I. INTRODUCTION

Since European contact, the Navajo Nation has struggled to reclaim and continue its culture and manage its own affairs. Native American governments and court systems, modeled after systems in the United States, were required and established by the U.S. government as a way to assimilate native peoples. However, through the creation of substantive law and dispute resolution processes that respect traditional culture, the Navajo Nation uses its legal system to continue...
its quest for sovereignty\(^4\) and self-determination.\(^6\) Thus, as is the case with most groups that have experienced imperialism and conquest,\(^7\) the Navajo Nation uses the language and legal tools of the dominant culture\(^8\) to recover and preserve its own culture.\(^9\)

The Navajo Nation has been forever changed because of its experience with the Spaniards\(^10\) and the Anglo-American United States.\(^11\) While the Navajo Nation can never fully retrieve its pre-contact culture and way of life, it can create a space where Navajo people can manage their own affairs, plan their destiny, and evolve as a culture.\(^12\) Tribal law and tribal courts can be a mechanism for doing

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7. See generally *LATINOS IN THE UNITED STATES: HISTORY, LAW AND PERSPECTIVE* (Antoinette Sedillo Lopez ed., 1995) (six volume anthology of articles written in English by Latino scholars regarding issues facing Latino people including the loss of their language).


Over the last century, the Navajo Nation has developed a three-branch government structure, a tribal court system, and a comprehensive tribal code.

Tribal regulation of marriage is an example of the tribal government and tribal court using the legal system to reclaim traditional values and to resist (at least in part) the dominant values imposed on the Navajo Nation. Identity as Diné (the Navajo’s term to refer to themselves) is based on clan affiliations, which


16. The first western courts were introduced to the Navajo Nation in 1892. See SIXTY-FIRST ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 209 (1892). The contemporary Navajo Nation courts were created in 1959 and reconstituted in 1985. See Robert Yazzie, “Life Comes From It”: Navajo Justice Concepts, 24 N.M. L. REV. 175, 177 (1994). As Chief Justice Yazzie points out in his article, most courts of the Navajo Nation use an adversarial model of adjudication, which is not consistent with the traditional healing approach of Navajo concepts of justice. Justice Yazzie has been a tireless advocate of using the court system to recover and preserve traditional Navajo culture.


[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.]
are determined by blood and marriage.\textsuperscript{19} Marriage has been an important and sacred institution in Navajo tradition.\textsuperscript{20} The Navajo Supreme Court and the Tribal Council have attempted to find a substantive law of marriage that respects traditional Navajo culture\textsuperscript{21} while meeting contemporary needs of Navajo people. The Navajo Nation's legal regulation of marriage has changed over time in a struggle to balance respect for sacred tradition and the needs of contemporary Navajo people.\textsuperscript{22} Ultimately, the Navajo Supreme Court and Tribal Council developed marital tribal law in a way that resists, at least in part, dominant Anglo-American cultural values concerning marriage and meets the needs of the Navajo people.

This article first describes the role of tribal courts in recovering tribal values, and then describes the history of the Navajo legal system.\textsuperscript{23} Although the legal system was imposed on Navajos by the federal government, the Navajos have increasingly used it to preserve and recover Navajo cultural values. Second, the article reviews the history of marital regulation on the Navajo Reservation.\textsuperscript{24} In arriving at its current law the Navajo Nation faced two struggles in preserving

\textit{Id.} at 182.

\textsuperscript{19} \textit{See generally,} GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE (1975).

\textsuperscript{20} Hozho in a marriage is the state of affairs where everything is in its proper place and functioning in harmonious relationship to everything else. \textit{See Kuwanhyoima v. Kuwanhyoima, No. TC CV-334-84 (Tuba City D. Ct. 1990), aff'd on other grounds, opinion approved, No. A-CV-13-90 (Navajo Nation S. Ct. 1990).}

\textsuperscript{21} Traditional Navajo culture is a matrilineal society. The Navajo creation story articulates that major differences between men and women justify different roles. In the story, Changing Woman explains the differences between men and women when she makes her demands on the sun:

Remember that I willingly let you send your rays into my body. Remember that I gave birth to your son, enduring pain to bring him into the world. Remember that I gave that child growth and protected him from harm. . . . Remember, as different as we are, you and I, we are of one spirit. As dissimilar as we are, you and I, we are of equal worth. As unlike as you and I are, there must always be solidarity between the two of us.


\textsuperscript{22} \textit{See infra} notes 60-141 and accompanying text. This paper will look at the legal issue of marriage law in Navajo country in its legal, historical, and cultural context. \textit{See} Antoinette Sedillo Lopez, \textit{A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology}, 10 HASTINGS W. L. J. 343 (1999) (proposing a four step approach to comparative analysis which takes cultural context, legal context, history, and perspective into account).

\textsuperscript{23} \textit{See infra} notes 30-59 and accompanying text.

\textsuperscript{24} \textit{See infra} notes 60-141 and accompanying text.
its values. The first struggle was with the federal government and its policy of assimilation. The second struggle was with itself in trying to recover and determine its own values about the marital relationship. The Navajo Nation has balanced respect for Navajo tradition with contemporary realities of the Navajo people. The Navajo Supreme Court and Tribal Council have fused Navajo traditional concepts and Anglo-American concepts to recover and preserve Navajo heritage in its marriage law. Third, the article looks at state and federal marriage regulation. States recognize many marriage-like relationships and "foreign" marriages including marriages under tribal law. State and federal authorities must continue to respect Navajo authority over domestic matters and allow Navajo law to evolve pursuant to tribal values.

