. Navajo common-law scholars have pointed out the differences between the two systems.[12] Vertical systems of justice have hierarchies of power and authority and use force or coercion. Horizontal systems of justice are basically egalitarian, use relationships to decide matters, and reject force or coercion. All participants have an equal voice in a horizontal system of justice and there is not a single all-powerful decision maker, such as a judge in a vertical system.

Equality is embedded in Navajo culture and is practiced throughout everyday relationships. In relationships between men and women, particularly in marriage, there is equality of planning and decision making. Children are considered equal to adults in several areas, including the right

to own property and the right to make decisions affecting their own property. All individuals have an equal opportunity to speak on issues during community discussions. And individuals have equal opportunity to use community resources.

Traditional Leadership

Traditional Navajo peace leaders, unlike Western leaders, shunned authoritarianism; hence, a leadership hierarchy was not essential to the functioning of the traditional Navajo political system. A traditional leader's power came from the respect he earned as an individual member of the community and as a leader skilled in the normative precepts that come from *hózhǫ́, k´é,* and *k´éí.* Because traditional Navajos believe "words are powerful," oratory skill was the principal means by which a leader persuaded people on a particular point. Unanimity or consensus on policy or solutions was the desired end of the decision-making process. These traditional civil procedures were still practiced in the early 1940s in spite of the Bureau of Indian Affairs's attempts to supplant traditional civil norms with Anglo-American–style democratic methods. Research from that period shows that local policy was made through consensus, which means that discussion "continued until unanimity was reached, or at least until those in opposition felt it was useless or impolitic to express further disagreement."[13]

As mentioned earlier, traditional Navajos recognized two kinds of leaders: the peace leaders (or peace planners), who were known as *hózhǫ́ǫjí naat´ááh;* and the war leaders (or war planners), who were known as *hashkééjí naat´ááh.* Both civil and war leaders usually underwent a leadership initiation ceremony called *Naat´áanii ídlį́ bee bi´dilzį́įh* that blessed them with recognition, credibility, and other characteristics deemed essential for "official" leadership. Even after creation of the Navajo Tribal Council in 1923, council delegates and chairmen were initiated by traditional ceremony. The two values, recognition and credibility, were very important in a political structure that emphasized leading by persuasion and consensus rather than coercion.

The traditional peace leaders were great orators, wise and fair, and had to earn the trust of the people to maintain leadership positions. Leaders

were selected by community consensus and expected to lead by example, help the people surmount obstacles, and plan for community survival and commonality. The Navajo Nation Supreme Court used a case involving a power struggle among modern Navajo government officials to exemplify the high standards under which traditional Navajo leaders served:

> After the epic battles were fought by the Hero Twins [Monster Slayer and Born-for-Water], the Navajo people set on the path of becoming a strong nation. It became necessary to select *naat´aaniis* by a consensus of the people. A *naat´aanii* was not a powerful politician nor was he a mighty chief. A *naat´aanii* was chosen based upon his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If a *naat´aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words. The *naat´aanii* indeed was expected to be honest, faithful and truthful in dealing with his people.[14]

Traditional Navajo leaders fit the modern description of the American Indian "elder." The elder status, which is honored and respected among American Indians, is earned through a lifetime of good works, personal achievements, and unwavering spirituality. A person does not achieve elder status by simply growing old and gray. Individuals who have achieved elder status are normally older and wiser than fellow citizens through a lifetime of learning and experiences. Navajos recognize their elders as keepers of traditional knowledge, including the Navajo Creation Scripture and Journey Narratives and the foundational doctrines that comprise the framework for traditional Navajo philosophy.

In summary, the *k´é* doctrine sets the rules for a Navajo's relationship with family, clan, related clans, Navajos in general, non-Navajos, and eventually with everything in the universe. *K´é* maintains Navajo kinship bonds and unity through positive values that include respect, kindness, cooperation, friendliness, mutual obligations, love, sharing, and giving. The three foundational doctrines, *hózhǫ́, k´é,* and *k´éí,* underlie Navajo understandings of kinship and relationships in everyday life and in the universe. The doctrine of universal relations, which describes the universe as a system composed of interrelated, interconnected, and interdependent elements, relies on *hózhǫ́, k´é,* and *k´éí* for completeness.

Similar to the *hózhǫ́* doctrine, the *k´é* doctrine is not law in the sense that it can be applied to legal issues. The doctrines of *k´é* and *k´éí* are the dynamic dyads that facilitate group cooperation, planning, discussion, persuasion, and consensus, which are essential to dispute resolution in the traditional Navajo context, and to a limited extent in the modern Navajo Nation courts. Several principles derived from the *k´é* doctrine apply during a court's problem-solving stage, the stage denominated *anáhóót´i´* in the Navajo jurisprudence model (*hózhǫ́* → *anáhóót´i´* → *hózhǫ́*). These principles can synthesize with Western legal principles during legal analysis, but in the overall understanding of Navajo jurisprudence, synthesis or not, adopted Western laws are still Navajo law. The sections that follow to the end of chapter 4 demonstrate how the Navajo Nation courts, which are structured after the Anglo-American court model, use the *k´é* doctrine, including *k´é*-derived principles, to address legal issues brought by Navajos and non-Navajos during litigation.

K´é in the Navajo Nation Courts

When the Navajo Nation judiciary adopted the Navajo Nation Code of Judicial Conduct on November 1, 1991, the judges made sure that Navajo common law, including the doctrines of *hózhǫ́, k´é,* and *k´éí,* would be used not only in the decision making of the Navajo Nation courts, but also in the daily administration of judicial business:

> A longstanding objective of the Navajo Nation courts is to preserve the customs and traditions of the Navajo people. They are embodied in the Navajo common law, and it is a source for many of the provisions of the [Navajo judicial] code. . . . While the Navajo Nation courts generally follow the state model of justice . . . that system is alien to the Navajo common law. Traditional Navajo justice methods rely upon adjusting the differences of equals, in mediation and the free discussion of problems, to resolve them by consent. It does not rely upon a superior decision-maker, who imposes decisions upon others. It does not use coercion or force, and is instead based upon an agreed need for harmony in the community.[15]
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> Under certain circumstances the [Navajo judicial] code may apply to other members of the court staff, and particularly those who advise or counsel a judge

> or justice. In particular, the Canons apply to law clerks, attorneys to the courts, paralegals, court administrators, and others who are in close and constant working relationship with a judge or justice. The principles apply, because these officials are identified with judges and justices in the eye of the Navajo public.[16]

One month after the judges approved the Navajo judicial code, the Navajo Nation Supreme Court declared Navajo common law as the law of preference in the Navajo Nation courts.[17] At the time of these declarations, the Navajo Nation courts were handling several cases generated by what Navajos have come to call "the turmoil," a 1989 political power struggle between supporters of suspended Chairman Peter MacDonald Sr. and those in opposition. The 1989 events generated heated and ample public debate, but the judges were most impressed by traditional Navajos who decried the extent to which Navajo leaders had strayed from the teachings that emphasize *hózhǫ́, k'é,* and *k'éí.* The turmoil caused Navajos to fight Navajos on the same ground where their ancestors had sought the blessings of the Holy Beings after their release from imprisonment at Fort Sumner more than a hundred years earlier. Most important, the judges saw the turmoil as a lesson that the Navajo courts have a duty to use Navajo common law.

The Courts' Duty to Use Navajo Common Law

The discussions on the early drafts of the Navajo judicial code united the judges in a spirit of collegiality that essentially focused the judiciary on revitalizing dormant customary precepts. The Navajo judges began encouraging each other during their quarterly meetings to use the *hózhǫ́, k'é,* and *k'éí* doctrines and other traditional principles in decision making and court administration. Quarterly judicial conferences are held every three months during which judges and staff discuss court policy and planning, fiscal matters, court administration, changes to court rules, judges and staff training, and other topics important to the Navajo Nation courts and American Indian tribal courts in general. During the court system's annual conferences in the 1990s, the Navajo Nation Chief Justice encouraged judicial branch employees, including judges, attorneys, peacemakers, and court staff, to incorporate *k'é* values (friendliness, cooperation, kindness, kinship terms, etc.) into their work and interactions with each

other and the public. The Navajo Nation Court System is now at a juncture where traditional principles are not only mainstays in the courts' decision making, but serve as the foundation from which the judicial branch of the Navajo Nation government operates.

Navajo Nation judges know their decisions must be informed by the *hózhǫ́, k´é,* and *k´éí* doctrines. Canon One of the judicial code advises the Navajo judges to decide cases within the four sacred mountains, the four mountains located at cardinal directions and that mark the boundaries of ancient Navajoland.[18] This is the land the Navajos believe the Holy Beings promised to them for their home and perpetual possession. Navajos believe the Holy Beings placed everything they would need to prosper and grow on the lands within the Four Sacred Mountains. Navajos believe the mountains are "beings" blessed with divine power, so they contain all knowledge and spiritual blessings that are essential to the Diné Life Way.

Navajo judges are instructed to "apply Navajo concepts and procedures of justice, including the principles of maintaining harmony, establishing order, respecting freedom, and talking things out in free discussion."[19] The judicial code advises Navajo judges, as successors to the traditional peacemakers, to follow *k´é* rules by treating litigants as if they were relatives. Navajo society, of course, revolves around kinship:

> This value [treat people like relatives] requires judges, as *Hozhoji´ Naat´aah* (peace leaders), to treat everyone equally and fairly. Navajos believe in equality and horizontal, person-to-person relationships as part of their concept of justice. Obligations toward relatives extend to everyone, because that is a means of not only stressing personal equality, but creating solidarity.
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> . . . .
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> The procedure of Navajo justice is people talking out their problems for a consensual resolution of them. A judge should encourage free discussion of the problem before the court, within the limits of reasonable rules of procedure and evidence. A judge should not encourage or permit aggressive behavior, including the badgering of witnesses, rudeness, the infliction of intentional humiliation or embarrassment, or any other conduct which obstructs the right to a full and fair hearing.[20]

Borrowing from traditional dispute resolution practice, a Navajo judge can assume a peacemaker's role at opportune stages of litigation and

employ *k'é* to encourage parties to reach consensus on disputed points. A judge can "use the pretrial conference, sentencing hearing, or post-judgment proceeding to encourage the parties to reach consensus regarding their dispute."[21] Because coercion has no place in peacemaking, the judge as peacemaker cannot force parties to settle issues. Even the Navajo Nation Supreme Court has on occasion used *k'é* to encourage parties with cases pending before it to settle their disputes amicably in the interests of community harmony, healing relationships, and maintaining kinship unity.

The Navajo Nation Supreme Court consistently proclaims that the Navajo Nation courts "serve the purpose of bringing people in dispute back into harmony" with their relatives and community.[22] The harmony theme is diffused throughout the judicial code, but is explicitly set forth under Canon One:

> Injustice, in the sense of evil or wrongdoing, is the result of disharmony. One of the goals of justice is to return people and their community to harmony in the resolution of a dispute. The judge must promote harmony between litigants, achieve harmony through assuring reasonable restitution to victims, and foster harmony by providing the means for offenders or wrongdoers to return to their communities. That is achieved through free discussion, conciliation, consensus, and guidance from the judge.[23]

Navajo judges know that although the Navajo judicial code contains a set of ethics principles based on normative precepts, it has other unstated goals: (1) to encourage the judges to use traditional Navajo thinking when deciding cases; (2) to set forth foundational customary principles, including *hózhǫ́, k'é,* and *k'éí,* "talking things out," *nályéél* (restitution), *naat'ááh* (leadership), and consensus, for active and future judges to know, apply, and develop; (3) to instill in court employees important traditional values pertinent to their work; and (4) to declare that Navajo common law, culture, spirituality, language, sense of place, and identity compose the foundation from which the entire Navajo Nation Court System operates.[24]

The Rule on Adopting Bilagáana *Law*

The solid emphasis on use of Navajo common law in the Navajo Nation courts does not mean that non-Navajo law is excluded or given less

importance in Navajo jurisprudence. Just as the structure of the Navajo Nation Court System replicates the Anglo-American court model, state and federal laws have guided many decisions of the Navajo courts.[25] The Navajo Nation Supreme Court, however, has advised caution and careful deliberation before the Navajo Nation courts adopt foreign legal concepts.[26] After the Navajo Nation Council passed the Diné Fundamental Laws in November 2002, the Navajo Nation Supreme Court established a rule on adoption of non-Navajo law, particularly the rule on adoption of *bilagáana* law (Anglo-American law), which requires compatibility of the foreign law with fundamental Navajo values before its application to an issue:

> In the absence of [Navajo] statutory law, we first and foremost consider *Diné Bi Beenaaz´áanii* (Navajo Fundamental Law). We also consider other ways of dealing with a problem, including approaches in *bilagáana* legal thought such as the Restatements when consistent with fundamental Navajo legal principles, particularly in situations involving adopted concepts. (citations and parenthetical information omitted)[27]

The Navajo word for American white people is *bilagáana,* but the rule on adoption of *bilagáana* law would apply to all non-Navajo laws, including those of the states, federal government, other Indian nations, and international laws.

The Navajo Nation Supreme Court in *Goldtooth v. Naa Tsis'Aan Community School, Inc.* found the non-Navajo concept of apparent authority consistent with Navajo values and joined it with the Navajo principle of *naat´áanii* (traditional leader) to rule that the school's executive director, as *naat´áanii,* had apparent authority to bind the principal (the school board) to an employment contract.[28] The Court said the executive director's (as *naat´áanii*) "words carry great weight"; thus, when the director told the employee that his contract was renewed, his words bound the school board, "absent clear guidance from the [school board that the director's] authority was limited."[29] The Supreme Court's use of *naat´áanii* to find a binding contract comes from norms that associate a traditional leader with strong persuasive ability through skilled use of *k´é* values, and whose words the people respect and follow. The Court's finding of a

binding employment contract also furthers the goal of returning disputants to harmony (*hózhǫ́*).[30]

The Navajo Nation Supreme Court confirmed that it will consider and "adopt *bilagáana* legal principles, if consistent with fundamental Navajo principles," in *Etsitty v. Diné Bii Association for Disabled Citizens, Inc.*[31] The Court adopted the "control test" in employment law, which the New Mexico courts use to distinguish between employees and independent contractors.[32] The Court added new factors to the "control test" to "foster harmony by honoring the expectations of the parties under the Navajo principle of *k'é,* a consideration absent from *bilagáana* legal thought."[33] The *Goldtooth* and *Etsitty* cases disclose methods that the Navajo courts use to conjoin traditional Navajo and non-Navajo concepts to form new Navajo law that they apply to issues, without losing focus of the ultimate goal of returning parties to harmony.

In a criminal case involving Miranda rights, the Navajo Nation Supreme Court spoke at length about Navajo and non-Navajo statutes containing similar language on similar topics and whether non-Navajo sources should inform interpretation of those Navajo statutes, particularly similar provisions in the Navajo Nation Bill of Rights and the Indian Civil Rights Act:[34]

> In interpreting the Navajo Bill of Rights and the Indian Civil Rights Act, as with other statutes that contain ambiguous language, we first and foremost make sure that such interpretation is consistent with the Fundamental Laws of the Diné. That the Navajo Nation Council explicitly adopts language from outside sources, or that a statute contains similar language, does not, without more, mean the Council intended us to ignore fundamental Diné principles in giving meaning to such provisions. Indeed, Navajo understanding of the English words adopted in statutes may differ from the accepted Anglo understanding. Further, the Indian Civil Rights Act does not require our application of federal interpretations, but only mandates the application of similar language. (citations and parenthetical information omitted)
>
> . . . .
>
> While we are not required to apply federal interpretations, we nonetheless consider them in our analysis. We consider all ways of thinking and possible approaches to a problem, including federal law approaches, and we weigh their underlying values and effects to decide what is best for our people. We have applied federal interpretations, but have augmented them with Navajo values, often providing broader rights than that provided in the equivalent federal

> provision. Our consideration of outside interpretations is especially important for issues involving our modern Navajo government, which includes institutions such as police, jails, and courts that track state and federal government structures not present in traditional Navajo society. (citations and parenthetical information omitted)[35]

After setting forth instructions, the Navajo Nation Supreme Court adopted the minimum requirements of Miranda because it was consistent with Navajo values.[36] The Court identified individual freedom, which prohibits coerced confessions, as one of those values: "Our Navajo Bill of Rights [specifically, the right against self-incrimination], as informed by the Navajo value of individual freedom, prohibits coerced confessions."[37] The Court also identified respect in Navajo relationships as another value. This value requires clear and concise communication so that "the meaning of our words and the effect of our actions based on those words" can be understood.[38] These two values come from the *k´é* doctrine; thus, they require respect and truthfulness in relationships, not only among individuals, but also between Navajo leaders (officials) and the people. For example, the Supreme Court stated that the method the police officer used to coerce a confession, threatening the defendant with a prison term of sixty years and a fine of more than a million dollars, "does not conform with the ways people should interact [in relationships; that is, government official and citizen]."[39]

The Navajo Nation Supreme Court does not require the Navajo trial courts to adopt non-Navajo law wholly even after satisfactory compliance with the rule on adoption of *bilagáana* law. Foreign law can be modified to meet the Navajo cultural context, it can be joined with Navajo common law, or it can guide the process for crafting new law, including setting the extent of its reach. In some cases, non-Navajo law and Navajo common law may synthesize to form new law. The following sections show the Navajo Nation courts at work using Navajo common law and Anglo-American law to create a unique corpus of Navajo law.

Principle of Naat´ááh Nabik´íyáti´ *(Participatory Democracy)*

The Navajo belief that the people as a whole can make law is consistent with the universal relations doctrine. According to this doctrine, the entire

universe is composed of a community of relatives. The Navajos consider all the multifarious elements that compose the universe as basically equal because they compose the web of universal relations; all relations must be in harmony and balance for the universe to be in a state of *hózhǫ́*. Thus, Navajo concepts of equality and egalitarianism derive from the belief that harmony and balance sustain the web of universal relations.

The Navajo Nation Supreme Court explained the egalitarian concept, a principle necessary for participatory democracy, within the context of dispute resolution in *Downey v. Bigman:* "One of the major differences between Western principles of adjudication and Navajo legal procedure as participatory democracy is that it is essentially egalitarian. Egalitarianism is the fundamental principle of participatory democracy. The egalitarian principle is the ability of the people as a whole to make law."[40] Thus participatory democracy, from the traditional Navajo view, means that the people have a right to participate equally and fully with their leaders in all processes of government, including discussions leading to consensual decision making and policy making. The traditional Navajo form of government is therefore a pure democracy.

The *Nidáá´* ceremony, which was mentioned earlier in this chapter, under "Kin Giving, Sharing, and Support," provided the perfect forum for participatory democracy at the local level in more traditional days. The public portion of the ceremony provided an open forum so anyone could discuss issues affecting tribe, community, and families. Leaders were summoned to listen to local concerns so they could act on them during Navajo Nation Council sessions. The open forum also provided a perfect opportunity for people to evaluate the effectiveness of locally elected officials and delegates to the Navajo Nation Council. The adoption of Western ways has caused the local open forums provided by major ceremonies to fall into desuetude.

The doctrine of participatory democracy informed Navajo views of political liberty in *Bennett v. Navajo Board of Election Supervisors,*[41] where a candidate for the Office of Navajo Nation President was disqualified for failure to meet the statutory requirement of previous service as an elected Navajo government official or as an employee of a "Navajo tribal organization." While holding the statute void for vagueness, the Navajo

Nation Supreme Court identified and discussed values that foster Navajo political liberty, which is part of the doctrine of participatory democracy:

> Navajo *beehaz´aanii* speaks to political liberty, and we apply Navajo common law rather than the Anglo concept of political liberty. In Navajo tradition, government and governing was a matter of the consensus of the people, and Navajos had a participatory democracy. It was, in fact, one of the purest democracies in human history. Long before the United States of America extended the privilege and right to vote to those who did not own property and to women, all Navajos participated in public decisions. Therefore, there is a strong and fundamental tradition that any Navajo can participate in the processes of government, and no person who is not otherwise disqualified by a reasonable law can be prohibited from holding office.[42]

Because participatory democracy underlies the traditional Navajo political system, modern Navajo leaders must continue to uphold its standards to guarantee the Navajo people their fundamental right to participate in decisions affecting their Nation, communities, and families. Navajo participatory democracy works because the "talking things out process" allows free-flowing discussion of values and concepts that lead to consensus in an atmosphere of *k´é.* The case of *Rough Rock Community School v. Navajo Nation* demonstrates how participatory democracy works.[43]

In *Rough Rock* the Navajo Nation Supreme Court was asked to decide whether the Education Committee of the Navajo Nation Council had complied with a statutory requirement of "consultation" with local school boards before drafting an apportionment plan for school-board elections. The Court found that the Education Committee had not followed the dictates of *k´é,* which motivate participatory democracy, and thereby had violated the statutory consultation requirement:

> The statutory requirement of "consultation" should have been strictly adhered to since the apportionment plan was being developed for the local schools and the communities they serve. Navajo common law speaks to consultation as giving participants ample freedom to speak, be heard, and opportunity to present written comments. The Navajo doctrine of *k´e* underlies all transactions between and among Navajos, and it likewise frames our view of consultation under the Election Code. Consultation is far more than giving unilateral testimony under oath for a limited number of minutes. It must encompass complete

> discussion of Navajo values, concepts, and diversity of opinion in an atmosphere of *k´e* (including equality and respect), ultimately leading to a consensual solution. This is the heart of Navajo due process embedded in Navajo participatory democracy. (citation omitted)[44]

Along the same line, the Navajo Nation Supreme Court reminded the Navajo Nation Council of its duty to uphold the standards of participatory democracy in *Judy v. White,*[45] a case concerning a pay increase that the Navajo Nation Council gave itself without first seeking the approval of the Navajo electorate:

> Through time, our traditional form of participatory democracy has given way to non-Navajo formality; this flexibility is necessary to accommodate the ever-changing face of Navajo governance and its attendant complexities. But the acceptance of formality does not circumscribe the absolute right of the Navajo citizen to complain about the manner in which he or she is governed. We have said before that participatory democracy does not come from the non-Navajo, and today we aver that it also does not come from the [Navajo Nation] Council. It comes from a deeper, more profound system of governance: the Navajo People's traditional communal governance. Whether governance occurred at a public meeting place, a windmill, someone's homestead, the final day of a traditional ceremony or at a chapter meeting, the root of that process comes from the Diné Life Way. Our narratives on the Diné Life Way are replete with allusions to communal or participatory governance. Nowhere in our life journey narratives is there any indication that one was denied the privilege to speak, nor shunned for asking.[46]

These cases illustrate that Navajo participatory democracy relies on rules that permit free-flowing discourse leading to group consensus in a milieu of *k´é* among participants. The values that create an environment of *k´é* are, of course, respect, kindness, friendliness, cooperation, use of kinship terms, and other positive values that promote free-flowing discussion and consensual decision making. The Navajo Nation Supreme Court summed up well the constituent values of Navajo participatory democracy in *Downey v. Bigman:*

> Navajo participatory democracy guarantees participants their fundamental right to speak on an issue, and discussion continues until the participants reach consensus. In this sense, decisions are a product of agreement among the community

> rather than a select few. Status, wealth and age are not determinants of whether a person may participate in the decision-making process. Furthermore, no one is pressured to agree to a certain solution, and persuasion, not coercion, is the vehicle for prompting decisions. Participatory democracy is evident throughout many sectors of Navajo society, including government operations, the chapter meeting, and peacemaking.[47]

The rules that facilitate Navajo participatory democracy are "talking things out," persuasion, and consensus. The "talking things out" (*nabik´íyáti´*) and consensus rules merit further elaboration. The "talking things out" rule protects a person's fundamental right to speak freely on an issue and enables discussion until unanimity on solution results. Duties, responsibilities, obligations, relations, and potential solutions to problems are easily identified when participants engage in free-flowing discussion. Consensual solutions and ways to maintain them are also identified during free-flowing discussion. Thus, the "talking things out" and consensus rules work in unison so that dialogue leads to agreed-upon solutions.

Although achieving consensus on a solution does not present much of a problem in peacemaking sessions, it can become difficult to achieve consensus during community meetings (i.e., local chapter governance), especially if the group is quite large and viewpoints are diverse. To prevent stalemates, community members now vote on solutions to community issues after full discussion, with the majority carrying the day. During a peacemaking session, the "talking things out" rule gives all participants an opportunity to speak on every aspect of an issue, which ensures consideration of all arguments, claims, and proposals expressed. Compromise is a necessary element of "talking things out" in peacemaking, and that assures that the views of all participants, especially minority views, are considered equally.

The "talking things out" rule and its related values of persuasion and consensus may appear incompatible with the adversarial process, particularly during the course of a trial, but they work well during settlement negotiations, pretrial conferences, sentencing hearings, or postjudgment proceedings. During different stages of trial, the three rules can be used to encourage parties to settle cases, narrow issues, or agree on undisputed facts. The procedural and evidentiary rules that control litigation

unfortunately limit "talking things out," because Anglo-American–model court rules are designed to restrict, rather than promote, free-flowing dialogue. The Navajo Nation courts provide an alternative to rigid court proceedings by allowing parties to transfer disputes to the Navajo Peacemaking Division, where problems and solutions can be "talked out" in free-flowing discussion in an environment of *k´é.*

Ííshjání Ádoolníił *(Make Things Clear) and* Ííshjání Ádooníił *(Clarity in the Law) Rules*

A traditional Navajo peacemaking session makes extensive use of the "talking things out" rule and the *ííshjání ádoolníił* rule (glossed here as "make things clear" rule) during the discussions that eventually lead to a mutual solution. The two rules are complementary and work in concert to foster subject matter clarity and understanding among the peacemaking participants (i.e., disputants, family members, relatives, elders, and clan members). The "make things clear" rule requires individuals to express points clearly while "talking things out" to prevent perturbation and confusion among the peacemaking participants. Navajos know from experience that people cannot engage in respectful, meaningful, and relevant discussions and move toward a consensual resolution of a problem unless they understand each other's positions. Respectful, meaningful, and relevant discussions also apply in modern litigation in the Navajo Nation courts; they help rationalize application of the traditional "make things clear" and "talking things out" rules in different areas of Navajo law.

The Navajo Nation Supreme Court integrated the traditional "make things clear" rule into Navajo decisional law in *Rough Rock Community School v. Navajo Nation,*[48] when it was asked to void a Navajo statute that required school-board candidates to prove "demonstrated interest, experience, and ability in educational management" as a precondition to running for public office. The Supreme Court utilized the "make things clear" rule and its complementary "talking things out" rule to hold the candidate qualification statute void because it "delegated unregulated discretion [to the Board of Election Supervisors] which could lead to manipulation and abuses of authority":[49]

> In the process of "talking things out," or meeting the Navajo common law procedural requirement that "everything must be talked over," there is a requirement of *ashjoni adoolnil* [*ííshjání ádoolníił*] (making something clear or obvious). Navajo decision-making is practical and pragmatic, and the result of "talking things out" is a clear plan. The Navajo Nation Council did not make an important precondition to school board candidacy clear, obvious, certain or definite. In other words, it did not follow the Navajo traditional requirement of *ashjoni adoolnil* [*ííshjání ádoolníił*], and for that reason, the "Educational Management" requirement is void for vagueness. The standard was not objective but instead delegated unregulated discretion which could lead to manipulation and abuses of authority. Navajo thought deplores abuses of authority because of the consensual and egalitarian principles of governance.[50]

Although the Navajo Nation Supreme Court used the "make things clear" rule in *Rough Rock* to test statutory vagueness, the Court has also invoked the rule to require a showing of clear statutory intent before a task is undertaken. In the case of *In re Grievance of Wagner,*[51] the Supreme Court was asked to decide whether an administrative hearing tribunal had the power to invalidate the election of a public official because he allegedly copied and altered a sample ballot. The Court held that an administrative tribunal was powerless to invalidate an election in the absence of a clearly stated grant of power in the election code. The Court said, "Invalidation of an election is a drastic remedy that interferes with the will of the Diné people in choosing a *naat'áanii.* As such, the Court hereby holds that invalidation for election irregularities is only appropriate when clearly stated in the Code."[52] In other words, the "make things clear" rule requires a clear statutory expression that an administrative tribunal has the power to set aside an election for such action to be legal.

In an important sovereign immunity case, the *ííshjání ádooniił* rule ("clarity in the thing itself") was applied to determine whether a newly enacted law granting the Navajo Housing Authority immunity from suit had retroactive application. The Navajo Housing Authority administers federal grants to build homes on the Navajo Nation. The relevant facts in that case, *Phillips v. Navajo Housing Authority,*[53] are these: A mutual help homeowner sued the Navajo Housing Authority for damages that allegedly resulted from its failure to complete renovations to her home. While the lawsuit was pending, the Navajo Nation Council passed legislation

granting the housing authority immunity from suit. The trial court dismissed the lawsuit pursuant to the new grant of immunity.

The controlling issue on appeal became whether the Navajo Nation Council clearly intended retroactive application of the law. The Navajo Nation Supreme Court held that the necessary clarity required by the "make things clear" rule was missing in the law that granted the housing authority immunity from suit; therefore, the new law could not be applied retroactively:[54]

> [T]he Navajo concept of *ííshjání ádooníił* . . . mandates that Navajo laws must be clear so that our people may understand them. This clarity requirement takes on particular importance in laws affecting homes, as homes hold a central place in Navajo thinking. The Court will not interpret such laws to burden the ability of Navajos to live in safe and secure homes unless clearly stated by the Council. (citations omitted)[55]

The *Phillips* case contains a method the Navajo courts use to incorporate normative precepts into modern decisional law. A Navajo court will apply custom to decide an issue and then use a second custom as supporting rationale. In *Phillips,* the Navajo Nation Supreme Court applied the "makes things clear" rule to hold that a newly enacted law did not apply retroactively and then reinforced its holding with the traditional Navajo concept of home. Although the two concepts (statutory clarity and concept of home) may appear incongruent in Western legal thinking, they are perfectly synchronized and accentuate the Court's holding in Navajo thinking. The method the Navajo Nation Supreme Court used to decide the *Phillips* case illustrates the flexible nature of Navajo common law. A single traditional Navajo principle can contain a broad perspective that gives it great flexibility of application so that it can be applied in several different cases (such as domestic relations, torts, and criminal law).

Finally, the "make things clear" rule can be expressed through a variety of phrases in the traditional Navajo context. This variety again shows the broad perspective contained within many traditional Navajo principles and concepts. These phrases (with translations applicable to statutory construction) include *doo naaki nilíígóó* (unequivocal), *t'áá ííshjánígo* (clear on its face), and *t'áá bééhózinígo* (palpable, obvious, or readily

understood). On these different phrases, the Navajo Nation Supreme Court instructed as follows: "At the heart of each phrase is the principle that our statutes and rules must be clear so that the people may understand them and can follow them."[56]

Application of "Talking Things Out" Rule

The Navajo Nation Supreme Court has applied the "talking things out" rule in several different contexts, which confirms its potential for diverse, but narrow, application in Navajo trial court litigation. In a criminal case, the "talking things out" rule was used to reject the defendant's argument that the entire contents of the prosecutor's opening statement should have been confined to admissible evidence.[57] The Supreme Court, after rejecting the defendant's position, explained that the "talking things out" rule "permits discussion of inferences [in the opening statement] which may arise from admissible evidence and a fair presentation of the parties' theory of the case."[58] In another criminal case, the Supreme Court explained that in traditional Navajo society, criminal offenses were resolved using the traditional Navajo civil process of "talking things out" (or "talking things out process") because traditional Navajos did not distinguish between criminal and civil cases.[59] All cases, including those that the Navajo Nation Code now classifies as criminal, were treated as civil in traditional Navajo society and *nályéél* (restitution), rather than punishment, was used to redress injuries and wrongs.

In an insurance case, the Navajo Nation Supreme Court ruled that the insurance company's refusal to negotiate damages in good faith violated the "talking things out" rule.[60] In a case raising free speech issues, the Supreme Court announced that the "talking things out" rule can limit speech when priority is given to a traditional rule that requires a disgruntled person to "speak directly with the person's relative" about concerns before resorting to strangers (in this case an administrative tribunal) for redress.[61] The Supreme Court ruled in an employment case that the Navajo Nation Labor Commission, an administrative hearing body, violated the "talking things out" rule when it dismissed the employee's complaint for her failure to attend and exhaust her remedies in an employer-provided hearing; the dismissal denied the employee her statutory right to a hearing

before the commission.[62] Finally, the Navajo Nation Supreme Court held that it did not violate the "talking things out" rule when the two remaining justices decided a case after the third justice had been removed from office.[63] The Court said two statutory provisions authorize it to decide a case with two justices and, furthermore, the efficient flow of cases would suffer if the Court were to rehear the case with a new third justice.[64]

K´é Informs Individual and Community Rights

Navajo kinship solidarity (*k´é*) is community by another name. The universal relations doctrine informs the traditional Navajo idea of community or, more specifically, the idea of a clan group as a community comprised of relatives that a Navajo calls *shik´éí* (my relatives). Also, the web of universal relations is community on a higher level of abstraction and the multifarious elements that comprise the web are relatives in the Navajo way of thinking. Identity, privileges, rights, duties, obligations, and reciprocity are defined and carried out within the context of community; thus, Navajos (and American Indians in general) are conditioned to approach problems with a community orientation. The idea of community, therefore, affects the exercise of individual and other rights.

Principle of Hazhó´ógo *(Freedom with Responsibility)*

Approaching issues with a communal orientation does not mean that individual rights and freedoms are trampled to protect community interests. Navajo culture accords individual rights and freedoms great respect, but rights and freedoms must be exercised responsibly within the context of community.[65] The Navajo perception of individual rights differs dramatically from the Anglo-American view of these rights, which deems them individualistic and community rarely factors into the analysis. The maxim, "it's up to him," states the Navajo view of individual rights and freedoms. Navajos have freedom to do what they want, but they must act like they have relatives:

> One fundamental value of Navajo society is complete equality among people. Navajos have what some call "permissive" child-rearing techniques, but Navajo children are treated as equals who have their own identities. This reflects the

> value that equals are free to do what they please, without others telling them what they can or cannot do. When asked if another Navajo will do something or if that person's property may be used, a tribe member will reply "it's up to him."[66]

The responsible exercise of rights and freedoms within the context of community is denominated here as the *hazhó´ógo* principle. *Hazhó´ógo* is a polysemous term, and although its meaning usually depends on the context within which it is used, it generally means respectful and considerate behavior in the presence of others. The following is one context (police treatment of criminal suspect) the Navajo Nation Supreme Court used to introduce the principle:

> *Hazhó´ógo* is not man-made law, but rather a fundamental tenet informing us [of] how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it's not uncommon for an elderly person to stand and say "*hazhó´ógo, hazhó´ógo sha´ alchíní*" ("my children, show each other respect"). The intent is to remind those involved that they are *Nohookáá Dine´é* ("Earth-surface people [human beings]"), dealing with another *Nohookáá Dine´é,* and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na´nile´ dii éí dooda* ("delicate matters and things of importance must not be approached recklessly, carelessly or with indifference to consequences"). This is *hazhó´ógo,* and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our adopted ways are all intended to be conducted with *hazhó´ógo* in mind. (footnotes omitted)[67]

The *hazhó´ógo* principle is used here to describe the responsible exercise of rights and freedoms within the context of community in an environment of *k´é,* which is the traditional practice of freedom with responsibility:

> The high respect for individual freedom is balanced by concepts of responsibility and duty. Navajos have an ingrained respect for *ke´e,* or kinship. *Ke´e* encompasses extensive responsibilities to others and respect for them. The others include spouses, children, immediate blood relations, clan relations, Navajos in general, and people at large. Even Father Heaven, Mother Earth, and the plants and animals are included.[68]

Rights and freedoms are enumerated in the Navajo Nation Bill of Rights and its federal counterpart, the Indian Civil Rights Act.[69] Between the two laws, the Navajo Nation courts "give primacy to the Navajo Nation Bill of Rights, interpreted from a Navajo perspective."[70]

Although the Navajo Nation courts have leeway to apply federal court interpretations of the U.S. Bill of Rights, the Navajo Nation Supreme Court declared that the Navajo courts must ensure that those federal court interpretations do not contravene the Diné Fundamental Laws: "In interpreting the Navajo Bill of Rights and the Indian Civil Rights Act, as with other statutes that contain ambiguous language, we first and foremost make sure that such [federal court] interpretation is consistent with the Fundamental Laws of the Diné."[71] The Supreme Court's Fundamental Laws test, which determines whether federal case law on individual rights should be adopted, ensures that Navajo Nation courts give primacy to construction of rights within the context of Navajo culture, language, spirituality, and Navajo ways of doing things.

Navajo Due Process

The Navajo Nation Supreme Court established rules on interpreting the due process provisions of the Navajo Nation Bill of Rights and the Indian Civil Rights Act in *Billie v. Abbott,*[72] a case involving a Utah official who had intercepted the federal tax returns of Navajo fathers living on the Navajo Nation to recoup funds the state had spent to support their children:

> Due process under the ICRA and the NBR must be interpreted in a way that will enhance Navajo culture and tradition. Navajo domestic relations, such as divorce or child support, is an area where Navajo traditions are the strongest. To enhance the Navajo culture, the Navajo courts must synthesize the principles of Navajo government and custom law. From this synthesis Navajo due process is formed.
>
> When Navajo sovereignty and cultural autonomy are at stake, the Navajo courts must have broad-based discretion in interpreting the due process clauses of the ICRA and the NBR, and the courts may apply Navajo due process in a way that protects civil liberties while preserving Navajo culture and self-government.[73]

The rules established in *Billie v. Abbott* can be used to interpret other provisions of the Navajo Nation Bill of Rights to guarantee consistent

considerations of Navajo culture, spirituality, language, sense of place, identity, and sovereignty while protecting individual liberties.

The Navajo court decisions that interpret the Navajo Nation Bill of Rights, particularly those involving the right to due process, demonstrate that inherent in the *hazhó´ógo* principle are notions of freedom, duty, responsibility, community, relationships, respect, and *k´é.* In *Atcitty v. District Court for the Judicial District of Window Rock,* the Supreme Court reiterated that due process must be "interpreted in light of the customs and traditions, or common law, of the Navajo people, and in a manner that will enhance Navajo culture, tradition and sovereignty,"[74] before explaining Navajo due process in light of the *k´é* principle (and by implication the *hazhó´ógo* principle):

> The Navajo principle of *k´e* is important to understanding Navajo due process. *K´e* frames the Navajo perception of moral right, and therefore this Court's interpretation of due process rights. *K´e* contemplates one's unique, reciprocal relationships to the community and the universe. [footnote 2]. It promotes respect, solidarity, compassion and cooperation so that people may live in *hozho,* or harmony. *K´e* stresses the duties and obligations of individuals relative to their community. The importance of *k´e* to maintaining social order cannot be overstated. In light of *k´e,* due process can be understood as a means to ensure that individuals who are living in a state of disorder or disharmony are brought back into the community so that order for the entire community can be reestablished.[75]

As the Court states, Navajo notions of due process are embedded in long-established customary practices and law ways. The Navajo Nation Supreme Court consistently declares that the foundation for Navajo due process lies in traditional Navajo principles, practices, and values that define fairness, and not in Anglo-American concepts of fairness and fundamental rights:

> The concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act or the Navajo Nation Bill of Rights. The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present and defend their positions. This custom is still followed today by the Navajo people in the resolution of disputes.

