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## Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition

Andrew Gilden  
*Georgetown University Law Center*

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PRESERVING THE SEEDS OF GENDER FLUIDITY:  
TRIBAL COURTS AND THE BERDACHE TRADITION

*Andrew Gilden\**

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SUMMARY

Since acquiring greater legal and political sovereignty after the enactment of the Indian Reorganization Act of 1934, Native American tribes have strived to reverse several centuries of socioeconomic subordination and assimilation by restructuring their societies in accordance

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\* Georgetown University Law Center, J.D. expected May, 2007. Brown University, A.B. in Anthropology and Economics, 2004. The author would like to sincerely thank Professor Richard Chused for his guidance in writing this Article and Professor Lina Fruzzetti for her helpful input and continued support.

with traditions suppressed under colonial rule. By constructing legal relationships in terms of traditional duties and responsibilities, tribal courts in particular have laid the foundations for reclaiming these seemingly lost traditions.

One tradition effectively eradicated under Euro-American domination was a comparatively fluid understanding of gender. A substantial number of tribes recognized a gender role, generally referred to as berdache, which was predominantly defined by the acquisition of the socioeconomic role of the opposite biological sex. Because this identity was incompatible with the strict Euro-American linkage of sex and gender, the berdache tradition became a casualty of repressive colonial policies.

This Article outlines the particular cultural characteristics giving rise to traditional berdachism, the means by which American policies fostered their decline, and the Navajo tribal courts' re-infusion of these characteristics into contemporary jurisprudence. By tracking the interplay between the traditional values of child autonomy, gender equality, and tribal collectivism, the rise, fall and potential reemergence of the berdache tradition can be analyzed as resulting from shifts in its determinative cultural elements.

## I. INTRODUCTION

Since the enactment of the Indian Reorganization Act (IRA) in 1934, Native American tribes have gained the opportunity to establish greater political and judicial sovereignty and to counter several centuries of subjugation, annihilation and assimilation under Euro-American rule. The creation of Native American tribal courts after the IRA allowed tribes to reclaim and/or preserve their traditional cultural practices by giving these traditions the force of law while simultaneously acknowledging the needs of contemporary Native American nations.

One significant cultural characteristic that was largely eroded by Euro-American contact was a comparatively fluid conception of gender.<sup>1</sup>

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1. It should be noted that although traditional berdachism, as described in the following section, exhibits marked fluidity *between* gender roles, there is some dispute as to whether berdachism indicates a non-binary notion of gender. Compare Mary Ann Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305 (1997) (noting berdachism's adherence to binary notions of gender despite fluidity between binary poles) with Will Roscoe, *How to Become a Berdache: Toward a Unified Analysis of Gender Diversity*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 329, 330 (Gilbert Herdt ed., 1994) (theorizing that the berdache constitutes a distinct third or even fourth gender

A large proportion of Native American tribes acknowledged a gender role that did not conform to Euro-American notions of male and female. This gender role, generically referred to as berdache, represents an extreme departure from Euro-American gender construction. Berdache were usually biological men (or, less often, women) who assumed culturally-defined traits of the opposite gender. As with many Native American cultural institutions, Europeans and Americans were unsurprisingly shocked, offended, and confused by the foreign concept of gender fluidity. As with most Native American institutions that they failed to understand, European settlers and their American successors made a persistent effort to eradicate the berdache. From first contact through the middle of the twentieth century, Euro-Americans aimed to reconstruct Native American culture by introducing Western gender concepts into Native societies so that the berdache would no longer enjoy the conspicuous and respected role they once held. To a large extent, they succeeded. By the time the IRA was enacted, berdache had greatly diminished in numbers, and where they remained in small numbers, they largely altered their behavior so as to recede from public view and American attention.