II. THE ROLE AND WORK OF TRIBAL COURTS

Scholars have evaluated and discussed the work of tribal courts. Frank Pommersheim describes the work of the tribal courts as having to "transcend the

25. See infra notes 29-39 and accompanying text.
26. See infra notes 60-141 and accompanying text.
27. Comparative work often involves studying the impact of one legal system and culture on another legal system and culture. See, e.g., DAVID J. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821-1846 (1987) (comparing the Mexican legal system and the Anglo American legal system and describing their impact on each other when Anglo-Americans settled in the Mexican territory of California in the early 1800s).
28. See infra notes 142-158 and accompanying text.
29. See infra notes 159-168 and accompanying text.
ravages of colonialism, while simultaneously animating traditional values in contemporary circumstances." He states that some of the "tools for this work include language, narrative, and the pursuit of justice." He urges tribal courts to use language carefully with an indigenous perspective, because the language and law of the colonizer is inherently suspect. He believes that tribal courts should use narrative and storytelling to tell the counter-stories and save their traditions. Finally, tribal courts should find their own meaning of justice that respects and cherishes their cultural identity. While these suggestions are wise, tribal courts must also use the tribal legal system and its substantive law to resist the American Legal Tradition Destroys Indigenous Societies, 28 COLUM. HUM. RTS. L. REV. 235 (1997) (arguing that adoption of Anglo-American norms in tribal courts threatens tribal sovereignty); Nell Jessup Newton, Praxis, A Year in the Life of Tribal Courts, 22 Am. Indian L. REV. 225 (1998). Finally, in 1995, the Journal of the American Judicature Society devoted an entire issue to tribal courts. Indian Tribal Courts and Justice, JUDICATURE, Nov.-Dec. 1995, at 110.

32. Id at 424.
33. See id at 425.
34. See id.
35. This will avoid the process of assimilation and the loss of important cultural values. See Kirke Kickingbird, "In Our Image... After Our Likeness: The Drive for the Assimilation of Indian Court Systems," 13 AM. CRIM. L. REV. 675 (1976).
imposition of dominant values and law, and find solutions that come from the tribe’s own values and beliefs.\(^{37}\) An important purpose of the tribal courts is to meet the needs of their communities by deciding cases in a manner that creates respect for the court and acceptance by the community. The tribe must find a way to create its own solutions to contemporary problems. This may ultimately require transforming substantive laws and procedural devices that have been imposed on tribes as well as adapting traditional customs.

The English language may pose a barrier to the recovery of tribal cultural values because it may not adequately express the Navajo values sought to be applied in the court system.\(^{38}\) Therefore, the court should (and does) use the appropriate Navajo term in its analysis when necessary to convey the intended

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\(^{37}\) See Edward W. Said, *Culture and Imperialism* 281-336 (1993). Professor Said has described how native writers have engaged in the process of cultural decolonization by creating works of literature which expose the mechanism of control and repression of their people. In doing so these native writers reclaim for their peoples the right of self determination. See id.

\(^{38}\) See Antoinette Sedillo Lopez, *Translating Legal Terms In Context*, 17(4) Legal Reference Services Q. 105 (1999) (illustrating how context is necessary in understanding meaning of legal terms).
meaning. To support the work of the tribal court in preserving Navajo culture and sovereignty, state and federal courts must respect the Navajo tribal court system and its jurisdiction over internal matters on the reservation.

III. IMPOSITION OF WESTERN LEGAL SYSTEM ON THE DINE

Prior to European contact, Navajo law was based on Navajo religious and cultural beliefs. Law was not created by man as a control mechanism but came from the deities as part of the Navajo way of life. Navajo mechanisms for resolving disputes relied on wise elders and community involvement. Traditional cultural practices did not include a formal court system.

The treaty of 1868 established the current Navajo reservation after a disastrous attempt by the federal government to intern the Navajo people away from their homeland. After setting up the reservation on the homeland of the Navajo people, the federal government set up a Court of Indian Offenses on the reservation. These courts began their existence as puppets of the federal government. Anglo-American law was imposed in large part to assimilate Navajos. In 1934 the Navajo Nation refused to accept the Indian Reorganization Act and did not adopt a Bureau of Indian Affairs (BIA) designed constitution.
However, the Navajo Nation created a governmental structure in response to the federal requirement to develop "modern" governments.\(^{49}\) Navajo anger at a federal stock reduction program implemented on the reservation led to the Navajos beginning to take over and control the puppet governmental structure in the 1930s.\(^{50}\)

In 1959 the Navajo Tribal Council created a judicial branch of its government.\(^{51}\) The tribe had become concerned that if it did not have a legal system modeled on the Anglo-American system in place in the United States, states would begin to assume jurisdiction on the reservation.\(^{52}\) The concern was highlighted in the case of *Williams v. Lee*\(^{53}\) when a trader attempted to sue in state court to collect a debt of a Navajo couple residing on the reservation.\(^{54}\) In reversing the state court case and upholding the exclusive jurisdiction of the tribal court, the United States Supreme Court emphasized the tribe's improvement in the quality of its legal system in resources and training of personnel.\(^{55}\)

Currently, the Navajo court system includes seven district courts, five family courts, and a fully staffed Supreme Court.\(^{56}\) The system serves over 143,000 people who live on over 25,000 square miles in Arizona, New Mexico, and Utah on the Navajo Nation.\(^{57}\) Scholars have noted that the more a tribal court system looks like the Anglo-American system\(^{58}\) the more it will be respected by the dominant culture.\(^{59}\) However, in seeking to find respect of the dominant culture, the Navajo court system risks losing its legitimacy among Navajo people and imposing dominant values on Navajo people. This paradox is a difficult one to bridge; however, it is important that the tribal courts view their role primarily within the context of their people's needs. If the courts do not meet these needs


\(^{50}\) See Lieder, *supra* note 36, at 37; See also, RUTH ROESSEL & BRODERICK JOHNSON, *NAVAJO LIVESTOCK REDUCTIONS: A NATIONAL DISGRACE* (1974).