> When conflicts arise, involved parties will go to an elder statesman, a medicineman, or a well-respected member of the community for advice on the problem and to ask that person to speak with the one they see as the cause of the conflict. The advisor will warn the accused of the action being contemplated and give notice of the upcoming group gathering. At the gathering, all parties directly or indirectly involved will be allowed to speak, after which a collective decision will be made. This is Navajo customary due process and it is carried out with fairness and respect. The heart of Navajo due process, thus, is notice and an opportunity to present and defend a position.[76]

In *Atcitty,* Navajo due process defined within the context of community allowed the applicants for governmental benefits more rights than they would have received under federal court interpretations and applications of due process. The Supreme Court acknowledged that the Navajo Nation courts have applied American notions of due process, which are "concerned with equality in process and not of outcome. That is, everyone is 'equal' before the law, and so long as everyone has an opportunity to be heard, the outcome is irrelevant."[77] However, when due process is informed by traditional Navajo values underlying community, such as distributive justice, outcome becomes a relevant factor:

> The Petitioners urge this Court to follow federal law, particularly *Roth,* 408 U.S. 564, and hold that the Respondents, as mere applicants for governmental benefits, do not have a protectable property interest. However, we do not believe that the inquiry stops there. Traditional Navajo due process encompasses a wider zone of interest than general American due process. In cases concerning entitlement to governmental benefits, Navajo due process protections would extend to outcome, making it very relevant. The Navajo doctrine of distributive justice underlies this reasoning.[78]

When Navajo Nation courts interpret individual rights and freedoms within the context of community and values inherent in Navajo culture, the standard they apply to government infringement on fundamental rights may differ from the standard used by American courts under similar circumstances. In *Rough Rock Community School v. Navajo Nation,*[79] the Navajo Nation Supreme Court ruled that, because the Navajo Nation allows local community participation on local school boards and on setting education policy for Navajo children, any statute that "unreasonably

restricts that grass-roots participation" will be struck for violation of due process. This standard, the Court said, is a "mere reasonableness standard. The American standard is a more stringent standard. It requires a showing that not only is the statutory restriction reasonable, but also that it forwards some governmental interest."[80]

The Navajo Nation Supreme Court's use of the words *reasonableness* and *unreasonableness* creates confusion. While the Court says the Navajo standard is a "mere reasonableness standard," the actual test focuses on whether the alleged government infringement is unreasonable, not whether it is reasonable. In *Bennett v. Navajo Board of Election Supervisors,* the Supreme Court said "no person who is not otherwise disqualified by a reasonable law can be prohibited from holding public office," and then struck the statute for vagueness because it did not contain "ascertainable standards."[81] The statutes in both *Rough Rock* and *Bennett* were voided because they imposed "unreasonable" restrictions in light of Navajo customs and traditions. Thus, the appropriate test should be whether a statute imposes unreasonable restrictions as measured by Navajo customs and traditions.

The *hazhó´ógo* principle, when applied in the context of government conduct, requires the Navajo Nation and its officials, agencies, and departments to stay within the bounds of law so that individuals are not deprived of rights guaranteed by the Navajo Nation Bill of Rights. In *Mustach v. Navajo Board of Election Supervisors,*[82] the Navajo Nation Supreme Court faulted the election board, an executive branch agency, for departing from statutory procedures on providing a hearing, which the Court said denied the candidate for public office due process of law. In another case on the due process right to a hearing, the Supreme Court held that under the facts of the case (where the temporary restraining order had essentially decided the merits of the case) and pursuant to *k´é* rules (e.g., "talking things out," respect, notice), the trial court should have held a hearing on the motion to dissolve the temporary restraining order, which would have given the nonmoving party an opportunity to protect its contractual interests.[83] In a case excluding a non-Indian juvenile from the Navajo Nation for delinquency, the Navajo Nation Supreme Court ruled that children, like adults, have a right to Navajo due process that is informed by *k´é,* so that the trial court must hold an exclusion hearing to comply with Navajo due

process requirements.[84] Under *k´é* standards, the non-Indian child would be entitled to representation, to have community people speak on her behalf, to have an opportunity to speak, and in all respects have the same rights and treatment as a Navajo child under similar circumstances, including invoking the "talking things out" rule.

The Navajo Nation Supreme Court used the *k´é* principle to protect the due process right of access to the courts in *Fort Defiance Housing Corp. v. Lowe,*[85] a case involving a housing management company's attempt to evict tenants for delinquent rent. The tenants tried but could not post an appeal bond within five days of the trial court's judgment, a condition imposed by a forcible entry and detainer statute, before they could prosecute their appeal. After underscoring the domestic, cultural, and spiritual significance of the home to Navajos, the Court ruled that the due process right of access to the courts should not be denied to persons on the brink of foreclosure on technical grounds (i.e., posting of bond within five days of the trial court's judgment):

> The primary Navajo value that informs our due process analysis is *k´e.* In the context of Navajo due process, *k´e* ensures that individuals living in disharmony are brought back into right relationships and into the community to reestablish order. . . .
>
> Under Navajo due process this Court cannot take the separation of a Navajo person from his or her home lightly, nor can we simply adopt a strict non-Navajo statutory interpretation of the law. Navajo due process includes the concept of fundamental fairness. It is fundamentally unfair to impose harsh and difficult timelines and to penalize a person by taking away their home without some strict requirements to assure due process. After all, Navajo due process requires that Navajo courts be just and do justice. We take judicial notice of the fact that distances within the Navajo Nation are great, and transportation sometimes difficult. We do not do justice by expecting tenants to understand the unique eviction appellate requirement, to come into the court to see the judge, get the judge to set bond conditions, and then to comply with such conditions, all within five days of the order. (citations omitted)[86]

As the Court noted, the rural nature of the Navajo Nation and its lack of basic infrastructure can sometimes impede the Navajo Nation government's obligation to provide individuals with due process.

The Navajo Nation Supreme Court uses the *k´é* values of "talking things out" and consensus within the context of community to guarantee that litigants will have an opportunity to be heard at a meaningful time and in a meaningful way:

> The rights protected in the Navajo Due Process Clause are fundamental, but they are not absolute, limitless, or unrestricted. They are considered in light of the enjoyment and protection of rights by all Navajos. We require that everyone coming before our courts have an opportunity to be heard at a meaningful time and in a meaningful way. That is the right to one's day in court. Navajo common law fully recognized this right, and it was exercised in family, neighborhood, and council gatherings where everyone had the opportunity to speak, and decisions were reached through consensus.[87]

A party who has received adequate notice of hearing and its subject matter and allowed ample time to obtain counsel and prepare for hearing cannot claim denial of an opportunity to be heard at a "meaningful time."[88] Also, a party who has been "allowed an opportunity to raise any claim [and] an opportunity and procedure for doing so" cannot claim he was denied an opportunity to be heard in a "meaningful way."[89] These cases stand for the proposition that if an opportunity has been provided and the person does not take advantage of it, he cannot later argue that he was denied due process. The principle of *bił ch´íníyá* (failure to take advantage of an opportunity), which was discussed in chapter 3, would apply to these missed opportunities.

The "talking things out" rule requires that those affected by a dispute should be given notice of hearing and an opportunity to make their opinions known. In *Zuni v. Chinle Family Court,*[90] an Indian Child Welfare Act case, a foster parent appointed by a state court for a Navajo child in a state proceeding was not given notice that a Navajo family court had scheduled a hearing to decide if it should accept jurisdiction over the child in a parallel proceeding brought by the Navajo Nation in family court. The foster parent, an American Indian, but not Navajo, had petitioned the state court to terminate the Navajo mother's parental rights so she could adopt the child. The Navajo family court entered an order accepting jurisdiction over the child. The Navajo Nation Supreme Court reversed, holding that a fundamental Navajo principle, the "talking things out" rule, requires

"that persons directly affected by a decision should have the opportunity to be heard."[91] The foster parent's right to due process was denied because she was not given notice of the hearing scheduled in family court; therefore, the court could not obtain jurisdiction over the child.

The non-Navajo petitioner, the foster parent, was the child's caretaker, but the Navajo Nation, without giving her notice, had brought the action in Navajo family court to remove the child from her care. The Navajo Nation Supreme Court responded to this tactic through another fundamental Navajo value: "To not allow a person who has cared for a Navajo child pending the transfer of the case to be heard at a hearing where the child might be removed from her care, is not only not harmless, but is highly discourteous, if not outright disrespectful."[92] As the *Zuni* case shows, the Navajo value of respect works hand in hand with the "talking things out" rule.

In a case involving comity recognition of Colorado's workers' compensation scheme, the Navajo Nation Supreme Court declared that "while the Navajo Nation Council has the authority to change the law (in situations not involving vested civil rights), it cannot retroactively deprive a litigant of the property right to sue for injuries," which would be a violation of due process.[93] The Supreme Court subsequently reinforced this ruling in a case involving a question certified by the Federal District Court of Arizona. The federal district court asked whether a Navajo Nation Council resolution that recognized "workers' compensation to be the exclusive remedy for covered injuries to employees occurring in the workplace, applies retroactively to cases pending prior to its enactment."[94] The Supreme Court held that the resolution did not have the force of law because the Navajo Nation Council disobeyed laws and rules for enacting valid legislation (i.e., the Council must follow the limitations it places on itself) when it passed the resolution:

> It is our duty to enforce what the Council has enacted, but there are certain presumptions that apply. The first is that the Navajo Nation Council would not intend to violate the Navajo Nation Bill of Rights by enacting an ex post facto law, adopting a bill of attainder or denying an individual due process or equal protection of the law. There is an additional presumption that the Navajo Nation Council would not intend to retroactively overrule a court decision or prospectively dictate the conclusion of any case pending before the Navajo Nation courts.[95]

The Supreme Court again addressed the retrospective/prospective application of its opinions in *Fort Defiance Housing Corp. v. Allen.*[96] The Court declared that its opinions apply to all cases pending in the Navajo Nation courts and administrative hearing tribunals at the time the opinions are filed, with the exception that the Court can make an opinion prospective only if it does not violate Navajo due process as informed by *k´é.*[97]

Leadership Standards

Principle of *Baa Ní´jookąąh* (Humble Leader)

In 1989, in response to the near collapse of the Navajo Nation government during "the turmoil," the Navajo Nation Council passed comprehensive amendments to Title Two of the Navajo Nation Code and thereby established the legislative and executive branches of Navajo government, including their powers. A law in Title Two authorizes Navajo voters to approve pay raises for council delegates through local chapter referendums.[98] The Navajo Nation Council, working with its chief attorney, passed a resolution that first impaired the law that required voter approval and then gave each delegate a ten thousand-dollar pay raise.[99] Concerned voters immediately challenged the resolution as illegal in *Judy v. White.*[100] The Navajo Nation Supreme Court invalidated the resolution and admonished the Council for slipping below traditional Navajo standards of leadership:

> Our Navajo way dictates that we [comment on] the misapplication of Resolved Clause 7. To do this, we must give thought to the propriety of the Council's actions in attempting to bypass section 106(A) through Resolved Clause 7. [The trial court called the Council's action unjust enrichment.] While we do not pronounce such condemnation, we must nonetheless remind public officials [of] the duties and responsibilities incumbent on them as the People's leaders.
>
> As *Diné bi naat´aanii* [leaders of Navajo people] . . . we carry the burden of leadership and safeguarding the interests of our people. The Council understood its obligations under [section] 106(A) and attempted to comply by giving way to the chapter ratification process. When that failed, it attempted a bypass. Had the Council properly approached the chapters, they would not have failed, perhaps. But, at the very least, the members of the Council would have taken their concern for delegate welfare to the very people who voted them into office. That is the Navajo way. We refer to it in Navajo as "*Baa ní´ jookąąh*" or "you beg

> leave" of your people. That has been the Navajo way for centuries. . . . The ritual goes like this: you approach and ask. The act of approach suggests humility and equality. In the course of asking you speak of your status, your need for recompense, and you beg leave. While your request may not be honored, the act of approach and request strengthens ties and relations. The cornerstone of this custom is *k'é.*[101]

The public's concern was not the amount of money each delegate received as a salary increase. The Navajo people generally agree that the delegates deserve a higher salary. The ire came when the Navajo people realized that the Navajo Nation Council can simply set aside laws that give the people leverage to keep their leaders accountable. Modern Navajo laws that give the people some control over their leaders are not inconsistent with the traditional principle of participatory democracy. These laws, particularly because the Navajo Nation government operates like an American form of government, allow the people to keep their leaders honest and accountable. In fact, the doctrine of participatory democracy allows the Navajo people to occasionally look over the shoulders of their elected officials.

Principle of *Naat'áanii Ídlį Bee Bi'dilzį́įh* (Anointing a Leader)

Navajo tradition recommends that an individual selected to lead the people should undergo a traditional leadership initiation ceremony called *Naat'áanii ídlį bee bi'dilzį́įh,* which may be glossed as the "initiation of a leader" or "anointing a leader." The ceremony, which is partly an installation ceremony, is analogous to an oath of office. The principle on adherence to leadership initiation protocol is discussed in *In re Grievance of Wagner,*[102] where the Navajo Nation Supreme Court was asked to decide whether an elected official could serve as a delegate to the Navajo Nation Council and a New Mexico state senator concurrently.

In *Wagner,* the appellant was elected to the Navajo Nation Council while still serving a term as New Mexico state senator. Two statutes in the Navajo Nation Code prohibit simultaneous service as a council delegate and as an elected state official, except for school board or county elective office.[103] The appellant argued that the Diné Fundamental Laws allow him to serve the people in the two offices concurrently because that group of laws protects the right of Navajo voters to freely elect leaders of their

choice.[104] The Navajo Nation Supreme Court agreed with the appellant's reading of the applicable Diné Fundamental Laws on the people freely electing their leaders, but found that he could not possibly swear loyalty to the Navajo Nation and the state of New Mexico simultaneously:[105]

> In Navajo thinking, the selection of a person by voters is one of two requirements for a candidate to become a *naat'áanii.* That person must also accept the position, and, to accept, must take an oath to serve the laws of the sovereign government within whose system he or she will serve the people—"*naat'áanii ádee hadidziih.*" Only when a person accepts through an oath will all of the Navajo people say that a person has been properly installed as a *naat'áanii*—"*naat'áanii idlį́ bee bitooszį́į́.*" In other words, "*Diné binant'a'í bee bi'dooszį́į́d*" or "*Diné binaat'áanii bee bi'dooszį́į́d.*" . . . The oath is absolute, and allows no conflict in loyalty. . . . Under these principles, a person may not swear allegiance to obey and serve simultaneously the laws of the [Navajo] Nation and the State of New Mexico.[106]

The Supreme Court in *Wagner* recognized the traditional Navajo concepts associated with the "initiation of a leader" and applied them to a modern leadership issue involving concurrent service as a Navajo Nation Council delegate and a state senator. The Court's holding relies on the traditional belief that Navajo leaders should always be loyal to the Navajo people. The traditional loyalty requirement is integral to the traditional Navajo ceremony that is used to "initiate a leader."

Free Speech

In *Judy v. White,* the Navajo Nation Supreme Court introduced the traditional Navajo concept of "community free speech" (different from individual free speech), a right inherent in the Diné Life Way (*Diné bi'í'ool'įįł*) and central to the "community voice" concept:

> It is without question that in recognizing and giving formality to the Navajo People's fundamental principles and tenets of the *Diné bi'ó'ool'įįł,* or the Diné Life Way, the Council conceded that despite its statutory pronouncements, there exists a deeper, more profound system of governance. It is abhorrent to the Diné Life Way to violate the right of a community member to speak or to express his or her view or to challenge an injury, whether tangible or intangible. This right is protected to such an extent that the right to speak to an issue . . . belongs to the community as a whole, and any member of that community may speak.[107]

The principle of community free speech justified legal standing for the Navajo citizens challenging a resolution passed by the Navajo Nation Council in the *Judy* case. The Supreme Court has not addressed the extent to which the Navajo Nation courts should recognize fundamental "community" rights, but *Judy* shows that the Court acknowledges that such rights exist in Navajo culture. Whether the Navajo Nation courts should also recognize "community" due process, "community" equality, and other "community" rights will be addressed in due time. Moreover, because Navajo philosophy recognizes other "beings" besides human beings, the Navajo Nation Supreme Court will have to address at some point whether nonhuman "beings" have rights that require protection (e.g., do trees have standing and rights under Navajo common law?).

The Navajo Nation Supreme Court addressed the individual right to free speech in *Navajo Nation v. Crockett,*[108] a case that pitted three fired employees against their former employer, a Navajo Nation–owned business enterprise. The enterprise fired the employees after they copied confidential business records without authorization and disclosed them at a meeting of Navajo officials where they also charged enterprise officials with mismanagement and misconduct.[109] The terminated employees sued, alleging, among other theories, that their rights to free speech were violated.[110] The Court held that under the facts of the case, where the employees voiced concerns (similar to whistle-blowing) about job safety, undue Bureau of Indian Affairs interference in contracts, and misconduct and malfeasance by company officials, the employees' rights to free speech were indeed violated.[111] The Supreme Court declared that free speech rights are embedded in Navajo customs and traditions, particularly the *k´é* principle, and then explained how those customs and traditions regulate speech in Navajo society:

> [A]n individual has a fundamental right to express his or her mind by way of the spoken word and/or actions. As a matter of Navajo tradition and custom, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle.
>
> . . . .
>
> Furthermore, speech should be delivered with respect and honesty. This requirement arises from the concept of *k´e,* which is the "glue" that creates

> and binds relationships between people. To avoid disruptions of relationships, Navajo common law mandates that controversies and arguments be resolved by "talking things out." This process of "talking things out," called *hoozhoojigo,* allows each member of the group to cooperate and talk about how to resolve a problem.[112]

The *hazhó´ógo* principle (freedom with responsibility) substantiates the Supreme Court's assertion in the preceding quotation that, as a matter of Navajo common law, "people speak with caution and respect, choosing their words carefully to avoid harm to others." This statement also describes the "words are powerful" principle. Traditional Navajos believe that knowledge is power—this means that knowledge formed as thought, which is expressed through language (i.e., everyday spoken Navajo, or ceremonial language, or symbols), which in turn is expressed through words or symbols, can be used to coerce, control, destroy, manipulate, or persuade. The process through which the goal is achieved follows this pattern: knowledge precedes thought; thought precedes language; and language precedes words; thus, a word, as the ultimate manifestation of knowledge, is sacred and powerful. The beliefs that "words are sacred" and "words are powerful" (two separate but related concepts) apply especially during a ceremony.

The Navajo Nation Supreme Court applied the principle of "words are sacred" in *Kesoli v. Anderson Security Agency,*[113] an employment termination case involving a supervisor for a private security company who was fired for unprofessional conduct—shouting at his subordinates. The Court held that the supervisor's unprofessional conduct constituted "harassment" and thus satisfied the "just cause" standard for his termination under the Navajo Preference in Employment Act.[114] The supervisor's shouting equated to harassment under Navajo common law because "[w]ords are sacred and never frivolous in Navajo thinking, and are not to be used to offend or intimidate," particularly where the actor is a supervisor or a *naat´áanii* (leader).[115] The Court said a *naat´áanii* has a "responsibility to conduct himself thoughtfully and carefully with respect for his employees under the principle of *hazhó´ógo,* including utilizing *k´e*" to deal with subordinates.[116] The *Kesoli* case applied the *hazhó´ógo* principle in a nongovernmental context by casting the company official as

a *naat'áanii* and then applying the "words are sacred" principle to the supervisor's conduct. Like the police officer in *Navajo Nation v. Rodriguez,*[117] the supervisor should have used *k'é* norms when interacting with subordinates. In addition, because the Court took the *naat'áanii* principle from the political or governing context and applied it to a supervisor in a private employment dispute, it will have to address the extent to which the characteristics demanded of political leaders should be applied to supervisors in the private sector.

The "words are sacred" principle is also used to construe contract terms. In *Office of Navajo Labor Relations, ex rel. Bailon v. Central Consolidated School District No. 22,*[118] the state school district argued that the Navajo Nation waived its right to force it to grant employment preference to Navajo workers in a lease the parties signed that allowed the state to build a school on Navajo lands. The state also argued that it would be in violation of state antidiscrimination laws if it gave employment preference to Navajos. The Navajo Nation Supreme Court had to construe two provisions in the lease to decide the case. In the first provision, the state promised to give employment preference to Navajos without limitation. In the second provision, the state agreed to comply with Navajo law "as long as those [Navajo] laws, regulations, and ordinances do not conflict with state or federal law."[119] The Court used standard contract interpretation rules to hold that the first provision, as the more specific provision, controlled the second general provision. In its analysis, the Court stated that the standard contract interpretation rules were "consistent with the Navajo common law principle that every word is powerful, sacred, and never frivolous. Under this principle, a contracting party cannot give their word in one section and take it back in the next."[120] Thus, when the state gave its explicit promise to grant Navajos employment preference at the school, it could not take its promise back in a subsequent provision that stated general terms.

The Navajo Nation Supreme Court acknowledged that the Navajo people recognize some traditional limitations on the content of speech in *Navajo Nation v. Crockett* when it said certain statements "reciting oral traditions are prohibited during specific times of the year."[121] The most well-known prohibition on speech confines the traditional narratives on

the Hero Twins' journey to visit the Father and their subsequent battlefield exploits to the winter season (from the first frost to about the spring equinox). A prohibition on discussing the property of a deceased during the four-day mourning period is also a limitation on the content of speech. In more traditional days, a deceased person could only be spoken of in the past tense. Offensive and sacrilegious words are prohibited within the immediate vicinity or inside the ceremonial hogan during a ceremony.[122] The Supreme Court also declared that traditional control on speech requires "a disgruntled person [to] speak directly with the person's [the person causing the discomfort] relative about his or her concerns before seeking other avenues of redress with strangers."[123] The area of traditional limitations on speech is still in its nascent stage, but in Navajo culture the limitations are usually observed because "words are powerful." The Navajo Nation Supreme Court has not had much opportunity to analyze free speech issues so far.

Rights of Criminal Defendants

The Navajo Nation Supreme Court has been quite active utilizing the *hazhó'ógo* principle to protect the rights of defendants in criminal cases. The constituent elements of the modern Navajo criminal justice system, including criminal laws, police officers, jails, charging crimes in the name of the sovereign, and probation, were initially federally imposed and, therefore, foreign to traditional Navajo society. The Supreme Court briefly compared the modern Navajo criminal justice system with traditional Navajo ways of social control and dealing with offenses in *Navajo Nation v. Blake,* where the defendant challenged the trial court's *sua sponte* order that he pay seventy-six thousand dollars in restitution even though evidence was not admitted to substantiate the amount or the extent of the alleged damages:[124]

> Our modern criminal law, as it is found in the Navajo Nation Criminal Code, is foreign to traditional Navajo society. Navajos, traditionally, did not charge offenders with crimes in the name of the state or on behalf of the people. What are charged as offenses today were treated as personal injury or property damage matters, and of practical concern only to the parties, their relatives, and, if necessary, the clan matriarchs and patriarchs. These "offenses" were resolved

> using the traditional Navajo civil process of "talking things out." *Nalyeeh* (restitution) was often the preferred method to foster healing and conciliation among the participants and their relatives. The ultimate goal being to restore the parties and their families to *hozho* (harmony).[125]

Restitution (*nályéél*) was the preferred method of redressing offenses, including homicide, in traditional Navajo society. For example, although murder was infrequent among traditional Navajos, when it occurred, the victim's family and clan relatives sought restitution in the form of payment of tangible goods. The families and clan relatives of the victim and the offender, guided by leaders or elders, agreed upon the amount of payment in peacemaking by using the "talking things out" rule. Should the offender's family refuse to pay the restitution, the murderer was put to death, and if he should die without paying the restitution, his children were held responsible.[126] In traditional Navajo society, a "crime" was committed against the victim, the victim's family, and the victim's clan relatives. On the opposite side, the offender's misconduct implicated not only the offender, but also the offender's family and clan relatives, making them equally liable for the offender's misconduct. Relatives of both victim and offender have interests in the crime and its redress pursuant to the kinship system. In the traditional Navajo world, the clan as institution exercised legal authority over what are considered felony crimes today.

The Western form of criminal justice system that was imposed on the Navajo people removed the clan, families, and relatives from participation in the settlement process and replaced them with invisible entities: the state and its institutions. Furthermore, the offender assumed individual liability for his misconduct and the victim, as the injured party, mostly became irrelevant in the criminal process. The traditional roles that clan, family, and relatives played as enforcers of norms that dictated proper behavior were severely weakened under the Western-style Navajo criminal justice system. The Navajo Nation courts now struggle with a high criminal caseload.[127] Most of the criminal defendants are indigent, which requires the judiciary to meticulously safeguard their rights and the Navajo government to provide them with free counsel.

Although the Navajo Nation courts do not keep statistics on pleas, it is common knowledge that the rate for guilty pleas made during arraignment

in the Navajo trial courts is very high. Many guilty pleas are motivated by firmly established cultural norms that require honesty and accountability for misconduct. On the whole, the Navajo Nation courts do an exemplary job of keeping defendants apprised of their rights in the English and Navajo languages before they enter a plea:

> Throughout the United States, from 90 to 95% of all criminal convictions are by pleas of guilty. The same is true within the Navajo Nation, and there are also cultural reasons which motivate pleas of guilty. Given these facts, it is highly important that the district courts take great care when receiving pleas of guilty to make certain that criminal defendants know their rights, and what they may do, to be certain the plea is knowing and intelligent. Equally important is making certain pleas are voluntary and made without any threat or undue pressure. Finally, the district courts must be satisfied that there is a factual basis for a plea of guilty. (citation omitted)[128]

In *Navajo Nation v. Morgan,*[129] the defendant pled guilty to the charge of aggravated battery and was sentenced to a jail term. A month later, the defendant filed a motion to withdraw his guilty plea, which the trial court denied.[130] The defendant appealed, raising the issue of whether his guilty plea was knowingly and intelligently made.[131] In its analysis, the Navajo Nation Supreme Court emphasized that, pursuant to the *hazhó´ógo* principle, all "[w]aivers of rights by criminal defendants must be knowingly and intelligently made to be valid. . . . Under this analysis, courts and other governmental officials must proceed carefully and patiently, clearly explaining a defendant's rights before a waiver is considered valid."[132] The Supreme Court held that the defendant's guilty plea was not knowingly and intelligently made because the trial judge did not (1) explain the different pleas available to the defendant, (2) advise the defendant of the possible sentencing options, and (3) explain to the defendant the elements of the criminal charge and the factual basis for it.[133] Because the Navajo language is still widely spoken on the Navajo Nation, the Navajo trial courts must explain rights, charges, and the factual basis for charges in the Navajo and English languages. Translation of English legal terms and Latin legal terms (especially) into the Navajo language poses formidable challenges.

The difference between a guilty plea and a no contest plea became an issue in *Curley v. Navajo Nation,*[134] where the defendant pleaded no

contest to a criminal charge, but later sent a note from jail to the judge claiming that he "did not know what no contest meant" and he "was nervous and couldn't think straight" when he entered the plea. The Navajo Nation Supreme Court examined the defendant's note to find "meritorious second thoughts" and "sufficient doubt about whether [defendant's] plea was genuinely knowing or intelligent."[135] In *Curley,* the trial court violated the *hazhó'ógo* principle because it did not explain to the defendant the difference between a guilty plea and a no contest plea, and he was not advised that both pleas carried the same sentence.[136] The Supreme Court reinforced its holding by stating that "ordinary people are not likely to know the difference between a plea of 'guilty' and a plea of 'no contest'" and defendants "have a right to know what their pleas mean, [so] Judges should go through the complaint with [defendants] and discuss the elements of the crime and the facts that support it."[137]

In *Eriacho v. Ramah District Court,*[138] the defendant went to the prosecutor's office and signed a form waiving her right to arraignment, which she filed with the trial court. Several months later, she requested a jury trial, but the trial court denied her request because she had waived her right to a jury trial through inaction, that is, she had not requested a jury trial within fifteen days of the date she filed the waiver of arraignment form with the trial court.[139] The arraignment waiver form she signed advised her to demand a jury trial within fifteen days of her waiver but she did not pursue that right.[140] Although a litigant can waive the right to jury trial through inaction, the Navajo Nation courts still meticulously protect that right because it fits perfectly within the traditional Diné concept of community and is a fundamental right protected by the Navajo Nation Bill of Rights.

Jury Trial

The Navajo concept of community is the traditional foundation for the modern right to a jury trial. As the *Eriacho* decision teaches, any alleged limitation on the right to jury trial undergoes heightened scrutiny. The Court in *Eriacho* described the jury as "a modern manifestation of the Navajo principle of participatory democracy in which the community talks out disputes and makes a collective decision. . . . As a deeply-seeded

[*sic*] part of Navajo collective identity, we construe restrictions on the right to a jury trial narrowly."[141] The *Eriacho, Duncan,*[142] and *Downey*[143] decisions suggest that the traditional concept of community, as expressed through collective participation and decision making, significantly influences the Court's thinking on the right to jury trial, both criminal and civil, and possibly other rights listed in the Navajo Nation Bill of Rights.

The Navajo Nation Supreme Court in *Eriacho* announced that the *hazhó'ógo* principle (glossed here as "doing things right") requires meaningful notice and an explanation of rights so a defendant has enough understanding to make a knowing and intelligent decision to waive a right or not.[144] The prosecutor's failure to orally explain the consequences of the defendant's waiver violated the *hazhó'ógo* principle in that case, leaving the Court no alternative but to order the trial court to grant the defendant a jury trial:[145]

> As *hazhó'ógo* requires meaningful notice and explanation of a right before a waiver of that right is effective, it requires, at a bare minimum, that the Nation give notice that the right to a jury trial may be waived by inaction. For notice to be meaningful, and therefore a waiver to be effective, the Navajo government must explain to the defendant that the jury trial right is not absolute, as it may be waived by doing nothing within a certain time. Absent this explanation, the information received by a defendant is incomplete, as it appears the right is automatic and perpetual, like the federal constitutional right. Without this information, the waiver by inaction is not truly knowing and intelligent, and would violate the defendant's right to due process. As the description of the right to jury trial in the waiver of arraignment form does not include a statement that the right must be exercised within fifteen days, Eriacho's failure to request it within that time was not a knowing and intelligent waiver. (footnotes omitted)[146]

Miranda Rights

In *Navajo Nation v. Rodriguez,*[147] a police officer gave the defendant an "advice of rights form" that listed rights similar to Miranda rights for him to read. The rights were written in English and the police officer did not explain each right to the defendant in either English or Navajo.[148] The police officer also told the defendant that he could spend sixty years in federal prison and pay a fine of a million and half dollars for allegedly

shooting in a residential area.[149] The defendant signed a waiver on the bottom of the advice of rights form and then wrote a lengthy confession that essentially implicated him in the shooting.[150] The advice of rights form with the signed waiver and the confession were admitted into evidence and used to convict the defendant. On appeal, the defendant alleged that his written confession was coerced, so it should have been suppressed, and the advice of rights form, without further verbal explanation, was insufficient to waive his right against self-incrimination.[151]

Traditional Navajos abhor the use of coercion in dispute resolution and in everyday life. The Navajo Nation Supreme Court in *Rodriguez* used the traditional aversion to coercion to establish a rule that a person in police custody cannot be coerced into waiving his right against self-incrimination:

> [O]thers may "talk" about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt. . . . Our Navajo Bill of Rights, as informed by the Navajo value of individual freedom, prohibits coerced confessions. We [apply] these principles to a person in police custody. . . . The parties agree that Rodriguez was coerced, and we find that any degree of coercion is in violation of the Navajo Bill of Rights.[152]

The Navajo value of individual freedom that the Supreme Court mentioned pertains to traditional concepts of free speech. Because a person's freedom to speak encounters few limitations, a person cannot be coerced or forced into speaking, including admitting wrongdoing. In this sense, using coercion to force a person to speak contravenes the traditional Navajo principle of freedom of speech.

The Navajo Nation Supreme Court in *Rodriguez* applied the *hazhó´ógo* principle to the question of whether the defendant had waived his right against self-incrimination by signing a waiver on an advice of rights form. The Court first accepted the minimum requirements of Miranda rights as consistent with Navajo values.[153] The Court then described *hazhó´ógo* as "a fundamental tenet informing us how we must approach each other as individuals," and, while interacting with one another, "patience and respect are due."[154]

The *hazhó´ógo* principle normally guides human interaction on a daily basis, and that same reasoning applies to a Navajo government official's

interaction with a Navajo Nation citizen. For example, in *Rodriguez,* the Supreme Court pronounced that "[m]odern court procedures and our other adopted ways are all intended to be conducted with *hazhó´ógo* in mind."[155] In other words, government officials should interact with citizens using *k´é* values that include kindness, friendliness, helpfulness, and respect:

> The relationship between the Navajo Nation government and its individual citizens requires the same level of respect as the relationship between one person to another. In our Navajo way of thinking we must communicate clearly and concisely to each other so that we may understand the meaning of our words and the effect of our actions based on those words. The responsibility of the government is even stronger when a fundamental right, such as the right against self-incrimination, is involved.[156]

The police officer did not heed the *hazhó´ógo* principle when he obtained the defendant's confession. First, the officer did not verbally explain the rights listed on the advice of rights form so the defendant could understand them; and second, the officer forced the defendant to confess by threatening him. According to the Supreme Court, the police officer's conduct did not conform to "the ways that people should interact" and "a police badge cannot eliminate an officer's duty to act towards others in compliance with the principles of *hazhó´ógo*."[157]

Finally, the Supreme Court set forth guidelines that should keep police officers within the acceptable range of *hazhó´ógo* for obtaining valid waivers from criminal defendants:

> We therefore hold that the police, and other law enforcement entities and agencies, must provide a form for the person in custody to show their voluntary waiver. They must also explain the rights on the form sufficiently for the person in custody to understand them. Merely providing a written English language form is not enough. The sufficiency of the explanation in a Navajo setting means, at a minimum, that the rights be explained in Navajo if the police officer or other interviewer has reason to know the person speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so that the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence. (footnote omitted)[158]

The cases discussed in this section show that the Navajo Nation courts have gone beyond ordinary standards to protect the rights of criminal defendants who traverse the Navajo Nation criminal justice system. In their efforts to protect the rights of criminal defendants, the Navajo Nation courts have frequently granted defendants more rights under the Navajo Nation Bill of Rights than they would receive under comparable provisions of the U.S. Bill of Rights. Because many criminal defendants are indigent, the Navajo Nation courts appoint free counsel through the Navajo Nation Public Defender's Office or through the Navajo Nation Bar Association.[159] Every active member of the bar association has a duty to provide free legal services when called upon. The federal Indian Civil Rights Act does not require tribes to provide criminal defendants with free counsel; it only requires criminal defendants, including indigent defendants, to have counsel at their own expense.[160] The Navajo Nation does more than required by federal law to make sure criminal defendants are treated justly.

K´é as the Basis for Equitable Rights

Principle of Ch´íhonít´i´

The Navajo Nation Supreme Court illuminated a traditional equity principle in *Navajo Nation v. Arviso,*[161] although the Court does not call it an "equity" principle in its opinion. In *Arviso,* the son (Arviso) of lessees of Navajo Nation land for business purposes took over his parents' expired lease after their deaths.[162] Arviso attempted a lease renewal with the Bureau of Indian Affairs to no avail, and shortly thereafter, the Navajo Nation brought an action for unpaid rent plus interest and eviction against him and his brother.[163] The trial court used the traditional principle of *ch´íhonít´i´* to construe a provision in the lease in Arviso's favor by holding that he had rights to the land as a "successor" holding an "equitable lease," and dismissed the Navajo Nation's suit.[164] On appeal, the Navajo Nation Supreme Court held that Arviso was not a successor under the lease, but an entrant on the premises without the Navajo Nation's consent; therefore, the Nation had a right to evict him, but the Nation had to first consider his defenses.[165]

The trial court recognized Arviso's interest in the property using the Navajo custom known as *ch´íhonít´i´*. This term, as the Supreme Court stated, literally means "The Way Out";[166] it could also be glossed as "a way out." Traditionalists believe that a person's thoughts, creativity, personality, words, songs, or prayers could stagnate inside anything the person creates or undertakes if "a way out" is not provided.[167] The underlying cultural rationale suggests that "a way out" guarantees a person unrestrained freedom of thought and movement in pursuit of new undertakings and goals. The "way out" custom ensures continuity, discovery, creativeness, and progress in the Navajo world. In the legal context, the "way out" custom would allow for application of the law tempered by considerations of fairness and justice that come from traditional Navajo ways of doing things.

The trial court refused to evict Arviso, stating that the Navajo Nation, guided by *k´é* values, "should have been flexible enough to seek a solution ('The Way Out,' or *ch´íhonít´i´*), including negotiating a new lease."[168] The Navajo Nation had not demanded rent or pursued other remedies, including evicting the original lessees from the premises, for more than twenty-seven years, and these facts, the trial court said, supported negotiation of a new lease pursuant to the *ch´íhonít´i´* principle.[169] The Supreme Court, however, dismissed the argument that either the *k´é* principle or "the way out" principle supported granting Arviso an equitable lease. The Court said the Navajo people had given their government representatives authority to enact laws that regulate leasing of lands for business purposes on the Navajo Nation and those leasing laws controlled its decision in the case:

> Over the years Navajo laws have been enacted to regulate the use of Navajo lands for business purposes. The Chapters are now adopting land use plans. The decision of the people through their local and national governments on how to use particular tracts of land is premised upon the "importance of *k´é* to maintaining social order." A land use decision by the people through their governments is the balance struck between the individual land user and the needs and desires of the community. As this Court said, . . . "this is a part of the broader Navajo traditional principle of freedom with responsibility. An individual has much freedom in Navajo society, but that freedom must be exercised

> with respect for family, clan relatives, and the community at large." The cooperation expected between individuals and the community is also expressed in the Nation's legislative recognition of the place and application of the fundamental laws of the people, where the Navajo Nation Council recognized that *Diné bi beenahaz´áanii* teaches that the rights and freedoms of the individual are not the only considerations. The rights and freedoms of the people as a whole must also be recognized. (citations omitted)[170]

Statutory laws and the entire regulatory scheme that regulate land use on the Navajo Nation prevailed over Navajo common law (*k´é* and *ch´íhonít´i´* principles) in *Arviso.* The controlling factor, apparently, was that the tract was leased for business purposes. Leases of land for business use must satisfy numerous Navajo and federal rules and regulations and the Bureau of Indian Affairs must give final approval.

Another factor used to defeat Navajo common law is the Supreme Court's distinction between land used for a home and land used for business purposes. Navajo common law affords greater protection for land with a home on it than land used for business purposes, especially if the business lease has expired. According to the Navajo Nation Supreme Court, Arviso

> has no right to occupy . . . Navajo property for business purposes without being a party to a lease. . . . Unlike a residential land situation, in which a home "in the context of Navajo custom and tradition is more than just a dwelling place," there is no comparable interest held by individuals using land owned by the collective Navajo people for commercial purposes. The lower court's decision that [Arviso] possessed an "equitable lease" is essentially a determination that [Arviso] has gained a right of possession comparable to "title" to a tract of land. (citation omitted)[171]

Although the "way out" principle may not save an expired lease for business purposes, it should allow at least an equitable lease for residential purposes. It is also possible that the "way out" principle can be applied to breaches of individual contracts and business contracts (e.g., repossession of consumer goods bought on credit). The *Arviso* case demonstrates that Navajo customary ways contain equitable principles that can be extracted and applied to modern legal transactions.

Although the equitable "way out" principle is not mentioned in the case that follows, it would provide the same remedy, a deadline extension,

as the legal doctrine of equitable tolling.[172] The Navajo Nation Supreme Court has permitted the Navajo Nation Labor Commission great leeway in extending statutory time limits for filing employee complaints using the doctrine of equitable tolling: "This Court [recognizes] the doctrine of equitable tolling in NPEA [Navajo Preference in Employment Act] cases, allowing, and in some circumstances requiring, the commission to extend the one year time period in [15 N.N.C.] section 610(B)(6) when circumstances beyond the employee's control prevent him or her from complying with the time requirement."[173] The *k´é* doctrine can produce equitable decisions that conform to Navajo concepts of fairness and justice in modern litigation.