\(^{51}\) See Navajo Tribal Code tit. 2, § 4.

\(^{52}\) See Lieder, *supra* note 36, at 37.


\(^{54}\) See id.


\(^{56}\) See Navajo Tribal Code tit. 7. See also Lowery, *supra* note 36, at 382.


\(^{59}\) See Atwood, *supra* note 36, at 929, 931.
and command the respect of the Navajo people, they do not fulfill their function either as policy makers for their communities or as deciders of disputes within the community.

IV. NAVAJO REGULATION OF MARRIAGE

Navajo regulation of marriage is complicated because the status, rights, and responsibilities of married individuals depend not only on what the Navajo Nation (and Navajo culture) extends to the married couple; but also on norms, benefits, and entitlements of federal and state governments.

Early in the history of United States/Navajo relations, one of the Navajo cultural values the federal government sought to destroy, by way of the legal system, was Navajo polygamy. One of the federal regulations first applied to the Navajo reservation outlawed polygamy. Thus, the government intruded on very basic cultural values of Navajo people—their family and kinship rules. On July 12, 1945, the Navajo Tribal Council enacted legislation voiding plural marriages. Although Navajos by and large discontinued the cultural practice of polygamy, they continued to practice the traditional religious and cultural ceremony, which required the participation of extended family members, the ceremonial consumption of cornmeal mush from a sacred basket, and other ceremonial requirements.

60. See AMERICANIZING THE AMERICAN INDIANS, supra note 4, at 302.
61. See generally WITHERSPOON, supra note 19.
63. See Marley Shebala, Council Considers to Override Prez’s Veto, NAVAJO TIMES, Aug. 12, 1999, at A1. The Council passed legislation containing a provision decriminalizing polygamy but leaving unmarried status as a requirement of Navajo Marriage law. The President vetoed the legislation. See id.
64. See RUTH ROESSEL, WOMEN IN NAVAJO SOCIETY 57-60 (1981). Dr. Roessel describes the ceremony:

The Navajo Wedding was taught to the Navajos by the Holy People, and it was the way by which the young boy and girl would begin their own life under the guidance, protection and blessing of the Holy People. The traditional Navajo Wedding Ceremony consisted of feeding all of the friends and visitors who came to see the young couple get married. Prior to the food and feast aspect came the Navajo wedding ceremony itself. This ceremony consisted of first the groom entering the hogan with his father or uncle and sitting on the westside of the hogan. After he had entered and was seated the first would enter accompanied by her father or her uncle. She would sit beside the boy and the two would be facing the east-toward the door of the hogan. The girl would sit on the right of the boy. She would pour water form a pitch-covered jug on to the boy’s hands and he would wash his hands.
with family and friends was enough—the community knew that a marriage had
taken place—a marriage license or other documentation was unnecessary.°
Navajo marriage not only joined two families, but also joined four clans, so it was
a unifying force in Navajo life.°° However, in 1940 the Tribal Council passed a
resolution requiring Navajo couples who wished to marry to obtain a marriage
license.°° This was probably to satisfy BIA officials who had a very heavy hand
in the development of tribal law. In 1944, the Tribal Council amended the
resolution to validate marriages recognized by the community but not contracted

Next the boy would pour water from the same jug onto the girl’s hands
and she would wash her hands. This symbolized purity and cleansing.

Next the medicine man would take the sacred basket in which
there was corn meal mush and make a circle of corn pollen in the center
of that circle. While the medicine man was doing that he would be
praying quietly, and when he had finished making the decorations on
the mush with the corn pollen, the basket would be placed in front of
the couple, and the boy would take the first bite—by dipping two
fingers in to the mush and eating from them—at the east where the
basket design opens. Next, the girl would take a bite in the same way,
and then they would take one bite after the other from the four
directions and finally from the center. Usually the couple was
instructed to eat all of the mush themselves, but at some weddings the
remaining part of the mush would be passed around so that each
member of the boy’s family could get a bite.

The traditional Navajo approach would be to have the basket
remain stationary in front of the couple so that it would not be handed
around and moved about as different people took bites of the mush with
their fingers. After the mush has been eaten the basket is given to the
mother of the boy who is instructed to keep it and preserve it at all
times... The traditional Navajo marriage always took place at night...
Following the completion of eating the mush, food was passed around
to all of the guests at the wedding. After this distribution and feasting
had been completed, the older and happily married couples would give
advice to the young married couple in terms of what to expect and how
to live happily and properly with one another.

Id. See also, ELEANOR SCHICK, NAVAJO WEDDING DAY: A DINE MARRIAGE CEREMONY
(1999).

65. Navajo culture has an oral and not a written tradition. In this tradition what is
spoken is important. The written word has little meaning. Interview with Eleanor Schick,
author ELEANOR SCHICK, NAVAJO WEDDING DAY: A DINE MARRIAGE CEREMONY (1999), in
Albuquerque, N.M. (July 28, 1999).

66. See ROUSELL, supra note 64, at 57.

67. See RES. CJ-2-40, NAVAJO TRIBAL COUNCIL RESOLUTIONS 1922-1951, 78-80
(1951).
by church, state, or custom. The Navajo Tribal Council directed the Tribal Council to inform the Navajo people of the change. The first case in the first published Navajo Nation reporter involved the validation of a tribal customary marriage. In upholding a traditional marriage, the path was paved for the court to uphold Navajo traditions and customs in their function as mechanisms for resolving disputes. Navajo courts have since taken this responsibility very seriously. In the Matter of the Marriage of Daw, a Navajo district court determined that a traditional tribal customary marriage that followed Navajo custom did not require a marriage license to be validated by a Navajo Tribal court. This decision upheld traditional culture between Navajo partners and gave the marriage, celebrated by a traditional marriage ceremony,

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68. See id. at 84.
69. See id.
71. Navajo Tribal Code tit. 7, § 204(A) reads “In all civil cases the Court of the Navajo Tribe shall apply any laws of the United States that may be applicable and any ordinances or customs of the Tribe not prohibited by such federal laws.” See Johnson v. Dixon, 4 Navajo Rep. 108, 109 (Navajo Ct. App. 1983) (stating that section 204 clearly expresses the intent that the Navajo Tribal Council wanted the courts to apply Navajo law, consisting of Navajo statutes, the common law (custom) and decisional law wherever possible); See, e.g., Sells v. Sells, 5 Navajo Rep. 104, 108 (Navajo Nation S. Ct. 1986) (stating that the soul of the court is to apply Navajo tribal law, especially where custom and tradition are important); In the Matter of the Estate of Annie Belone, 5 Navajo Rep. 161, 164-167 (Navajo Nation S. Ct. 1987) (outlining the procedure for arguing Navajo custom in court).
72. See, e.g., Davis v. Means, 21 Indian L. Rep. 6125, 6127 (1994), which is a paternity case where the court states that knowing one’s point of origin (parents) is very important in Navajo culture. See also In the Matter of Conciliation of the Marriage of Allison, 3 Navajo Rep. 199 (Window Rock D. Ct. 1982), in which the wife petitioned for a traditional Navajo marriage conciliation and the petition was granted.
74. The facts of the case are as follows: Helen and Jerry Daw were married by tribal custom on September 24, 1964. While they never obtained a marriage license, they registered with the Census as married, they had two children, and everyone knew them as married. Jerry Daw was killed in action in Vietnam. His widow could not obtain Veterans benefits unless her marriage was validated. (The children had prevailed in a prior paternity action so that they could qualify for social security benefits to which they were entitled). See id. at 1-2 (1969).
75. See Validating the Marriage of Garcia, 5 Navajo Rep. 30, 31 (Navajo Ct. App. 1985) (stating that the tribal court is without authority to validate a tribal customary ceremony between a Navajo and a non-Navajo—a Mexican-American male, in this case).
all of the legal recognition of a marriage formalized with a marriage license. The court noted that Navajos without marriage licenses face problems in acquiring social security and military benefits for their dependents. The court validated the couple's traditional marriage by stating that the Tribal Code license requirement was directory rather than mandatory. The court cited Title 9, Section 61 of the Navajo Tribal Code as an enactment intended to cure defects in form and procedure. The court also said that the Tribal Council did not specifically outlaw "common law marriages" after February 1, 1954. Once validated by the court, the validity of the marriage would not be questioned by federal government officials.

Ten years later, the Navajo Court of Appeals in The Matter of the Validation of Marriage of Ketchum expanded on the reasoning of the Daw case. The Navajo Court of Appeals, citing the 1877 United States Supreme Court case Meister v. Moore, concluded that common law marriage exists unless it is repealed by statute and upheld the marriage as a common law marriage. The court stated that the essential features of a common law marriage are "present consent to be husband and wife, actual cohabitation, and an actual representing of themselves to the community as married." Thus, the Court of Appeals afforded the benefits of marriage to a Navajo couple who had participated in a customary
marriage ceremony by using the legal concept of "common law marriage" derived from Anglo-American jurisprudence. 87

A year after Ketchum, in 1980 the Navajo Tribal Council eliminated the January 31, 1954 cutoff date for validation of Navajo customary marriages. 88 The Council recognized that "the Navajo people have continued to marry in tribal custom ceremonies since 1954," and "the law of validated marriages has created problems and hardships for numerous married Navajo people." 89 In an effort to encourage the move toward formalization and to ease the problem of keeping accurate records, the Council urged Navajo people to obtain a Navajo Tribal marriage license prior to marriage and to record them within three months. 90 The Council recognized the contemporary realities of the customs and behaviors of the Navajo people; eliminating the cutoff date meant that all customary marriages would be validated. This extended the federal benefits normally afforded to married couples to Navajos who were recognized by the community as being married and who considered themselves spiritually united in accordance with Navajo cultural and religious tradition. 91

All of the Navajo cases discussed supra involved the tribal courts' use of the doctrine of "common law" marriage to save a marriage that had been celebrated according to Navajo tradition. 92 In a later case, the Navajo Supreme Court stated that its recognition of "common law" marriage was not derived from Anglo common law but based on its own needs and culture. 93 Navajo Nation v. Murphy was a criminal case in which the accused sought to use the legal doctrine of spousal privilege to prevent his partner from testifying against him. 94 He and the potential witness had never participated in a tribal or civil marriage ceremony, but he stated that he and the witness were married under "common law." 95 The Navajo Supreme Court cited Ketchum for the proposition that Navajo law