One of the Navajo Nation Supreme Court's best discussions of the *k´é* doctrine, and one where traditional Navajo concepts of justice controlled the decision, is found in *Ben v. Burbank,*[174] a case involving breach of an oral contract between two clan relatives. The parties, both traditional Navajos, made their oral contract using customary ways. Burbank satisfied his part of the bargain and waited, as tradition usually allows, for his relative to do her part (pay him). When a reasonable time, measured by tradition, passed and payment was not forthcoming, he sent her invoices. Finally, positive of a breach, Burbank obtained a small-claims judgment.

Ben appealed and argued that the statute of limitations should have barred Burbank's action. Burbank then asked the Supreme Court to use the *k´é* doctrine and not the statute of limitations to resolve the matter. The Court agreed that the *k´é* doctrine would be the best option to repair the parties' damaged clan relationship and restore them to being good relatives:

> Navajo common law is the first law of our courts and we will abide by it whenever possible. Therefore, we agree with Appellee [nonbreaching party] that the Navajo way of *k´e* is the prevailing law to be applied. *K´e* recognizes "your relations to everything in the universe," in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply-felt emotion which is learned from childhood. To maintain good relations and respect one another, Navajos must abide by this principle of *k´e.*[175]

The *Burbank* case proposes that the *k´é, hózhǫ́, k´éí,* and universal relations doctrines are all parts of the same whole. In the Navajo world, privileges, rights, duties, and mutual obligations must be identified, relationships and kinship unity must be maintained, and the universe's multifarious elements must remain in harmony. The *k´éí* doctrine, discussed next, helps the Navajo people achieve these goals.

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K´éí (Descent, Clanship, and Kinship)

K´éí in Navajo Culture

The *k´é* doctrine and the *k´éí* doctrine are closely related and frequently work in unison to promote and maintain order and *hózhǫ́* in Navajo domestic affairs. While the *k´éí* doctrine, like the *k´é* doctrine, can assume universal proportions,[1] it is confined in this chapter to the Navajo clan system that regulates Navajo domestic life. The *k´éí* doctrine and its emanating rules regulate domestic matters by defining Navajo identity; determining clan relatives, those a Navajo calls *shik´éí;* illuminating responsibilities, duties, and mutual obligations among clan relatives; and establishing the bounds of proper behavior among unrelated Navajos and with non-Navajos in general.

Navajos understand *k´é* and *k´éí* as closely related, but each has distinct features that establish the framework for transactions that a Navajo engages with clan relatives and those who are not relatives. *K´é* applies in the course of relationships, including transactions, with both clan relatives and those who are not relatives. *K´éí* refers to relationships only between clan relatives. The transactional framework relies on *k´é* values (positive attributes) to regulate the giving and sharing, usually of sustenance and emotional and spiritual support, among clan relatives (kinship cohesiveness), and the exchange and reciprocity, usually of goods, a Navajo engages with those who are not relatives, including non-Navajos.

Transactions among clan relatives and among unrelated Navajos generally proceed along certain lines. When Navajos give unilaterally, they give or share with their clan relatives as a means of sustenance and spiritual and emotional support without expecting reciprocity, because the giving

or sharing is done as an expression of love or to help a relative in need (*k´é* values). This can be categorized as an expression of family or clan cohesiveness. In contrast, transactions involving unrelated Navajos rely more on bargains and agreements, with expectations of reciprocity, than as expressions of family or clan unity. In other words, a Navajo will give something to another Navajo who is outside his kinship network in exchange for something of equal value; however, according to customary ways, the reciprocity need not be performed immediately.

The giving and sharing among clan kin and the exchange and reciprocity between unrelated Navajos comprise the normative precepts that drive transactions among the Navajo people but, like the *k´éí* rules that use clans to define Navajo identity, the precepts are not impervious to mainstream American pressures. For example, some modern practitioners of ceremonies have set rates for services (similar to medical doctors) and give out receipts for insurance and tax purposes. The practitioners from more traditional days did not use fee schedules and left the amount of payment for services to the patient and family, because they believed they were simply human conduits through which the Holy Beings did their spiritual and healing work. In other words, the old-time practitioners complied with traditional norms that guided their profession and were less influenced by mainstream American culture.

K´éí *Determines Relatives*

The Navajo people use a sophisticated, matrilineal-based clan system to trace lineage through their mothers and to identify biological and nonbiological clan relatives. Specific kinship terms are used to distinguish between older and younger brothers and sisters, between maternal and paternal grandparents, between maternal and paternal aunts and uncles, and between male and female cousins on the mother's side and those on the father's side. The Navajo kinship system also creates relatives through related clans or linked clans. Clan A can be related to clan B, so that Navajos can identify nonbiological relatives through linked clans. Some linked clans are traceable to a single clan, which suggests splitting of an earlier clan.

Furthermore, clans can be related through adoption by the same clan. For example, two girls, one representing the Water-Flows-Together Clan

and the other representing the Mexican Clan, were adopted by the Tséikehé Clan ("Two Rocks Sit People"). The adoption created a sibling relationship of the Water-Flows-Together Clan and the Mexican Clan and the women of the adopting clan became their mothers. Navajos related through linked clans use the same kinship terms that biological clan relatives use to address each other. The kinship system, in reality, keeps the Navajo people united and the social structure intact and meaningful.

The Navajo kinship system creates its own set of problems for non-Navajos engaged in litigation, especially during in-court testimony. Navajo kinship terminology elicited during testimony often baffles non-Indian state and federal judges. For example, a Navajo will refer to his or her mother's sister's children (aunt's children) as "my brothers and sisters (cousins to non-Indians)," which are the same terms used to identify biological siblings. Legal practitioners should understand the kinship structure and clarify Navajo kinship terms for the state or federal court through an appendix attached to a motion or an exhibit or similar illustration.

The Navajo clan system generates more than thirty kinship terms and gives a Navajo thousands of relatives, many of whom he or she will never meet during his or her lifetime. The following illustration uses only the *matrilineal clan* to show the complexity of the Navajo clan system and the role kinship terminology plays to distinguish, identify, and address nonbiological relatives within the born-of clan (matrilineal clan). This illustration does not (and is not intended to) cover every kinship term used to identify nonbiological relatives within the matrilineal clan. Here are some kinship terms that a Navajo ego will use to address nonbiological members of his or her matrilineal clan: (1) members that are of ego's generation are "brother" and "sister"; the appropriate terms for younger and older siblings are used; (2) females of ego's mother's generation are "mother," or "older sister" if older than ego, or "younger sister" if younger than ego; (3) males of ego's mother's generation are "older brother" if older than ego, or "younger brother" if younger than ego; a female ego can also call a male of her mother's generation "my son"; (4) females of ego's grandmother's generation are "mother" or "older sister"; (5) males of ego's grandmother's generation are "older brother"; a female ego can also call a male of her grandmother's generation "my son"; (6) a male ego will

call the female members of his children's generation "mother" or "younger sister" and the male members "younger brother" or "nephew"; and (7) a female ego will call the male members of her children's generation "son" and the female members "daughter," but she can also call them "younger brother" and "younger sister," respectively. This system of kinship terminology and identification of nonbiological relatives increases in complexity when ego's father's clan, maternal grandfather's clan, and paternal grandfather's clan are added to the kinship matrix.

The Four Basic Clans

To simplify things, only the four basic clans that compose the Diné identity paradigm or the four clans that Navajos use to identify themselves and their relatives will be covered. A Navajo will call individuals who claim one or more of his four basic clans *shik´éí* (my relatives). Moreover, the four basic clans are frequently the ones needed to address legal issues in the area of Navajo domestic relations in the Navajo Nation courts. Assuming that a Navajo is "full-blood,"[2] his or her four basic clans are the mother's clan (matrilineal clan or born-of clan), the father's clan (born-for clan), the maternal grandfather's clan, and the paternal grandfather's clan. Although these four clans are important for purposes of individual identity and identification of relatives, the matrilineal clan and the born-for clan take precedence because of their close proximity to a Navajo (i.e., the parents) under the *k´éí* system. In comparison, Americans use a bilateral system with a paternal emphasis.

Under the matrilineal clan system, the mother's clan is the closest kin category to a Navajo because mother and child claim the same clan; next is the father's clan. Lineage is not traced through the father's clan because the matrilineal system traces descent through the female line. The father's clan is important to individual identity, particularly when used in conjunction with the matrilineal clan and the maternal grandfather and paternal grandfather clans.

The father's clan is also used to identify kin from the father's clan category. The males of the born-for clan are usually called "father" (*shizhé´é,* a general reference, or *shizhé´éyázhí,* a reference to father's brother), and the females are usually called "mother" (*shimá,* a general reference) or

"aunt" (*shimáyázhí,* a reference to father's sister), and on some occasions both father's brother and sister are called *shibízhí* (a general reference to father's siblings). A Navajo may occasionally receive gifts and contributions to the costs of major ceremonies or functions from his born-for clan relatives. A father who is a medicine man may select one or more of his children as his apprentice.

All individuals, young or old, who claim the paternal grandfather and maternal grandfather clans are relatives and are addressed as grandmother or grandfather without reference to age or generation, although kinship terminology distinguishes among each maternal and paternal grandparent. A Navajo uses kinship terms to distinguish among biological grandparents and applies the same terms to nonbiological relatives in the paternal and maternal grandfather clan categories: maternal grandfather is *shicheii;* maternal grandmother is *shimásání;* paternal grandfather is *shinálí (hastiin);* and paternal grandmother is *shinálí (asdzáán).* Both paternal grandparents are called *shinálí;* the addition of the terms *hastiin* (gentleman) and *asdzáán* (lady) distinguishes grandfather from grandmother, respectively.

The following shows application of kinship terms to nonbiological relatives: A person who is not a biological grandfather but is in the maternal grandfather clan category will be addressed as *shicheii,* the same term used for a biological maternal grandfather. The same format holds true for the other grandparent categories (paternal grandfather and paternal grandmother) and other relative categories (mother, father, aunt, uncle, brother, sister, etc.). The paternal grandfather and maternal grandfather clans establish grandparent/grandchild relationships, but the relationships are considered further in proximity than those of the matrilineal and born-for clans.

A Navajo's biological grandparents, particularly the maternal grandmother and maternal grandfather, because of traditional matrilocal residence, were the teachers of Navajo etiquette, history, stories, creation and journey narratives, and spirituality. Traditionally, biological grandmothers and grandfathers were responsible for transmitting culture (enculturation) to their grandchildren's generation. Transmission of culture from the grandparent generation to the grandchild generation has weakened, because more than half of the Navajo youth cannot carry on a conversation

in the Navajo language today. The generational communication gap has contributed to loss of traditional knowledge, particularly in the areas of ceremonialism and herbalism. In the past, a grandfather who was a medicine man usually made a grandson his apprentice.

Mother and child have the same clan under the Navajo clan system. Obviously, if the mother is non-Navajo, the child would not have a Navajo matrilineal clan (but may have a clan of another Indian tribe), although he would have a "born-for clan" through the Navajo father. In other words, the father's matrilineal clan is his child's "born-for clan." Under a traditional analysis, a person who has a Navajo matrilineal clan has a Navajo identity even though that person possesses a negligible amount of Navajo blood. This scenario illustrates the inherent contradiction between the traditional *k´éí* method of determining Navajo identity and the blood-quantum requirement that is now the Navajo Nation standard for determining Navajo identity and eligibility for enrollment, which requires one-fourth degree Navajo blood.[3] The Bureau of Indian Affairs and the Indian Health Services also use the blood-quantum requirement, generally one-fourth degree of Indian blood of a federally recognized tribe, to provide services to eligible American Indians.

If ego has a non-Navajo mother and a full-blood Navajo father, then ego's "born-for clan" (father's clan) is ego's link to Navajo identity, but under the clan system, the Navajo clan and identity will disappear with ego's grandchildren's generation if ego's children marry non-Navajos. Furthermore, ego's grandchildren will have one-eighth degree of Navajo blood, which would make them ineligible for enrollment in the Navajo Nation under the current standard requiring one-fourth degree of Navajo blood. A person with less than one-fourth degree of Navajo blood and the rest non-Navajo blood, but who has a Navajo matrilineal clan, will still be Diné under *k´éí* rules. The person, however, would not be eligible for enrollment in the Navajo Nation under current Navajo Nation law and that raises an important legal question: does a Navajo Nation court have criminal jurisdiction over this kind of person in light of the Ninth Circuit's decision that a tribal court has criminal jurisdiction only over a nonmember Indian who is "enrolled" or a "de facto" member of another Indian nation, but not over an Indian who is not enrolled in a tribe?[4]

Here is a likely scenario. Ego has less than one-fourth Navajo blood, has a Navajo matrilineal clan (or even a Navajo born-for clan), speaks the Navajo language fluently, and was raised and lives on the Navajo Nation, but is not enrolled in any Indian tribe. Would the Navajo Nation courts have criminal jurisdiction over ego as a "de facto" member of the Navajo Nation? This issue will surely arise in the Navajo Nation courts in the future because more and more Navajos are marrying outside the tribe and making their homes on the Navajo Nation. Congress should enact legislation granting the Navajo Nation courts criminal jurisdiction over all people who violate Navajo Nation criminal laws. This solution will go a long ways toward eliminating some of the complex jurisdictional morass in Navajo country and make the Navajo Nation safer for everyone.

It should also be noted that Navajo law declares that a person cannot become a member of the Navajo Nation by adoption:

> A. No Navajo law or custom has ever existed or exists now, by which anyone can ever become a Navajo, either by adoption, or otherwise, except by birth.
> B. All those individuals who claim to be a member of the Navajo Nation by adoption are declared to be in no possible way an adopted or honorary member of the Navajo People.[5]

This law obviously ignores the heterogeneity of the Navajo people. Several Navajo clans trace their roots to members of surrounding Indian tribes (e.g., Pueblos, Zuni, Jemez, Hopi, Ute, and Apache and even Mexican) who were adopted by Navajos. The statement that no Navajo custom has ever existed that permitted non-Navajos to be adopted into the Navajo Nation is patently false as it applies to members of other Indian tribes and Mexicans. The law, however, appears to have been passed to prevent Anglos from declaring membership in the Navajo Nation through alleged adoption or honorary status, practices made popular by western movies.

The foregoing discussion presents two methods of defining Navajo identity—the traditional Diné clan system and the blood-quantum standard that the Navajo Nation government adopted from the federal Bureau of Indian Affairs. Because the Bureau of Indian Affairs uses the blood-quantum test to determine an individual Indian's eligibility for federal services, Navajo Nation officials ignore the *k´éí* rules in determining Diné

identity. In lieu of the traditional rules, the Navajo Nation Council enacted a law that requires a person to possess at least one-fourth degree of Navajo blood to be eligible for membership in the Navajo Nation. Although a person with less than one-fourth degree of Navajo blood can still self-identify as Diné, that person is neither eligible for enrollment in the Navajo Nation nor eligible for services provided to enrolled Navajos, including health care, land assignment, scholarships, and other services provided by the federal government and the Navajo Nation.

Diné identity through the clan system is found in the Navajo Creation Scripture and Journey Narratives. According to the part called *Diné ánályaa* ("The Re-creation of the Diné"), Changing Woman rubbed dirt and skin wastes off the area between her breasts, back, and from under each arm to the waist to create four pairs of male and female Diné (each pair is designated brother and sister) who would eventually become the bearers of the modern original four clans. The pairs were then used to instruct the Diné on proper ways of marriage, including the traditional Navajo wedding ceremony. The "Re-creation of the Diné" is so called because the Navajo Creation Scripture and Journey Narratives describes an earlier creation of human beings at a sacred place called Hayoołkáál Bee Hooghan (Hogan made of Dawn). The "re-creation" is the second creation of the Diné and the four sets of Navajos that Changing Woman created became the originators of the four basic clans.

What do the preceding discussions of Navajo identity have to do with the Diné clan system? First, the customs (or rules) that determine Navajo identity emanate from *k´éí.* Second, it is clear that long-standing Navajo customs have been pushed to the periphery in favor of a foreign standard that exaggerates the significance of Navajo blood quantum to a people who have a history of biological heterogeneity. Third, by using a non-Navajo standard for determining Navajo identity, individuals who would be eligible for membership in the Navajo Nation under the *k´éí* rules are permanently excluded for failure to meet the Navajo blood-quantum standard. Finally, the federal degree of Indian blood standard exemplifies use of a non-Indian standard to regulate internal and core Navajo affairs, which is not consistent with the spirit of the 2002 Navajo Fundamental Laws.

Source of Navajo Clan System

According to Navajo traditionalists, the source of the modern Navajo clan system (*k´éí*) is the episode called the "Re-creation of the Diné." Changing Woman did not allocate clan names to the four pairs of Diné upon their creation, but instead bestowed on each pair a distinctive scepter—a White Shell Scepter, a Turquoise Scepter, an Abalone Shell Scepter, and a Black Jet Scepter—before sending the Diné on a homeward journey to their lands between the Four Sacred Mountains. The people were some distance from the San Francisco Peaks (the sacred West Mountain) when they ran out of water. Each scepter-bearer then attempted to locate potable water; the very act would earn them clan names. The first carrier struck a spring bed with the Abalone Shell Scepter and bitter tasting water formed, so this pair became the Bitter Water Clan; the second carrier struck a different place with the White Shell Scepter and salty water formed, so this pair became the Salt Water Clan; the third carrier struck a third site with the Black Jet Scepter and muddy water formed, so this pair became the Mud Clan; and finally, the last carrier poked another place with the Turquoise Scepter and out gushed clear spring water, so this pair became the Near Water Clan.[6]

The "Re-creation of the Diné" episode is the source of the Navajo clan system, which in turn is the foundation of traditional Navajo domestic relations. In the overall scheme of things, the *k´éí* doctrine imposes order through relationships (kin and non-kin) in the Navajo social world. Changing Woman, as the creator of the four pairs of Diné, established matrilineage, the foundational core of the Navajo clan system. Because the original pairs of Diné were created by Changing Woman, a female, the Navajo people are matrilineal. Changing Woman is the principal, primordial "mother" of the Navajo people and is called *shimá* (my mother).

K´éí Informs Traditional Domestic Matters

The *k´éí* doctrine not only determines who is a relative, but also regulates duties, responsibilities, and reciprocity among relatives and nonrelatives, and controls domestic matters, including marriage, inheritance, and property ownership. The *k´éí* doctrine is very important to the Navajo social

world. *K´éí,* as the kinship system, contains all the Navajo clans (today more than a hundred) and keeps the clans functioning through daily interactions among clan relatives and through matters that allow clan relatives to work together on large projects such as building a large structure or contributing money, food, and labor to hold a major ceremony. In domestic relations, a key role of the *k´éí* doctrine is controlling marriage choices among the Navajo people.

Traditional Marriage

An important rule that originates from the *k´éí* doctrine and one that helps maintain *k´é, hózhǫ́,* and order in the Navajo social world is the customary prohibition on marriage between clan-related individuals as determined by the basic clan paradigm (the four basic clans) and system of linked clans (splitting of earlier clans). The marriage prohibition extends to ego's mother's clan (matrilineal clan), father's clan (born-for clan), paternal grandfather's clan, maternal grandfather's clan, and linked clans. Here is an example of the marriage prohibition: Ego is Water-Flows-Together Clan and born-for Bitter Water Clan. Ego's paternal grandfather's clan is Salt and maternal grandfather's clan is Towering House. Ego is prohibited from marrying someone who is (born-of) Water-Flows-Together, Bitter Water, Salt, and Towering House clans or anyone who claims any of the four clans through their father or grandparents. In addition, the Water-Flows-Together and Mexican clans are related as siblings through adoption by the same mother; therefore, ego cannot marry someone of the Mexican Clan. Ego will call individuals claiming the clans listed above *shik´éí* (my relatives).

The traditional prohibition on marriage between clan relatives seems to weaken as the Navajo people adopt more and more of American mainstream culture. Some educated young Navajos consider the traditional rules passé and do not observe them, but the fault lies with Navajo leaders and the parent and grandparent generations for neglecting to teach them traditional values. However, even in more traditional times, some marriage choices deviated from traditional rules. For example, in 1946 a couple of researchers found that in the area where they worked (Ramah on the New Mexico side of the Navajo Nation), people married into the clans of their paternal or maternal grandfathers.[7]

Marriage into the maternal and paternal grandfather's clans, especially in 1946, was probably an aberration from the traditional prohibition against marriage of clan kin. A majority of Navajos would not, even today, approve of marriage between individuals related through the four basic clans. To marry a clan relative is incest, which is associated with witchcraft, a component of *hóchxǫ´,* and there is not a Navajo who wants to be accused of witchcraft.

Navajo normative precepts hold that marriage between clan relatives is incest. Incest has always been associated with witchcraft and both disrupt the Navajo social order by disrespecting the clan system and the *k´é* and *hózhǫ́* doctrines. Traditional Navajos will not approve of marriage between clan relatives because of its negative effects on *hózhǫ́, k´é,* and *k´éí,* and the social order in general. Marriage between clan relatives muddles the basic clan paradigm. For example, an extreme would be if a child born of a marriage between clan relatives claimed a born-for clan X and a born-of clan X. Any person who married a clan relative was the subject of widespread ridicule in more traditional times.

The Navajo Nation Council codified part of the traditional Navajo prohibition against marriage between clan relatives. These prohibitions were enacted in 1993 (sections 5D and 5E) and 2005 (section 2B) and are found in Title 9 (Navajo Nation Domestic Relations Code) of the Navajo Nation Code:

> § 2. Plural marriages void
>
> B. Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of one-half degree, as well as whole blood, and between uncles and nieces, aunts and nephews and between first cousins, is prohibited and void.[8]
>
> § 5. Requirements generally
>
> In order to contract a Navajo Nation marriage, the following requirements must be fulfilled:
>
> D. Parties who are Navajo Nation members, or who are eligible for enrollment, may not be of the same maternal clan or biological paternal clan. The provisions of this Subsection shall not affect the validity of any marriages legally contracted and validated under prior law.
>
> E. Parties may not be related within the third degree of affinity. The provisions of this Subsection shall not affect the validity of any marriage legally contracted and validated under prior law.[9]

It is not clear what the term "degree of affinity" in section 5E above would mean in the context of the Navajo kinship structure. Unlike the American kinship system, the Navajo kinship system does not determine relatedness in degrees.

The Navajo Nation Council did not codify entirely the traditional prohibition against marriage between clan relatives who make up the basic clan paradigm; that is, the prohibition against marriage between individuals who are related through the four basic clans. The only part of the traditional marriage prohibition expressly enacted at section 5D prohibits marriage of individuals who are "of the same maternal clan or biological paternal clan." The question is, which of the four basic clans does section 5D prohibit as marriage choices?

Section 5D may be interpreted this way: Two Navajos who have the same born-of clan (same maternal clan) cannot marry because they would be clan siblings (brother and sister). For example, if ego's maternal clan is A, then ego cannot marry anyone who claims A as his or her maternal clan; they would be brother and sister through their mothers' clan. The second part of the quoted language ("same . . . biological paternal clan") prohibits marriage of two Navajos who have the same born-for clan; they would also be brother and sister through their fathers' clan. For example, if ego's born-for clan is X, then ego cannot marry anyone who claims X as his or her born-for clan. The word *biological* that appears before "paternal clan" excludes a stepfather's clan from the marriage prohibition, because a child does not adopt the clan of his or her stepfather (or even stepmother).

A final interesting note: section 5D does not include the paternal grandfather clan and the maternal grandfather clan as part of the statutory marriage prohibition. Does the failure to include the grandfather clans allow ego to marry someone who claims as his or her maternal clan ego's paternal grandfather's clan or ego's maternal grandfather's clan? The relationship created would be a clan grandchild–grandparent relationship, but this does not mean they would be biological relatives (close relatives by blood). In the main, in spite of the statutory exclusion, a traditional Navajo would not approve of marriage into the grandfather clans.

Traditionally, the mother's brother or the maternal uncle was responsible for disciplining and instructing his nephews (and nieces) on life skills,

trades, and activities related to sustenance and survival. One of the uncle's chief duties was to arrange and approve of the marriage of his nephews and nieces. Although this traditional practice is rarely followed today, if at all, it was the maternal uncle's duty to find a spouse for his nephew. When the uncle located a girl from an acceptable family, he discussed the marriage proposal with her family and if they agreed to the marriage, the amount of bride price was set. Marriage discussions occurred without the presence of the potential couple because marriage in traditional Navajo society is really an agreement between two families and not between two individuals. Traditional marriage discussions focused on the interests of the community (family and clan) and not on the individual rights (or preferences) of the potential groom and bride.

The traditional marriage ceremony is an elaborate, spiritual, and social event attended by the couple's families, clan relatives, and friends. Unfortunately, the traditional marriage ceremony rarely occurs today as modern Navajos opt for Christian church weddings. A medicine man or any person who can perform the traditional ceremony may marry the couple inside a hogan at the residence of the bride's family. The medicine man sits on the west side of the hogan, the bride sits to his left, and the groom sits to the bride's left. A traditional basket containing blue corn meal mush (the mush can also be white or yellow cornmeal), a pitcher of water with a ladle, and a bag of corn pollen are placed before the couple.

Although procedures vary according to the knowledge of the person marrying the couple, the traditional wedding ceremony follows this general pattern.[10] The bride takes a ladleful of water and pours it on the groom's hands and he washes them; the groom does likewise for the bride. By washing their hands, the couple state to each other that they have cleansed themselves of their pasts and will start life together as one. The medicine man aligns the opening in the design on the basket with the east. Using corn pollen, he draws a line across the basket from east to west, then from south to north, and finally, beginning from the east and moving clockwise, around the circumference of the basket. The groom takes a small amount of the cornmeal from the east and eats it; the bride follows and does the same. This process moves to the south, west, and north and then ends at the center of the basket. After the couple finishes, the basket is passed to the

relatives and those in attendance, who eat small amounts of the cornmeal. The floor then opens for family members, clan relatives, elders, and friends to offer advice on a long and fulfilling marriage. Elders usually take this opportunity to explain to the couple the traditional Diné philosophy behind marriage and the significance of the traditional marriage ceremony.

The eating of the blessed mush from each cardinal direction symbolizes accumulation of knowledge, and eating the mush from the center represents fertility. The performance of the traditional marriage ceremony seeks the blessings of the Holy Beings so that the married couple will start life together in harmony with the Diné Life Way (*Diné bi´í´ool´įįł*). The traditional marriage ceremony links the past generation with the present generation, which in turn links with the future generation. Most significantly, the marriage perpetuates the Diné *k´éí* rules.

Under customary law, the validity of a marriage consummated by a traditional wedding ceremony is never questioned because it is believed that the ceremony itself validates the union. In addition, because the procedures that make up the traditional wedding ceremony vary with the knowledge of the person performing the marriage, there is no custom or rule that requires satisfaction of every element, or even certain elements, of the ceremony for the marriage to be valid. For example, medicine man X may include washing of the hands as part of his procedure, while medicine man Z may exclude that element but allow exchanging of vows instead. Today, the ceremony may be conducted in a modern house or a modern-style hogan. Unfortunately, Navajo elders rarely advise newlyweds anymore.

In more traditional days, the traditional marriage ceremony took place at the residence of the bride's family (called matrilocal marriage here). Although there was flexibility owing to demographics and resources, matrilocal marriage was the general practice because Navajos are matrilineal. Other reasons that support matrilocal marriage include the uncle's visit to the bride's family to "offer" his nephew to the family, and the man and his family "come to" the bride's residence so he could take a wife, and not the other way around. Matrilocal marriage is hardly followed today.

Following the traditional marriage ceremony, the husband remained at the residence area of his wife's family while his own family returned to his mother's residence area. Although there were exceptions to matrilocal

residence in traditional days, in the majority of cases, the couple established their residence in the same area as the wife's family's residence. Matrilocal residence is also not always followed today because of job, school, and other modern circumstances. The new husband becomes a contributing member of his wife's family and clan and is known by the affinal term *nihaadaaní* (male in-law to wife's family and clan);[11] the term applied to the wife by her in-laws is *nihizháá´áád* (female in-law to the husband's family and clan).

Traditional Divorce

Traditionally, when the marriage foundered, the man left with only his personal belongings and moved back to his mother's residence. The marital property, including livestock, farming equipment, and household items, remained with the wife for her and her children's support. Although there were exceptions, the children remained with their mother, because of the matrilineal rule derived from the *k´éí* doctrine.

As mentioned, Navajo customary law treats children as children of the matrilineal clan. The Navajo clan system determined custody of children in traditional Navajo society. If the mother or both parents died, a maternal aunt adopted her sister's children; and if a marriage failed, the mother retained custody of the children. These customs on child custody are not the prevailing laws in the Navajo Nation courts today. It was not unusual, and is not even today, for children to live with their aunts or uncles or grandparents at different times of the year.

The traditional divorce practices outlined above have changed as a result of the Navajo Nation's adoption of American laws and the American form of court system. Today, only the Navajo Nation family courts are authorized to grant divorces, whether the marriage was consummated by a traditional marriage ceremony or not.[12] Divorce, child custody, child support, alimony, and marital property distribution are now handled by the Navajo Nation courts.

Traditional Property Concepts

Traditionally, Navajo property ownership falls into three general categories: community property, family property, and individual property. Community

property includes common water resources for domestic and livestock use; timber areas where wood is cut for heating, posts, corrals, and construction of hogans and ramadas; salt licks and salt bush patches for livestock; and areas where herbs, plants, and different-colored sand are gathered for healing and ceremony. Individuals do not have exclusive rights to these community resources. Certain conventions that accord with *k´é, k´éí,* and *hózhǫ́* are followed when community property is used. For example, the land user should be notified first, as a matter of courtesy and respect, before traveling onto that person's land to collect herbs or materials for a ceremony and to cut wood or collect other materials.

A Navajo family does not fit the mold of the American nuclear family. Navajo families are extended families; thus, family property means property owned and used in common by all members of an extended family, which may include matrilineal grandparents, aunts, uncles, cousins, siblings, and parents. Property owned and used by a Navajo family includes farm and range lands, fruit trees, farm produce, livestock, corrals, ceremonial hogan, farm equipment, and family-constructed resources such as wells and water tanks. Again, Navajo customs that control family ownership of property, though still followed in many areas of the Navajo Nation, have been modified by modern Navajo laws, such as grazing regulations, range-management regulations, land-leasing laws, and American concepts of property ownership.

Traditionally, individual property (or personal property) includes personal items such as clothing, saddles, spiritual items, and personally owned livestock such as horses. The individual property category includes ceremonial paraphernalia; sacred words; knowledge of Navajo Creation Scripture and Journey Narratives; knowledge of traditional stories (trickster stories); knowledge of herbs and plants; "hard goods" (jewelry, precious stones, etc.); "soft goods" (buckskins, blankets, cloth, baskets, etc.); and personally owned livestock. There are many more tangibles that would fall into the category of individual property today.

Traditional Probate

Aged Navajos traditionally distributed their personal property to their children and grandchildren before their deaths. Alternatively, the elderly

usually designated through an oral will who should receive what items of their property. The oral will is discussed later in this chapter, under "Wills." Some personal property is buried with the deceased; the person may identify which property should be buried with him or her.

Traditionally, the personal belongings that have not been disposed of in an oral will are distributed to family members and relatives after four days have passed from the date of burial. If the deceased was a medicine person, his or her ceremonial contents, called *jish,* are given to a son or daughter or relative who knows the particular ceremony. Otherwise, a person who knows the same or a similar ceremony may bless the ceremonial contents and return them to nature. Individual items of property that have not passed through either a written or an oral will, or given away prior to death, are now distributed through probate proceedings in the Navajo Nation courts.

K´éí *Fosters Duties and Responsibilities*

The Navajo clan system creates extensive responsibilities, duties, and mutual obligations among kin, the Navajo people, and people at large:

> Navajo families live in groups, with each person having a role for family survival. Men have duties to women, women to men, and parents have responsibilities to their children. The family, which includes extended family members, works as an economic unit. The Navajo clan system, where people trace their lineage through their mothers, is a legal system. Navajo relations and responsibilities to clan members are part of a sophisticated system that defines rights, duties, and mutual obligations in relationships. Navajos are taught their responsibilities to clan members, which they carry out, and there is a saying that "One should act towards others as if they were your relatives." Shaming is an important part of discipline, and Navajos say to a wrongdoer, "You act as if you had no relatives."[13]

In traditional Navajo society, children are taught duties, responsibilities, and mutual obligations that arise from the extensive clanship network at a young age by their clan mentors, using what will be called here the traditional Diné knowledge paradigm. As it is with most Navajo frameworks, the traditional Diné knowledge paradigm uses the cardinal directions (cardinal directions phenomenon). The cardinal directions

phenomenon is significant in Navajo culture because it perpetuates order, stability, and predictability and figures prominently in the Navajo version of the creation of the universe. The cardinal directions phenomenon always starts with the east.

The following illustrates the elements associated with each direction of the cardinal directions phenomenon. The east is associated with the basic element light, the color white, and the sacred mountain Mount Blanca. The south is associated with the basic element water, the color turquoise, and the sacred mountain Mount Taylor. The west is associated with the basic element air, the color yellow, and the sacred mountain the San Francisco Peaks. The north is associated with the basic element dust/dirt, the color black, and the sacred mountain Mount Hesperus. Each sacred mountain is believed to be blessed with its own natural elements and spiritual powers, and each is designated with its own sacred spiritual name, songs, and prayers. All mountains on earth, including the Navajo sacred mountains, are considered to be "living beings" with powers to keep the earth (including the natural environment) stable and in balance with the universe. The Navajo sacred mountains are also believed to be blessed with powers that heal the human body, mind, and soul.

According to traditional Navajos, the Creator used four basic elements and the cardinal directions phenomenon to create everything in the universe. Navajo traditionalists teach that everything in the universe contains four basic elements: light, water, air, and dirt. In this respect, traditional Navajos and Aristotle share a common theory; Aristotle believed that "all the matter in the universe was made up of four basic elements, earth, air, fire, and water."[14]

The traditional Diné knowledge paradigm defines the duties and responsibilities of clan mentors within the Navajo clan system. Ego's kin from ego's four basic clans have duties and responsibilities to instruct ego on the four foundational elements—*nitsáhákees, nahat'á, iiná,* and *sihasin*—of the Diné Life Way. Again, using the cardinal directions phenomenon, the four foundational elements are ordered in this manner: the east is associated with *nitsáhákees* (thought), which takes into account all thought processes, including those that may lead to action; the south is associated with *nahat'á* (planning), which takes things that are thought

out and puts them into action, including plans; the west is associated with *iiná* (life), which encompasses everything that goes into the Diné Life Way (such as culture, spirituality, language, and lands); and the north is associated with *sihasin* (glossed as satisfaction and respect), which includes happiness, relaxation, hope, compassion, and feelings of completeness.

The traditional Diné knowledge paradigm assigns duties and responsibilities for ego's learning to each of the four basic clans using the cardinal directions phenomenon to identify clans and their distinct responsibilities: the east is associated with the maternal clan (born-of clan), which teaches the child on *nitsáhákees;* the south is associated with the father's clan (born-for clan), which teaches the child on *nahat´á;* the west is associated with the maternal grandfather's clan, which teaches the child on *iiná;* and the north is associated with the paternal grandfather's clan, which teaches the child on *sihasin.* The traditional Diné knowledge paradigm applies to several other areas of Navajo philosophy, teachings, and ceremonies, but is used here to demonstrate the allocation of duties and responsibilities among clan kin, where each foundational element of the Diné Life Way is identified with a clan and a cardinal direction.

The clan duties and responsibilities just outlined are more ideal than practical, but even then, clan duties and responsibilities to the younger generation have been neglected in modern times because the Navajo extended family has lost cohesiveness, especially in families where members have relocated to urban areas or have moved from extended family homesteads to distant Navajo Nation towns. Western culture is also changing Navajo thought and culture, such that some of the old ways are no longer followed or have been undermined by Western ways. Another major problem today with teaching the old ways across generations is language loss; more than half of the younger generation does not speak the Navajo language, and that makes it impossible to teach the old ways in the Navajo language. It is unfortunate when young Navajos cannot communicate with their grandparents or elders who do not speak the English language.

In the traditional Navajo world, the *k´éí* doctrine regulates descent relationships through the clan system, determines Navajo identity, and establishes duties, responsibilities, and mutual obligations among kin and among non-kin. The *k´éí* and *k´é* doctrines are closely related, but can be

distinguished this way: *k´é* is concerned with both kin and non-kin relationships or interactions through positive values, while *k´éí* is concerned only with clan relatives. The *k´éí* doctrine provides traditional values that regulate the whole of domestic relations in Navajo society, which includes marriage, divorce, property classifications, and probate. The modern Navajo Nation courts use these same traditional norms to decide domestic relations cases, although they have at times altered them to fit modern conditions.

K´éí in the Navajo Nation Courts

The Navajo Nation courts assumed tremendous responsibility when they adopted use of Navajo customary law ways as official court policy in 1982. Ample credit goes to the Navajo judges, past and present, for preserving Navajo customs and traditions in court opinions and by instructing the public on use of traditional precepts in court and government. Use of Navajo common law in a Western-style Navajo court system took root in the early days of the Navajo Court of Indian Offenses. The Navajo judges of the Navajo Court of Indian Offenses would apply Navajo common law and then mask their decisions with Anglo-American legal terminology in written orders to subvert the Indian agent who reviewed their decisions. Various criminal offenses simply became "disorderly conduct"[15] and headmen or respected individuals were summoned to "punish" offenders with the stern "Navajo lecture" on maintaining relationships through proper behavior.

Navajo common law became widely accessible to the public, legal practitioners, judges, and scholars through publication of Navajo Nation court decisions in the *Navajo Reporter,* starting with cases decided in 1969. By the mid-1980s, a unique body of scholarship devoted to the Navajo Nation courts and Navajo common law and on American Indian tribal courts and American Indian common law in general had emerged and has since burgeoned.[16] The Navajo Nation Court System leads the movement on using traditional Indian ways to build Indian nations and to strengthen tribal sovereignty and self-determination, while revitalizing and preserving traditional normative precepts and the Diné Life Way for future Navajo generations.

Clan System as Foundation of Navajo Domestic Relations

The Navajo Nation courts frequently rely on domestic relations cases to introduce traditional norms and values and provide legal commentary on them using traditional Diné thinking. The heart of Navajo domestic relations law is the clan system, which in turn is a legal system, because it determines rights, duties, and shared obligations among relatives. The Navajo Nation Supreme Court declared in *Naize v. Naize* that "[t]he Navajo People's segmentary lineage system (clanship system) is the foundation of Navajo Nation domestic relations law. The system itself is law."[17]

A fundamental rule in Navajo society, and a lesson learned early in life, is that every Navajo must know his or her clans and linked clans, because they "are essential to a Navajo's identity and must be known for Navajo religious ceremonies. One must know them to be in *hózhǫ́* (harmony and peace)."[18] The long-standing belief that the clan system is central and indispensable to Navajo culture has been incorporated into Navajo jurisprudence:

> It must also be understood that the Navajo clan system is very important, with a child being of the mother's clan and "born for" the father's clan. The clan is important, and the family as an economic unit is vital. The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters, and all the members of the family group have important duties to each other. These duties are based on the need to survive and upon very important religious values which command each to support each other and the group.[19]

Traditional Navajos believe that the episode called the "Re-creation of the Diné" in the Navajo Creation Scripture and Journey Narratives is the source of the modern Navajo clan system. Changing Woman, who is also called White Shell Woman, is the principal actor and creator of the carriers of the four basic clans in that episode, so she is the "mother" of the Diné. The most important domestic relations precepts are attributed to and associated with Changing Woman. In Navajo culture, Navajo women assume Changing Woman's authority, power, strength, and other qualities through the *Kinaaldá* Ceremony, a female puberty ceremony. The laws on Navajo domestic relations have as their core the clan system, which,

of course, is represented by the female. Traditional Navajos call the laws underlying Navajo domestic relations *Yoołgaii Asdzáán Bibee Haz´áanii* (Changing Woman's Law).

In *Riggs v. Estate of Attakai,*[20] the Navajo Nation Supreme Court recognized Changing Woman's Law and the norms that derive from that law, which undergird the Diné woman's role and authority in Navajo society, particularly as they influence decisions affecting home and land:

> Traditionally, women are central to the home and land base. They [women] are the vein of the clan line. . . . The crucial role of women is expressed in the principles established by White Shell Woman and are commonly referred to as *Yoołgaii Asdzáán Bi Beehazáanii.* These principles include *Iiná Yésdáhí* (a position generally encompassing life; heading the household and providing home care, food, clothing, as well as child bearing, raising and teaching), *Yódi Yésdáhí* (a position encompassing and being a provider of, a caretaker of, and receiver of materials things such as jewelry and rugs), *Nitł´iz Yésdáhí* (a position encompassing and being a provider of and a caretaker of mineral goodness for protection), [and] *Tsodizin Yésdáhí* (a position encompassing spirituality and prayer).[21]

Navajo women have a revered and central position in Navajo culture. As the Supreme Court acknowledged in *Riggs,* Navajo women are "keepers of the clan line."[22] As "keepers of the clan line," Navajo women represent the foundational precepts of Navajo domestic relations law. In traditional Navajo thinking, this was reason enough to forbid violence against women in Navajo society.

The home (*hooghan*) and family, including extended family members, and everything that a Navajo family needs to live life according to the Diné Life Way fall into the domestic relations category. In *Davis v. Means,* the Navajo Nation Supreme Court restated the traditional Navajo view that "[t]he family is the core of Navajo society. Thus, family cohesion is a fundamental tenet of the Navajo People. It is Navajo customary law—*Diné Bibee haz´áanii*—or Navajo common law."[23]

Home and family are synonymous (called *hooghan haz´ánígíí*) within the context of everyday home and family life in Navajo society, such that Navajos may say "I am from that home" to mean I am from that family. The Navajo Nation Supreme Court explained *hooghan haz´ánígíí* as follows:

> Family cohesion under Navajo common law means there is a father, a mother and children. They comprise the complete initial family unit and are protected as such inside and outside the blessed home (*hooghan*) by the Holy People. The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity.
>
> Navajo common law on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and the clan relationships. This is inherent in the Navajo doctrine of *ak´ei* (kinship). . . . When the family is complete, there is peace and harmony, which produces beautiful and intelligent children and happiness and prosperity throughout all the relationships. The family is blessed.[24]

Navajos believe home (*hooghan*) encompasses values important to family, clan relationships, property, descent, education, spirituality, and all things that are essential to and components of the Diné Life Way. To Navajos, the home "is the center of all Navajo relationships"; it is a place where children are conceived, born, nourished, and educated on *k´é, hózhǫ́,* and the *k´éí* system; it is a place "of spiritual centrality."[25] The home could also be said to be the source of Navajo Nation sovereignty and Navajo nation building, because Navajo culture, knowledge, language, spirituality, identity, and all things that compose the Navajo Nation flow outwards from inside the hogan. The premises stated in this book on the *k´éí* doctrine motivate the thinking of the Navajo Nation judges when they handle domestic relations cases, particularly those concerning marriage, divorce, children, and property.

Marriage

As discussed earlier, a major function of the clan system is regulation of marriage in Navajo society. In the main, marriage between clan relatives and relatives through linked clans is prohibited. Some of the traditional marriage prohibitions, particularly marriage between clan relatives, have been codified in the Navajo Nation Domestic Relations Code.[26] This means that marriage between clan relatives will not be recognized as valid under Navajo Nation law, so officials who marry Navajos should ask about kin relationships through the clan system before agreeing to perform traditional or Western-style marriage ceremonies.

Another traditional Navajo practice, although not prevalent, was when a man supposedly had "more than one wife."[27] The two or more "wives" were usually sisters. Using a traditional analysis, the assertion that a Navajo man can be married to two women simultaneously is inaccurate because by custom a man could not marry another woman in a traditional wedding ceremony while he was married to his present wife. The man who is said to have "two wives" usually carried on an extramarital relationship with the second woman, and because he could not marry her in a traditional ceremony, she was not legally his wife under Navajo common law. There was an old custom that held that a person could marry in a traditional Navajo marriage ceremony only once in a lifetime, but that has largely been forgotten. Today, people marry in a traditional marriage ceremony, get divorced, and then marry again in another traditional marriage ceremony.

On two separate occasions, in 1944 and 1945, the Navajo Tribal Council passed resolutions prohibiting plural marriage.[28] The enactments must have pleased officials of the Bureau of Indian Affairs and the Christian missionaries because they had been combating "plural marriage" among the Navajo people at least since the Bureau of Indian Affairs outlawed the practice among Indian tribes in 1883.[29] Nonetheless, the Navajo Tribal Council seems to have passed the resolutions to mollify Navajo elders who were distraught that young, educated Navajos were leaving spouses and remarrying without regard for the traditional belief in the sacredness of marriage and long-standing marriage customs.[30]

In 1940, the Navajo Tribal Council started to regulate marriage on the Navajo Nation by establishing marriage laws and requiring marriage licenses of Navajos who married the old way:

> [T]hree kinds of marriage ceremonies are recognized by the tribe, namely, State, Church, and "Tribal Custom." While the majority of Navajos who have the advantage of an education prefer church or state marriages, the overwhelming majority of those who have not been to school are married by tribal custom. . . .
>
> [T]he definition of the tribal custom marriage is vague; these marriages are seldom recorded, and many common law marriages are frequently termed tribal custom marriages.[31]

The Navajo Tribal Council then codified the traditional procedures used in a traditional Navajo wedding ceremony, stating "that in tribal custom marriages the following rites shall be observed."[32] The 1940 law is the source for the modern description of the traditional marriage that is set forth at section 4(D) of the modern marriage code in Title Nine. After codifying the procedures used in a traditional Navajo marriage, the Navajo Tribal Council enacted a marriage license requirement and mandated that traditional marriages shall "be recorded in the tribal census rolls" in Window Rock, Arizona.[33]

In 1954, the Navajo Tribal Council passed another law requiring the Navajo Nation courts to validate all traditional marriages that took place on or before January 31, 1954, as legal.[34] An additional purpose of the 1954 law obviously was to encourage Navajos who married according to the old way to obtain marriage licenses from then on. Nonetheless, while Navajos who married using Western ways obtained marriage licenses, the majority of Navajos who were married by the traditional wedding ceremony did not obtain marriage licenses, in spite of the 1940 and 1954 laws. Most Navajos did not see a need for a marriage license because by customary law "the performance of the [traditional marriage] ceremony completely validates the union."[35] However, as the following case illustrates, the failure to obtain a marriage license in an increasingly Western-influenced Navajo world posed problems for Navajos who sought federal government benefits (e.g., Social Security and Veterans Benefits) for their dependents.

The facts in the case of *In re Marriage of Daw*[36] are as follows: Helen and Jerry Daw were married in a traditional Navajo wedding ceremony on September 24, 1964. Although they registered their marriage with the Agency Census Office, they did not obtain a marriage license. Their community recognized them as married. The couple had two children. On June 8, 1967, Jerry Daw was killed in action in Vietnam. Without a marriage license, the Veterans Administration could not substantiate the couple's marriage and refused to pay benefits to the surviving dependents.[37] The Supreme Court was asked to decide whether the Daws' customary marriage could be validated in spite of the 1954 law, which required all Navajos who marry by custom after its effective date to obtain a marriage

license. The Court validated the union, stating that after January 31, 1954, all traditional marriages not accompanied by a marriage license were "common law marriages," and the Navajo Tribal Council in 1954 did not expressly outlaw "common law marriages after that date."[38] To arrive at its holding, the Court read the statute requiring a license as a precondition for a valid marriage as directory, rather than mandatory.[39]

When the Court in *Daw* used the term "common law marriage," it was obviously referring to the Anglo form of common-law marriage because common-law marriage is not recognized in traditional Navajo culture. The Court could have still validated the Daws' marriage by recognizing the customary marriage as lawful (instead of treating it as a common-law marriage) and then construing the license requirement of the statute as directory and not mandatory as it did, because the Navajo Tribal Council had not explicitly outlawed customary marriage in the 1954 law. Nonetheless, whether the Navajo Tribal Council intended it or not, the Anglo form of common-law marriage entered Navajo Nation marriage law through *Daw.*

The Court's decision in *Daw* was reaffirmed in a 1979 decision wherein the Court held that "any marriage contracted by tribal custom after January 31, 1954 may not be validated by the tribal court but is recognized as a common law marriage."[40] The Navajo Nation Supreme Court revisited the common-law marriage issue in 1988, this time in the context of the husband–wife testimonial privilege in a criminal case. The Court relied on the *Ketchum* decision to announce that "[r]elationships commonly referred to as common-law marriages have been recognized as marriages within the Navajo Nation."[41]

Anglo-style common-law marriage appeared to be alive and well in the Navajo Nation until the Navajo Nation Supreme Court decided *In re Validation of Marriage of Francisco* in 1989.[42] The facts of the case are these: Loretta Francisco, a Navajo, and Oliver Chaca, a Hopi, lived together and held themselves out to the community as married up to the time of Chaca's death. The couple talked of marriage but did not marry using any kind of marriage ceremony (Navajo or non-Navajo) and they did not have a marriage license. Francisco attempted to claim life-insurance proceeds as Chaca's surviving spouse but was denied. At the time of

Chaca's death, Navajo Nation law required that marriages of Navajos and non-Navajos had to comply with state or foreign law to be recognized as valid in the Navajo Nation. The trial court ruled that Arizona, the couple's state of residence, did not recognize common-law marriage, so it refused to validate Francisco's alleged common-law marriage.[43]

The Navajo Nation Supreme Court in *Francisco* cited Navajo marriage customs, instead of statutory law, to affirm the trial court. In the course of holding that Navajo common law did not recognize common-law marriage, the Supreme Court explained:

> Navajo custom does not recognize common-law marriage, regardless of whether one or both spouses are Navajos. Navajo tradition and custom do not recognize common-law marriage; therefore, this Court overrules all prior rulings that Navajo courts can validate unlicensed marriages in which no Navajo traditional ceremony occurred. For the same reason, this Court will not construe any section of Title 9 of the Navajo Tribal Code as authorizing judicial validation of common-law marriages. To enhance Navajo sovereignty, preserve Navajo marriage tradition, and protect those who adhere to it, Navajo courts will validate unlicensed Navajo traditional marriages between Navajos. For these reasons, the district court's refusal to validate the alleged common-law marriage between Chaca and Francisco is affirmed. (citation omitted)[44]

The sacred status that marriage holds in traditional Navajo society precludes common-law marriage. Navajos believe that Changing Woman taught the traditional Navajo wedding ceremony to the Navajo people during the episode called the Re-creation of the Diné. Traditional Navajos believe that the traditional wedding ceremony and the resultant marriage are sacred. A marriage consummated through a traditional wedding ceremony complies with the laws of Changing Woman and the Holy Beings. The Navajo Nation Supreme Court discussed the belief in the sanctity of the traditional Navajo marriage in *Francisco:*

> "Traditional Navajo society places great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the 'Holy People.' This blessing ensures that the marriage will be stable, in harmony, and perpetual." Under traditional Navajo thought, unmarried couples who live together act immorally because they are said to steal each other. Thus, in traditional Navajo

> society the Navajo people did not approve of or recognize common-law marriages. (citation omitted)[45]

Moreover, the Navajo Nation Supreme Court justices used the *Francisco* case to fulfill their customary duties as *naat'áanii* (leader) in Navajo culture. The Court relied on its customary leadership role to recommend "that the Navajo Tribal Council amend Title 9 of the Navajo Tribal Code so it reflects Navajo regulation and control of domestic relations within Navajo territorial jurisdiction."[46] An American court would not feel comfortable suggesting a change in statutory law, but the Navajo people see their judges as *naat'áanii* with authority to recommend policy that furthers their best interests. Customary leadership protocol requires leaders to identify, plan, and communicate policy that benefits the Navajo people. Thus, the Navajo Nation Supreme Court was fulfilling a traditional leadership responsibility when it recommended a change in the law to reflect Navajo control of marriage on the Navajo Nation.

The Navajo Nation Supreme Court said the statutory requirement that mixed marriages of Navajos and non-Navajos had to comply with state or foreign law perilously "allows outside law to govern domestic relations within Navajo jurisdiction," especially when "Navajo domestic relations is the core" of the Navajo Nation's internal relations.[47] Because Navajo Nation sovereignty is precious, the Navajo Nation must be vigilant so state and foreign laws do not infringe on Navajo internal affairs:

> Such needless relinquishment of sovereignty [by injecting state law into Navajo domestic relations] hurts the Navajo Nation. The Navajo people have always governed their marriage practices, whether the marriage is mixed or not, and must continue to do so to preserve sovereignty. Regulation of marriages, an integral part of the Navajo Nation's right to govern its territory and protect its citizens, should be free from the reach of state and foreign law. The Navajo Nation must regulate all domestic relations within its jurisdiction if sovereignty has any meaning.[48]

The Navajo Nation Council heeded the Supreme Court's recommendation and completed a comprehensive revision of the Navajo Nation Marriage Code in 1993.[49] The Navajo Nation Council eliminated the mixed

marriages statute, established clear guidelines for contracting marriage, clarified licensing requirements and procedures for validating marriages, and codified some of the traditional prohibitions on marriage of clan relatives. Ironically, while heeding the Court's suggestion to overhaul the marriage code, the Council overruled the Court's holding in *Francisco* by enacting law that explicitly recognizes common-law marriage as valid when contracted on the Navajo Nation.[50] The Navajo Nation Council's action of overturning the Navajo Nation Supreme Court's holding in *Francisco* is a clear example that the Council can recognize, modify, or eliminate customary law through statutory pronouncements.

Sometimes surviving spouses petition the Navajo Nation courts for an order validating their marriage because they did not obtain a marriage license. A state or federal court may also have to decide the legality of an alleged Navajo marriage in the absence of a marriage license. The Navajo marriage code states that a marriage can be contracted on the Navajo Nation in any of five ways: (1) parties may marry by signing a Navajo Nation marriage license before two witnesses, who must also sign; (2) parties may marry in any church ceremony; (3) a Navajo Nation judge may marry parties; (4) parties may marry in a traditional Navajo wedding ceremony; and (5) parties may establish a common-law marriage (which is not a traditional Navajo marriage).[51]

A surviving spouse who claims a valid marriage through traditional means must prove that a traditional Navajo wedding ceremony actually took place. The medicine man or woman who performed the ceremony should testify to that fact. If the officiating medicine person is unavailable for any justifiable reason, then individuals who witnessed the ceremony can testify that a traditional Navajo wedding took place. Because procedures used in traditional wedding ceremonies vary according to the knowledge of the medicine man or woman, courts (Navajo, state, and federal) should interpret the procedures set forth at 9 N.N.C. § 4(D)(1)–(5) as guidelines rather than as strict requirements. Although statutory law now regulates marriage within Navajo Nation jurisdiction, including traditional Navajo marriage, the Navajo Nation Supreme Court may still have to analyze the impact of the Diné Fundamental Laws on the statutory recognition of common-law marriage on the Navajo Nation.

Some Navajo court decisions hinge on marriage-related issues. In *Navajo Nation v. Murphy,*[52] the criminal defendant claimed a common-law marital relationship and invoked the husband–wife testimonial privilege to block his alleged wife's testimony against him.[53] The Navajo Nation Supreme Court found that the Western medieval basis for the privilege, that the husband and wife are one and the husband was predominant, was antithetical to Navajo matrilineal, matrilocal culture, which revered the role of women.[54] Instead, the Supreme Court said, a rule designed to "prevent the breakup of a marriage" conforms to traditional Navajo culture.[55] Thus, the Navajo husband–wife testimonial privilege is "justified by Navajo society's interests in preserving the harmony and sanctity of the marriage relationship," and not the predominance of the husband.[56] The defendant, however, could not benefit from the privilege because he could not produce sufficient evidence of a common-law marriage.[57]

In the case of *Means v. District Court of Chinle Judicial District,* the Navajo Nation Supreme Court announced the traditional Navajo rule that a male in-law, Navajo or non-Navajo, assumes the status of *hadane* (also spelled *haadaaní*) and that status carries reciprocal obligations in Navajo culture.[58] The petitioner, Russell Means, a well-known Lakota actor and activist, was charged with criminal offenses arising from domestic violence when he was residing on the Navajo Nation with his Navajo wife. Means was accused of threatening and battering his father-in-law (an Omaha Indian) and another person, a Navajo relative of his wife.[59] Means argued that the Navajo Nation did not have criminal jurisdiction over him because he was not a member of the Navajo Nation.[60] At that part of its decision relevant to this discussion, the Supreme Court stated:

> An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoone'e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the "foreign nation" clans include the "Flat Foot-Pima clan," the "Ute people clan," the "Zuni clan," the "Mexican clan," and the "Mescalero Apache clan." See, Saad Ahaah Sinil: Dual Language Navajo-English Dictionary, 3–4 (1986). The list of clans based upon other peoples is not exhaustive. A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship

> forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. Among those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person).
>
> We find that the petitioner, by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a *hadane,* consented to Navajo Nation criminal jurisdiction. This is not done by "adoption" in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.[61]

In *Means,* the Navajo Nation Supreme Court relied on Navajo marriage customs and clan relationships to find that the Navajo Nation has criminal jurisdiction over a nonmember Indian. The Court also ruled that the 1868 Navajo Treaty, Article II (which set aside the Navajo Reservation for the exclusive use of Navajos and other Indians that the Navajo Nation and federal government may admit), reserved to the Navajo Nation criminal jurisdiction over nonmember Indians (389–91). Furthermore, the issue of jurisdiction over non-Navajo Indians was specifically discussed during the treaty negotiations (390–91). Barboncito, the Navajo headman and chief negotiator, expressed concerns about other Indians coming into Navajo Country to offend, to which General William T. Sherman, the federal negotiator, replied: "If . . . the Utes or Apaches come into your country with bows and arrows and guns you of course can drive them out but must not follow beyond the boundary line" (391). Using the "as the Indians understood it" canon of treaty construction, the Navajos understood Sherman to mean that they have the right to punish non-Navajo Indians for committing offenses in Navajo Country (ibid.).

It is important to restate the Navajo Nation Supreme Court's interpretation of the "as the Indians understood it" canon here: "We understand this canon to mean that we have the authority to interpret the treaty as Navajos understand it today. That includes the knowledge passed on to us by our ancestors through oral traditions" (389n12). Plainly, the Navajo Nation Supreme Court is concerned that nearly all interpretations and constructions of Indian treaty provisions have come, not from Indian thinking, perspectives, and reasoning (in other words, "as the Indians understood

the treaty provisions"), but from Anglo-American thinking, perspectives, and reasoning. The time is here for American Indian tribes to interpret their treaties using their own cultures, languages (many treaties were negotiated by translating the Indian language into English and vice versa), sense of place, philosophies, and oral accounts of the treaty negotiations passed on to them by ancestors.

Divorce

It might seem quite unbelievable that a people who emphasize the sanctity of marriage and whose traditional marriages are elaborate spiritual ceremonies would have divorce customs as simple as a wife placing her husband's saddle outside the hogan or a husband announcing *tse hah maz* ("Stone Rolls Out") and walking away. These are the usual accounts made by white researchers who write on what they call traditional Navajo divorce.[62] These non-Indian descriptions fit the customary concept known as *yo de yah,* which describes a spouse's act of "walking away from" or separating from the other spouse (usually the husband "walking away" from a marriage).

What is the basis for these so-called traditional Navajo divorces? Traditionally, the husband moves to his wife's area of residence after their marriage. If the marriage founders, the husband leaves (or "walks away from") his wife's family's homestead and returns to his own mother's area of residence. This matrilocal aspect of traditional Navajo marriage requires that the husband (and not the wife) leave the marriage to effectuate the *yo de yah* and *tse hah maz* concepts.

The relative ease with which a Navajo could allegedly divorce a spouse does not comport with the *hózhǫ́* doctrine under a traditional Navajo analysis. The *hózhǫ́* doctrine requires use of a formal ceremony to restore parties to harmony following major disruptions in life. Because a marriage breakup is a major disruption for the affected families and clans, a formal ceremony would be needed to restore them to harmony. The mere act of walking away (or leaving a marriage) would not restore the husband, the wife, or their relatives to *hózhǫ́*. The fact that Navajos use ceremony to neutralize or eliminate every major disruption in life suggests that in the distant past, a traditional formal divorce ceremony, not practiced now,

was available to undo the traditional wedding ceremony. Navajo culture normally provides a ceremony to neutralize the "powers" of a previous ceremony after it has served its purpose (e.g., a Navajo has a Blessing Way Ceremony after undergoing a Protection Way Ceremony).

Whether a traditional divorce ceremony was practiced at one time or not, the Navajo Tribal Council banned traditional Navajo divorce in 1940, a day after statutorily acknowledging the traditional Navajo marriage:

> Whereas, there has been no action by the Tribal Council to establish a legal way for securing a divorce of marriage by Tribal Custom; Therefore, Be It Resolved that the Court of Tribal Offenses [Navajo Court of Indian Offenses] is hereby authorized to grant divorces, for cause, for all marriages consummated by Tribal Custom Ceremony; that all such divorces must be recorded in the agency office, and that a certificate of divorce shall be issued by the Tribal Courts; . . .
>
> Be It Further Resolved that no person, married by Tribal Custom, who claims to have been divorced, shall be free to remarry until a Certificate of Divorce has been issued by the Tribal Courts.[63]

The fact that traditional Navajo divorce has not been recognized in the Navajo Nation since 1940 has not prevented arguments that the Navajo Nation courts should recognize that traditional Navajo divorce terminates traditional Navajo marriage. In *Begay v. Chief,*[64] a case decided in 2005, the petitioner claimed that her common-law husband had divorced his first wife by custom and sought to have her common-law relationship validated as a marriage. The facts of the case are as follows: In 1978, Jessie Chief and Dorothy Farland were married in a traditional Navajo wedding ceremony. Sometime thereafter, Chief took his saddle and blanket and left Farland. Neither party obtained a divorce decree from a court. Chief married a second woman and then divorced her by a court decree in 1985. Beginning in 1985, Chief and Julia Begay lived together in a common-law relationship; they had one child and operated several businesses together. After Chief and Begay separated, Begay filed a petition to validate their relationship as a common-law marriage using the 1993 law that recognizes common-law marriage on the Navajo Nation. Chief moved to dismiss the petition, arguing that he was still married to Farland, his first wife, because his customary marriage to her was not ended by a court decree as required

by Navajo Nation statutory law. In response, Begay claimed that the Navajo customs of *yo de yah* and *tse ha maz* terminated Chief's customary marriage to Farland when he left with his saddle and blanket.[65]

The gist of the case depends on whether the Navajo Tribal Council intended to abolish customary divorce practices in 1940. Begay argued that the Tribal Council eliminated traditional divorce in 1940 and then modified its stance to allow traditional divorce in 1956. She argued that the Council's first enactment in 1940 (now 9 N.N.C. § 407 (2005)) explicitly required a court-issued divorce decree to terminate a customary marriage, but a statute enacted in 1956 (section 4A; now 9 N.N.C. § 5A (2005)) only requires a "decree of divorce," not that this "decree of divorce" be issued by a court. The Navajo Tribal Council's failure to require that the "decree of divorce" be issued by a court, according to Begay, left open the option for granting a "decree of divorce" through traditional practices.[66] Begay's argument suggests that the *yo de yah* and *tse hah maz* practices are equivalent to a divorce by "decree."

Would the Navajo Tribal Council's failure to explicitly require that a divorce decree be issued by a court in the later enactment (1956) mean that customary divorce is still viable? No, said the Navajo Nation Supreme Court, because in 1977 it had addressed that very issue in *In re Validation of Marriage of Slowman,*[67] and held that the Navajo Tribal Council clearly abolished customary divorce, and that holding controls all subsequent cases raising the same argument.[68] In *Slowman,* the surviving petitioner claimed that she had a common-law marriage with Slowman, the deceased. The Court found that Slowman's prior customary marriage was not terminated by a court-issued divorce decree as required by statute, so he could not marry the petitioner; thus, the Court could not validate the alleged common-law marriage.

The Navajo Nation Supreme Court did not discuss the impact of the 2002 Diné Fundamental Laws on the facts of the *Begay v. Chief* case or on its prior holding in *Slowman,* especially because the *Slowman* case, which the Court relies on heavily, was decided in 1977 and the fundamental laws now require application of Navajo common law. Moreover, the Navajo Nation Council established the Diné Policy Institute at Diné College specifically to research the Diné Fundamental Laws and other normative

precepts.[69] That legislative act proves that traditional values have priority in Navajo governance and decision making.

The Navajo Nation Supreme Court also did not ask whether the traditional equity doctrine of *ch'íhonít'i'* ("a way out") applied to the unique facts of the case, considering that Chief voluntarily left his first marriage with his "saddle and blanket" and then married a second woman whom he divorced by court decree in 1985. Chief apparently believed that he had divorced his first wife by Navajo custom or he would not have married the second woman and then divorced her by court decree. Moreover, if Chief's first wife relied on the "customary divorce" and has since remarried, the Navajo Nation Supreme Court's holding casts legal doubt on her remarriage.

Although divorce by custom is not recognized in the Navajo Nation, the application of two traditional principles, the principle of finality of divorce and the equity principle of *ch'íhonít'i',* should have justified the creation of an exception using the unique facts of the *Begay v. Chief* case. The finality principle, which cuts the ties of the spouses upon divorce, has been stated as follows: "[T]here is a custom of finally terminating a marriage by someone moving, the woman keeping the property when the move is made or the couple making an equal division of marital property before going their own ways."[70] The rationale behind the customary principle of finality applies equally to modern divorces as to those from traditional days: "There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common sense."[71]

Alimony

Traditionally, with some exceptions, the husband moved to the residence area of his wife upon their marriage and the couple built marital property and family relationships there. The wife's relatives benefited from the marriage through the addition of a male in-law provider. If the marriage foundered, the husband left "with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the marital property stay[ed] with the wife and children at their residence for

their support and maintenance."[72] The husband's act of leaving his wife is the *yo de yah* concept.

Although there is no Navajo custom that specifically grants alimony to a spouse, the traditional practice of the husband leaving marital property behind for the support of the wife and children "is akin to modern spousal maintenance."[73] The Navajo Nation courts also have equitable authority to award alimony; the rationale for such authority comes from the traditional maxim that one should not "throw one's family away."[74] Because alimony can be justified by traditional practice and a maxim, the Navajo Nation Supreme Court held that the Navajo Nation courts do not need statutory authorization to award alimony to either spouse.[75]

In *Sells v. Sells,*[76] a 1986 decision on alimony, the Navajo Nation Supreme Court reversed a prior holding (means legal ruling) that allowed the Navajo Nation courts to use state standards to fix alimony awards in the Navajo Nation. The Supreme Court warned that application of state law to issues of Navajo domestic relations would turn the Navajo courts into "mirror images of Anglo courts."[77] The Court stressed use of Navajo common law as a way of developing uniform, consistent, and predictable Navajo domestic relations law.[78] The Supreme Court also set forth guidelines for the Navajo trial courts to use in "a fair and reasonable manner when awarding alimony."[79] Moreover, the guidelines would also determine the length of time that alimony would be available. The guidelines cover the circumstances of the husband and wife, including need, age, means of support, earning capacity, length of marriage, property ownership, health, employment skills, children and their needs, and customary factors.[80] Customary factors would likely include costs of particular Navajo healing ceremonies and herbs for an ailing ex-spouse.

In 2005, the Navajo Nation Supreme Court established the rule that monthly interest can be applied to unpaid alimony obligations.[81] The Supreme Court's reasons for allowing interest on alimony arrearages are similar to awarding interest on unpaid child support payments.[82] The Court did not see a "reason to treat spousal support differently from child support. Both provide necessary support, and the award of interest creates the same incentive to make the important payments."[83] The Supreme Court held that the interest rate on spousal support arrearages will be the same

as for child support, which at the time of the Court's decision was 10 percent calculated monthly.[84] The Navajo Nation Council has not enacted laws on alimony, but has always deferred to the Navajo Nation courts and Navajo common law on alimony issues arising on the Navajo Nation.

Child Custody and Support

In Navajo society, children are not viewed as property or possessions, but are viewed as "individuals in a community."[85] There is "a fundamental belief that children are wanted and must not be mistreated in any way."[86] Navajo children are integral to the Navajo family and clan. In the event of divorce, the Navajo family court has a responsibility to provide for the children's needs by using all of the parents' available resources (the child's best interest rule). These customary beliefs underlie Navajo court decisions addressing child custody and support.

In *Lente v. Notah,* a case involving a request for change of custody following a divorce, the mother argued that "Navajo custom requires that she be given custody of the child, since Navajo children belong to their mother's clan."[87] The Navajo Nation Supreme Court acknowledged that the mother correctly stated the general customary law on child custody, but then qualified the customary law this way:

> The danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place; Old customs and practices may be followed by the individuals involved in a case or not; There may be a dispute as to what the custom is and how it is applied; or, A tradition of the Navajo may have so fallen out of use that it cannot any longer be considered a "custom."[88]

The Navajo Nation Supreme Court also acknowledged that the general custom on child custody has traditional exceptions, which are "rare and . . . must be approved by everyone concerned, especially the head mothers."[89] The head mothers are the clan matriarchs. But when it comes to modern child custody litigation, custom is only one factor among several that are considered. The trial judge, under proper circumstances (or facts), can disregard custom and the Supreme Court will uphold that decision on review unless the trial court clearly abused its discretion.[90] The

Supreme Court announced that when the Navajo Nation courts consider child custody factors, the child's best interests rule should be the principal standard.[91]

In *Goldtooth v. Goldtooth,* the trial court found that granting the parents joint custody of their children was in the best interests of the children.[92] The court looked to Navajo customary ways to find that children maintain strong relationships with extended family members so that joint custody of children is a common, traditional practice in Navajo society:

> This court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular, children are considered members of the mother's clan. While that fact could be used as an element of preference in a child custody case, the court wants to point out that the primary consideration is the child's strong relationship to members of an extended family. Because of those strong ties, children frequently live with various members of the family without injury. . . . Therefore, the court looks to that tradition and holds that it must consider the children's place in the entire extended family in order to make a judgment based upon Navajo traditional law.[93]

Using Navajo common law "reinforced by modern principles of child psychology," the trial court concluded that joint custody to the parents would be in the best interests of the children.[94] While the traditional child custody rule that favors the mother is still available to litigants, *Goldtooth*'s joint custody rule dominates the modern courts' child custody decisions.

In the area of paternity, the Navajo Nation Supreme Court recognized that Navajo common law is consistent with the universal presumption that a child born to a married woman "is considered the issue of that marriage."[95] The Supreme Court also stated the customary rule that "Navajo women have equal status with Navajo men to participate in decisions affecting family and tribe."[96] Thus, Navajo common law recognizes a wife's standing to deny that her husband is her child's father.[97]

Where questions surround the child's paternity, a putative father cannot be granted parental rights such as custody; nor can he be ordered to fulfill parental obligations:

> Mere claim of biological parenthood is not enough to entitle a parent to child custody. The best interests of a child are paramount in custody decisions and a

> determination of paternity. We decide today that a Navajo court lacks jurisdiction to grant a putative father custody of minors in a temporary protection order without a legal determination establishing paternity and a parent–child relationship. In this regard, not even a putative father has standing to request custody. A paternity determination is a legal precondition in granting custody to a putative parent.[98]

In custody dispute cases where parents are not adequately protecting the rights of their child, Navajo common law grants the child a right to be heard if the child is of sufficient age and maturity.[99] The rule derives from two customs and a maxim. The customs are that "Everyone has a right to be heard at a meaningful time and in a meaningful way," and "Navajos have a right to speak for themselves." The maxim is "It's up to him."[100] The maxim "It's up to him" means that the person should be consulted before actions affecting his interests are undertaken. The trial court has discretion, using facts, to decide whether a child is of sufficient age and maturity to be heard separately from the parents.

On the child's right to be heard, the Navajo Nation Supreme Court proclaimed that "under proper circumstances a child may intervene in an action between his or her parents where that child's rights or interests are affected."[101] In accordance with Navajo common law, the child's right to be heard may be implemented through a spokesperson who can express the child's wishes to the court.[102] Before making the discretionary decision to grant the child his right to be heard, the trial court must examine "the child's best interests and whether the child's interests are adequately represented by the existing parties."[103] Moreover, the Supreme Court found that "the provisions of Article 12 of the Convention on the Rights of the Child mirror Navajo common law."[104] This finding recognizes and incorporates international human rights norms into the decisions of the Navajo Nation courts.

The fundamental Navajo custom that obligates a father to support his children is the basic law that controls court decisions on child support, including child support decisions in paternity actions. A 1983 Navajo appellate court decision, *Tom v. Tom,* aptly stated the fundamental customary law and its rationale on the support of Navajo children:

> It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least its mother, the duty of support. It is said that if a man

> has a child by a woman and fails to pay the woman money to support it, "He has stolen the child." In other words, the man who receives the benefit and joy of having a child is a thief if he does not share in the worldly burdens of taking care of it. This Navajo custom lays the ground rule of support, and the conclusion to be drawn from the principle given is that a man must pay as much as is necessary for the child, given his abilities and resources at any given time.[105]

In a 2001 decision, the Navajo Nation Supreme Court explained what Navajos mean when they say the father "has stolen the child."[106] In *In re Estate of Tsinahnajinnie,* the father did not marry his daughter's mother, support his daughter, or participate in her life, but when his daughter died, he filed a claim for part of the insurance proceeds awarded for her death.[107] In the course of finding that the father had provided little care or support for his daughter, the Supreme Court stated:

> [The father] had no claim because he provided little or no care or support for his own daughter. As the Navajo common law maxim states, "he just stole the child." Viewed as either a Navajo common law case or one arising in equity, this father simply sought to benefit from his child's death. He did not even attend her birth, nor give material or emotional support to her, nor seek to be a part of her life.
>
> Although the father had every opportunity to be with his child, and reasonable demands were made upon him for child support, he simply was not around. As [the Window Rock District Court] aptly stated, this man hid behind the hogan waiting for the corn crop to be harvested, when he did nothing to help grow that crop. The conclusion that someone cannot benefit from the work of others without contributing to the end product is a matter of common sense, and our rules of Navajo common law are, at end, "Navajo common sense." (citations omitted)[108]

The Navajo Nation Supreme Court reaffirmed *Tom*'s Navajo common-law rule on the father's obligation to support his children in *Notah v. Francis*.[109] *Tom*'s rule was also used to deny the father's argument that the statute of limitations barred the mother's petition to collect unpaid child support: "[C]hild support is not a right of the mother to payments, which may be waived if the mother does not assert it within a given time, but an obligation of the father to the child, continuing for as long as the child needs that support."[110] On the in-kind contributions that the father made

in lieu of money payments, the Supreme Court held that "in-kind contributions may be credited to child support payments when allowed by the [trial] court, or when both parties consent to the substitution," but the original court order must be modified to allow those contributions.[111] In addition, it has been held that the Navajo Nation courts can assess monthly interest on unpaid child support as an incentive for timely payments.[112]

In the 1988 case of *Descheenie v. Mariano,* the Navajo Nation Supreme Court again affirmed *Tom*'s rule on a father's obligation to support his child and then extended the rule to both parents: "Navajo custom obligates each Navajo parent to provide for the support of his or her child."[113] The Supreme Court then described what is expected of each parent to fulfill their child support obligations:

> Navajo custom also requires each parent to contribute his or her reasonable share toward the child's support, according to each parent's income and resources. The support award can be consistent with the lifestyle the child is accustomed to. However, the awarding court must not order a parent to pay so much child support that the parent has insufficient money to live on. A court must make child support awards such that each parent bears an appropriate amount of responsibility for the child, while keeping in mind that for the child to prosper, the parents also must prosper. (citations omitted)[114]

The Supreme Court used its *Descheenie* decision to establish a general formula for the trial courts to use to fix the amount of each parent's child support responsibility because statutory guidelines were not available. The formula accounts for each parent's net earnings, allows adjustment of earnings for mandatory expenses, and takes into account the reasonable needs of the child.[115] The 1994 Navajo Nation Child Support Enforcement Act now contains statutory guidelines for determining child support obligations on the Navajo Nation.[116]

The Navajo Nation Supreme Court also addressed the issue of back child support in paternity cases in *Descheenie.* Although the Court recognized the parents' obligations to support their children, it found that unique circumstances (primarily economic) existing on the Navajo Nation make an award of back child support in paternity actions "inappropriate and unenforceable."[117] Three factors influenced the Court's decision. First, no statute that authorized back child support in paternity cases existed;

thus, to order a father to pay back child support, which he has "no legal duty to do originally," would violate his right to due notice.[118] Second, few parents keep receipts of purchases made or money spent on children, so any attempt to determine past child support "would plunge the district court into a quagmire of speculation," particularly where back child support is requested for several years.[119] Third, negative economic conditions on the Navajo Nation, including lack of employment opportunities and low per capita income, were not conducive to granting back child support in paternity cases.[120]

The Supreme Court, however, advised that a paternity action should be filed immediately after the child's birth so the other parent can be held responsible for the child's support from an early age:

> No parent will be expected to pay 100% of a child's expenses. However, if a parent wants the child's other parent to take responsibility for a portion of the child's support, that parent must file an action for paternity and support as soon as possible after the child's birth. In this manner the child will be assured support from an early age. Petitions for paternity and child support cases, like all other lawsuits, take many months and sometimes years to be fully resolved.[121]

The Navajo Nation Supreme Court upheld *Descheenie*'s rule that retroactive child support is not permitted in the 2003 case of *Leuppe v. Wallace,* where the Court was asked to establish the time "when child support payments commence in a paternity action."[122] The Court said it refused to allow back child support in *Descheenie* "because of lack of fair notice," but that was not the case in *Leuppe,* where the father had received "fair notice of the potential to pay child support at the time the paternity action [was] filed against him."[123] Thus, the Court distinguished *Descheenie* and held that a Navajo trial court "may order that child support payments commence anytime after a paternity action is properly filed."[124] The Supreme Court, however, did not modify *Descheenie*'s rule that back child support cannot be awarded beginning from the date of the child's birth.