87. See articles cited supra note 85.
88. See Navajo Tribal Council Resolution, CAP 36-80 (Apr. 30, 1980).
89. Id.
90. See id.
91. See In the Matter of the Validation of Marriage of Ketchum, 2 Navajo Rep. 102 (Navajo Ct. App. 1979). Shirley and Francis Ketchum were married in a traditional marriage on June 7, 1974. They had two children. Frances died on February 8, 1979. The Social Security Administration refused to pay the claim for benefits without documentation of the marriage despite the fact that Shirley and Francis considered themselves culturally and spiritually united as a married couple under Navajo custom.
92. In the Matter of the Estate of William Al Tsosie, 5 Navajo Rep. 261 (Window Rock D. Ct. 1987). This was a probate case in which the court validated a common law marriage despite the existence of a later formalized marriage. See also Ration v. Robertson, 4 Navajo Rep. 15 (Navajo Ct. App. 1983), which was a dispute involving property between a man and a woman living in a common law marriage.
94. See id at 6036.
95. See id.
recognized common law marriage. However, the court noted that it applied the spousal privilege as a matter of Navajo tradition and culture and not because of its derivation from the English common law doctrine of merger of husband and wife. The court stated that medieval reasoning has no support in Navajo tradition and culture. However, the court found that marriage was an important aspect of Navajo culture, and that a rule that would potentially prevent the breakup of a marriage is justified by Navajo society’s interest in preserving the harmony and sanctity of marriage. Despite finding that the privilege was available, the court found insufficient evidence to show that the elements of a “common law” marriage existed.

However, the very next year, the Navajo Supreme Court revisited the question of whether recognizing marriages in which the parties lived together and held themselves out to the community as married without any kind of ceremony was indeed part of Navajo cultural tradition. In the case of *In re: Validation of Marriage of Francisco* the Navajo Supreme Court reviewed a case involving a couple who had lived together between October 1978 and August 1987 in Window Rock, Arizona. The woman was an enrolled member of the Navajo tribe and her partner was a Hopi. They combined their earnings, acquired personal property in both of their names, and accumulated debt in both of their names. The man often introduced the woman as his wife. However, while the pair talked of marriage, they did not obtain a marriage license, marry according to Arizona state law, or participate in a traditional Navajo wedding ceremony. They had no children. The man died as a result of a car accident and his heirs were entitled to the proceeds from his life insurance policy. Unless her marriage was validated, the woman would not collect any part of the life insurance proceeds. Because the man was a Hopi and not a member of the Navajo tribe, the Window Rock district court ruled that under the Navajo Tribal Code (Title 9, Section 2), a Navajo member could not use the Navajo law to validate her common law marriage. Under the Code she had to contract her

96. See id.
97. See id.
98. See id.
99. See id.
100. See id. The parties apparently did not reside together and the defendant presented no evidence that they held themselves out to the community as married. Further, the witness identified herself as the defendant’s girlfriend. Id.
102. See id.
103. See id.
104. See id.
105. See id.
106. See id.
107. See id.
marriage in accordance with applicable state or foreign law. Because Arizona did not recognize common law marriage, the district court refused to validate her marriage.

The Navajo Supreme Court's analysis began with a review of the history of Navajo marriage law. The court recognized that it was faced with the difficult task of reconciling the Tribal Council's intent in passing the Tribal Code with the parties' expectations in recovering military and other benefits. The court determined that the Daw case was an attempt to save traditional marriage and was probably not intended to create a new way of contracting marriage in Navajo country. The court found that the court in Daw viewed the requirement of obtaining a marriage license as directory and not as mandatory. The court determined that when read as a whole, the Tribal Council's resolution and the Tribal Code appeared to attempt to remedy the situation where there was a technical defect in a customary marriage, but did not intend to create a "common law" marriage. The court cited an anthropological treatise to indicate that Navajo traditional custom did not recognize common law marriages. Thus, the court said, a Navajo court could validate traditional marriages only upon evidence that a traditional ceremony occurred, but not when a traditional ceremony had not taken place. The court overruled Daw, Ketchum, and Murphy to the extent they authorized a tribal court to validate a "common law" marriage. The court stated that validating only Navajo traditional ceremonial marriages between Navajos would enhance Navajo sovereignty, preserve the Navajo marriage tradition, and protect those who adhere to the Navajo tradition.

Next, the court discussed its view of adopting foreign legal concepts and concluded that Navajo sovereignty required that the Navajo Nation be cautious about state or foreign law infringement. The court urged the Tribal Council to amend that Navajo Tribal Code so that it also regulated marriages between

108. See id. Interestingly, the well known case of Santa Clara v. Martinez, 436 U.S. 49 (1978) involved a Santa Clara woman who married a Navajo man. The Santa Clara Pueblo did not recognize the children of a mother of such a mixed marriage but it would have recognized the children of a father of such a marriage. The Supreme Court ultimately held that the issue of tribal membership was for the tribe to decide.


110. See id. at 6113.

111. See id. at 6114.

112. See id.

113. See id.

114. See id.

115. See id.

116. See id. at 6115.

117. See id.

118. See id.

119. See id.
Navajos and non-Navajos because “domestic relations is the core of the tribe’s internal and social relations.”

The Tribal Code’s requirement that “marriages between Navajos and non-Navajos may be validly contracted only by the parties complying with applicable state or foreign law” needlessly injected foreign law to govern domestic relations within Navajo jurisdiction. The court continued, “[s]uch needless relinquishment of sovereignty 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.”

The court urged the Tribal Council to amend Title 9 of the Navajo Tribal Code so that it reflects Navajo regulation and control of domestic relations within the Navajo territorial jurisdiction.

The Tribal Council responded by revising the Domestic Relations Code in 1993. Interestingly, while the Council heeded the Court’s suggestion to apply its domestic relations code to marriages between Navajos and non-Navajos and rescinded the provision in the Tribal Code concerning mixed marriages, the Tribal Council rejected the Navajo Supreme Court’s holding in Francisco by explicitly allowing parties to establish a common law marriage by cohabiting and holding themselves out to the community as a married couple. The Tribal Council thus expanded the manner in which parties within the Navajo Nation may contract marriage.