The Navajo Nation Supreme Court in *Alonzo v. Martine* did not see problems with allowing back child support "where parents have children in marriage," because under Navajo common law, "children born during

a marriage are considered the issue of that marriage."[125] In addition, parents who have children in marriage already have notice of their child support obligations, so that the due notice problem identified in paternity actions in *Descheenie* does not arise.[126] The Supreme Court held that "where parents have children in marriage, back child support may be ordered at the entry of a divorce decree covering the time the noncustodial parent was absent and provided no support."[127]

The Window Rock District Court addressed the method by which delinquent child support payments can be collected in *Navajo Tribal Utility Authority v. Foster,* which involved an employer's refusal to garnish the wages of an employee to pay delinquent child support.[128] The employer argued that the Navajo Nation did not have a specific statute authorizing garnishment of wages to satisfy unpaid child support.[129] The trial court rejected the employer's argument by holding that several Navajo Nation statutes authorize the Navajo Nation courts to order garnishment of wages, and even though the statutes do not contain the word *garnishment,* they allow the courts to order the surrender of property to satisfy a judgment.[130]

In 1983, the Navajo Nation Supreme Court upheld the power of the Navajo Nation courts to order garnishment of wages specifically for child support.[131] The Supreme Court limited the trial courts' garnishment power to child support cases only: "The Courts of the Navajo Nation are not going to allow such equitable remedy as wage garnishment for other than child support enforcement."[132] Thus, the Navajo Nation courts cannot garnish wages to pay judgments that have nothing to do with child support. In 1994, as part of the Navajo Nation Child Support Enforcement Act, the Navajo Nation Council enacted several statutes that authorize the Navajo Nation Office of Hearings and Appeals, an administrative forum, to order wage garnishment for child support purposes.[133] The Child Support Enforcement Act also gives the Navajo Nation Supreme Court power to review alleged errors of law committed by the Office of Hearings and Appeals.[134]

Marital Property

The seminal case stating Navajo common law on property division in a divorce is *Apache v. Republic National Life Insurance Co.,* a 1983 Navajo

trial court opinion.[135] The facts in *Apache* are as follows: While married, Boyd Apache designated his wife, Rebecca, as the beneficiary of his life insurance policy. Boyd died one month after his wife divorced him, but he did not change the beneficiary designation he had made. The case pitted Rebecca against Boyd's mother and sister, who claimed they were the only ones entitled to the life insurance proceeds pursuant to Navajo customary law. Rebecca claimed the proceeds, alleging that the terms of the insurance policy must be enforced using standard American contract law. The mother argued that Rebecca was not entitled to the proceeds because a divorce terminates all rights of former spouses to each other's property under Navajo common law.[136]

The trial court used the case to set forth the general Navajo customs on property division after a divorce. The first method of property division allows the spouses to keep their premarital property and the wife takes all the property acquired during the marriage.[137] The second method of property division, said the court, allows the couple to "split the blanket" by equally dividing the property acquired during the marriage; however, if the parties cannot agree on an equal division, the wife keeps all the marital property.[138] The court summarized the Navajo customs on property division after a divorce as follows:

> Under Navajo custom the woman can simply keep the property of the marriage and send the man to his own family, taking only his own property acquired before the marriage. She also has the option of working out an arrangement with the man. In modern times, the woman has the further choice of coming into a court using Anglo-European ways.[139]

Navajo common law presumes that the wife owns all the marital property, which allows her to either take all the property or agree with the husband to an equal division. Once the wife has made her choice, the Navajo common-law doctrine of finality of divorce takes effect. That doctrine, which holds that the divorce cuts all ties of the former spouses to each other, foreclosed the former wife's claim to the insurance proceeds in the *Apache* case: "Because Navajo customs show us that there was finality to custom divorces and since the former wife left the husband, leaving property behind her [the insurance policy], this court must hold that as a

matter of Navajo customary law she surrendered any further right in the [insurance] policy" (citation omitted).[140]

How would the Navajo Nation Supreme Court rule when a single Navajo man designates his non-Navajo girlfriend as the beneficiary on his life insurance policy instead of his children? In *Gene v. Hallifax,* the insured, a divorced Navajo police officer with custody of his children, designated his Hispanic girlfriend as the beneficiary of his life insurance policy.[141] The insured died in the line of duty.[142] When the insurance company tried to pay the designated beneficiary, the insured's mother sued, claiming that the insurance proceeds should be paid to her for the benefit of her son's children.[143] The trial court first invalidated the beneficiary designation (because the named beneficiary did not prove she was the intended beneficiary and she had no meaningful relationship with the insured) and then applied Navajo common law to award the proceeds to the mother.[144] The Navajo customs the trial court used state that "children are central to Navajo life, that there is preference for their support, and that the children of a decedent 'should not be forgotten.'"[145]

On appeal, the Navajo Nation Supreme Court construed the insurance policy as a contract and ruled that the insured clearly intended his girlfriend to be his beneficiary:

> Gene was not an unsophisticated insurance applicant. . . . There is no indication in the record that he had any problems reading or speaking standard English. The term "beneficiary" is not a mysterious one, and the insurance application form makes a clear distinction between the "dependents to be covered (the children)" and the "beneficiary." It is clear that Gene intended for Hallifax to be the beneficiary of his life insurance policy. He wrote Hallifax's name in the "beneficiary" box of the policy application, and he described their relationship [friends] in the adjacent box.[146]

The Supreme Court said that the issue "in insurance cases is the intent of the insured" and, upon finding that Gene intended his beneficiary to be his girlfriend, reversed the trial court's decision.[147]

Although the Navajo common-law presumption that favors the wife on marital property was used to defeat the former wife's claim to the insurance proceeds in the 1983 *Apache* case, it has not been used in more recent divorce decisions to favor the wife over the husband. The present

statute that controls division of property in a divorce states: "Each divorce decree shall provide for a fair and just settlement of property rights between the parties."[148] This section "does not mandate equal division of community property. It grants the trial court discretion to make unequal divisions of community property."[149] The statute prefers equal division of marital property in divorce cases, but if the trial court allows an unequal division, it must state its reasons for doing so in the divorce decree.[150]

The Navajo Nation Supreme Court established the following guidelines or factors for the trial courts to use if they see a need to divide property unequally between the divorcing spouses: (1) the economic circumstances of each party, including age, health, station in life, employment skills, employability, and opportunity to acquire assets; (2) contribution of the spouses to the marriage; and (3) duration of the marriage.[151] Navajo customs on property division in a divorce have not been applied in any of the modern divorce decisions of the Navajo Nation courts. The traditional rule cited in *Apache* that favors the wife on property division in a divorce case has most likely been nullified by the equal protection clause of the Navajo Nation Bill of Rights.[152]

Descent and Distribution

Use of Navajo common law predominates in the disposal of estates on the Navajo Nation and the reasons have to do with adherence to cultural norms. Navajo probate practice, including wills, determination of heirs, property definitions, and estate distribution, are normally driven by ancient rules of practice that implicate and involve clan and kin relationships and the need to maintain *hózhǫ́, k'é,* and *k'éí* in Navajo society. Navajos have traditionally reserved estate matters to the deceased's family, including extended family, and clan. Depending on the strength of retained culture, a family may first observe cultural etiquette before probing into estate matters. For these reasons, the Navajo Nation Council has abstained from enacting probate laws, thereby, leaving disposal of estates primarily to the family and the Navajo Nation courts and Navajo common law.[153] Moreover, because disposal of estates is seen strictly as an internal family matter, many Navajo families continue to use the old ways instead of the

courts to handle probate matters. The entire Navajo Nation Probate Code (Title 8) contains three statutes (jurisdiction; determination of heirs; and approval of wills) that expressly defer to Navajo customary precepts for distribution of estates.[154]

Some of the general customs regulating inheritance and the distribution of a deceased family member's property are worth repeating here. Elderly Navajos generally divide all their property among their children, grandchildren, and relatives while they are alive. The motivation for such distribution is to prevent conflicts over property that normally create strife or disharmony in family relationships after the owner's death. Tangible items that may be distributed by the property owner include jewelry, saddles, rugs, blankets, animals, and land-use and grazing permits, and intangible property, including songs, prayers, sacred words, and ceremonial knowledge and practices. The property owner may designate which items of property should be buried with him or her. The property owner may also designate which relative should receive which property after his or her death (the traditional oral will). Family and relatives normally gather four days after burial to parcel out property that the deceased did not distribute or to fulfill the last wishes of the decedent if an oral will has been made.

Wills

The first recorded Navajo Nation Supreme Court decision on oral wills is the 1971 case of *In re Estate of Lee.*[155] In *Estate of Lee,* the petitioner challenged a probate judgment by claiming that the deceased (his brother) had orally devised a land-use permit to him and that he, his mother, and two other brothers witnessed the deceased make his oral will. The trial court had awarded the decedent's surviving spouse the land-use permit in the probate judgment.[156] After recognizing Navajo customs on making an oral will, the Supreme Court held that the petitioner had not proven that his deceased brother had fulfilled the customary requirements:

> It is a well established custom that a Navajo may orally state who shall have his property after his death when all of his immediate family are present and agree and that such a division will be honored after his death. We know of no other custom in this respect. We hold, therefore, that unless all of the members of his

> immediate family are present and agree [a] Navajo cannot make an oral will. Since the wife and children were not present when the deceased made the alleged oral will to the petitioner, we hold it was invalid.[157]

The Navajo custom recognized in *Estate of Lee* establishes that a Navajo oral will is valid if (1) the testator's immediate family members witness the making of the oral will; and (2) the immediate family members agree to honor the terms of the oral will. In 1988, the Navajo Nation Supreme Court clarified the "immediate family agreement" requirement stated in *Estate of Lee* to mean that "all members of the immediate family agree that the testator orally made known his or her last will before them."[158] The clarification dispensed with what earlier appeared to be the need of the immediate family members to unanimously agree to the terms of the oral will,[159] a requirement that can discourage people from making oral wills if the immediate family members are uncooperative or if the decedent had multiple marriages, each with its own children.

For several years after its decision in *Estate of Lee,* the Navajo Nation Supreme Court struggled to formulate a definition of "immediate family" that would satisfy cultural norms and still apply in modern probate cases. In the case of *In re Estate of Benally,* the testator made his oral will in the presence of his second wife and their four children, but his children from his first marriage were not present.[160] The trial court found that the second wife and the four children constituted the testator's immediate family and ruled the oral will valid.[161] The trial court refused to recognize the children from the first marriage as members of the testator's immediate family. The Supreme Court agreed with the trial court on review and explained that the traditional Navajo definition of immediate family that includes extended family members would make it nearly impossible to make an oral will:

> We adopt the rule that the children of the decedent's first marriage, who were not living with the decedent when he died, are not members of the immediate family for the purpose of an oral will. We are limiting this rule on the immediate family to cases involving oral wills because the Court is mindful of the Navajo concept of the extended family. This rule is adopted because it would work too great a hardship on the Navajo People to require the presence of all who might be considered immediate family by the Navajo extended family

> concept. Since many Navajo[s] cannot write, cannot afford to have an attorney write a will, and do not understand the concept of a written will, [it] is important that there be some alternative method by which a person may devise his property.[162]

The Supreme Court also used *Estate of Benally* to decline to adopt the American legal version of the Dead Man's Act:[163] "The effect of the application of the Dead Man's Act would be to invalidate all oral wills as the immediate family could not testify. . . . We decline to impose a rule of law that would make it impossible to make an oral will."[164] The Supreme Court's refusal to adopt the Dead Man's Act means that a party disputing an oral will would have an opportunity to cross-examine each immediate family member who testifies in favor of the decedent making an oral will.

The Navajo Nation Supreme Court's next case on oral wills, *In re Estate of Thomas,*[165] actually reversed *Estate of Benally*'s holding that children from a testator's first marriage did not constitute his immediate family. In *Estate of Thomas,* the testator had eight children but made his oral will in the presence of only two sons who resided with him. The other six children did not reside with the testator and did not witness the oral bequeathment. The trial court found that the two sons residing with the testator were his immediate family and validated the oral will. The Supreme Court reversed, holding that "the immediate family includes all of the children of the testator and the spouse if alive."[166] Under a Navajo common-law analysis, any decision that does not recognize some of the testator's children as part of his immediate family "is inconsistent with the Navajo custom which teaches that parents should view each of their children equally."[167] The Navajo custom on treating offspring equally that was recognized in *Estate of Thomas* would include children from all of the decedent's marriages and those who are born out of wedlock as members of his immediate family.

The procedure that a testator should follow to make a valid oral will if she has only one surviving heir was established in *In re Estate of Howard.*[168] In *Estate of Howard,* the testator's niece argued that the sole surviving heir, a daughter, had told her (the niece) that the testator made an oral will wherein she wanted her niece, who lived with her, to have her house.[169] The daughter denied making the statement, so the niece introduced a

secretly taped telephone conversation between her and the daughter that appeared to show the daughter acknowledging the testator's wish that the niece should have the house.[170] The trial court relied on the secretly recorded conversation to rule that the testator had made a valid oral will.[171]

The Navajo Nation Supreme Court reversed the trial court's holding on two grounds: (1) the alleged declaration of intent made to the daughter was unreliable in light of the fact that the alleged beneficiary, the niece, had lived with the testator (the testator could have told the niece); and (2) the admission of the secretly taped conversation into evidence and using it to rule in favor of an oral will was error.[172] The Supreme Court drew on Navajo common law to rule that a secretly taped conversation is theft and therefore cannot be used to decide the validity of an oral will:

> Generally, under Navajo common law, information is property. A person's words are property. Taping them in a clandestine manner and without the knowledge and consent of the speaker is a form of theft. It is deceit. Despite any other rule governing telephonic or other electronic communications where a sender does not know a recipient or third person is recording the communication, we hold that as a matter of policy, framed by Navajo common law, the Navajo Nation courts will not receive recordings of electronic communications if they are made without the knowledge and consent of a speaker or sender or other legal authorization.[173]

The Supreme Court established the rule that when a testator's sole surviving heir is also the immediate family, then another person should "witness the discussions that form the basis of the decedent's final declarations."[174] The Court's "another witness" rule should compel a sole surviving heir to implement the decedent's wishes. The *Estate of Howard* opinion is probably not the final word on Navajo oral wills or the immediate family rule. The potential for error in constructing an oral will is always present, but the Supreme Court's statement that the "oral will is too entrenched in the values of the Navajo People to abandon now" is also true.[175]

Where an electronic recording is not secretly taped but allegedly contains the testator's voluntary and final oral will, then the party asserting the oral will must introduce the recording into evidence. In the case of *In*

re Estate of Kindle,[176] a grandson claimed that his grandmother recorded an oral will on a videotape that proves he is an heir to her estate. The grandson introduced the affidavits of two witnesses who alleged they knew of the contents of the video, but the videotape was never produced at trial. The trial court ruled that the videotape was the best evidence of the grandson's claim (and the oral will) and refused to give the affidavits much weight. On appeal, the Navajo Nation Supreme Court affirmed and held that a party who claims that a videotape contains an oral will must place the tape into evidence.[177]

Estate Property

The definitive opinion on traditional Navajo property concepts and property classification is the Window Rock District Court's 1983 decision, *In re Estate of Apachee.*[178] The trial court's analysis in this case shows exemplary use of Navajo common law to solve modern issues. The court's final solution reflects the needs of the parties to the case, establishes guidelines for the Navajo people at large, and illustrates Navajo resourcefulness at making normative precepts work in modern litigation. The court employs "Navajo thinking" to classify money (from the life insurance payment), a nontraditional asset, into one of the traditional property categories that actuate distribution of intestate property in accordance with traditional Navajo probate practice (181).

Navajos traditionally designate estate property as either productive goods or nonproductive goods (182). These are the two overall categories that define group property and individual property. The productive goods category contains property that benefits the residence group and may include livestock, livestock trailers, farm equipment, grazing land, agricultural land, water resources, land-use permit, and grazing permit. The deceased's spouse, children, grandchildren, parents, brothers, sisters, uncles, aunts, nephews, and nieces may compose the residence group. Property that normally passes to individuals during distribution of the estate comes from the nonproductive goods category (ibid.). Nonproductive goods may include jewelry, personal tools, equipment, rugs, fabrics, personal vehicles, and individually owned livestock (e.g., a horse) (178). The decedent may be buried with some of his personal property

(nonproductive goods) and his clothes may be burned according to customary practices (ibid.).

The test for dividing property into one of the two categories is whether an item of property is essential to the maintenance of the residence group (182). Using this test, the trial court in *Estate of Apachee* classified the insurance money as nonproductive property that may be distributed to the heirs based on need.[179] The trial court established a presumption that money falls into the nonproductive property category, unless a party gives persuasive reasons for classifying it as productive property.

Productive property is held, usually by a mature individual, in a customary trust status for all members of the residence group. A tractor used for farming was held to be productive property because the extended family relied on subsistence farming.[180] The Navajo Nation Supreme Court describes this form of trust this way: "The customary trust is a unique Navajo innovation which requires the appointment of a trustee to hold the productive property for the benefit of the family unit."[181] Grazing and land-use permits are frequently held in customary trust, which is a traditional concept of property ownership that benefits a residence group. The customary trust doctrine comes from the customary practice of group use of resources.

A gathering supervised by an elder or respected mature person takes place at the residence of the deceased, usually four days or so after the funeral, for discussions on the distribution of estate property.[182] Items of property classified as nonproductive goods are distributed with first preference to immediate family members, but factors such as being a residence group member and individual need are taken into account.[183] The definition of immediate family for the purpose of distributing intestate property is not the same as that term is used to make a valid oral will. The immediate family, for the purpose of intestate distribution of property, is defined by "close ties of blood [and] the mutual assistance and support they gave to each other,"[184] meaning that the group members resided in close proximity in the same area. Thus, only family members who lived with the decedent, plus his son, were found to be his immediate family in *Estate of Apachee.*[185] Navajo common law did not allow children to inherit separately because they were already supported by extended family members.[186]

The *Estate of Apachee* opinion also states the traditional Navajo definitions of property and property classifications. Traditional Navajos generally classify property into six separate categories: (1) *Nitł´iz* (hard goods) includes coins, silver ornaments, white and yellow shell, coral, cannel coal, jewelry, and all precious stones; (2) *Yódí* (soft and flexible goods) includes cloth, fabrics, rugs, baskets, hides, skins, blankets, clothing, yarn, and wool; (3) *Jish* (ceremonial values) includes songs, prayers, herbs, good luck formulae, sacred names and words, medicine bags, and ceremonial paraphernalia; (4) *Kéyah* (land) includes farm lands, range lands, water sources, and livestock pens and shelters; (5) *Dini´chil ´ałtaas´éí* (game goods) includes livestock, other domesticated animals, and wild animals; and (6) *Hooghan* (buildings) includes hogans, houses, sheds, ramadas, and other buildings and structures.[187] The property definitions and classifications also apply to property outside the area of probate law.

Grazing and Land-Use Permits

Navajo Indian Country is made up predominately of trust lands. The U.S. government holds title to Indian trust lands for the benefit of Indian tribes. Trust lands are not individually owned in fee simple and are restricted, which means they cannot be sold without the explicit approval of the federal government. The status of Navajo Nation lands has been described this way: "Restricted property . . . includes reservation land for which the Navajo Nation holds title for the common use and equal benefit of all tribal members. Unrestricted property includes property owned by individuals, and for which the Navajo Nation does not hold title for all tribal members."[188] Land use on the Navajo Nation is controlled by a complex system composed of federal and Navajo Nation statutes, rules, and regulations and Navajo common law. Federal, state, and Navajo Nation court rulings on civil and criminal jurisdiction in Navajo Indian Country further complicate matters affecting land within Navajo territorial jurisidiction.

Because restricted lands (trust lands) cannot be owned in fee simple, under federal law and Navajo law, Navajos who need land for agricultural, grazing or other nonbusiness purposes must obtain land-use and grazing permits from local officials who are charged with enforcing land-use laws

on the Navajo Nation. Federal and Navajo Nation statutes, rules, and regulations regulate business use of Navajo Nation lands. The Navajo Nation Supreme Court ruled that land-use and grazing permits represent interests "in land that may pass by will or inheritance or be sold or assigned" according to Navajo laws.[189] While these two kinds of permits represent interests in land, they do not grant land ownership interests.[190]

The Navajo Nation Supreme Court described the legalities and policies that underlie land-use and grazing privileges and the overall land tenure system on the Navajo Nation this way:

> Land use and grazing permits within the Navajo Nation are not "owned" in the same sense that property can be owned in fee simple under the Anglo American legal system. Although land use and grazing permits are sold or passed through inheritance, all transfers are subject to regulation by district land boards and grazing committees. In allotting permits, these committees must consider, among other things, the policies of insuring (1) that tracts assigned by land use and grazing permits are large enough to be economically viable, and (2) that land is put to its most beneficial use. Further, under Navajo common law, a person can only maintain a "right" to productive land if he is personally involved in its beneficial use. (citations omitted)[191]

The land policy of the Navajo Nation requires keeping tracts of land intact and granting land-use permits to individuals who will make the most beneficial use of land. The most beneficial use of land requirement equates to the use it or lose it rule: "Another aspect of traditional Navajo land tenure is the principle that one must use it or lose it."[192] For example, in the case of *In re Estate of Wauneka,* the heir most able to make beneficial use of the estate land was unemployed, had no rights to other land, had tools to work the land, lived near the land, had farmed the land in the past, and needed the land to make a living.[193] A Navajo Nation court that probates "land use and grazing permits must avoid splitting up the permits whenever possible," but the court must also ensure that the rights of all heirs to the estate are protected.[194] Heirs who do not receive an interest in a land-use permit or grazing permit may be compensated with other estate property.[195] Navajo peacemaking is also available for probating estates, including devising land-use and grazing permits.[196]

The Navajo Nation Supreme Court emphasized that the following Navajo Nation policies on land use on the Navajo Nation must be considered each time a grazing permit is probated: (1) animal units in grazing permits must be sufficiently large to be economically viable; (2) land must be put to its most beneficial use; (3) the most logical person should receive land-use rights; (4) use rights must not be fragmented; and (5) only heirs who are personally involved in the beneficial use of land may be granted a grazing permit.[197] These factors (called *Keedah* factors), according to the Supreme Court, must be "considered and applied consistent with the Navajo Fundamental Laws which define the role and authority of Diné women in [Navajo] society."[198]

Navajo custom holds that the maternal clan, as represented by the clan matriarch, maintains and controls land-use rights. Thus, under customary precepts, Navajo women, as keepers of the clan line, "are often the most logical persons to receive land use rights to hold in trust for the family" and to put the land for which rights are held to its most beneficial use.[199] However, the custom that seems to favor women as the most logical heir does not make gender a dispositive factor. According to the Navajo Nation Supreme Court, this custom must be considered along with the five *Keedah* factors.[200]

When a land-use permit must descend and then be reassigned to benefit a residence group, the Navajo Nation court probating the estate must transfer the permit to the decedent's most logical heir to comply with Navajo Nation land policy.[201] The most logical heir requirement conjures up an image of a personal inheritance of a permit for sole use to the exclusion of other family members, but that is not the case in Navajo land tenure. Navajo Nation court decisions show that modern Navajo land tenure evolved from traditional land-use practices, which flow from norms regulating community use of resources:

> The word "land" in Navajo is *shi keyah,* or "That which is beneath my feet." As a general principle, Navajo land tenure is based on communal or family land use, and "that which is beneath [the] feet" of most Navajos is held for general family use. There is individual use rights to land under Navajo common law, particularly agricultural land, but for the most part Navajo grazing permits and leases are held in individual names for the benefit of the family or group.[202]

In *Johnson v. Johnson,* the Supreme Court rejected the appellant's argument that his father gave him the land-use permits as gifts and therefore they were his separate, individual property:

> It is Navajo tradition that when a person gives property to a younger family member (such as a father giving a land use permit to his son), the gift is intended to benefit the entire family, *and most of all the children of the family.* When a land use permit is given from a father to a son and that son is the head of a household, it is traditionally the intention that the son keep the land use permit in his name, but the gift is really being made to the children. It is, therefore, against tradition and custom to characterize the land use permits given as gifts to [the appellant] as his separate property. (emphasis in original)[203]

The holding of grazing and land-use permits in individual names for the benefit of the family or residence group is called the Navajo customary trust. The following synopsis describes the customary trust:

> The customary trust is so called because, in Navajo custom, land is held and managed for the benefit of the clan and the family. The aim of a customary trust is to keep tracts of land and grazing permits intact and in the family. Therefore, land and grazing permits held in customary trust should descend in somewhat the same way as property held in joint tenancy with right of survivorship. That is, once a customary trust is established, those involved in the trust cannot normally devise their interests in the land or grazing permits to their heirs, as that would cause the rights to be split up among more and more owners. Rather, the permits remain intact, and the last surviving member of the original trust will end up owning the entire permit. However, common-law requirements governing the creation and destruction of joint tenancies do not apply to the customary trust, which is a product of Navajo common law.[204]

Navajo judges developed the customary trust to protect group property rights under Navajo common law. In contrast, American law generally does not recognize group rights. The foundational elements of the Navajo customary trust are the group residence (the extended family), the group use of subsistence resources equally, and the need to protect group rights to property. Navajo land tenure, as framed by traditional Navajo group rights, is explained as follows:

> To understand the Navajo customary trust, we must examine Navajo land use. Traditional Navajo land tenure is not the same as English common law tenure,

> as used in the United States. Navajos have always occupied land in family units, using the land for subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership. Grazing rights are a land use right, but they are not individual rights as such. Navajo families and relatives occupy an area and graze animals for the benefit of the group. A grazing permit is not a form of land title, but the right of a named permittee to graze a certain number of animals in a large common grazing area. The right is measured by "animal units" or "sheep units."
>
> . . . .
>
> The usual pattern of the trust is for an elderly Navajo permittee to give the permit to a child, to be held "in trust" for other children or grandchildren. Usually the most responsible child, and one who makes actual use of the permit, will hold the permit in his or her own name, but to be shared and used by the other children. The Navajo courts follow the same process in probates, awarding it to the "most logical heir," who is personally involved in using the permit. The "trustee" is therefore a person who holds a grazing permit for the benefit of those who actually graze sheep or cattle on the land. That has nothing to do with the American common law trust. (citation omitted)[205]

Not every case involving transfer of a land-use permit or grazing permit results in creation of a customary trust. A customary trust is appropriate only if the trust beneficiaries cooperate in its establishment and thereafter effectively manage it.[206] Because the customary trust benefits the family group, the person appointed as trustee must encourage the best use of the land to ensure that all members of the trust benefit.[207] The other members of the trust have the right to use the land "as long as their use is not contrary to the interests of another member of the trust. However, those who make their living from the land should have day-to-day responsibility for its management."[208]

The Navajo Nation Supreme Court has not had an opportunity to discuss the remedies that might be available for proof of mismanagement of a customary trust. It also has not hinted on the facts that might be needed to prove mismanagement of a customary trust. Two possible remedies for mismanagement would be removal of the trustee and *nályéél* (restitution). The Supreme Court has declared that members of a customary trust have standing to sue to determine the extent of their own and others' land-use rights to the same land.[209]

Finally, the following is the Court's synopsis of modern Navajo land tenure:

> [We summarize] the land policies of the Navajo Nation as follows: (1) animal units in grazing permits must be sufficiently large to be economically viable; (2) land must be put to its most beneficial use; (3) the most logical heir should receive land use rights; (4) use rights must not be fragmented; and (5) only those who are personally involved in the beneficial use of land may inherit it. All these land policies are designed to assure that Navajo Nation lands are used wisely and well, and that those who actually live on them and nurture them should have rights to their use.[210]

The rapidly increasing Navajo population is shrinking the land base; thus, the Navajo Nation must continue to develop effective land policies and enforce them. Local officials are sometimes reluctant to enforce land policies and regulations because they do not wish to offend the embedded kinship structure. The policies the Navajo Nation Supreme Court outlined should be reviewed and updated periodically so that Navajo Nation lands are used efficiently, in an environmentally sound manner, and consistent with Diné cultural and spiritual values.

Land Use

The lands that make up the majority of the Navajo Nation are located in three states—northeastern Arizona, southeastern Utah, and northwestern New Mexico. Two smaller Navajo reservations are located at Alamo and Tóhajiileeh in New Mexico. The total land base of the Navajo Nation is nearly 15.5 million acres. Traditional Navajo country, called Diné Bikéyah (the territory the Holy Beings promised to the Navajo ancestors), extends beyond the reservation boundaries to the four cardinal sacred mountains. Navajo Nation lands are mostly trust lands, and the rest are individually owned Navajo allotments, Navajo Nation government–owned fee lands, and a small amount of individually owned fee lands, including non-Indian fee lands. The Navajo Nation also owns fee land and leases land outside its territory, such as the well-known seventy-five thousand–acre Big Boquillas Ranch, which is located north of Seligman, Arizona.

Traditional Navajos do not believe in private ownership of land and land cannot be bought or sold (in contrast to the Western concept of fee

simple).[211] Traditionalists believe that all of Navajo country is owned by the entire Navajo people. Clans, in more traditional days, and extended families today enjoy use rights to tracts of land. The Navajo Nation courts have stated the traditional Navajo perspective regarding Navajo lands as follows:

> There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would [not] exist and without which the Navajo People would be caused to disperse. . . . Land is basic to the survival of the Navajo People.
>
> While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival—the Navajo People.[212]

The use rights that extended families have over Navajo Nation lands today are called customary usage and the area over which use rights are exercised is called the customary use area. The customary use area and customary usage concepts have been discussed in several Navajo Nation court opinions, including the following 1986 decision, *In re Estate of Wauneka:*

> Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use area concept.[213]

Six years later, the Navajo Nation Supreme Court reaffirmed its *Estate of Wauneka* decision and explained that permits issued by the Navajo Nation are required to use Navajo Nation lands, which includes the customary use area, for agriculture, grazing, homes, and other purposes:

> In *Estate of Wauneka Sr.,* this Court discussed the difference between private ownership of land, usually off the reservation, and use and occupancy of reservation land traditionally inhabited by a person's family, known as a customary use area. The great majority of the Navajo reservation is trust land, including

> the area in dispute. Trust land cannot be owned by individuals outright ("in fee") the way land is owned off the reservation. Rather, the actual title is held by the United States government in trust for the Navajo people. The Navajo people use trust land for livestock grazing, agriculture, homesites, herb gathering, and sacred purposes. The Navajo Nation government grants permits for agricultural use within irrigation project areas and for livestock grazing across the reservation. It also grants homesite leases throughout the Navajo Nation. Navajos use their customary use areas for small agricultural plots, homesites, and grazing. (citation omitted)[214]

As the Court stated, a valid grazing permit and customary use rights are required to graze livestock on Navajo Nation lands. The Supreme Court explained that a grazing permit "allows its holder to own livestock and to graze that livestock on Navajo trust lands to which he or she has use rights. No one can hold a grazing permit unless he also holds use rights to land sufficient to support the livestock authorized."[215] A livestock grazing permit is valuable property in Navajo society: "In Navajo common law, a grazing permit is one of the most important items of property which a Navajo may own."[216] A grazing permit allows its holder to own livestock that can be used for food, clothing, barter, gift, and income.

Livestock is an essential part of the economy on the Navajo Nation. With an expanding Navajo population, grazing land that in the past sustained a livestock economy has severely diminished. The consequences of scarce grazing land are land disputes between neighbors and between land users and the Navajo Nation government. The Navajo Nation Supreme Court expressed a fact that is now common knowledge: just about every "acre on the reservation not reserved for a special purpose is a part of someone's customary use area."[217] Because land and livestock are crucial to the survival of the Navajo people, the Navajo Nation government and its courts have recognized that just compensation must be paid for government taking of customary use rights through eminent domain.[218] Thus, customary usage is a property right protected by the Navajo Nation Bill of Rights and the federal Indian Civil Rights Act.[219]

The Navajo Nation Supreme Court has yet to fashion a test that the trial courts can use to determine which lands fit the definition of a customary use area. In the case of *Estate of Wauneka,* the Court relied on the following

reasons to rule that land the decedent used for farming qualified as his customary use area: (1) the decedent continuously and exclusively used the land during his lifetime; (2) the decedent's use of the land was not disputed either by the Navajo Nation government, the Bureau of Indian Affairs, or other land users in the area; and (3) the land was fenced and readily ascertainable.[220] Thus, the decedent's heirs could inherit his property interest in his customary use area.

In *Hood v. Bordy,* the appellants claimed that "they acquired a 'customary use' ownership or possessor interest" in a condemned apartment owned by the Navajo Nation government and, therefore, could sell that interest to a buyer.[221] The appellants claimed that they acquired "customary use ownership interests" when they or their predecessors refurbished the apartment.[222] According to the Navajo Nation Supreme Court, Navajo common law recognizes that "individual Navajos who use or improve land with buildings, corrals, fences, etc., create for themselves a customary use ownership interest" that can be bought and sold.[223] The Supreme Court, however, saw unique facts that it used to dispel the appellants' claim that they acquired a customary use interest in the apartment: (1) they did not make "improvements" to the land from the ground up; (2) property cannot be wrested from the Navajo Nation government through adverse possession; and (3) public policy prohibits individuals from acquiring customary use interests in condemned property.[224]

The Navajo people view land not as property to be privately owned and bought and sold, but as essential for life, spirituality, well-being, and the Diné Life Way. The Shiprock District Court explained the central importance of land to the Navajo people this way:

> Land to the Navajo people is life which embodies the concept of spiritual, mental, physical and emotional well being. Navajo thinking and values accord land with survival and sustenance. Since the Long Walk [the forced marches to Fort Sumner, New Mexico, in 1864], Navajos have maintained a subsistence lifestyle based on livestock production, which livestock ownership among the Navajo is a symbol of wealth, prestige and stability.[225]

Land guarantees that future generations of Navajos will seek guidance from the Holy Beings as their ancestors did to ensure continuation

of Navajo culture, language, spirituality, sense of place, and identity. Land is so integral to a Navajo's physical, mental, and spiritual well-being that the Blessing Way Ceremony uses land and sacred places, the gifts of Mother Earth, to restore troubled Navajos to the state of *hózhǫ́*. When one realizes that Navajo culture, language, spirituality, sense of place, and identity are inextricably intertwined with land, it is easier to understand the Navajo people's belief that their lands are sacred.

Law Is the Product of Human Experience

Being a tribal court judge in the United States has its own set of challenges, many quite formidable. Funding is the most pressing need of tribal judicial systems. Tribal court judges need funds for court administration, salaries, court facilities, research sources, equipment, law clerks, training, and programs to counter rising caseloads. Tribal court judges do so much with very little and their commitment to serving the underserved on Indian reservations makes them indispensable to Indian country justice, tribal sovereignty, and nation building of Indian tribes. A few tribes adequately fund their courts, but the majority of tribal courts need sufficient funds to fulfill their potential as courts of the third sovereign in the United States. Congress can do its part by providing monetary support that will meet the needs of tribal courts. The 1993 Indian Tribal Justice Act, 25 U.S.C. §§ 3601 et seq., authorizes federal funds for tribal courts as part of the federal trust duty, but none has been appropriated under that law.

Tribal court judges have unique judging duties that other judges in the United States rarely, if ever, experience. They commonly apply American law to legal issues in their courts, but judging takes a different turn when customary precepts are presented for solving issues that arise from modern interjurisdictional business transactions, cross-boundary travel, Indian and non-Indian relationships, internal domestic matters, and a host of negative activity generated by reservation social problems. Integrating tribal normative precepts provides a unique challenge of making Western-style litigation and decision making relevant in American Indian societies that value harmony, right relationships, free-flowing discussion, and consensual decision making above rigid adversarial win–lose outcomes. Those

interested in this unique area of indigenous jurisprudence will find that the Navajo judges have developed workable frameworks for integrating indigenous consuetudinary law and methods into modern tribal court litigation and decision making. The frameworks the Navajo judges use are discussed in this book as possible models for the world's indigenous societies. These frameworks can also serve as starting points for discussion of indigenous law ways and methods.

Commentators on tribal courts praise the Navajo courts for incorporating tribal customary law ways into modern dispute resolution. Although praise is well deserved and the Navajo Nation courts indeed have proven that indigenous precepts can fit into Western-style litigation and decision making, the Navajo judges bear other significant goals in mind when they work with Navajo common law. Viewed in a political context, use of Navajo common law promotes nation building and allows the Navajo Nation to exercise its sovereignty through customary ways for the benefit of its people. Viewed in the context of culture, use of Navajo common law preserves the Diné Life Way—Diné culture, language, spirituality, identity, and sense of place—for future generations. Viewed in a spiritual context, use of Navajo common law acknowledges and perpetuates the covenant the Navajo people believe the Holy Beings made with their primordial ancestors. Each point reinforces the Navajo belief that by using Diné customary ways in Navajo governmental operations and in everyday life, the Navajo people will continue to use their ancient way of life centuries from now, as the Nohookáá´ Dine´é Diyinii (Holy Earth Surface People).

The U.S. government in the 1890s attempted outright extirpation of Navajo customs and traditions or Navajo common law through the Navajo Court of Indian Offenses and the Bureau of Indian Affairs Law and Order Code. The Navajo judges of the Navajo Court of Indian Offenses repelled those foreign attacks on the Diné Life Way by resorting to Navajo common law and traditional peacemaking to settle disputes in their courts. Credit goes to the judges of the Navajo Court of Indian Offenses for allowing customary precepts to take root in an imposed Western-style court system.

Modern Navajo judges learned from their predecessors' experiences, which led them to develop new ways of integrating Navajo common law

into litigation before the Navajo courts. These methods not only had to be compatible with Western-style adjudication and court rules, but also had to reflect Navajo history, culture, language, spirituality, and modern conditions. In some cases, this meant modification or shaping of customs and traditions to fit the circumstance. Today, Navajo common law is used not only in litigation, but also in court and government administration, government policy making, ethics codes, personnel rules, statutory laws, and other areas of Navajo government functions. The three foundational doctrines that are the focus of this book are the keys to a versatile Navajo common law for the Navajo Nation.

The three doctrines—*hózhǫ́* (harmony, balance, and peace), *k'é* (kinship unity through positive values), and *k'éí* (kinship/clan system)—serve as the foundation upon which Navajo society functions. The three doctrines are sources for normative precepts that court practitioners introduce into litigation, and the courts apply them to solve legal problems. The expert witness rule and judicial notice doctrine are particularly useful in the Navajo common-law integration process. The entire incorporation process advances a notch each time legal practitioners gain additional understandings of Navajo common law and its relevancy in dispute resolution.

Navajo judges base the modern dispute resolution process, including court adjudication and peacemaking, on a traditional model (*hózhǫ́* → *hóchxǫ'* → *hózhǫ́*) that restores disputants to harmony (*hózhǫ́*) with each other and their families and communities. Navajos strive for *hózhǫ́* in daily life, but when disrupters collectively known as *naayéé'* cause disharmony (*hóchxǫ'*), spiritual ceremony is used to restore things and beings to the state of *hózhǫ́.* The same process applies in Navajo jurisprudence, which uses *anáhóót'i'* (existence of a problem) in place of *hóchxǫ',* and instead of relying on spiritual ceremony, the judges use Navajo common law and traditional dispute resolution methods, such as "talking things out," to restore disputants to *hózhǫ́.* This model is called the Navajo jurisprudence model (*hózhǫ́* → *anáhóót'i'* → *hózhǫ́*) in this book. The Navajo jurisprudence model works exceptionally well in peacemaking, a modern Navajo institution that is based on the traditional forum for dispute resolution. The dispute resolution process becomes a Navajo justice ceremony each time the Navajo jurisprudence model is used.

Navajo judges have proven that Navajo customs and traditions work well at resolving legal disputes brought by Navajos and non-Navajos alike. This book, it is hoped, will educate non-Indian state and federal judges, including those on the U.S. Supreme Court, who harbor or express antagonistic views of American Indian customs and traditions and American Indian tribal courts in general. Navajo common law and American Indian common law are products of human experience, just as Euro-American common law is the product of human experience. Thus, any suggestion that Indian common law is so divergent that it should be confined to matters involving only Indians on their reservations is unwarranted, unsupportable, and smacks of extreme Euro-American ethnocentrism, probably to the point of racial bias. Such fearmongering goes hand in hand with ignorance of American Indian cultures, languages, spirituality, and the role American Indian justice plays in the overall scheme of justice in the United States.

American Indians throughout the Americas and indigenous peoples everywhere need encouragement and help to resurrect their customary laws and long-standing methods of dispute resolution. Every dispute resolution system contains beneficial elements that other systems can use to improve dispute resolution for everyone. For example, the Navajo dispute resolution system called peacemaking brings parties and communities together on amicable terms, costs a fraction of adversarial court litigation, does not cast blame on wrongdoers, and identifies and treats the underlying cause of the problem. Opportunities abound for peoples around the world to learn from each other, and this book is offered with that in mind.

Glossary of Navajo Words and Kinship Terms

Ádóone´é	a clan (as in "What clan are you?")
Ak´éí	relatives or related
Anáhóót´i´	a problem; legal issue
Baa ní´jookąąh	to ask for something respectfully
Bee haz´ą́	act that is legal
Bee haz´áanii	laws of every kind
Bee hózhǫ́ náhodoodleeł	something used to restore harmony
Bilagáana	American white person
Bił ch´íníyá	failure to take advantage of an opportunity
Ch´íhonít´i´	a way out
Diné	traditional name of the Navajo people and other Athabascan peoples
Diné ánályaa	"The Re-creation of the Diné" (an episode in the Navajo Creation Scripture and Journey Narratives)
Diné bibee haz´áanii	Navajo common law (Navajo customs, traditions, values, etc.)
Diné Bigóóldih	Navajo Nation Court System
Diné bi´í´ool´įįł	Diné Life Way or Navajo way of life (language, culture, spirituality, sense of place, and identity)
Diné Bikéyah	Navajo lands
Diné binaat´áanii	Navajo Nation government officials; leaders of Navajo people
Dine´é	concept of "beings"; also various races of people
Diyin Bits´ą́ądę́ę´ Bee Haz´áanii	Laws of the Great Spirit

Diyin Dine´é Bits´ą́ą́dę́ę́ Bee Haz´áanii	Laws of the Holy Beings
Diyin k´ehjí hane´	The Sacred Way of Knowledge
Diyin Nohookáá´ Dine´é (also Nohookáá´ Dine´é Diyinii)	spiritual name for the Diné people
Diyin Nohookáá Diné Bibee Haz´áanii	Laws of the Diné
Doo naaki nilį́į́góó	unequivocal
Haadaaní	male in-law
Hashkéédjí naat´ááh	war leader
Hastóí	elder men
Hatáát k´ehjí hane´	The Ceremony Way of Knowledge
Hataałii	traditional Navajo healer (medicine man or woman)
Hayoołkáát Bee Hooghan	Dwelling Made of Dawn (sacred place where the Holy Beings created the Diné people)
Hazaad jidísingo	keeping your word or promise
Hazháá´áád	female in-law
Hazhó´ógo	done in a careful, respectful way; to exercise freedom with responsibility
Hóchxǫ´	state of disharmony
Hooghan	hogan or traditional Navajo dwelling; home
Hooghan haz´ánígíí	family or domestic matters
Hózhǫ́	balance, harmony, and peace
Hózhǫ́ nahasdłii	harmony restored
Hózhǫ́ nahodoodleeł	harmony will be restored
Hózhǫ́ǫgo shił haz´ą́	my domestic affairs are in order
Hózhǫ́ǫ́jí	Navajo spiritual ceremony called the Blessing Way Ceremony
Hózhǫ́ǫ́jí hane´	The Peace Way of Knowledge
Hózhǫ́ǫ́jí Naat´ááh	peace leader
Hózhǫ́ǫ́jí Naat´áanii	Navajo peacemaking

Hwéél dih	Navajo and Mescalero Apache Reservation at Fort Sumner, New Mexico, 1864–68; also called Bosque Redondo Reservation
Ííshjání ádoolníił	make things clear
Ííshjání ádooníił	things become clear (by themselves)
K´é	kinship unity through positive values
K´éí (also hak´éí)	Navajo clan or kinship system
Kinaaldá	female puberty ceremony
Ła´yilyaa	final or complete
Naachid	tribewide assembly
Naakaii	Mexicans
Naakaiiłbáhí	Spaniards
Naaltsoos Sání	Navajo Treaty of 1868
Naat´ááh	government; leader in general
Naat´ááh nabik´íyáti´	participatory governance or participatory democracy
Naat´áanii	leader
Naat´áanii ídlį bee bi´dilzį̨h	anointing a leader
Naayéé´	anything that causes disharmony
Naayéé´ Neizghání, Tó Bájíshchíní	twin warriors (“Monster Slayer” and “Born-for-Water”)
Naayééjí hane´	The War Way of Knowledge
Nabik´íyáti´	talk things out
Ná binaheezláago	doing things ethically; doing things without secrecy while involving people
Ná binaheezláago bee t´áá łahjį´ ałgha´deet´ą́	comprehensive agreement after consideration of all evidence
Nahasdzáán dóó Yádiłhił Bits´ą́ądę́ę́ Bee Haz´áanii	Laws of Mother Earth and Father Heaven
Nályéél h	restitution, reparation, or atonement for an injury
Nidáá´	War Way Cleansing Ceremony
Nihaadaaní	our male in-law
Nihizháá´áád	our female in-law

Sa´ąh Naagháí Bik´eh Hózhǫ́	gloss as “existing eternally”
Sáanii	elder women
Shik´éí	my relatives
Shił hózhǫ́	I am happy
T´aa ałtso ałhił ka´iijée´go	full participation
T´áá ałtso ałk´éí daniidlį́	everything in the universe is related
T´áá ałtso anaa´ silį́´	everything became enemy
T´áá bééhózinígo	palpable, obvious, or readily understood
T´áá ííshjánígo	law is clear on its face (when used in legal context)
Yádaati´	public speeches made at major ceremonies
Yoołgaii Asdzáán Bibee Haz´áanii	Changing Woman’s Law

Kinship Terms

Shí	me (ego)
Shimá	mother
Shizhé´é	father
Shimásání	maternal grandmother
Shicheii	maternal grandfather
Shinálí Asdzáánígíí	paternal grandmother
Shinálí Hastiinígíí	paternal grandfather
Shimáyázhí	mother’s sister (maternal aunt)
Shidá´í	mother’s brother (maternal uncle)
Shibízhí	father’s sister (paternal aunt)
Shizhé´éyázhí (also Shibízhí Hastiinígíí)	father’s brother (paternal uncle)
Shádí	older sister
Shideezhí	younger sister
Shínaaí	older brother
Shitsilí	younger brother

Notes

Introduction

1. The Navajos call the Holy Beings (also Holy People), *Diyin Dine´é.* The Holy Beings are Supernatural Beings.

2. The White World is divided into the Glittering World and the White World; the former is the first phase, and the latter is the second phase. The present world is the White World.

3. *Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz and Basilio Teul, Higinio Teul, Marcelina Cal Teul and Susano Canti, claimants, and The Attorney General of Belize and The Minister of Natural Resources and Environment, Defendants, and Manuel Coy in his own behalf of the Maya Village of Conejo and Manuel Caal, Perfecto Makin and Melina Makin, Claimants, and The Attorney General of Belize and The Minister of Natural Resources and Environment, Defendants,* Nos. § 171 of 2007 and 172 of 2007 (Belize Supreme Court, October 18, 2007). Belize attorney Antoinette Moore and Law Professor S. James Anaya, staff attorneys, and law students of the Indigenous Peoples Law and Policy Program, James E. Rogers College of Law, University of Arizona, worked with and represented the two Maya villages over several years to secure this precedent-setting victory. Professors, staff attorneys, and law students of the Indigenous Peoples Law and Policy Program are also assisting several other American Indian tribes in the United States, Canada, and South America in asserting rights to ancestral lands and resources.

4. The term "Navajo Nation" is not a Navajo conceit. The 1868 Navajo Treaty, 15 Stat. 667, refers to the Navajo people as the "Navajo Nation."

5. Navajo Nation Supreme Court opinions and selected Navajo trial court opinions are published in the *Navajo Reporter.* The first volume begins with cases decided in 1969. Navajo court decisions are available online through VersusLaw; ArizonaNa tiveNet on the Indigenous Peoples Law and Policy Program Web site, University of Arizona College of Law; Navajo Nation Supreme Court Web site; and the Tribal Court

Clearinghouse Web site (Navajo and other Indian tribes' court decisions and codes). Many tribal court decisions and codes are available online and at law school libraries where federal Indian law is part of the curriculum.

6. Navajo Nation Council Resolution No. CN-69-2002 (November 1, 2002) (codified as 1 N.N.C. §§ 201–6 (2005 ed.)).

7. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 210 (1978).

8. Raymond D. Austin, "ADR and the Navajo Peacemaker Court," *The Judges' Journal* 32, no. 2 (1993): 47–48.

1. The Navajo Nation Court System

1. Veronica E. Valarde Tiller, *Tiller's Guide to Indian Country* (Albuquerque: BowArrow Publishing Co., 1996), 214.

2. U.S. Census Bureau, *Census 2000: Special Tabulation* (Washington, D.C., revised June 30, 2004).

3. J. Lee Correll, *Through White Men's Eyes: A Contribution to Navajo History* (Window Rock, Ariz.: Navajo Times Publishing Co., 1976), 2–3.

4. Frank D. Reeve, *Navajo Foreign Affairs 1795–1846,* ed. Eleanor Adams and John Kessell (Tsaile, Ariz.: Navajo Community College Press, 1983).

5. Garrick Bailey and Roberta Glenn Bailey, *A History of the Navajos: The Reservation Years* (Santa Fe: School of American Research Press, 1986), 9.

6. General Carleton pleaded with Washington to provide the Navajos with $150,000 worth of clothes, farm tools, livestock, seeds, and other gratuities annually for ten years. These, the general wrote, would make Navajos "the happiest and most delightfully located pueblo of Indians in New Mexico—perhaps the United States" (General Carleton Letter to General Lorenzo Thomas, March 6, 1864, in Robert A. Roessel, Jr., *Pictorial History of the Navajo, from 1860 to 1910* [Rough Rock, Ariz.: Navajo Curriculum Center, Rough Rock Demonstration School, 1980], 31–32).

7. See "Proceedings of Board of Officers," in ibid., 22. Subsequent references are given in the text.

8. David E. Wilkins, *The Navajo Political Experience* (Tsaile, Ariz.: Diné College Press, 1999), 79. (The government proposed for the Navajos did not take effect because they preferred to live in extended family groups.) But see Bailey and Bailey, *History of the Navajos* (29): "At Bosque Redondo the military organized the tribe into twelve bands and appointed a chief for each one," citing Lawrence C. Kelly, *The Navajo Indians and Federal Indian Policy 1900–1935* (Tucson: University of Arizona Press, 1968), 14. The plan failed because Navajos refused to live in houses where someone had died and death was a near-daily occurrence at the Bosque Redondo Reservation.

9. Roessel states that the proposed court system and criminal laws were implemented and used to force Navajos to work their fields (Roessel, *Pictorial History,* 22).

10. For a different view, see Vicenti: "The court (góóldi) can be seen as possibly being derived from the Navajo word for Bosque Redondo or Fort Sumner (hweeldi)" (Dan Vicenti, Leonard B. Jimson, Stephen Conn, and M. J. L. Kellogg, *Diné Bibee Haz´aanii* [Ramah, N.Mex.: Ramah High School Press, 1972], 157).

11. Leonard Watchman told this story to James W. Zion. See James W. Zion, "Law as Revolution in the Courts of the Navajo Nation," *Federal Bar Association Indian Law Conference Materials* (Albuquerque, N.Mex., April 7, 1995), 8. See also Peter Iverson, *Diné, a History of the Navajos* (Albuquerque: University of New Mexico Press, 2002), 60.

12. Martin A. Link, *The Navajo Treaty—1868* (Las Vegas, Nev.: KC Publications, 1968), Introduction.

13. For a description of the conditions at Fort Sumner, see Iverson, *Diné,* 57–59.

14. Link, *Navajo Treaty,* 5–6.

15. Navajo Nation President Joe Shirley, address at the Bosque Redondo Memorial dedication, Bosque Redondo, New Mexico (June 4, 2005) (unpublished document on file with author).

16. Roessel, *Pictorial History,* 20.

17. Link, *Navajo Treaty,* 4–6.

18. See Bailey and Bailey, *History of the Navajos,* 29; Wilkins, *Navajo Political Experience,* 68; Clyde Kluckhohn and Dorothea Leighton, *The Navajo,* rev. ed. (Cambridge: Harvard University Press, 1974), 122; Robert W. Young, *A Political History of the Navajo Tribe* (Tsaile, Ariz.: Navajo Community College Press, 1978), 15–16.

19. Wilkins, *Navajo Political Experience,* 69.

20. A remark attributed to scholars Klara Kelly and Harris Francis is applicable here: "[A]bsence of evidence is not necessarily evidence of absence" (Iverson, *Diné,* 14).

21. Berard Haile, *Women versus Men,* ed. Karl W. Luckert (Lincoln: University of Nebraska Press, 1981), 9–11.

22. Van Valkenburgh states that the Naachid assembled "all the people" in the days when "the tribe was not so widely diffused as it is today" (Richard Van Valkenburgh, "Navajo Common Law I: Notes on Political Organization, Property and Inheritance," *Museum Notes: Museum of Northern Arizona* 9 [1936]: 17, 18).

23. Young, *Political History,* 19; Valkenburgh, "Navajo Common Law I," 18. My maternal grandfather also said the last Naachid was held at Tsin Sikaad (near Chinle, Arizona) a few years before the Navajos left for Fort Sumner.

24. Wilkins, *Navajo Political Experience,* 70–71; See also, Young, *Political History,* 17. In contrast, Kluckhohn and Leighton suggest that the accounts of twelve war chiefs and twelve peace chiefs are likely "ideal patterns with a strong element of

retrospective falsification" (*The Navajo,* 122). Washington Matthews mentions that the "natcid" was held for Navajo Chief Big Knee sometime after Spanish contact (Washington Matthews, "The Gentile System of the Navajo Indians," *Journal of American Folklore,* no. 3 [April–June 1890]: 94–95).

25. Young, *Political History,* 17.

26. Ibid.

27. Valkenburgh, "Navajo Common Law I," 18. Notice the reverse arrangements of peace and war. Inside the ceremonial hogan, peace is on the south side; outside the ceremonial hogan, peace is on the north side.

28. Young, *Political History,* 17–18.

29. The area between the large ramada used for cooking and feasting and the ceremonial hogan is reserved for speaking (called *yádaati´*) on any topic.

30. Iverson, *Diné,* 133; Kelly, *Navajo Indians and Federal Indian Policy,* 49–50.

31. Iverson, *Diné,* 133–34; Kelly, *Navajo Indians and Federal Indian Policy,* 51–52n14.

32. David E. Wilkins, "Governance within the Navajo Nation: Have Democratic Traditions Taken Hold?" *Wicazo Sa Review* 17, no. 1 (spring 2002): 102. The provision is Article X of the 1868 Navajo Treaty.

33. Iverson, *Diné,* 133–34 (Special Commissioner Hagerman had served previously as New Mexico territorial governor); Wilkins, "Governance within the Navajo Nation," 101; Kelly, *Navajo Indians and Federal Indian Policy,* 61–64.

34. See chapter 2, note 1, for a discussion on how Secretary Fall's creation of the Navajo Tribal Council conforms to Professor Derrick Bell's interest convergence dilemma theory.

35. Iverson, *Diné,* 134–35; Navajo Tribal Council Resolution (July 7, 1923), printed in *Navajo Tribal Council Resolutions 1922–1951,* 315.

36. Young, *Political History,* 62–63; Iverson, *Diné,* 135.

37. Young, *Political History,* 78–79.

38. Ibid., 63, 79; Navajo Tribal Council Resolution (October 31, 1933), printed in *Navajo Tribal Council Resolutions 1922–1951,* 317.

39. 25 U.S.C. § 461 et seq. (Wheeler-Howard Act).

40. Young, *Political History,* 86. Young shows the vote tally as 7,992 opposed and 7,608 in favor of the Indian Reorganization Act. Young's figures come from page 116 of the Secretary of the Interior's 1935 Annual Report. An oral account told to me describes Jacob Morgan, a later chairman who was opposed to the Indian Reorganization Act, associating the Act to livestock reduction. At meetings throughout the Navajo Nation, Morgan allegedly waved a copy of the Indian Reorganization Act while telling the assembled Navajos, "You can eat your sheep, but you cannot eat this [referring to the IRA]."

41. Kelly, *Navajo Indians and Federal Indian Policy,* 195–96.

42. Young, *Political History,* 107.

43. Kelly, *Navajo Indians and Federal Indian Policy,* 195–96.

44. See Navajo and Hopi Tribes Rehabilitation Act, P.L. 474, Section 6 (April 19, 1950) (codified at 25 U.S.C.S. § 636 (2008)).

45. Young, *Political History,* 142.

46. Ibid. The disputed constitutional provision stated that the Navajo Nation could exercise any power, "subject only to 'any limitations embodied in the statutes or Constitution of the United States'" (ibid., 141). The Navajo Nation believed this provision allowed it to exercise all of its residual sovereignty, while federal officials interpreted it to mean that the Navajo Nation could be excluded from laws applicable to all Indian tribes on order of the Secretary of the Interior, a power federal reviewers claimed the secretary did not have.

47. Norman K. Eck, *Contemporary Navajo Affairs* (Rough Rock, Ariz.: Navajo Curriculum Center, Rough Rock Demonstration School, 1982).

48. The Navajo Nation Council enacts legislation and officially acts through resolutions. The resolution that reorganized the Navajo Nation government is Navajo Tribal Council Resolution No. CD-68-89 (December 15, 1989). In addition, the Navajo Nation Code seemingly gives more power to the Navajo Nation Council than the other two branches: "The Navajo Nation Council is the governing body of the Navajo Nation." 2 N.N.C. § 101 (1995).

49. The two-branch system of Indian nation government resembles a corporate structure; that is, a chairperson presides over a board of directors.

50. Young, *Political History,* 66–67.

51. Ibid.

52. 7 N.N.C. § 355(A) (October 24, 2003, amendments). See also *In re Certified Questions I, Navajo Nation v. MacDonald,* 6 Nav. Rptr. 97 (Nav. Sup. Ct. 1989).

53. This statement does not mean, nor does it imply, that the Navajo Nation courts always blend Navajo common law with Anglo-American or other law. In some cases, the Navajo Nation courts apply only Navajo custom to decide issues; in others, they apply only Anglo-American law. Moreover, the Navajo Nation courts have leeway to utilize the law or reasoning of other "nations," including Indian nations, to decide cases. See *Pelt v. Shiprock District Court,* 8 Nav. Rptr. 111, 116n3 (Nav. Sup. Ct. 2001) ("[B]ecause the Navajo Nation is a 'nation,' we will look to other nations' courts, as well as those of the states and federal government, for guidance on human rights issues").

54. James W. Zion, "Law as Revolution in the Courts of the Navajo Nation," *Federal Bar Association Indian Law Conference Materials* (Albuquerque, N.Mex., April 7, 1995), 1–3.

55. Michael Taylor, "Modern Practice in the Indian Courts," *Puget Sound Law Review* 10 (1987): 236.

56. *Means v. Navajo Nation,* 432 F.3d 924, 933 (9th Cir. 2005), *cert. denied* 127 S. Ct. 381 (2006).

57. The Navajo Tribal Council established the Navajo Nation Court System in 1958. The new court system superseded the Navajo Court of Indian Offenses. Navajo Tribal Council Resolution No. CO-69-58 (October 16, 1958).

58. "Sixty-first Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior," in *Report of the Secretary of the Interior,* 52d Cong., 2d Sess. (1892), 209.

59. *United States v. Clapox,* 35 F. 575, 577 (D.C. Or. 1888).

60. Ibid.

61. Frank Pommersheim, *Braid of Feathers* (Berkeley: University of California Press, 1995), 62.

62. Francis Paul Prucha, ed., *Americanizing the American Indians* (Cambridge: Harvard University Press, 1973), 296–97. The savage and barbarous practices that Secretary Teller wanted to abolish included traditional feasts and dances, customary marriage and divorce, religious practices of medicine men, customary probate, and traditional burials (ibid.).

63. William T. Hagan, *Indian Police and Judges* (Lincoln: University of Nebraska Press, 1980), 108–9. Indian agents were white men working for the federal government. They exercised complete authority over their assigned reservations and Indian tribes.

64. Ibid., 109.

65. "Fifty-ninth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior," in *Report of the Secretary of the Interior,* 51st Cong., 2d Sess. (1890), 166.

66. Agent Shipley, accompanied by Navajo police, nearly started another Navajo war in 1892 when he tried to round up thirty Navajo children from the Round Rock, Arizona, area to enroll in school at Fort Defiance. Black Horse, the area's headman, and his followers held Agent Shipley hostage for a day and a half before releasing him to American soldiers. A few days later, Agent Shipley asked the soldiers to arrest Black Horse, but the commanding officer denied the request, stating that the situation would be better handled by Navajo headmen (Iverson, *Diné,* 89–91).

67. "Sixtieth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior," in *Report of the Secretary of the Interior,* 52d Cong., 1st Sess. (1892), 310. I cannot determine which ceremony Agent Shipley was referring to as the "hish kohu." Agent Shipley was probably voicing a novice's optimism. Navajo customs and ceremonial practices were still prevalent in the 1890s. Navajos were severely traumatized by Colonel Kit Carson's scorched-earth campaign against them and their

subsequent imprisonment at Fort Sumner; both caused post-traumatic stress disorder among the Navajo survivors. Navajos knew about PTSD long before contact with Europeans because they had curing ceremonies to treat it. The ceremonies and traditional practices used to treat PTSD were as dynamic as ever at the time Agent Shipley submitted his annual report.

68. Bailey and Bailey, *A History of the Navajos,* 99. Arizona Governor Frederick A. Tritle, in 1885, also noted that the Navajos would never be civilized and would always retain their barbarous customs (William H. Lyon, "The Navajos in the American Historical Imagination, 1868–1900," *Ethnohistory* 45 [1998]: 251).

69. "Sixty-first Annual Report of the Commissioner," 209.

70. Francis Paul Prucha, ed., *Documents of United States Indian Policy,* 2d ed. (Lincoln: University of Nebraska Press, 1990), 186–89 (the August 1892 regulations are titled "Punishment of Crimes and Misdemeanors Committed by Indians").

71. The Phelps-Stokes Fund, "The Navajo Indian Problem" (1932): 72.

72. Ibid., 73. See also "Law and Order Regulations," *Federal Register* 3 (May 18, 1938): 1134.

73. Phelps-Stokes Fund, 73. See also "Law and Order Regulations," 1134.

74. Phelps-Stokes Fund, 77.

75. John S. Boyden and William E. Miller, "Report of Survey of Law and Order Conditions on the Navajo Indian Reservation" (U.S. Bureau of Indian Affairs Report, March 23, 1942), 38. From 1937 through 1941, the Navajo Court of Indian Offenses had the following criminal caseloads: 1937: 516; 1938: 838; 1939: 1062; 1940: 1025; 1941: 1121 (ibid., 8).

76. Mary Shepardson and Blodwen Hammond, *The Navajo Mountain Community* (Berkeley: University of California Press, 1970), 132.

77. Phelps-Stokes Fund, 79.

78. Boyden and Miller, "Report of Survey of Law and Order," 17.

79. "Law and Order Regulations," 1137.

80. See 7 N.N.C. § 701(A) (2005): "The judgment in all civil cases shall be an order of the Court awarding money damages to the injured party, directing the surrender of certain property to the injured party, directing the performance of an act for the benefit of the injured party, directing that a party refrain from taking action with regard to the injured party, or a declaration of rights of the parties."

81. Phelps-Stokes Fund, 73; Boyden and Miller, "Report of Survey of Law and Order," 16. The Navajo men who were observed while presiding as judges of the Navajo Court of Indian Offenses during the period of these two studies were Judges Tom Claw, John Curley, Sammy Jim, Sidney Phillips, Slowtalker, and Jim Shirley.

82. Phelps-Stokes Fund, 74; Boyden and Miller, "Report of Survey of Law and Order," 16.

83. *Navajo Tribe v. Willie White Begay,* Case No. 14 (Navajo Court of Indian Offenses, Shiprock, N.Mex., March 2, 1942) (reported in Boyden and Miller, "Report of Survey of Law and Order," 66).

84. Boyden and Miller, "Report of Survey of Law and Order," 17.

85. See interviews in ibid., 28–52A.

86. Ibid.

87. Ibid., 35.

88. *Navajo Tribe v. Jim Warito, Art Sandoval, Richard Antoni, and John Largo,* Case No. 18 (Navajo Court of Indian Offenses, Crownpoint, N.Mex., March 6, 1942) (reported in Boyden and Miller, "Report of Survey of Law and Order," 70–71).

89. Boyden and Miller, "Report of Survey of Law and Order," 41.

90. David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law,* 5th ed. (St. Paul: West Publishing Co., 2005), 199; *Williams v. Lee,* 358 U.S. 217, 220–21 (1959).

91. 67 Stat. 588 (1953), as amended, 18 U.S.C.A. §§ 1161–62, 25 U.S.C.A. §§ 1321–22, 28 U.S.C.A. § 1360 (1953). Public Law 280 extended state criminal and civil jurisdiction to Indian country in five specified states: California, Nebraska, Minnesota (except Red Lake Reservation), and Wisconsin; Alaska was added in 1958.

92. See *Williams v. Lee,* 358 U.S. 217, 222–23 (1959).

93. 25 U.S.C.A. § 636 (1954); Stephen Cohn, "Mid-Passage—The Navajo Tribe and Its First Legal Revolution," *American Indian Law Review* 6 (1978): 334.

94. Cohn, "Mid-Passage," 344–45.

95. Congress passed the Navajo-Hopi Rehabilitation Act with the Fernandez Amendment in 1949, but President Harry Truman vetoed the Act, stating that the Amendment might be construed to eliminate Navajo customary practices and impose upon the Navajos, the majority of whom were non-English-speaking, non-Indian laws "which they neither want[ed] nor [understood]" (ibid., 345).

96. The Navajo-Hopi Rehabilitation Act channeled millions of dollars to the Navajo Nation for road construction, schools, range conservation, irrigation projects, health-care facilities, loans, and domestic and institutional water projects (Iverson, *Diné,* 4, 189–90).

97. Navajo Nation, "Navajo Tribal Council Minutes" (Window Rock, Ariz., October 14, 1958), 246. Chairman Jones's remarks preface the legislation that established the Navajo Nation Court System.

98. Norman Littell had worked with two Seattle law firms and had served as assistant solicitor in the Department of the Interior and as assistant attorney general in the U.S. Justice Department before becoming the Navajo Nation's general counsel on July 10, 1947. Littell resigned as general counsel in late February 1967, following an acrimonious relationship with Chairman Raymond Nakai, which resulted in a federal

court decision against Littell in *Udall v. Littell,* 366 F.2d 668 (D.C. Cir. 1966) (Iverson, *Diné,* 207, 231–32; Peter Iverson, "Legal Counsel and the Navajo Nation since 1945," *American Indian Quarterly* 3 [1977]: 2, 6–7). In 1968, as part of the Indian Civil Rights Act, Congress removed unilateral state authority and replaced it with tribe consent to state jurisdiction. See 25 U.S.C. §§ 1321(a), 1322(a), 1326 (2006).

99. Cohn, "Mid-Passage," 335, 340.

100. *Williams v. Lee,* 83 Ariz. 241, 319 P.2d 998 (Ariz. 1958).

101. *Williams v. Lee,* 356 U.S. 930 (1958).

102. *Williams v. Lee,* 358 U.S. 217 (1959). Professor Charles Wilkinson points out that the U.S. Supreme Court's decision in *Williams v. Lee* "opened the modern era of federal Indian law" (Charles F. Wilkinson, *American Indians, Time and the Law* [New Haven: Yale University Press, 1987], 1).

103. *Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959). The Navajo Tribal Council legalized religious use of peyote on the Navajo Nation in 1967.

104. The estimated budget for law enforcement on the Navajo Nation for the 1958 fiscal year was $1,398,766. Out of that total, the Navajo Nation's share was $1,313,766 (93.5 percent), while the federal government's share was $85,000 (6.5 percent). Navajo Tribal Council Resolution No. CJ-45-58 (July 18, 1958).

105. "The Navajo Tribe hereby requests the Secretary of the Interior to divest himself of and to transfer to the Navajo Tribe his authority over all aspects of the law enforcement program on the Navajo Reservation and other land subject to the jurisdiction of the Navajo Tribe" (ibid.).

106. Navajo Nation, *Navajo Tribal Council Minutes* (October 14, 1958), 246.

107. Navajo Tribal Council Resolution No. CO-69-58 (October 16, 1958). This resolution created the Navajo Nation Court System.

108. Ibid.

109. Ibid.

110. Navajo Tribal Council Resolution No. CMY-39-78 (May 4, 1978).

111. Navajo Tribal Council Resolution No. CAP-32-77 (April 5, 1977), titled "Supporting Chairman Peter MacDonald in the Defense of Charges Brought against Him Alleging That Tucson Gas & Electric Company Was Defrauded and Amending Fiscal Year Budget by Appropriating $70,000 for the Defense." The 74-member Navajo Tribal Council passed the resolution (34 in favor, 19 against) that appropriated $70,000 of Navajo public funds to pay attorney F. Lee Bailey to defend Chairman MacDonald against federal criminal charges.

112. *Halona v. MacDonald,* 1 Nav. Rptr. 341 (Shiprock Dist. Ct. 1978). The Shiprock District Court issued its permanent injunction on May 25, 1977. The date shown in the citation of the case in the *Navajo Reporter* (May 18, 1978) could be the date the court filed its written opinion.

113. *Halona v. MacDonald,* 1 Nav. Rptr. 189 (Nav. Sup. Ct. 1978).

114. Navajo Nation, *Navajo Tribal Council Minutes* (May 4, 1978), 478–95.

115. Ibid., 470–71.

116. Ibid., 472.

117. Ibid.

118. Ibid.

119. Navajo Tribal Council Resolution No. CD-94-85 (December 4, 1985) (the Judicial Reform Act of 1985).

120. 7 N.N.C. § 302 (2005).

121. 7 N.N.C. §§ 302, 303 (2005) (mandamus compels a lower court or government official to perform mandatory or ministerial duties; prohibition prevents a lower court from exceeding its jurisdiction; and habeas corpus is used to test the legality of a person's detention). The Navajo Nation Supreme Court can answer certified questions that involve Navajo Nation law. *In re Certified Question from the U.S. Dist. Ct. for the Dist. of Arizona and Concerning the Case of: Peabody Coal Co. v. Nez,* 8 Nav. Rptr. 132 (Nav. Sup. Ct. 2001).

122. *Tafoya v. Navajo Nation Bar Association,* 6 Nav. Rptr. 141 (Nav. Sup. Ct. 1989).

123. "The Family Courts of the Navajo Nation shall have original exclusive jurisdiction over all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship, mental health commitments, mental and/or physical incompetence, name changes, and all matters arising under the Navajo Nation Children's code." 7 N.N.C. § 253(B) (2005).

124. 7 N.N.C. §§ 292(A), (C) (2005).

125. 7 N.N.C. § 355(A) (2005).

126. 7 N.N.C. §§ 355(B), (C) (2005).

127. 7 N.N.C. §§ 352(A), (B), (D) (2005).

128. 7 N.N.C. § 352(C) (2005).

129. 7 N.N.C. § 253(A)(1)–(3) (2005).

130. 7 N.N.C. § 253(A)(1) (2005).

131. 17 N.N.C. § 204(C) (2005). This section codifies the *haadaaní* rule announced in *Means v. District Court of the Chinle Judicial District,* 7 Nav. Rptr. 383, 391–93 (Nav. Sup. Ct. 1999). *Means* holds that the Navajo Nation courts have criminal jurisdiction over non-Navajos who marry enrolled Navajos and violate Navajo Nation criminal laws. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), holds that Indian tribes do not have general criminal jurisdiction over non-Indians.

132. 17 N.N.C. § 204(D)(1)–(4) (2005).

133. 28 U.S.C. § 1151 (2005).

134. 7 N.N.C. § 254(A) (2005).

135. 522 U.S. 520 (1998).

136. See 17 N.N.C. § 477 (2005) (interfering with judicial proceedings).

2. Foundational Diné Law Principles

1. As discussed in chapter 1, Secretary of the Interior Albert Bacon Fall established the original Navajo Tribal government primarily to serve the economic interests of exploitative non-Indian mineral companies. Secretary Fall's reasons for creating the Navajo Tribal Council arguably conform to Professor Derrick Bell's interest convergence dilemma theory. Bell's theory holds that "minority rights are only recognized by the dominant society when that society perceives that it is in its own best interests to do so" (Robert A. Williams, Jr., *Like a Loaded Weapon* [Minneapolis: University of Minnesota Press, 2005], xxxiii). The challenge for Indian nation leaders is to convince American policy makers and judges that it is in the country's interests that tribes "govern their reservation homelands and those who enter them by their own laws, customs, and traditions, even when these are incommensurable with the dominant society's values and ways of doing things" (ibid., xxxv).

2. See Navajo Tribal Council Resolution No. CJA-1-59 (January 6, 1959) (titled "Adopting as tribal law the law and order regulations of the Department of the Interior on a temporary basis").

3. Cultural match, which means that the tribe's culture, including customs and traditions, should match its institutions, is one of the components of the Nation-Building Model. The other components are "stable institutions and policies, fair and effective dispute resolution, separation of politics from business management, [and] a competent bureaucracy" (Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," *American Indian Culture and Research Journal* 22 [1998]: 196, 201–5).

4. The goals of the termination policy were to abolish Indian reservations and make the lands taxable and severable, end the tribal–federal relationship, and end the special services that the federal government provides to Indian nations. Although termination in practice was abandoned in 1961, it was not until President Richard M. Nixon called for a new federal policy of self-determination for Indian tribes in 1970 that the termination policy was officially ended. See Stephen Cornell, *The Return of the Native* (New York: Oxford University Press, 1988), 123–25.

5. See Resolution of the Judicial Conference of the Navajo Nation (April 23, 1982). Copy of resolution in James W. Zion and Nelson McCabe, *Navajo Peacemaker Court Manual* (1982). In 1991, the Navajo Nation Supreme Court declared Navajo common law as the law of preference in the Navajo Nation courts. *Navajo Nation v. Platero,* 6 Nav. Rptr. 422 (Nav. Sup. Ct. 1991).

6. Navajo common law has been a mainstay in the decision making of the Navajo Nation courts since 1959. The Navajo Nation Judicial Branch published the first volume containing Navajo court decisions in 1979. The first reported decision concerns Navajo custom: whether a Navajo custom marriage between two Navajos that lacks a marriage license is a valid marriage. *In re Marriage of Daw,* 1 Nav. Rptr. 1 (Nav. Sup. Ct. 1969).

The Navajo judges of the Navajo Court of Indian Offenses also applied customs and used traditional Navajo dispute resolution methods. In 1959, the Navajo Tribal Council converted the old Court of Indian Offenses' choice of law regulation, which had allowed use of Indian customs in decision making, into Navajo Nation law. Navajo Tribal Council Resolution No. CJA-1-59 (January 6, 1959) (codified at 7 N.N.C. § 204 (2005)). See chapter 2, note 23 for the regulation that applied in the Navajo Court of Indian Offenses.

7. Zion and McCabe, *Navajo Peacemaker Court Manual,* 2–3.

8. Ibid., 3.

9. Navajo Nation Council Resolution No. CN-69-2002, Whereas Cl. 6 (November 1, 2002). See also Dan Vicenti, Leonard B. Jimson, Stephen Conn, and M. J. L. Kellogg, *Diné Bibee Haz´aanii* (Ramah, N.Mex.: Ramah High School Press, 1972): "The white man did not understand Navajo law because Navajo people did not call it law, but, rather, religion" (104).

10. *Bennett v. Navajo Board of Election Supervisors,* 6 Nav. Rptr. 319, 324 (Nav. Sup. Ct. 1990).

11. Ibid.

12. Natural law is defined as a philosophical system of law and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than human institutions; also, moral law embodied in principles of right and wrong (Black's Law Dictionary, 7th ed. [1999], 1049).

13. Navajo Nation Council Resolution No. CN-69-2002 (November 1, 2002).

14. Ibid.

15. Those who call American Indian philosophy primitive have never done the hard task of explaining Diné epistemology by going to its substratum to abstract subtle features. Navajo philosophy rivals any philosophy in the world. The concepts that comprise Navajo epistemology (called the Diné Way of Knowledge in this book) are highly developed, complex, and difficult to translate into English. For these reasons, and because I am using my traditional education and knowledge to explain traditional concepts, my translation of the Diné Fundamental Laws differs from those in the Navajo Nation Code. The difference in translation does not mean that those in the Code are wrong. The difference results from lack of English words that accurately describe Navajo concepts that have much broader meaning and application than Anglo-American legal concepts.

16. 1 N.N.C. §§ 203(A)–(J) (2005). This section speaks to the people's right to choose their leaders; that Navajo leaders should be ethical and law-abiding; that the government is composed of four branches (with specified duties)—executive, legislative, judicial, and national security; that Navajo culture, spirituality, and language should be preserved; and that the Navajo Nation respects all religions and honors religious freedom.

17. 1 N.N.C. § 201 (2005). When they created the original Diné, the Holy Beings established foundational laws that the Diné people were directed to follow. This mandate is likely part of the covenant referred to at section 201.

18. Navajo Nation Council Resolution No. CN-69-2002, Preamble: Whereas Cl. No. 2 (November 1, 2002). These are the closest English translations of these terms: *Diyin* means the Creator; *Diyin Dine´é* means the Holy Beings; and *Nahasdzáán* and *Yah diłhił* mean the Earth and the Heavens, respectively.

19. The spiritual origins of Navajo traditional law are briefly discussed in Robert Yazzie, "'Life Comes from It': Navajo Justice Concepts," *New Mexico Law Review* 24 (1994): 175–76.

20. See the Declaration of the Foundation of Diné Law, codified at 1 N.N.C. § 201 (2005) (Diné language is one aspect of Diné identity), Navajo Nation Council Resolution No. CN-69-2002 (November 1, 2002).

21. E. Adamson Hoebel, *The Law of Primitive Man: A Study of Comparative Legal Dynamics,* 5th printing (New York: Atheneum Press, 1974), 12–17.

22. *In re Estate of Belone,* 5 Nav. Rptr. 161, 165 (Nav. Sup. Ct. 1987); see also *Navajo Nation v. Platero,* 6 Nav. Rptr. 422, 424 (Nav. Sup. Ct. 1987). The Window Rock District Court decisions from that time that describe customs and traditions as Navajo common law are *In re Estate of Apachee,* 4 Nav. Rptr. 178, 179–81 (Window Rock Dist. Ct. 1983) and *Tome v. Navajo Nation,* 4 Nav. Rptr. 159, 160–61 (Window Rock Dist. Ct. 1983) (Navajo common law consists of Navajo customs, traditions, and usages and is binding on the Navajo Nation courts). The Navajo Nation Council and the Navajo Nation courts do not use the same terminology to identify Diné fundamental customs and traditions. See 1 N.N.C. §§ 202–6 (2005), Navajo Nation Council Resolution No. CN-69-2002 (November 1, 2002).