The Tribal Code permits parties to contract marriage within the Navajo Nation as follows: by 1) signing a Navajo Nation marriage license in the presence of two witnesses, 2) marrying according to the rites of any church, 3) marrying before a tribal judge, 4) engaging in a traditional Navajo wedding ceremony, or 5) establishing a “common-law” marriage. Thus, the Tribal

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120. Id.
121. Id. (citing Navajo Tribal Code tit. 9, § 2).
122. See id. at 6115.
123. Id.
124. Id.
125. See Navajo Tribal Code tit. 9 (revised 1993) (Domestic Relations).
126. See Navajo Tribal Code tit. 9, § 2 (annotation).
127. Navajo Tribal Code tit. 9, § 3E.
128. Navajo Tribal Code tit. 9, § 3A.
129. Navajo Tribal Code tit. 9, § 3B.
130. Navajo Tribal Code tit. 9, § 3C.
131. Navajo Tribal Code tit. 9, § 3D provides:

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;
Council responded to the contemporary needs of the community by passing legislation to remedy a social problem that is created when parties who live together and behave as a married couple do not formalize their relationship. This is much the same rationale that was used to explain the development of common law marriage in the American tradition.\footnote{133}

Common law marriage was developed to extend marital rights and responsibilities to couples who did not formalize their marriage in the days when formalization was expensive and difficult.\footnote{134} In much the same way, Navajo  

\begin{enumerate}
  \item The bride and bridegroom eat cornmeal mush out of a sacred basket;
  \item Those assembled at the ceremony give advice for a happy marriage to the bride and groom;
  \item Gifts may or may not be exchanged;
  \item The person officiating or conducting the traditional wedding ceremony shall be authorized to sign the marriage license.
\end{enumerate}

\textit{Id.}

\footnote{132} Navajo Tribal Code tit. 9, § 3E provides:

\begin{enumerate}
  \item Present intention of the parties to be husband and wife;
  \item Present consent between the parties to be husband and wife;
  \item Actual cohabitation;
  \item Actual holding out of the parties within their community to be married.
\end{enumerate}

\textit{Id.}

\footnote{133} See \textit{infra} notes 134, 142-158.

\footnote{134} Officials were not often available to solemnize the relationship and record keeping bureaucracies were not always available to record the relationship. See McChesney v. Johnson, 79 S.W. 2d 658, 659 (Tex. 1934). As the Texas Supreme court tells the story:

It took root there when the conditions in Texas justified it. The sparse settlements, the long distance to places of record, bad roads, difficulties of travel, made access to officers or ministers difficult for some of our residents, lack of general education in the English language produced unfamiliarity with the laws, and, in the small settlements it was more difficult to dignify an illicit association with the name of marriage than in one of our large cities where all of us are strangers to the private life of most of its residents.

\textit{Id.}
people who live in isolated and remote areas of the reservation and who may not be able to afford the costs of a traditional ceremony may choose to live as married without formalizing their union. The Navajo Nation now recognizes this reality. By extending legal recognition to couples the community recognizes as married, the Navajo Nation remedies a potential social problem.

Of course, rules requiring the formalization of a marital relationship disadvantage women in disproportionate numbers. Navajo women who do not have validated marriages may not have access to domestic violence protections, alimony, and property division upon separation; and inheritance, social security, veteran benefits, and insurance upon death of their partner. Allowing common law marriage gives them these benefits.

In addition, there may indeed be a cultural basis for recognizing a couple who hold themselves out as married even though they do not formalize the relationship. This, of course, raises questions of how tribal courts determine relevant Navajo culture. Do they look to the culture of pre-European contact? Do they look to cultural norms in the contemporary community?

Cultural norms evolve over time. The cultural norms about marriage have undoubtedly evolved since pre-European contact. Indeed, "i'ii nel kad" the Navajo phrase meaning that there is going to be a wedding, literally means "bringing in the horses" referring to the exchange of traditional gifts between the uniting families. However, horses did not appear on the scene until after the Spaniards arrived. It is vital that the Navajo Council and the Navajo Court continue to develop their domestic law in a way that balances their traditional culture and their modern needs.

135. See ROESSEL, supra note 64 (describing the generous gift giving and feasting that is part of a traditional ceremony).
136. See generally Bowman, supra note 85.
137. Many of these legal protections require a legally recognized marriage. See cases cited supra notes 70-109 for examples of cases in which a legally recognized marriage was necessary to the parties seeking validation.
138. See WITHERSPOON, supra note 19, at 23 (stating that the basis of an affinal marital relationship is a sexual relationship). See Means v. District Court of the Chinle Judicial District, 26 Indian L. Rep. 6083, 6087 (Navajo Nation S. Ct. 1999) (describing an individual who marries or has an intimate relationship with a Navajo as a hadane (in law)).
139. For a study of the use of custom in Navajo Tribal Courts, see generally Lowery, supra note 36.
140. See ROESSEL, supra note 64, at 57.
141. There is evidence that horses did once exist in North America but became extinct and were then reintroduced by the Spaniards. See <http://www.cyberhighway.net/%7Eshirtail/new.htm> (visited Apr. 14, 2000).
V. WESTERN LEGAL REGULATION OF MARRIAGE INCLUDING COMMON LAW MARRIAGE