23. The law-and-order regulation for the Navajo Court of Indian Offenses that became Navajo statutory law stated: "In all civil cases the Court of Indian Offenses shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe, not prohibited by such Federal laws." See section 2, "Law Applicable in Civil Actions," *Federal Register* 3 (May 18, 1938), 1135. The term "Courts of the Navajo Tribe" replaced "Court of Indian Offenses" when the Navajo Tribal Council adopted the Bureau of Indian Affairs regulation as Navajo law in 1959. The 1985 amendment reads as follows:

"In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws and customs of the Navajo Nation not prohibited by applicable federal laws." 7 N.N.C. § 204 (1985). The 1985 amendment dropped the word *civil* from the term "civil cases."

24. The current statutory authorization, 7 N.N.C. § 204(A) (2005), states: "In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The courts shall utilize Diné bi beenahaz´aanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz´aanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts."

25. *Navajo Housing Authority v. Bluffview Resident Management Corp.,* 8 Nav. Rptr. 402, 414 (Nav. Sup. Ct. 2003); *Fort Defiance Housing Corp. v. Lowe,* 8 Nav. Rptr. 463 (Nav. Sup. Ct. 2004); *Judy v. White,* 8 Nav. Rptr. 510 (Nav. Sup. Ct. 2004).

26. The eight published volumes of the *Navajo Reporter* contain opinions from 1969 through 2005. Opinions beginning in January 2006 are in loose-leaf form. The books can be purchased from the Navajo Nation Supreme Court, P.O. Box 520, Window Rock, Navajo Nation, AZ 86515.

27. *Navajo Nation v. Platero,* 6 Nav. Rptr. 422, 424 (Nav. Sup. Ct. 1991). The U.S. Supreme Court recognizes the right of the Navajo Nation courts to use Navajo common law. *United States v. Wheeler,* 435 U.S. 313 (1978).

28. 7 Nav. Rptr. 222 (Nav. Sup. Ct. 1996). The *Ben v. Burbank* case is discussed at the end of chapter 4.

29. *Lente v. Notah,* 3 Nav. Rptr. 72, 80 (Nav. Sup. Ct. 1982).

30. *In re Estate of Belone,* 5 Nav. Rptr. 161, 163–64 (Nav. Sup. Ct. 1987); *Judy v. White,* 8 Nav. Rptr. 510, 535–36 (Nav. Sup. Ct. 2004).

31. Custom "is a practice and not an opinion. . . . Custom is what men *do,* not what they think" (emphasis in original). *Lente v. Notah,* 3 Nav. Rptr. 72, 80 (1982). According to Hoebel, customs that are law meet the following criterion: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting" (Hoebel, *Law of Primitive Man,* 28). Thus, a handshake, although a Navajo custom, is not law.

32. For example, a common etiquette is to wait at least five minutes before knocking on the door when visiting a Navajo family. The time allows the family to prepare for the visitor's welcome. When Navajos still lived in hogans, the delay was used to prepare a place for the visitor on the west side of the hogan.

The Navajo Nation Bar Association, with headquarters in Window Rock, Navajo Nation (Arizona), has more than 450 Navajo and non-Navajo members who practice

law on the Navajo Nation. Bar members who are not state-licensed attorneys (both Navajos and non-Navajos) are called court advocates. *Tafoya v. Navajo Nation Bar Association,* 6 Nav. Rptr. 141 (Nav. Sup. Ct. 1989); *In re Practice of Law in the Courts of the Navajo Nation by Avalos,* 6 Nav. Rptr. 191 (Nav. Sup. Ct. 1990); see also *Alderman v. Navajo Nation Bar Association,* 6 Nav. Rptr. 188 (Nav. Sup. Ct. 1990) (the Navajo Nation Supreme Court has ultimate authority over law practice on the Navajo Nation).

33. *Tafoya v. Navajo Nation Bar Association,* 6 Nav. Rptr. 141, 143 (Nav. Sup. Ct. 1989).

34. 5 Nav. Rptr. 161 (Nav. Sup. Ct. 1987).

35. *In re Estate of Belone,* 5 Nav. Rptr. 161, 164 (Nav. Sup. Ct. 1987). A party who pleads custom gives notice to all parties and the court that custom will be used in the case.

36. 8 Nav. Rptr. 510, 535–36 (Nav. Sup. Ct. 2004).

37. *In re Estate of Belone,* 5 Nav. Rptr. 161, 165 (Nav. Sup. Ct. 1987).

38. 4 Nav. Rptr. 178, 180 (Window Rock Dist. Ct. 1983).

39. *In re Estate of Belone,* 5 Nav. Rptr. 161, 165 (Nav. Sup. Ct. 1987).

40. Ibid., 166–67.

41. Ibid., 165.

42. Ibid. The Supreme Court stated that the trial court must be satisfied that "use of an expert witness is proper," *In re Estate of Belone,* 5 Nav. Rptr. at 166, which, when interpreted in light of the "sound discretion" standard, would mean that the expert's testimony would help the judge or jury (1) understand the custom, or (2) identify the custom that is applicable, or (3) determine how the custom should be applied. In addition, the second full paragraph on page 166 in *In re Estate of Belone* is general background information on expert witnesses. The guidelines for use of experts in the Navajo Nation courts are set forth on page 167 in *In re Estate of Belone,* beginning with the first full paragraph.

43. Ibid., 167.

44. Ibid.

45. Ibid. This limitation arises from the Court's concern that parties may attempt to manipulate experts to benefit their own interests, which is not in keeping with the traditional Navajo civil procedure of "talking things out" and making decisions by consensus.

46. 7 N.N.C. § 204(B) (2005). The predecessor to this provision comes from the 1938 regulations for the Navajo Court of Indian Offenses: "Where any doubt arises as to the customs and usages of the tribe the court may request the advice of counselors familiar with these customs and usages." See section 2, "Law Applicable in Civil Actions," *Federal Register* 3 (May 18, 1938): 1136.

47. *In re Estate of Belone,* 5 Nav. Rptr. 161, 166, 167 (Nav. Sup. Ct. 1987).

48. The Court said, on appeal, it will "review, as a matter of law, whether the district court followed the proper procedure in determining the expert witness's qualifications as regards the custom or tradition applicable to the specific circumstances and locale involved" (ibid., 167). The words at the end of the quote ("locale involved") imply that Navajo custom can be unique to a place.

49. Ibid.

50. Ibid., 165–66.

51. *Apache v. Republic National Life Insurance Co.,* 3 Nav. Rptr. 250 (Window Rock Dist. Ct. 1983).

52. Ibid., 252.

53. 5 Nav. Rptr. 161, 165 (Nav. Sup. Ct. 1987).

54. Ibid., 165–66.

55. Ibid., 165.

3. *Hózhǫ́* (Peace, Harmony, and Balance)

1. The phrase "the main stalk" is borrowed from John R. Farella, *The Main Stalk: A Synthesis of Navajo Philosophy* (Tucson: University of Arizona Press, 1984), 32. Navajo philosophers and storytellers also use the corn stalk (as "the main stalk") to symbolize *hózhǫ́* when narrating the Navajo Creation Scripture and Journey Narratives. Additionally, the *hózhǫ́* concept has roots in the creation and journey stories.

2. The Navajo term, *T'áá ałtso ałk'éí daniidlį,* is called the Navajo universal relations doctrine in this book and is discussed at the beginning of chapter 4.

3. See Leland C. Wyman, *Blessingway* (Tucson: University of Arizona Press, 1970), 7; Clyde Kluckhohn, "The Philosophy of the Navajo Indians," in *Ideological Differences and World Order, Studies in the Philosophy of the World's Cultures,* ed. F. S. C. Northrop (New Haven: Yale University Press, 1949), 368–70.

4. For example, when it rains Navajos will say, "We have been blessed because our prayers have been answered." Thus, rain is *hózhǫ́,* a blessing.

5. Gladys A. Reichard, *Navajo Religion: A Study of Symbolism* (Princeton, N.J.: Princeton University Press, 1950; renewed 1977), 45.

6. SNBH is all-encompassing and pervasive in the Navajo universe. A sure way to know that Navajo thinking on SNBH is at a level of sacredness, and not available for public discourse, is when the keeper of the knowledge refuses to discuss its intricacies with Navajo or non-Navajo. The sacred knowledge applies in a ceremony.

7. Gary Witherspoon, *Navajo Kinship and Marriage* (Chicago: University of Chicago Press, 1975), 8; see also Raymond D. Austin, "ADR and the Navajo Peacemaker Court," *The Judges' Journal* 32, no. 2 (1993): 10: "The Navajo culture stresses

hozho, which when generally translated means 'harmony.' It is, however, broader than that, with a meaning something like 'a reality with a place for everything, and everything in its place, functioning well with everything else.' In other words, the 'Perfect State.'" I would add the words "and with" to Witherspoon's translation: *hózhǫ́* "refers to that state of affairs where everything is in its proper place and functioning in harmonious relationship to [and with] everything else."

8. The idea of beings in Navajo philosophy is discussed at the beginning of chapter 4.

9. See Farella, *The Main Stalk,* 9–14 ("Levels of Knowledge").

10. Ibid., 10.

11. See James W. Zion, "Navajo Therapeutic Jurisprudence," *Touro Law Review* 18 (2002): 597.

12. Farella, *The Main Stalk,* 13.

13. Ibid.

14. See Maureen Trudelle Schwarz, *Molded in the Image of Changing Woman* (Tucson: University of Arizona Press, 1997), 25.

15. Ibid. The translations are my own. Again, another Navajo language speaker could interpret the terms differently.

16. See Gary Witherspoon, *Language and Art in the Navajo Universe* (Ann Arbor: University of Michigan Press, 1977), 39.

17. Farella, *The Main Stalk,* 35. Farella argues that positive and negative are needed to contrast things. For example, you need beauty to define ugliness. Do away with beauty and you eliminate ugliness, its opposite.

18. The Twin Warriors are *Naayéé´ Neizghání* and *Tó Bájíshchíní;* their names translate into English as "Monster Slayer" and "Born-for-Water," respectively. The Fourth World is the present world. Navajos call Changing Woman their mother because they believe she created the Diné who originated the four basic clans, the source of the modern kinship structure.

19. No. SC-CR-04-05 (Nav. Sup. Ct., July 24, 2006).

20. 1 N.N.C. § 8 (2005).

21. *Navajo Nation v. Kelly,* No. SC-CR-04-05, slip op. at 6–7 (Nav. Sup. Ct., July 24, 2006). On the double-jeopardy issue, the Court stated that the traditional Navajo concept of finality assures that "multiple charges arising out of a defendant's single action may not allow multiple convictions, as the offenses charged must clearly resolve separate conduct to not violate a defendant's double jeopardy right." Ibid., slip. op. at 8. The doctrine of finality also has an important role in restoring parties to *hózhǫ́* following a divorce. See *Apache v. Republic National Life Insurance Co.,* 3 Nav. Rptr. 250 (Window Rock Dist. Ct. 1983).

22. 8 Nav. Rptr. 463, 473 (Nav. Sup. Ct. 2004).

23. 8 Nav. Rptr. 476 (Nav. Sup. Ct. 2004) ("we must interpret the DAPA [Domestic Abuse Protection Act] consistent with *Diyin Nohookáá´ Diné´e Bi Beehaz´aanii* (Navajo common law)"). Ibid., slip op. at 7.

24. *Fort Defiance Housing Corp. v. Lowe,* 8 Nav. Rptr. 463, 474–75 (Nav. Sup. Ct. 2004).

25. 8 Nav. Rptr. 510 (Nav. Sup. Ct. 2004).

26. Ibid., 529, 530.

27. Ibid., 531. The Navajo concept of community free speech is addressed in chapter 4 under the subheading "Principle of *Hazhó´ógo* (Freedom with Responsibility)."

28. *In re Mental Health Services of Bizardi,* 8 Nav. Rptr. 593 (Nav. Sup. Ct. 2004); *Duncan v. Shiprock District Court,* 8 Nav. Rptr. 581 (Nav. Sup. Ct. 2004); *Navajo Nation v. Blake,* 7 Nav. Rptr. 233, 235 (Nav. Sup. Ct. 1996).

29. *In re Mental Health Services of Bizardi,* 8 Nav. Rptr. 593 (Nav. Sup. Ct. 2004); *Navajo Nation v. Blake,* 7 Nav. Rptr. 233, 235 (Nav. Sup. Ct. 1996) (the goal of traditional dispute resolution is to "restore the parties and their families to *hozho* (harmony)" using the civil process of "talking things out" and the remedy of *nályéél*); *Atcitty v. District Court for the Judicial District of Window Rock,* 7 Nav. Rptr. 227, 230 (Nav. Sup. Ct. 1996).

30. 8 Nav. Rptr. 593 (Nav. Sup. Ct. 2004).

31. Ibid., 597. In the field of law, moot means having no practical significance (e.g., an issue that has been decided becomes moot).

32. 4 Nav. Rptr. 3, 4 (Nav. Sup. Ct. 1983).

33. *Fort Defiance Housing Corp. v. Allen,* 8 Nav. Rptr. 492 (Nav. Sup. Ct. corrected opinion, 2004) (a conflict between a court rule that allowed thirty days for appeal and a forcible entry and detainer statute that allowed five days for appeal caused the late filing of the notice of appeal).

34. *Fort Defiance Housing Corp. v. Lowe,* 8 Nav. Rptr. 463, 475 (Nav. Sup. Ct. 2004).

35. No. SC-CV-63-05 (Nav. Sup. Ct., January 4, 2006).

36. Ibid., slip op. at 6.

37. 471 U.S. 845 (1985).

38. 6 Nav. Rptr. 246 (Nav. Sup. Ct. 1990). The Navajo Nation labor laws are collectively called the Navajo Preference in Employment Act, 15 N.N.C. §§ 601–19 (2005).

39. *Arizona Public Service Co. v. Office of Navajo Labor Relations,* 6 Nav. Rptr. 246, 279 (Nav. Sup. Ct. 1990).

40. 8 Nav. Rptr. 159 (Nav. Sup. Ct. 2001).

41. Ibid., 165. The Navajo Nation Labor Commission is an administrative hearing body, 15 N.N.C. § 302 (2005), with jurisdiction over labor complaints filed pursuant to the Navajo Preference in Employment Act (NPEA), 15 N.N.C. §§ 601–19 (2005). The Act's chief objective is enforcement of employment preference for Navajo workers

employed on the Navajo Nation or with businesses that contract with the Navajo Nation. The reasons for enactment of the NPEA are listed at 15 N.N.C. § 602 (2005).

42. *Tuba City Judicial District v. Sloan,* 8 Nav. Rptr. 159, 167–68, slip op. at 5 (Nav. Sup. Ct. 2001).

43. 1 Nav. Rptr. 189 (Nav. Sup. Ct. 1978); see also discussion related to this case in chapter 1, under the subheading "Navajo Supreme Judicial Council of the Navajo Tribal Council."

44. Ibid., 205–6.

45. No. SC-CV-40-05, slip op. at 5-6 (Nav. Sup. Ct., May 18, 2006).

46. *Bradley v. Lake Powell Medical Center,* No. SC-CV-55-05, slip op. at 7 (Nav. Sup. Ct., February 16, 2007).

47. *In re Estate of Kindle,* No. SC-CV-40-05, slip op. at 5–6 (Nav. Sup. Ct., August 2, 2001) (petitioner had numerous opportunities to produce a videotape as evidence of an oral will but did not do so. The principle of *bił ch´íníyá* barred petitioner's further requests to the court to produce the tape).

48. No. SC-CV-55-05, slip op. at 7 (Nav. Sup. Ct., February 16, 2007).

49. Ibid., slip op. at 6. Comity, as used here, means that the Navajo courts should give legal effect to the state tribunal's decision.

50. Ibid., slip op. at 11.

51. Ibid., slip op. at 12.

52. Navajo Tribal Council Resolution No. C0-63-67 (October 9, 1967) (codified at 1 N.N.C. §§ 1–9 (2005)).

53. 25 U.S.C. § 1302 (2007).

54. 7 Nav. Rptr. 227 (Nav. Sup. Ct. 1996).

55. *Atcitty v. District Court for the Judicial District of Window Rock,* 7 Nav. Rptr. 227, 231 (Nav. Sup. Ct. 1996).

56. Ibid.

57. Ibid., 230.

58. *Means v. District Court of the Chinle Judicial District,* 7 Nav. Rptr. 382, 388n11 (Nav. Sup. Ct. 1999). On the right to counsel, the Navajo Nation Bill of Rights, 1 N.N.C. § 7 (2005), states: "[No] person shall be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation."

59. 25 U.S.C. § 1302(10) (2007).

60. 1 N.N.C. § 7 (2005). In civil cases, a jury trial is not permitted "in any domestic relations, decedent's estate, equitable proceeding, or miscellaneous case." 7 N.N.C. § 651 (2005).

61. *Duncan v. Shiprock District Court,* 8 Nav. Rptr. 581, 592–93 (Nav. Sup. Ct. 2004).

62. 7 Nav. Rptr. 176 (Nav. Sup. Ct. 1995).

63. Ibid., 178.

64. No. SC-CR-04-05, slip op. at 7 (Nav. Sup. Ct., July 24, 2006).

65. 8 Nav. Rptr. 463, 473–74 (Nav. Sup. Ct. 2004).

66. 7 Nav. Rptr. 100 (Nav. Sup. Ct. 1994).

67. Ibid., 102–3.

68. Ibid., 103.

69. 3 Nav. Rptr. 250 (Window Rock Dist. Ct. 1983).

70. Ibid.

71. Ibid., 253. The trial court said it was obligated to take judicial notice of Navajo custom that "every damn fool knows." Ibid., 252.

72. Ibid., 252–54.

73. 7 Nav. Rptr. 269, 270 (Nav. Sup. Ct. 1997).

74. Ibid., 273.

75. 8 Nav. Rptr. 627 (Nav. Sup. Ct. 2005).

76. Ibid., 636. See also *Yazzie v. Navajo Sanitation,* No. SC-CV-16-06, slip op. at 4 (Nav. Sup. Ct., July 11, 2007) (the Navajo Nation Labor Commission, an administrative hearing body, can create remedies for violations of employment laws; thus, the commission can grant an employee relief, including monetary relief, using the *nályéél* principle).

77. No. SC-CV-48-05 (Nav. Sup. Ct., March 8, 2007).

78. Ibid., slip op. at 7.

79. Ibid.

80. Ibid.

81. Fiscal Year 2006 Annual Report, Judicial Branch of the Navajo Nation (released May 2007). A fiscal year begins October 1 and ends September 30 of each year. These figures are about average for fiscal years 2001 to 2006. The total case load of the Navajo Nation courts for fiscal year 2006 was 74,384 cases (this does not include probation cases).

4. *K'é* (Kinship Unity through Positive Values)

1. The belief that there are categories of beings relies on the Navajo version of animism, which attributes "Inner Forms" to all things. The concept of "Inner Forms" implicates the sacred, which is integral to ceremonial practice so it will not be discussed further. The subject fits into the category of guarded knowledge. However, "Inner Forms" may become relevant in a lawsuit involving a Navajo sacred site.

2. For a further discussion of beings and the web of universal relations, see Maureen Trudelle Schwarz, *Molded in the Image of Changing Woman* (Tucson: University of Arizona Press, 1997), 17.

3. Gary Witherspoon, *Navajo Kinship and Marriage* (Chicago: University of Chicago Press, 1975), 120.

4. James W. Zion, "Navajo Therapeutic Jurisprudence," *Touro Law Review* 18 (2002): 607.

5. 7 Nav. Rptr. 100 (Nav. Sup. Ct. 1994).

6. Ibid., 103.

7. Ibid., 104–5.

8. The 2000 American Indian census reports that 298,197 people identified themselves as Navajo or part Navajo. United States Census Bureau, Department of Commerce, *The American Indian and Alaska Native Population: 2000, United States Census 2000* (issued February 2002), 8.

9. Clyde Kluckhohn and Dorothea Leighton, *The Navajo,* rev. ed. (Cambridge: Harvard University Press, 1974), 100.

10. Witherspoon, *Navajo Kinship and Marriage,* 120.

11. Whereas clauses 4 and 8 of the resolution state as follows: "4. The lack of definition of power and separation of legislative and executive functions have also allowed the legislative body to overly involve itself in administration of programs thereby demonstrating a need to limit the legislative function to legislation and policy decision making and further limit the executive function to implementation of laws and representation of the Navajo Nation; and . . . 8. It is in the best interest of the Navajo Nation that the Navajo Nation Government be reorganized to provide for separation of functions into three branches, and provide for checks and balances between the three branches." Navajo Nation Council Resolution No. CD-68-89 (December 15, 1989).

12. James W. Zion and Robert Yazzie, "Indigenous Law in North America in the Wake of Conquest," *Boston College International and Comparative Law Review* 20 (1997): 74; Philmer Bluehouse and James W. Zion, "Hozhooji Naat´aanii: The Navajo Justice and Harmony Ceremony," *Mediation Quarterly* 10, no. 4 (1993): 328–29. The idea of vertical and horizontal systems of justice comes from "Richard Falk's distinction between 'vertical' and 'horizontal' justice institutions in international law and Michael Barkun's adaptation of the idea to indigenous law" (citations omitted). James W. Zion, "Monster Slayer and Born for Water: The Intersection of Restorative and Indigenous Justice," *Contemporary Justice Review* 2 (2001): 365.

13. Kluckhohn and Leighton, *The Navajo,* 118, 120.

14. *In re Certified Questions II, Navajo Nation v. MacDonald Sr.,* 6 Nav. Rptr. 105, 117 (Nav. Sup. Ct. 1989).

15. Preamble, Navajo Nation Code of Judicial Conduct.

16. Application of the Code, Navajo Nation Code of Judicial Conduct.

17. *Navajo Nation v. Platero,* 6 Nav. Rptr. 422, 424 (Nav. Sup. Ct. 1991).

18. Canon One, Principle, Navajo Nation Code of Judicial Conduct. The Navajo Four Sacred Mountains are Mount Blanca in Colorado; Mount Taylor in New Mexico; San Francisco Peaks in Arizona; and Mount Hesperus in Colorado.

19. Ibid.

20. Canon One, Considerations No. 3 (Judicial Attitudes), No. 4 (Coercion), and No. 6 ("Fair Play"), Navajo Nation Code of Judicial Conduct.

21. Canon Three, Consideration No. 1 ("The Judge as Mediator"), Navajo Nation Code of Judicial Conduct.

22. *In re Mental Health Services of Bizardi,* 8 Nav. Rptr. 593, 597 (Nav. Sup. Ct. 2004).

23. Canon One, Consideration No. 1 ("Harmony"), Navajo Nation Code of Judicial Conduct.

24. The Navajo people are masters of cultural integration—taking foreign concepts, tweaking them with Navajo ingenuity, and making them their own. For example, the Navajo Nation Court System, while modeled on the Anglo-American form of adjudication, uses Navajo common law in its decisions. Another example is the integration of members of other Indian tribes into the Navajo population and giving them clan names.

25. The Navajo Nation Supreme Court, while addressing the issue of whether a New Mexico statute that exempted certain property from execution in state court should be applied by the Navajo Nation courts, stated as follows: "The Navajo judicial system, as is the federal judicial system, is an independent system for administering justice to those who come within its jurisdiction. That being the case, the Navajo Courts . . . follow Navajo policies as to how the Navajo Courts should be run. (We do not, as do the federal courts, consider the policy of providing substantially the same outcome as the state courts. Our policy is often to *not* provide the same outcome in order to protect Navajo interests and cultural values)" (citation omitted) (emphasis in original). *Johnson v. Dixon,* 4 Nav. R. 108, 110 (1983).

26. *In re Validation of Marriage of Francisco,* 6 Nav. Rptr. 134, 139–40 (Nav. Sup. Ct. 1989) ("As a sovereign Indian nation that is constantly developing, the Navajo Nation must be forever cautious about state or foreign law infringing on Navajo Nation sovereignty").

27. *Goldtooth v. Naa Tsis´Aan Community School, Inc.,* 8 Nav. Rptr. 682, 691 (Nav. Sup. Ct. 2005).

28. Ibid., 692; see also *Kesoli v. Anderson Security Agency,* 8 Nav. Rptr. 724 (Nav. Sup. Ct. 2005) (a supervisor employed by a private security company is a *naat´áanii,* so he must be careful with his words; thus, when he "shouted" at subordinates, he

committed "harassment" [unprofessional conduct according to company policy], which justified his firing).

29. *Goldtooth v. Naa Tsis´ Aan Community School, Inc.,* 8 Nav. Rptr. 682, 692 (Nav. Sup. Ct. 2005).

30. Ibid., 691.

31. 8 Nav. Rptr. 743, 750 (Nav. Sup. Ct. 2005).

32. Ibid., 749–50.

33. Ibid., 750.

34. *Navajo Nation v. Rodriguez,* 8 Nav. Rptr. 604 (Nav. Sup. Ct. 2004). Despite the similarity of language on the right against self-incrimination in the Navajo Nation Bill of Rights and the Indian Civil Rights Act, the Navajo Nation Bill of Rights does not track its federal counterpart. The Navajo Nation Bill of Rights was passed in 1967, and the Indian Civil Rights Act was passed in 1968. If anything, the Navajo Nation Bill of Rights borrows language from the U.S. Bill of Rights.

35. Ibid., 613–14.

36. Ibid., 614.

37. Ibid., 613.

38. Ibid., 615. The Court added to Miranda rights the requirement that a standardized "advice of rights" form given to a suspect to sign as a waiver of rights must be explained in detail so that the suspect understands the rights he is waiving. The requirement of clear and concise communication falls within the principle of *íishjání ádoolníił,* which is discussed after the next section and in *Rough Rock Community School v. Navajo Nation,* 7 Nav. Rptr. 168, 174–75 (Nav. Sup. Ct. 1995).

39. *Navajo Nation v. Rodriguez,* 8 Nav. Rptr. 604, 610, 613, 615–16 (Nav. Sup. Ct. 2004). To buttress its position, the Court also said that "a police badge cannot eliminate an officer's duty to act towards others in compliance with the principles of *hazhó´ógo.*" The word *hazhó´ógo,* when applied to contacts between an authority figure and a non-authority figure, suggests that the government official should observe *k´é* rules when dealing with a member of the community.

40. 7 Nav. Rptr. 176, 177 (Nav. Sup. Ct. 1995).

41. 6 Nav. Rptr. 319 (Nav. Sup. Ct. 1990).

42. Ibid., 325.

43. 7 Nav. Rptr. 313 (Nav. Sup. Ct. 1998).

44. Ibid., 317–18.

45. 8 Nav. Rptr. 510 (Nav. Sup. Ct. 2004).

46. Ibid., 531; *Duncan v. Shiprock District Court,* 8 Nav. Rptr. 581, 592–93 (Nav. Sup. Ct. 2004) (community participation in dispute resolution is an exercise in Navajo ways of governance and reinforces Navajo collective identity).

47. 7 Nav. Rptr. 176, 177 (Nav. Sup. Ct. 1995); *In re Mental Health Services of*

Bizardi, 8 Nav. Rptr. 593, 597 (Nav. Sup. Ct. 2004) ("talking things out" with respect under the doctrine of *k´é* restores parties to *hózhǫ́*).

48. 7 Nav. Rptr. 168 (Nav. Sup. Ct. 1995).

49. Ibid., 175.

50. Ibid., 174–75.

51. No. SC-CV-01-07 (Nav. Sup. Ct., May 14, 2007).

52. Ibid., slip op. at 5; see also *Yazzie v. Thompson,* 8 Nav. Rptr. 693 (Nav. Sup. Ct. 2005) (the "make things clear" rule requires a clear statement as to which party should be responsible for paying the fee of a domestic violence commissioner).

53. 8 Nav. Rptr. 751, 754–55 (Nav. Sup. Ct. 2005).

54. Ibid., 758.

55. Ibid.

56. *Yazzie v. Thompson,* 8 Nav. Rptr. 693, 697n2 (Nav. Sup. Ct. 2005).

57. *Navajo Nation v. MacDonald Jr.,* 7 Nav. Rptr. 1, 7 (Nav. Sup. Ct. 1992).

58. Ibid., 7.

59. *Navajo Nation v. Blake,* 7 Nav. Rptr. 233, 234–35 (Nav. Sup. Ct. 1996).

60. *Singer v. Nez,* 8 Nav. Rptr. 122, 130 (Nav. Sup. Ct. 2001).

61. *Navajo Nation v. Crockett,* 7 Nav. Rptr. 237, 241 (Nav. Sup. Ct. 1996).

62. *Taylor v. Dilcon Community School,* 8 Nav. Rptr. 365 (Nav. Sup. Ct. 2005).

63. *Benally v. Mobil Oil Corp.,* 8 Nav. Rptr. 365 (Nav. Sup. Ct. 2003).

64. Ibid., 367–68; *Allstate Indemnity Co. v. Blackgoat,* 8 Nav. Rptr. 627 (Nav. Sup. Ct. 2005) (the Supreme Court decided this case with two justices after the third justice was unable to continue because of severe illness).

65. For a discussion of individual rights within the context of community (as opposed to individual rights in American law), see James W. Zion, "Monster Slayer and Born for Water: The Intersection of Restorative and Indigenous Justice," *Contemporary Justice Review* 2 (2001): 363–69.

66. Raymond D. Austin, "ADR and the Navajo Peacemaker Court," *Judges' Journal* 32, no. 2 (1993): 8.

67. *Navajo Nation v. Rodriguez,* 8 Nav. Rptr. 604, 615 (Nav. Sup. Ct. 2004).

68. Austin, "ADR and the Navajo Peacemaker Court," 10. *K´ee* and *k´e* are different spellings of the same word.

69. 1 N.N.C. §§ 1–9 (NNBR) and 25 U.S.C. § 1302 (ICRA).

70. *In re Estate of Plummer Sr.,* 6 Nav. Rptr. 271, 274 (Nav. Sup. Ct. 1990).

71. *Navajo Nation v. Rodriguez,* 8 Nav. Rptr. 604, 613 (Nav. Sup. Ct. 2004).

72. 6 Nav. Rptr. 66 (Nav. Sup. Ct. 1988) (the due process clauses are at 1 N.N.C. § 3 in the Navajo Nation Bill of Rights and 25 U.S.C. § 1302(8) in the Indian Civil Rights Act).

73. 6 Nav. Rptr. 66, 74 (Nav. Sup. Ct. 1988).

74. 7 Nav. Rptr. 227, 229 (Nav. Sup. Ct. 1996).

75. Ibid., 230 (the Court stated at footnote 2: "This is a part of the broader Navajo traditional principle of freedom with responsibility. An individual has much freedom in Navajo society, but that freedom must be exercised with respect for self, family, clan relatives, and the community at large"); see also *Rough Rock Community School v. Navajo Nation,* 7 Nav. Rptr. 313, 317–18 (Nav. Sup. Ct. 1998) (*k´é* informs Navajo due process in the context of Navajo participatory democracy).

76. *Begay v. Navajo Nation,* 6 Nav. Rptr. 20, 24–25 (Nav. Sup. Ct. 1988).

77. *Atcitty v. District Court for the Judicial District of Window Rock,* 7 Nav. Rptr. 227, 231 (Nav. Sup. Ct. 1996).

78. Ibid.

79. 7 Nav. Rptr. 168, 173 (Nav. Sup. Ct. 1995).

80. Ibid., 173.

81. 6 Nav. Rptr. 319, 325–27 (Nav. Sup. Ct. 1990). The Court also said that the Navajo Nation Council can limit a fundamental right "only for good and weighty reasons for the protection of the public interest." Ibid., 328.

82. 5 Nav. Rptr. 115, 118–19 (Nav. Sup. Ct. 1987); see also *Staff Relief, Inc. v. Polacca,* 8 Nav. Rptr. 49 (Nav. Sup. Ct. 2000) (the Navajo Nation Labor Commission must follow its own rules on providing hearings for it to be in compliance with due process of law); *Taylor v. Dilcon Community School,* 8 Nav. Rptr. 717 (Nav. Sup. Ct. 2005) (the *k´é* principle requires the Navajo Nation Labor Commission to provide the terminated employee with a hearing, although she did not attend an employer-provided hearing).

83. *Navajo Housing Authority v. Bluffview Resident Management Corp.,* 8 Nav. Rptr. 402 (Nav. Sup. Ct. 2003).

84. *In re A.P. v. Tuba City Family Court,* 8 Nav. Rptr. 671 (Nav. Sup. Ct. 2005).

85. 8 Nav. Rptr. 463 (Nav. Sup. Ct. 2004).

86. Ibid., 475; see also *Navajo Townsite Community Development Corp. v. Sorrell,* 8 Nav. Rptr. 214 (Nav. Sup. Ct. 2002).

87. *In re Estate of Plummer Sr.,* 6 Nav. Rptr. 271, 275 (Nav. Sup. Ct. 1990).

88. Ibid.

89. Ibid.

90. No. SC-CV-63-06 (Nav. Sup. Ct., January 12, 2007).

91. Ibid., slip op. at 7.

92. Ibid.

93. *Benally v. Big A Well Service Co.,* 8 Nav. Rptr. 60, 66 (Nav. Sup. Ct. 2000) (holding the statutory requirement of posting bond in "an amount equal to double the yearly value or rental of the premises" as violating equal protection and therefore invalid).

94. *In re Certified Question from the U.S. Dist. Ct. for the Dist. of Arizona and Concerning the Case of: Peabody Western Coal Co. v. Nez,* 8 Nav. Rptr. 132, 137 (Nav. Sup. Ct. 2001). Navajo court rules allow state and federal courts to certify questions involving Navajo law, including statutory and Navajo common law, to the Navajo Nation Supreme Court for interpretation.

95. Ibid., 138–39; see also *Ramah Navajo Community School v. Navajo Nation,* 8 Nav. Rptr. 141 (Nav. Sup. Ct. 2001) (the Navajo Nation may not conduct school board elections using an apportionment plan that the Court has ruled invalid by subsequently passing a resolution that declares the plan valid. When the Navajo Nation used the invalidated plan, it violated the due process rights of the plaintiff schools and the candidates for office).

96. 8 Nav. Rptr. 492 (Nav. Sup. Ct., corrected opinion 2004).

97. Ibid., 499–500n4; *Allstate Indemnity Co. v. Blackgoat,* 8 Nav. Rptr. 627, 634n1 (Nav. Sup. Ct. 2005) (a Navajo Nation Supreme Court opinion applies to all cases pending in the Navajo Nation courts or administrative agencies at the time it is filed; the Court can require that an opinion apply prospectively if it does not violate due process as informed by *k´é*). An opinion is a court's written explanation of its decision in a case.

98. "A salary increase may be approved by the Navajo Nation Council but shall not become effective unless ratified by two-thirds (2/3) of all Navajo Nation Chapters within 30 days of approval by the Navajo Nation Council." 2 N.N.C. § 106(A) (2005).

99. The Council stated in its resolution, Whereas Clause 7, that "Sections 101(b), 102(a), 1008 and 106(A) of the Title Two (2) amendments shall not apply to amendments duly proposed by the Navajo Nation Commission on Navajo Government Development." Navajo Nation Council Resolution No. CJY-52-00 (July 20, 2000). The Council circumvented the four sections that posed obstacles by giving the commission authority to propose pay raises for delegates.

100. 8 Nav. Rptr. 510 (Nav. Sup. Ct. 2004).

101. Ibid., 541–42.

102. No. SC-CV-01-07 (Nav. Sup. Ct., May 14, 2007).

103. 2 N.N.C. § 104(B) (2005); 11 N.N.C. § 8(B)(11) (2005).

104. The part of 1 N.N.C. § 203(A) (2005) that the appellant relied on states: "It is the right and freedom of the Diné to choose leaders of their choice."

105. *In re Grievance of Wagner,* No. SC-CV-01-07, slip op. at 7, 8 (Nav. Sup. Ct., May 14, 2007).

106. Ibid., slip op. at 7–8.

107. 8 Nav. Rptr. 510, 531 (Nav. Sup. Ct. 2004).

108. 7 Nav. Rptr. 237 (Nav. Sup. Ct. 1996).

109. Ibid.

110. Ibid., 237–38.

111. Ibid., 242.

112. Ibid., 240–41.

113. 8 Nav. Rptr. 724 (Nav. Sup. Ct. 2005).

114. Ibid., 729; NPEA, 15 N.N.C. § 604(B)(8) (2005) ("All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause").

115. *Kesoli v. Anderson Security Agency,* 8 Nav. Rptr. 724, 732 (Nav. Sup. Ct. 2005); *Goldtooth v. Naa Tsis´ Aan Community School, Inc.,* 8 Nav. Rptr. 682 (Nav. Sup. Ct. 2005) (identifying the school's executive director as *naat´áanii*).

116. *Kesoli v. Anderson Security Agency,* 8 Nav. Rptr. 724, 732 (Nav. Sup. Ct. 2005).

117. 8 Nav. Rptr. 604 (Nav. Sup. Ct. 2004).

118. 8 Nav. Rptr. 501 (Nav. Sup. Ct. 2004). See also *Smith v. Navajo Nation Department of Head Start,* 8 Nav. Rptr. 709, 714–15 (Nav. Sup. Ct. 2005) (words in a contract [a personnel manual] are sacred and never frivolous; thus, a provision in a personnel manual that allows an employer to terminate a worker for her failure to report that she is not coming to work will be enforced). Up to now, the court has not specifically applied the "words are powerful" principle to a legal issue.

119. 8 Nav. Rptr. 501, 504 (Nav. Sup. Ct. 2004).

120. Ibid., 505–6.

121. 7 Nav. Rptr. 237, 240–41 (Nav. Sup. Ct. 1996).

122. These four (Hero Twins, deceased's property and identity, and ceremony) traditional limitations on speech come from my personal knowledge of Navajo culture.

123. *Navajo Nation v. Crockett,* 7 Nav. Rptr. 237, 241 (Nav. Sup. Ct. 1996).

124. 7 Nav. Rptr. 233, 234 (Nav. Sup. Ct. 1996).

125. Ibid., 234–35.

126. Richard Van Valkenburgh, "Navajo Common Law II, Navajo Law and Justice," *Museum Notes: Museum of Northern Arizona* 9 (April 1937): 53.

127. The criminal caseload for fiscal year 2006 (October 1, 2005–September 30, 2006) totaled 24,536 cases (Navajo Nation Judicial Branch, *2006 Annual Report*).

128. *Stanley v. Navajo Nation,* 6 Nav. Rptr. 284, 286 (Nav. Sup. Ct. 1990).

129. 8 Nav. Rptr. 732 (Nav. Sup. Ct. 2005).

130. Ibid., 737.

131. Ibid.

132. Ibid.; *Stanley v. Navajo Nation,* 6 Nav. Rptr. 284, 284–85 (Nav. Sup. Ct. 1990) (the tape recording of the arraignment proves defendant was informed of her rights as well as the contents of the complaint in Navajo and English; therefore, her guilty plea to the crime of accomplice to delivery of liquor was knowingly and voluntarily made).

133. *Navajo Nation v. Morgan,* 8 Nav. Rptr. 732, 738 (Nav. Sup. Ct. 2005); *Thompson v. Greyeyes,* 8 Nav. Rptr. 476, 487 (Nav. Sup. Ct. 2004) (the defendant must have

notice of the available sentencing options. The trial court erred when it imposed a jail term using a statute that allows only payment of restitution for a guilty plea).

134. 8 Nav. Rptr. 269, 272 (Nav. Sup. Ct. 2002) (the Court also said a prisoner's note from jail to the trial court must be treated as a petition for writ of habeas corpus under Navajo law).

135. Ibid., 273.

136. Ibid.

137. Ibid.

138. 8 Nav. Rptr. 617, 622 (Nav. Sup. Ct. 2005).

139. Ibid. The Navajo Nation Bill of Rights, 1 N.N.C. § 7, states as follows: "No person accused of an offense punishable by imprisonment . . . shall be denied the right, upon request, to a trial by jury of not less than six persons."

140. *Eriacho v. Ramah District Court,* 8 Nav. Rptr. 617, 622 (Nav. Sup. Ct. 2005) (the Navajo Rules of Criminal Procedure, Rule 13(a), requires a defendant to "demand a jury trial at the time of arraignment or within 15 days thereinafter or it will be waived").

141. Ibid., 623.

142. 8 Nav. Rptr. 581, 592–93 (Nav. Sup. Ct. 2004) (participatory democracy, as expressed through community decision making, is reflected in the modern Navajo jury trial).

143. 7 Nav. Rptr. 176, 178 (Nav. Sup. Ct. 1995) (the Court said participatory democracy, as expressed through community participation, allows jurors to ask questions of witnesses during trial).

144. 8 Nav. Rptr. 617, 625–26 (Nav. Sup. Ct. 2005).

145. Ibid., 627; Navajos and non-Navajos serve on Navajo court juries. Any person over eighteen years of age and residing within Navajo territorial jurisdiction can be called for jury duty. 7 N.N.C. § 654 (2005).

146. *Eriacho v. Ramah District Court,* 8 Nav. Rptr. 617, 625–26 (Nav. Sup. Ct. 2005).

147. 8 Nav. Rptr. 604, 610 (Nav. Sup. Ct. 2004) (this case is discussed in this chapter under "The Rule on Adopting *Bilagáana* Law").

148. Ibid.

149. Ibid.

150. Ibid.

151. Ibid., 612.

152. Ibid., 612–13.

153. Ibid., 614; *In re A.W., a minor,* 6 Nav. Rptr. 38, 41 (Nav. Sup. Ct. 1988) (a child taken into custody for juvenile delinquency must be informed of Miranda rights).

154. *Navajo Nation v. Rodriguez,* 8 Nav. Rptr. 604, 615 (Nav. Sup. Ct. 2004).

155. Ibid.

156. Ibid.

157. Ibid., 615–16.

158. Ibid., 616.

159. On appointment of pro bono counsel, see *Boos v. Honorable Robert Yazzie,* 6 Nav. Rptr. 211 (Nav. Sup. Ct. 1990), and *In re A.W., a minor,* Nav. Rptr. 38, 42, 43 (Nav. Sup. Ct. 1988) (child in custody for juvenile delinquency must be provided with counsel and given the same rights as adults).

160. The Indian Civil Rights Act states: "No Indian tribe in exercising powers of self-government shall—deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302(6) (2008).

161. 8 Nav. Rptr. 697 (Nav. Sup. Ct. 2005).

162. Ibid., 700.

163. Ibid. (the Navajo Nation settled the brother's part in the lawsuit).

164. Ibid., 700–701, 703.

165. Ibid., 702–3.

166. Ibid., 703.

167. For a further discussion of the "way out" concept, see Maureen Trudelle Schwarz, *Molded in the Image of Changing Woman* (Tucson: University of Arizona Press, 1997), 108–11.

168. *Navajo Nation v. Arviso,* 8 Nav. Rptr. 697, 703 (Nav. Sup. Ct. 2005).

169. Ibid.

170. Ibid., 703–4. Note the interplay between individual rights and community rights in the Court's reasoning.

171. Ibid., 704.

172. Equitable tolling means that a statute of limitations will not bar a plaintiff's claim if he made diligent efforts but did not discover the injury until after the time for bringing suit had expired.

173. *Moore v. BHP Billiton,* No. SC-CV-32-05, slip op. at 4 (Nav. Sup. Ct., May 14, 2007); see also *Yazzie v. Tooh Dineh Industries,* No. SC-CV-67-05 (Nav. Sup. Ct., September 20, 2006); *Harvey v. Kayenta School Board,* 7 Nav. Rptr. 374 (Nav. Sup. Ct. 1999).

174. 7 Nav. Rptr. 222 (Nav. Sup. Ct. 1996).

175. Ibid., 224.

5. *K'éi* (Descent, Clanship, and Kinship)

1. For example, Navajos refer to Changing Woman, a female Holy Being, as their mother. Changing Woman is credited with creating four pairs of Diné who are the

originators of the modern Navajo clan system. Ironically, modern Navajos cannot agree on which clans are the original four clans.

2. The political term "full-blood" is used here for illustrative purposes only. A Navajo can be less than "full-blood" and still claim all four clans. For example, if ego's one-half Navajo blood mother (she has a Navajo mother) marries a full-blood Navajo, ego will be three-fourths Navajo blood but can still claim the clans of his mother, father, maternal grandfather, and paternal grandfather.

3. The Navajo Nation enrollment law, 1 N.N.C. § 701 (2005), provides as follows: "The membership of the Navajo Nation shall consist of the following persons: (A). All persons of Navajo blood whose names appear on the official roll of the Navajo Nation maintained by the Bureau of Indian Affairs. (B). Any person who is at least one-fourth degree Navajo blood, but who has not previously been enrolled as a member of the Navajo Nation, is eligible for membership and enrollment. (C). Children born to any enrolled member of the Navajo Nation shall automatically become members of the Navajo Nation and shall be enrolled, provided they are at least one-fourth degree Navajo blood." The Navajo Tribal Council passed the original version of section 701 on January 18, 1938. See "legislative history, Title I," *Navajo Nation Code,* 42.

4. *Means v. Navajo Nation,* 432 F.3d 924, 933 (9th Cir. 2005). Which persons fall into the group the Ninth Circuit designates as "de facto members of tribes"?

5. 1 N.N.C. § 702 (2005).

6. These clan names come from Wilson Aronilth, Jr., *Foundation of Navajo Culture* (2d draft 1992), 111. My traditional teachings identify the four original clans as Bitter Water, Near Water, Mud, and *Biitaaníí* (not the same as the current *Bit'ahnii*—"Under His Cover Clan"). When directed to search for water, the first bearer struck the spring bed with his scepter and drew nothing but dust, so this pair became known as the *Biitaaníí* Clan. The *Biitaaníí* Clan did not enter the land between the four sacred mountains, but instead returned to Changing Woman's residence in the west. Changing Woman used the *Biitaaníí* Clan to people other Diné groups. This discussion shows that Navajos do not agree on the makeup of the four original clans.

7. Clyde Kluckhohn and Dorothea Leighton, *The Navajo,* rev. ed. (Cambridge: Harvard University Press, 1974), 112.

8. 9 N.N.C. § 2(B) (2005). This statute also prohibits plural and same-sex marriages: "A. All plural marriages contracted, whether or not in accordance with Navajo custom, shall be void and prohibited. . . . C. Marriage between persons of the same sex is void and prohibited." 9 N.N.C. §§ 2(A) and (C) (2005). Subsections B and C were enacted in 2005, Navajo Nation Council Resolution No. CJN-34-05 (June 3, 2005), and subsection A was passed on July 12, 1945. *Navajo Tribal Council Resolutions 1922–1951,* 86.

9. 9 N.N.C. §§ 5(D) and (E) (2005) (these subsections were enacted in 1993 by Navajo Nation Council Resolution No. CAP-36-93, April 23, 1993).

10. The general elements comprising the traditional marriage ceremony have been codified at 9 N.N.C. § 4(D)(1)–(6) (2005). See text accompanying note 51 in this chapter.

11. To see how the male in-law relationship has been used in the Navajo Nation courts to support jurisdiction over nonmember Indians, see *Means v. District Court of the Chinle Judicial District,* 7 Nav. Rptr. 383 (Nav. Sup. Ct. 1999).

12. 9 N.N.C. § 401 (2005).

13. Raymond D. Austin, "ADR and the Navajo Peacemaker Court," *Judges' Journal* 32, no. 2 (1993): 10.

14. Stephen Hawking, *A Brief History of Time* (New York: Bantam Books, 1988), 63.

15. See Dan Vicenti, Leonard B. Jimson, Stephen Conn, and M. J. L. Kellogg, *Diné Bibee Haz´aanii* (Ramah, N.Mex.: Ramah High School Press, 1972), 124, 126–27, 213, 214.

16. See as examples James W. Zion, "The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New," *American Indian Law Review* 11 (1983): 89–109; Michael Taylor, "Modern Practice in the Indian Courts," *University of Puget Sound Law Review* 10 (1987): 231–75.

17. 7 Nav. Rptr. 269, 271 (Nav. Sup. Ct. 1997).

18. *Davis v. Means,* 7 Nav. Rptr. 100, 103 (Nav. Sup. Ct. 1994).

19. *In re Estate of Apachee,* 4 Nav. Rptr. 178, 182 (Window Rock Dist. Ct. 1983).

20. No. SC-CV-39-04 (Nav. Sup. Ct., June 13, 2007).

21. Ibid., slip op. at 3.

22. Ibid.

23. 7 Nav. Rptr. 100, 102 (Nav. Sup. Ct. 1994).

24. Ibid., 102–3.

25. *Fort Defiance Housing Corp. v. Lowe,* 8 Nav. Rptr. 463, 473–74 (Nav. Sup. Ct. 2004); *Allen v. Fort Defiance Housing Corp.,* 8 Nav. Rptr. 759, 765 (Nav. Sup. Ct. 2005) (a home is "a place of central importance in Navajo thinking" and "a loss of a home deeply affects Navajo concepts of family and spirituality").

26. 9 N.N.C. §§ 2(B), 5(D), 5(E) (2005).

27. According to Kluckhohn and Leighton, in one geographic area they studied, "seven out of about 100 married men have more than one wife. In general, plural marriages are associated with higher economic status" (Kluckhohn and Leighton, *The Navajo,* 100–101).

28. 9 N.N.C. § 2 (2005): "All plural marriages contracted, whether or not in accordance with Navajo custom, shall be void and prohibited." The law enacted on July 12, 1945, states as follows: "[A]ll plural marriages contracted after the approval of this resolution, whether or not in accordance with tribal custom, shall be void." *Navajo Tribal Council Resolutions 1922–1951,* 86.

29. The August 27, 1892, "Rules for Indian Courts," which was a repeat of the 1883 rules for the Courts of Indian Offenses, promulgated by the Bureau of Indian Affairs contained a provision, section 4(b), that outlawed plural marriage among all Indian tribes: "(b) Plural or polygamous marriages. Any Indian under the supervision of a United States Indian agent who shall hereinafter contract or enter into any plural or polygamous marriage shall be deemed guilty of an offense, and upon conviction thereof shall pay a fine of not less than twenty nor more than fifty dollars, or work at hard labor for not less than twenty nor more than sixty days, or both, at the discretion of the court; and so long as the person shall continue in such unlawful relation he shall forfeit all right to receive rations from the Government" (*Documents of United States Indian Policy,* 2d ed., ed. Francis Paul Prucha [Lincoln: University of Nebraska Press, 1990], 187).

30. "[T]he Tribal Council expresses its displeasure of plural marriages among our younger people and any plural marriage consummated after this date shall be void and the parties thereto shall be subject to fine . . . not to exceed $30.00 and . . . imprisonment . . . not to exceed 30 days or both." *Navajo Tribal Council Resolutions 1922–1951* (July 18, 1944), 84.

31. Navajo Tribal Council Resolution No. CJ-2-40 (June 3, 1940).

32. Ibid. Resolved Clause No. 1. These are the rites that had to be observed: "1). The parties to the proposed marriage shall have met and agreed to marry. 2). The parents of the man [shall] ask the parents of the woman for her hand in marriage. 3). The parents agree, the date is set, and the marriage ceremony is performed as follows: (1) The ceremony is held in the hogan of the bride's parents. (2) The bridegroom pours water into the outstretched hands of the bride; she does likewise for him. (3) The bride and bridegroom then eat cornmeal mush out of the sacred basket. (4) Those assembled in the hogan then give advice for a happy marriage to the bride and groom. (5) Gifts may or may not be exchanged."

33. Ibid., Resolved Clause No. 2.

34. Navajo Tribal Council Resolution No. CF-2-54 (February 11, 1954).

35. *In re Validation of Marriage of Francisco,* 6 Nav. Rptr. 134, 136 (Nav. Sup. Ct. 1989).

36. 1 Nav. Rptr. 1 (Nav. Sup. Ct. 1969).

37. Ibid., 1–2.

38. Ibid., 3.

39. Ibid.

40. *In re Validation of Marriage of Ketchum,* 2 Nav. Rptr. 102, 105 (Nav. Sup. Ct. 1979). In *Ketchum,* the parties married in a traditional Navajo wedding ceremony in 1974, but did not obtain a marriage license. The husband died and his surviving dependents applied for and were denied Social Security benefits for lack of any document

showing a marriage. The Court stated the elements of a Navajo common-law marriage as: (1) present consent to be husband and wife; (2) actual cohabitation; and (3) actual holding out to the community as married. Ibid., 105, citing *Kelly v. Metropolitan Life Ins. Co.,* 352 F. Supp. 270 (S.D.N.Y., 1972).

41. *Navajo Nation v. Murphy,* 6 Nav. Rptr. 10, 13 (Nav. Sup. Ct. 1988).

42. 6 Nav. Rptr. 134 (Nav. Sup. Ct. 1989).

43. Ibid., 134–35. The "mixed marriages" statute stated as follows: "Marriages between Navajos and non-Navajos may be validly contracted only by the parties complying with applicable state or foreign law." 9 N.N.C. § 2 (1977) (rescinded by Navajo Nation Council Resolution No. CAP-36-93, April 23, 1993). The trial court in *Francisco* also relied on a previous decision where the Court refused to validate a 1959 traditional Navajo marriage between a Navajo and a Mexican-American. *In re Validating the Marriage of Garcia,* 5 Nav. Rptr. 30 (Nav. Sup. Ct. 1985).

44. 6 Nav. Rptr. 134, 139 (Nav. Sup. Ct. 1989). The prior rulings that the Court refers to are found in *Daw,* 1 Nav. Rptr. 1 (Nav. Sup. Ct. 1969); *Ketchum,* 2 Nav. Rptr. 102 (Nav. Sup. Ct. 1979); and *Murphy,* 6 Nav. Rptr. 10 (Nav. Sup. Ct. 1988).

45. 6 Nav. Rptr. 134, 135 (Nav. Sup. Ct. 1989), citing *Navajo Nation v. Murphy,* 6 Nav. R. 10, 13 (Nav. Sup. Ct. 1988).

46. *In re Validation of Marriage of Francisco,* 6 Nav. Rptr. 134, 140 (Nav. Sup. Ct. 1989).

47. Ibid.

48. Ibid.

49. Navajo Nation Council Resolution No. CAP-36-93 (April 23, 1993). The Council, at Whereas Clauses Nos. 3 and 4, stated: "3. The provisions of Title Nine, Chapter One, Navajo Tribal Code, incorporate provisions allowing state and foreign law to govern domestic relations within the Navajo Nation and incorporate principles of law which are alien to Navajo custom and are inconsistent with the practices of the Navajo people; and . . . 4. The Navajo Nation Supreme Court stated, in the decision of In re: Validation of Marriage of Loretta Francisco (A-CV-15-88, August 2, 1989), that provisions of Title Nine have outlived their usefulness and recommended that '. . . the Navajo Nation Council amend Title Nine of the Navajo Tribal Code so that it reflects Navajo regulation and control of domestic relations within Navajo territorial jurisdiction'" (citation omitted).

50. The Council recognized common-law marriage in the Navajo Nation to ensure that surviving spouses of deceased Navajo uranium miners would have their marriages validated without having to prove a traditional marriage ceremony that might have taken place a half a century or more ago. The resolution states: "Many members of the Navajo Nation who are applicants for benefits under the Radiation Exposure Compensation Act, 42 U.S.C. Section 2210, have encountered serious difficulties in proving

their eligibility for benefits as surviving spouses because Title Nine creates unnecessary complexities for proof of a valid marriage under Navajo Law." Navajo Nation Council Resolution No. CAP-36-93, Whereas Clause No. 5 (April 23, 1993).

51. The entire statute, at 9 N.N.C. § 4 (2005), states: "A marriage may be contracted within the Navajo Nation by any of the following procedures: A). The parties may contract marriage by signing a Navajo Nation marriage license in the presence of two witnesses. The witness shall also sign the license to acknowledge that the license was signed by the parties. In such cases the marriage shall be valid regardless of whether or not a ceremony is held; or B). The contracting parties may marry according to the rites of any church, in which case they, the officiating clergyman, and two witnesses shall sign in the places provided on the face of the marriage license. The authority to officiate at marriages of any person signing a Navajo Nation marriage license as a clergyman shall not be questioned; or C). The contracting parties may be married by any judge of the Navajo Nation Courts where the parties have first signed and completed a marriage license; or D). The contracting parties engage in a traditional Navajo wedding ceremony which shall have substantially the following features: (1). The parties to the proposed marriage shall have met and agreed to marry; (2). The parents of the man shall ask the parents of the woman for her hand in marriage; (3). The bride and bridegroom eat cornmeal mush out of a sacred basket; (4). Those assembled at the ceremony give advice for a happy marriage to the bride and groom; (5). Gifts may or may not be exchanged; (6). The person officiating or conducting the traditional wedding ceremony shall be authorized to sign the marriage license, or E). The contracting parties establish a common-law marriage having the following features: (1). Present intention of the parties to be husband and wife; (2). Present consent between the parties to be husband and wife; (3). Actual cohabitation; (4). Actual holding out of the parties within their community to be married."

52. 6 Nav. Rptr. 10 (Nav. Sup. Ct. 1988).

53. Rule 13 of the Navajo Rules of Evidence recognizes the husband–wife testimonial privilege. The Navajo evidence rules track the Federal Rules of Evidence. *Navajo Nation v. Murphy,* 6 Nav. Rptr. 10, 12 (Nav. Sup. Ct. 1988).

54. *Navajo Nation v. Murphy,* 6 Nav. Rptr. 10, 12, 13 (Nav. Sup. Ct. 1988).

55. Ibid., 13.

56. Ibid.

57. The parties did not live together and they did not hold themselves out to their community as married. Moreover, the alleged wife in her testimony identified the defendant as her boyfriend three times. Ibid., 12–14.

58. 7 Nav. Rptr. 383, 392 (Nav. Sup. Ct. 1999). *Haadaaní* is a male in-law and *hazháá´áád* is a female in-law.

59. Ibid., 387.

60. Ibid., 383. The U.S. Supreme Court held in *Duro v. Reina,* 495 U.S. 676 (1990), that an Indian tribe has criminal jurisdiction only over its members. In response to *Duro,* Congress amended the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303, called "Duro fix" legislation, to state that Indian tribes have inherent powers, "hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Means argued that the "Duro fix" legislation discriminated against him, because, "while the Navajo Nation 'cannot' prosecute non-Indians, the Nation is trying to prosecute [him] as a nonmember Indian." *Means v. District Court of Chinle Judicial District,* 7 Nav. Rptr. 383, 384 (Nav. Sup. Ct. 1999). Means's argument essentially was that the "Duro fix" legislation treats the two nonmembers of the tribe (non-Indian and nonmember Indian) differently because of their race. Means petitioned the Arizona federal district court for a writ of habeas corpus, which was denied. Means then appealed to the Ninth Circuit Court of Appeals, which held that the Duro fix legislation recognized and affirmed the Navajo Nation's criminal jurisdiction over nonmember Indians like Means and affirmed the Arizona federal district court. *Means v. Navajo Nation,* 432 F.3d 924, 933 (9th Cir. 2005), cert. denied 127 S. Ct. 381 (2006).

61. *Means v. District Court of Chinle Judicial District,* 7 Nav. Rptr. 383, 392–93 (Nav. Sup. Ct. 1999). Subsequent references are given in the text.

62. See, as examples, Mary Shepardson and Blodwen Hammond, *The Navajo Mountain Community* (Berkeley: University of California Press, 1970), 197; and Richard Van Valkenburgh, "Navajo Common Law I: Notes on Political Organization, Property and Inheritance," *Museum Notes: Museum of Northern Arizona* 9 (1937): 22 (cited in *Apache v. Republic National Life Insurance Co.,* 3 Nav. Rptr. 250, 252 [Window Rock Dist. Ct. 1983], and also used to argue for recognition of traditional Navajo divorce in *Begay v. Chief,* 8 Nav. Rptr. 654 [Nav. Sup. Ct., 2005]).

63. Navajo Tribal Council Resolution No. CJ-3-40 (June 4, 1940). The last resolved clause is now codified at 9 N.N.C. § 407 (2005) (the words "Tribal Courts" have been replaced with "Courts of the Navajo Nation").

64. 8 Nav. Rptr. 654 (Nav. Sup. Ct. 2005).

65. Ibid., 656–57.

66. Ibid., 657–58.

67. 1 Nav. Rptr. 141 (Nav. Sup. Ct. 1977).

68. *Begay v. Chief,* 8 Nav. Rptr. 654, 658–59 (Nav. Sup. Ct. 2005).

69. See Diné College Web site: http://www.Dinécollege.edu/ics/ (the institute was established in 2005). Diné College is located at Tsaile, Arizona, on the Navajo Nation.

70. *Apache v. Republic National Life Insurance Co.,* 3 Nav. Rptr. 250, 252–53 (Window Rock Dist. Ct. 1983).

71. Ibid., 254.

72. *Naize v. Naize,* 7 Nav. Rptr. 269, 271–72 (Nav. Sup. Ct. 1997).

73. Ibid., 272. In *Johnson v. Johnson,* 3 Nav. Rptr. 9, 11 (Nav. Sup. Ct. 1980), the Court upheld an award of alimony to the ex-wife using New Mexico statutory law, stating that there is no Navajo custom that prevented it from applying state alimony law. Regarding the support of a wife after divorce or desertion of her husband, the Court stated that traditionally the responsibility of support fell on her family. But the facts showed that the wife's family was not capable of supporting her, and that also justified the award of alimony using state law.

74. *Naize v. Naize,* 7 Nav. Rptr. 269, 271 (Nav. Sup. Ct. 1997).

75. Ibid., 272. The Court also said that Navajo laws "require our courts to apply Navajo common law equally to both spouses when addressing spousal maintenance issues." Ibid. In *Yazzie v. Yazzie,* 7 Nav. Rptr. 33, 34, 36 (Nav. Sup. Ct. 1992), the Court held that a trial court cannot modify an alimony award on its own. A party seeking modification of an alimony award must prove changed circumstances that are substantial and continuing. Also, despite the passage of time (ten years), all unpaid alimony must be brought current.

76. 5 Nav. Rptr. 105 (Nav. Sup. Ct. 1986).

77. Ibid., 107.

78. Ibid., 108.

79. Ibid., 106.

80. Ibid.

81. *Watson v. Watson,* 8 Nav. Rptr. 638 (Nav. Sup. Ct. 2005).

82. *Yazzie v. Yazzie,* 7 Nav. Rptr. 203, 206 (Nav. Sup. Ct. 1996).

83. *Watson v. Watson,* 8 Nav. Rptr. 638, 641 (Nav. Sup. Ct. 2005).

84. Ibid., 641.

85. *Alonzo v. Martine,* 6 Nav. Rptr. 395 (Nav. Sup. Ct. 1991).

86. Ibid., 396.

87. 3 Nav. Rptr. 72, 73 (Nav. Sup. Ct. 1982). Before a child custody order is modified, the requesting party must "show a substantial change of circumstances." *Barber v. Barber,* 5 Nav. R. 9, 12 (Nav. Sup. Ct. 1984) (quoting *Lente*). The substantial change of circumstances standard was revised to allow a lesser standard in the 1994 Navajo Nation Child Support Enforcement Act, which requires only "a showing of a change of circumstances." 9 N.N.C. § 1708(F) (2005). See also *Yazzie v. Yazzie,* 7 Nav. Rptr. 203, 206 (Nav. Sup. Ct. 1996).

88. *Lente v. Notah,* 3 Nav. Rptr. 72, 79–80 (Nav. Sup. Ct. 1982).

89. Ibid., 81.

90. Ibid.

91. Ibid., 77; *Barber v. Barber,* 5 Nav. Rptr. 9 (Nav. Sup. Ct. 1984) (the party requesting a change of child custody must prove that a change is in the best interests of the children; the court must act as the child's parent and act in the child's best interests);

Sombrero v. Honorable Keahnie-Sanford, 8 Nav. Rptr. 360 (Nav. Sup. Ct. 2003) (the child's best interests may require appointment of a guardian *ad litem*; the child's best interests require continuation of temporary child support). Other cases discussing the child's best interests standard include *Nez v. Nez,* 7 Nav. Rptr. 25 (Nav. Sup. Ct. 1992); *Alonzo v. Martine,* 6 Nav. Rptr. 395 (Nav. Sup. Ct. 1991); *Descheenie v. Mariano,* 6 Nav. Rptr. 26 (Nav. Sup. Ct. 1988); and *Notah v. Francis,* 5 Nav. Rptr. 147 (Nav. Sup. Ct. 1987).

92. 3 Nav. Rptr. 223, 227 (Window Rock Dist. Ct. 1982).

93. Ibid., 226.

94. Ibid., 227; *Pavenyouma v. Goldtooth,* 5 Nav. Rptr. 17 (Nav. Sup. Ct. 1984) (in this case, the Court found the reasoning in *Goldtooth v. Goldtooth* persuasive and awarded the parents joint custody of their children).

95. *Davis v. Davis,* 5 Nav. Rptr. 169, 171 (Nav. Sup. Ct. 1987).

96. Ibid., 171.

97. Ibid.

98. *Davis v. Crownpoint Family Court,* 8 Nav. Rptr. 279, 286 (Nav. Sup. Ct. 2003).

99. *In re Custody of T.M.,* 8 Nav. Rptr. 78 (Nav. Sup. Ct. 2001).

100. See also ibid., 85–86 (where the customs and maxim are acknowledged).

101. Ibid., 85.

102. Ibid., 86–87.

103. Ibid., 85.

104. Ibid., 85–86. Article 12 states: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules or national law" (Convention on the Rights of the Child, United Nations General Assembly Resolution No. 44/25 [November 20, 1989]).

105. *Tom v. Tom,* 4 Nav. Rptr. 12, 13 (Nav. Sup. Ct. 1983).

106. *In re Estate of Tsinahnajinnie,* 8 Nav. Rptr. 69 (Nav. Sup. Ct. 2001).

107. Ibid., 73–74.

108. Ibid., 76.

109. 5 Nav. Rptr. 147, 148 (Nav. Sup. Ct. 1987).

110. Ibid., 148.

111. Ibid., 150.

112. *Yazzie v. Yazzie,* 7 Nav. Rptr. 203, 205–6 (Nav. Sup. Ct. 1996) (the Court also set forth a formula for calculating interest on unpaid child support amounts).

113. 6 Nav. Rptr. 26, 27 (Nav. Sup. Ct. 1988).

114. Ibid., 27–28.

115. Ibid., 28–29.

116. 9 N.N.C. §§ 1701–1722 (2005). The child support guidelines are set forth at section 1706; this section also gives the Navajo Nation Supreme Court authority to "establish a scale of minimum child support contributions."

117. *Descheenie v. Mariano,* 6 Nav. Rptr. 26, 29 (Nav. Sup. Ct. 1988).

118. Ibid.

119. Ibid., 29–30.

120. Ibid., 30.

121. Ibid.

122. 8 Nav. Rptr. 274, 277 (Nav. Sup. Ct. 2003).

123. Ibid., 277.

124. Ibid., 277–78.

125. 6 Nav. Rptr. 395, 397 (Nav. Sup. Ct. 1991).

126. Ibid.

127. Ibid., 398.

128. 4 Nav. Rptr. 86 (Window Rock Dist. Ct. 1983).

129. Ibid.

130. Ibid., 89. The trial court identified the statutes as 7 N.T.C. § 701(a); 7 N.T.C. § 704; 7 N.T.C. § 706; 7 N.T.C. § 255; and 9 N.T.C. § 1303; *In re Interest of Tsosie,* 3 Nav. Rptr. 182 (Chinle Dist. Ct. 1981) (Navajo Nation statutes used to collect court judgments authorize wage garnishment to pay delinquent child support).

131. *Heredia v. Heredia,* 4 Nav. Rptr. 124, 126 (Nav. Sup. Ct. 1983).

132. Ibid., 127.

133. 9 N.N.C. §§ 1712, 1705(F), and 1708(E)(3) (2005).

134. 9 N.N.C. § 1709 (2005).

135. 3 Nav. Rptr. 250 (Window Rock Dist. Ct. 1983).

136. Ibid., 250–51. In disputes over insurance proceeds, the insurance company usually deposits the money with the court. The court then determines entitlement to the proceeds.

137. Ibid., 252.

138. Ibid.

139. Ibid., 253.

140. Ibid.

141. 8 Nav. Rptr. 20, 22 (Nav. Sup. Ct. 2000).

142. Ibid., 23.

143. Ibid., 23–24.

144. Ibid., 24.

145. Ibid.

146. Ibid., 26.

147. Ibid., 28.

148. 9 N.N.C. § 404 (2005).

149. *Begay v. Begay,* 6 Nav. Rptr. 160, 162 (Nav. Sup. Ct. 1989).

150. Ibid., 162.

151. Ibid. See also *Shorty v. Shorty,* 3 Nav. Rptr. 151 (Nav. Sup. Ct. 1982) (the guidelines were first established in this case).

152. 1 N.N.C. § 3 (2005) states: "Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law. Nor shall such rights be deprived by any bill of attainder or ex post facto law." In *Help v. Silvers,* 4 Nav. Rptr. 46 (Nav. Sup. Ct. 1983), the Supreme Court held that the equal rights clause prohibits gender-based favoritism. The Court refused to apply the Navajo common-law rule that favors a mother over a father in a child custody dispute.

153. The Navajo Nation Family Courts have original jurisdiction over probate matters on the Navajo Nation. 8 N.N.C. § 1 (2005).

154. A relevant section, in its entirety, states: "In the determination of heirs the court shall apply the custom of the Navajo Nation as to inheritance if such custom is proved. Otherwise the court shall apply state law in deciding what relatives of the decedent are entitled to be heirs." 8 N.N.C. § 2(B) (2005). See also *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 82 (Nav. Sup. Ct. 1986): "Under our rules, Navajo custom, if proven, controls the distribution of intestate property. Custom takes priority even if it conflicts with our rules of probate." Wills can be made in accordance with Navajo custom. Navajo custom, if proven, can supersede a provision in a will: a validly executed will shall be given effect, "but no distribution of property shall be made in violation of a proved Navajo custom which restricts the privilege of Navajo Nation members to distribute property by will." 8 N.N.C. § 3 (2005).

155. 1 Nav. Rptr. 27, 30 (Nav. Sup. Ct. 1971).

156. Ibid., 28.

157. Ibid., 31–32. It is common knowledge that orally devising property is a long-standing Navajo custom. Thus, the following statement in *In re Estate of Thomas,* 6 Nav. Rptr. 51, 53 (Nav. Sup. Ct. 1988), is a misstatement: "We can find no record of testamentary succession, either written or oral, in Navajo custom before the introduction during the middle of this century of the Anglo-American legal concept of succession through designation in a will."

158. *In re Estate of Thomas,* 6 Nav. Rptr. 51, 53 (Nav. Sup. Ct. 1988).

159. See Dan Lowery, "Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992," *American Indian Law Review* 18 (1993): 419–20.

160. 1 Nav. Rptr. 219, 220 (Nav. Sup. Ct. 1978).

161. Ibid., 221.

162. Ibid., 222–23.

163. The Dead Man's Act prohibits admission of a decedent's statement as evidence to support a claim against the decedent's estate (*Black's Law Dictionary,* 7th ed. [1999], 404).

164. *In re Estate of Benally,* 1 Nav. Rptr. 219, 224 (Nav. Sup. Ct. 1978).

165. 6 Nav. Rptr. 51 (Nav. Sup. Ct. 1988).

166. Ibid., 53.

167. Ibid., 54.

168. 7 Nav. Rptr. 262 (Nav. Sup. Ct. 1997).

169. Ibid., 263.

170. Ibid. (the daughter appears to evade the oral will on tape saying "it's not legal," and although "grandma wanted you to have the house," she "changed her mind").

171. Ibid.

172. Ibid., 266, 267.

173. Ibid., 267 (an investigator for the niece's attorney secretly taped the conversation).

174. Ibid., 268.

175. Ibid., 266.

176. No. SC-CV-40-05 (Nav. Sup. Ct., May 18, 2006).

177. Ibid., slip op. at 5.

178. 4 Nav. Rptr. 178 (Window Rock Dist. Ct. 1983). Subsequent references are given in the text.

179. Ibid., 183, 184. Neither party claimed that the money should go to the residential unit. The trial court said money can be either productive property or nonproductive property: "Cash can present a special problem because it can be treated either as productive property or nonproductive property. Treated as productive property, cash would be held in the camp for its economic security as a unit. Seen as nonproductive, cash would be distributed among family members." Ibid., 182.

180. *In re Estate of Chee,* 6 Nav. Rptr. 460 (Window Rock Dist. Ct. 1989).

181. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 82 (Nav. Sup. Ct. 1986). The customary trust is discussed in the next section, "Grazing and Land-Use Permits."

182. *In re Estate of Apachee,* 4 Nav. Rptr. 178, 182 (Window Rock Dist. Ct. 1983).

183. Ibid.

184. Ibid., 183.

185. Ibid. The decedent's brothers and sisters did not live with him, so they were not members of his immediate family for purposes of determining his heirs.

186. Ibid., 182.

187. Ibid., 181. The *hooghan* category is not listed in *In re Estate of Apachee.*

188. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 81 (Nav. Sup. Ct. 1986).

189. *In re Estate of Lee,* 1 Nav. Rptr. 27, 32 (Nav. Sup. Ct. 1971); *Yazzie v. Catron,* 7 Nav. Rptr. 19, 21 (Nav. Sup. Ct. 1992) ("A grazing permit can be sold, inherited or otherwise transferred and can be sub-leased to anyone eligible to receive it through inheritance").

190. See *In re Estate of Kindle,* 8 Nav. Rptr. 150, 157 (Nav. Sup. Ct. 2001) ("a grazing permit is only a license to graze animals in a given area, and it gives no land ownership interests"). The statement in *Estate of Kindle* probably narrowed a 1977 statement by the Court that a grazing permit transfers real property: "In the Navajo Nation, we hold that a grazing permit is the functional equivalent of a deed and is therefore an instrument which transfers real property." *In re Estate of Nelson,* 1 Nav. Rptr. 162, 165 (Nav. Sup. Ct. 1977).

191. *In re Estate of Benally,* 5 Nav. Rptr. 174, 179 (Nav. Sup. Ct. 1987).

192. *Begay v. Keedah,* 6 Nav. Rptr. 416, 421 (Nav. Sup. Ct. 1991).

193. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 83 (Nav. Sup. Ct. 1986). The rest of the heirs said they would sell their interests in the land if awarded and none wanted to farm the land or use it for subsistence.

194. *In re Estate of Benally,* 5 Nav. Rptr. 174, 179 (Nav. Sup. Ct. 1987).

195. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 83 (Nav. Sup. Ct. 1986); *In re Estate of Benally,* 5 Nav. Rptr. 174, 180, 181 (Nav. Sup. Ct.1987) ("Other heirs must be compensated from the estate in the approximate value of their share in the trust property," but may not receive a separate permit).

196. *In re Estate of Kindle,* 8 Nav. Rptr. 150 (Nav. Sup. Ct. 2001).

197. *Riggs v. Estate of Attakai,* No. SC-CV-39-04 (Nav. Sup. Ct., June 13, 2007). These factors are called the *Keedah* factors as they are outlined in the case of *Begay v. Keedah,* 6 Nav. Rptr. 416, 421 (Nav. Sup. Ct. 1991).

198. *Riggs v. Estate of Attakai,* No. SC-CV-39-04, slip op. at 3 (Nav. Sup. Ct., June 13, 2007).

199. Ibid., slip op. at 3–4.

200. Ibid., slip op. at 4n5.

201. *In re Estate of Benally,* 5 Nav. Rptr. 174, 179 (Nav. Sup. Ct. 1987), citing 3 N.T.C. § 785(1) (1977). See also 3 N.N.C. § 271(a) (2005) (a court must transfer a

land-use permit to the decedent's most logical heir and land assignments should not be subdivided).

202. *In re Estate of Harvey and Begay #2,* 6 Nav. Rptr. 413, 415 (Nav. Sup. Ct. 1991).

203. 3 Nav. Rptr. 9, 12 (Nav. Sup. Ct. 1980).

204. *In re Estate of Benally,* 5 Nav. Rptr. 174, 180 (Nav. Sup. Ct. 1987).

205. *Begay v. Keedah,* 6 Nav. Rptr. 416, 419–20 (Nav. Sup. Ct. 1991).

206. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 82 (Nav. Sup. Ct. 1986); *In re Estate of Benally,* 5 Nav. Rptr. 174, 180 (Nav. Sup. Ct. 1987).

207. *In re Estate of Benally,* 5 Nav. Rptr. 174, 180 (Nav. Sup. Ct. 1987).

208. Ibid.

209. *Malone v. Yazzie,* 7 Nav. Rptr. 88 (Nav. Sup. Ct. 1994).

210. *Begay v. Keedah,* 6 Nav. Rptr. 416, 421 (Nav. Sup. Ct. 1991).

211. "Private ownership of land, as by fee simple in the Anglo legal system, is unknown in the Navajo Nation." *Hood v. Bordy,* 6 Nav. Rptr. 349, 354 (1991). The quoted statement means that land is not owned by individuals in traditional Navajo society. Moreover, from the traditional Navajo perspective, the selling of Diné Bikéyah (Navajo lands) would be equivalent to selling one's mother.

212. *Tome v. Navajo Nation,* 4 Nav. Rptr. 159, 161 (Window Rock Dist. Ct. 1983). The Navajo Nation Supreme Court approved the *Tome* court's statement in *Hood v. Bordy,* 6 Nav. Rptr. 349, 354 (Nav. Sup. Ct. 1991).

213. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 81 (Nav. Sup. Ct. 1986).

214. *Yazzie v. Catron,* 7 Nav. Rptr. 19, 21 (Nav. Sup. Ct. 1992). In addition, the Court said, "Unless a Navajo has a grazing or agricultural use permit, a homesite or business lease, or rights to a customary use area, he or she has no rights or interest in trust land beyond those of every other member of the Navajo Nation." Ibid., 22.

215. Ibid., 21.

216. *Estate of Joe,* 4 Nav. Rptr. 99 (Nav. Sup. Ct. 1983).

217. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 83 (Nav. Sup. Ct. 1986).

218. *Dennison v. Tucson Gas and Electric Co.,* 1 Nav. Rptr. 95 (Nav. Sup. Ct. 1974). The dispute arose after the Navajo Nation government granted a right-of-way to a utility company for construction of a power transmission line across Navajo lands. The Court used the term "traditional use area" to refer to the area the government took by eminent domain and for which the plaintiffs wanted compensation. Ibid., 96. See also 16 N.N.C. § 1402 (2005) (the Navajo Nation government shall compensate the land user for the diminished or destroyed value of the land "for its customary use").

219. *In re Estate of Wauneka,* 5 Nav. Rptr. 79, 81 (Nav. Sup. Ct. 1986).

220. Ibid., 82.

221. 6 Nav. Rptr. 349, 351, 352–53 (Nav. Sup. Ct. 1991).

222. Ibid., 355–56.

223. Ibid., 354.

224. Ibid., 354, 356. The Court stated as follows: "The ownership of land always remains vested in the Navajo Nation as a whole, and cannot be wrested away through adverse possession or prescription by individual occupiers." Ibid., 354, citing *Yazzie v. Jumbo,* 5 Nav. Rptr. 75, 77 (Nav. Sup. Ct. 1986).

225. *In re Joe's Customary Use Area,* 6 Nav. Rptr. 545, 547–48 (Shiprock Dist. Ct. 1990).

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