Western marital regulation is a statement of a society's cultural values in the ordering of its society.142 Laws regulating marriage ensure that those who are married receive the status, rights, responsibilities, and benefits that society and their culture affords them.143 Marriage has been described as the most fundamental of rights and the foundation of the family.144 The history of the regulation of marriage in this country is rather complex. The definition of the marital relationship goes back to canon law.145 The legal prohibitions of polygamous marriages were particularly vigorous.146 Prohibitions against incest have been less so.147

"Common law marriage" is a marital relationship that is recognized by law, despite the fact that the couple did not formalize the relationship in accordance with legal requirements.148 Apparently the roots of common law marriage in the common law of England are rather shallow.149 Its rapid evolution in the United States illustrates the power of the judicial branch in the ordering of private relationships.150 Courts used the doctrine to validate dependent

143. See id. at 297.
144. See id.
145. See Andrew H. Freidman, Same-Sex Marriage and Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definition of Marriage, 35 How. L.J. 173 (1992) (tracing the historical evolution of the definition of marriage and arguing that the historical basis is no longer applicable to modern society).
146. See Jorge Martin, Note, English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England, 27 CORNELL INT’L L.J. 419 (1994). See also Reynolds v. U.S., 98 U.S. 145, 164 (1878) (stating that "polygamy has always been odious among the northern and western nations of Europe; and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence[sic] against society.")
147. See Martin, supra note 146.
148. The courts will look to whether the parties agreed to live together as husband and wife, whether the parties cohabited, and whether the parties held themselves out to the community as husband and wife. See 52 AM. JUR. 2D Marriage § 45 (1970).
149. See id.
150. See Dubler, supra note 85 (examining the nineteenth century expansion of common law marriage in this country and arguing that judges used marriage as a vector of public policy to define the proper sexual relationship between men and women). See also OTTO KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES (1975).
relationships so widows would receive social welfare, pension, and insurance benefits, and thus not become paupers. Courts also used the doctrine to legitimize the children of long term relationships. Many citizens, including the newly freed slaves, viewed the legal construct of marriage with distrust especially because divorce was so difficult to obtain. Some states adopted the doctrine of common law marriage, while other states rejected it. Courts and legislatures grappled with the dilemma of whether to legitimize marriages and give the legal benefits of marriage to individuals who behaved as if they were married or whether to discourage couples from flaunting social convention. In many cases, courts have come up with compromises—giving some rights, benefits, and responsibilities to those who have lived together, created children together, or both. A major concern of the courts is preventing someone from obtaining the benefits of the marital relationship fraudulently.

151. See Dubler, supra note 85, at 1892.
152. See Dubler, supra note 85, at 1894-1895.
154. See Dubler, supra note 85 (citing Henrik Hartog, Marital Exits and Marital Expectations in Nineteenth Century America, 80 Geo. L.J. 95 (1991)).
VI. STATE RECOGNITION OF TRIBAL CUSTOMARY MARRIAGE

Marriages that are valid in the place they are celebrated are usually recognized in this country unless the marriage violates some strong public policy of the state.159 As early as the nineteenth century, some jurisdictions stated that they would recognize Indian customary marriages.160 However, it appears that courts looked for indicia of the marital relationship in ways in which it appeared that the parties satisfied the requirements of a common law marriage.161 Although the BIA attempted to assimilate Indians by requiring them to adopt Anglo-American legal systems and substantive law, both state and federal governments have recognized marriages that complied with tribal law or custom. In 1890 Congress recognized that native communities celebrate marriage differently and passed a statute validating marriages contracted under the tribal law or tribal customs.162

Furthermore, in Carney v. Chapman, Justice Holmes noted that the passage of the statute made the issue a "federal question" and without much analysis validated a "common law" marriage of a Chickasaw couple who had celebrated a traditional Chickasaw ceremony.163 A few years later, the Supreme Court stated in United States v. Quiver:

At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against

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158. See Bowman supra note 85, at 733.
160. See Johnson v. Johnson's Adm't, 30 Mo. 72, 84-91 (1860) (holding that children of Indian woman and white man married according to Indian custom are legitimate); McBean v. McBean, 61 P. 418, 421 (Or. 1900) (holding that marriage according to Indian custom valid where at least one Indian was involved); State v. Ta-Cha-Na-Tah, 64 N.C. 614, 616 (1870) (refusing to recognize marriage according to Cherokee custom because state does not recognize common law marriage).
161. See cases cited supra note 160.
162. See Carney v. Chapman, 247 U.S. 102, 38 S.Ct.449, 62 L.Ed. 1005 (1918), which was a case arising in Oklahoma in which the Supreme Court interpreted the act of Congress of May 2, 1890 c. 182 section 38, 26 Stat 81, 98 regarding validating marriages contracted under the laws or tribal custom of any Indian nation to validate a common law marriage of a Chickasaw couple.
163. Id.
the person or property of another Indian to be dealt with, according to their tribal customs and laws.\textsuperscript{164}

The courts recognized tribal marriages.\textsuperscript{165} Even polygamous marriages in accordance with tribal custom were recognized.\textsuperscript{166} In the 1907 Nebraska case of Ortley v. Ross, the Nebraska Supreme Court, in deciding a probate matter stated:

Now, it is contended by appellants that, as the alleged marriage between the father and mother of the plaintiff was polygamous, it was neither valid in the state of Minnesota, where the parties then resided, nor in the state of Nebraska, to which they subsequently removed. This contention would be well founded if this marriage had taken place between citizens of the United States in any state of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated with as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages.\textsuperscript{167}

The tradition of recognizing tribal marriage law is quite pronounced.\textsuperscript{168} States, federal courts, and agencies should continue their practice of recognizing tribal marriage law. To do so is consistent with how marital law is applied generally and allows tribes to continue development of indigenous law.

\textsuperscript{164} United States v. Quiver, 241 U.S. 602, 603-604, 36 S.Ct. 699, 700, 60 L.Ed. 1196 (1916) (holding that a state does not have authority to prosecute Sioux Indian for adultery).

\textsuperscript{165} See, e. g., Barnett v. Prairie Oil and Gas Co, 19 F 2d. 504 (1927) (holding that Creek customary marriage and divorce practices would be recognized in probate context).

\textsuperscript{166} See Hallowell v. Commons, 210 F. 793 (8th Cir. 1914) (holding that Omaha tribe's customs with regard to polygamy must be respected); Kobogum v. Jackson Iron Co. 76 Mich. 498, 43 N.W. 602 (1889) (holding that states have no more right to determine Chippewa tribe's marriage law than they would a foreign jurisdiction). For a 1930's view about recognizing Indian customary marriages see Ray Brown, The Indian Problem and the Law, 3 Yale L. J. 307 (1930). The author demonstrates little understanding of the cultural basis for tribal marriage customs and laws.

\textsuperscript{167} Ortley v. Ross 78 Neb. 339, 110 N.W. 982, 983 (1907).

\textsuperscript{168} See Thomas v. Healey, 152 Okla. 93, 3 P.2d. 1047 (1931). See also Ponina v. Leland, 85 Nev. 263, 454 P.2d 16 (1969) (holding that a Pauite off-reservation couple who met the requirements of Pauite tribal customs were deemed to be husband and wife under Pauite law and it would be recognized in probate of husband's estate).
VII. RELATED DOMESTIC RELATIONS ISSUES

The state deference to tribal marriage law has implications in other areas of domestic relations. A recent case decided by the Navajo Nation Supreme Court raises the related issue of tribal jurisdiction over a domestic violence criminal matter. In Means v. District Court of Chinle the defendant was accused of threatening and committing a battery on his brother-in-law (a Navajo), and his father-in-law (a member of the Omaha Tribe). The defendant filed a motion to dismiss claiming that because he is a non-Navajo (he is Oglala Sioux) he is not subject to the criminal jurisdiction of the Navajo Nation. Means argued that the Navajo Nation has no jurisdiction over him, based on the Supreme Court decision of Duro v. Reina. In Duro, the Supreme Court found that for purposes of criminal jurisdiction, a tribe's inherent sovereign powers extend only to members of the tribe. In response to Duro, Congress amended the Indian Civil Rights Act to state that a tribe's criminal jurisdiction extends over all Indians. Congress called the action a "recognition" of inherent rights that Indian tribes have always held. Means argued that the Indian Civil Rights Act thus discriminated against him as a Native American.

 Apparently expecting an appeal, the Navajo Supreme Court gave detailed background about the Navajo Nation and social problems on the reservation. The court did not rest only on the Navajo Nation's inherent authority to regulate domestic relation matters. Because the case was a criminal case, the court relied on the Navajo Nation Treaty of 1868 as a source of Navajo Nation criminal jurisdiction over non-member Indians. The court found that language in the treaty setting apart the reservation for Navajos and such other Indians as the Navajos permitted to live there gave it authority to regulate criminal matters over non-Navajo Indians. Further, the court stated that the defendant's marriage to a Navajo gave him the status of a hadane (in-law). Because of his marriage to a

169. Defendant Russel Means is a noted activist and actor.
175. Id.
177. See id
178. See, e.g., Begay v. Miller, 70 Ariz. 380, 222 P. 2d 624 (1950) (holding that the state court is without authority to ignore an earlier tribal divorce decree).
179. See Means, 26 Indian L. Rep. at 6086-6087.
180. See id
181. See id at 6087.
Navajo, his status as a *hadane* or in-law, his longtime residence within the Navajo Nation, and his activities on the reservation, he consented to the criminal jurisdiction of the Navajo Nation. The court also pointed to the vulnerability of Navajo people if they cannot be protected from criminal activity on the reservation, and noted that criminal defendants on the Navajo Nation are treated no differently from criminal defendants in state or federal courts.

The *Means* case illustrates additional consequences of Navajo marriage law and points to the need for clear definition of tribal jurisdiction in domestic matters. As is true with the tribal law of marriage the tribe should have jurisdiction over domestic matters within its borders. For the same reasons that the Navajo Nation is free to develop its law of marriage, it must enforce its domestic relations law. This will allow the Navajo Nation to develop and evolve as a culture.

VIII. CONCLUSION

The Navajo people would seem to want to celebrate their marriages using traditional cultural marriage ceremonies and to live together without marital ceremonies. The Navajo Nation must determine whether and how to recognize these relationships. Because these couples function within Navajo society as married couples, the Navajo Nation may choose to give these individuals the status, rights, and responsibilities of married parties. The tribal court validation process ensures that the parties have fulfilled the tribal code requirements. The validation process also prevents parties from fraudulently obtaining benefits.

This article demonstrates the tribal court’s struggle to cherish cultural traditions while addressing modern challenges in regulating Navajo marriage law. The Navajo Supreme Court’s use of Anglo-American principles to preserve cultural traditions illustrates the richness, creativity, and fusion in Navajo jurisprudence. The article also demonstrates that early federal and state cases held that tribal domestic matters were well within the jurisdiction of the tribe. State and federal governments and agencies must continue to respect tribal court jurisdiction of domestic matters to allow tribes to develop their own solutions to domestic problems, and to decide their domestic disputes in a manner that is consistent with their cultural norms and values.

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182. See id.
183. See id.