The emergence of independent tribal courts in 1934 provided Native American tribes an opportunity to stem the erosion of their traditional gender beliefs by transforming traditional customs and practices into contemporary common law. Where federal statutes and tribal legislation remain silent or ambiguous, tribal courts look into their past to craft common-law rules and interpret legislation in accordance with tribal traditions. Although the berdache have not explicitly been a topic of discussion in Native American jurisprudence, the structure of gender and sexuality that enabled traditional gender fluidity has been repeatedly affirmed. When confronted with issues relating to gender, family, and sexuality, tribal courts have often rejected American family law approaches in recognition of the two cultures' extraordinarily different gender traditions. Tribal courts have strived to protect traditional family practices by looking to a heritage of child autonomy, female equality, and tribal collectivism. These traditions also happen to form the roots of berdachism. Despite judicial and cultural reticence about the berdache during the mid-to-late twentieth century, tribal courts served to strengthen the structural components of traditional Native American gender fluidity. Although these courts have by no means resolved the

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role). As this Article solely focuses on relative differences in gender fluidity between traditional Native American and Euro-American cultures rather than on the normative advisability of a binary conception of gender, this dispute does not alter the Article's underlying analysis.

myriad social issues stemming from Euro-American colonialism, there are signs that the berdache tradition has survived and continues to influence Native American conceptions of gender.

This Article will examine the role of tribal courts in protecting the legacy of the berdache. While evidence will be drawn from various Native American tribes, this discussion will focus on the Navajo due to their prevalence in anthropological literature and their relatively well-documented court opinions. Part II will provide an introduction to berdachism in general, the Navajo *nádleeh* in particular, and it will outline the important differences between Navajo and Euro-American conceptions of gender. Part III will summarize European and American interference with berdachism from early Spanish settlement through the assimilationist policies of the late 19th and early 20th centuries, as well as document the specific ways in which traditional gender conceptions were eroded. Part IV will examine Navajo tribal court opinions and demonstrate how, despite scholarly skepticism, the court has strengthened the cultural prerequisites of berdachism by centering family law on child autonomy, grounding its opinions in a history of gender equality, and emphasizing a cultural concern for the collective tribe. Part V will provide a brief epilogue about the renewed contemporary awareness of the berdache and some current indications that tribal courts have indeed incorporated gender diversity into their jurisprudence.

## II. THE BERDACHE TRADITION

### *A. Native American and Euro-American Gender Systems Compared*

Traditional understandings of gender among many Native American tribes varied substantially from the beliefs about gender commonly held by the dominant Euro-American society. Most emblematic of this divide was the historic prevalence and wide-spread sanctioning of a gender role generally referred to as “berdache.”<sup>2</sup> Berdache were typically

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2. I choose to use the term “berdache” for the sake of convenience and for lack of a better word. “Berdache” derives from the Arabic term for “male prostitute” and unsurprisingly has become disfavored. SABINE LANG, *MEN AS WOMEN, WOMEN AS MEN* xii (1998). However, a more suitable replacement has yet to be coined, and the prevalence of “berdache” in anthropological literature requires some utilization of the word. *See id.* at xii.. While the term “two-spirit” is sometimes used to describe traditional gender diversity, this term has come into general use in contemporary gay and lesbian communities and thus might confuse this discussion. *See infra* note 136 and accompanying text. Therefore, I will attempt to use tribe-specific terms whenever

biological men, or, less frequently, women, who assumed the culturally defined gender role of the opposite sex. Berdache usually, although not always, cross-dressed and almost universally adopted the occupational and spiritual roles typically attached to the opposite sex.<sup>3</sup> The incidence of berdachism was significant, documented in at least 113 Native American tribes.<sup>4</sup> While the closest analogues to berdachism in mainstream American society, transvestitism and transgenderism, are marked by a heavily maligned and marginalized status, the berdache were traditionally well-respected and integrated into tribal life. In stark contrast to the strife one would expect to be caused within an American family upon the transgender development of a child, among certain tribes such as the Navajo the emergence of a berdache youth was considered a great fortune. A family with a *nádleeh* (Navajo berdache) among its members “was considered by themselves and everyone else as very fortunate . . . [s]pecial care was taken in the raising of such children and they were afforded favoritism not shown other children of the family. As they grew older . . . [t]his respect verge[d] almost on reverence in many cases.”<sup>5</sup>

Accordingly, berdache were integrated into the mainstream familial structures of their tribe according to their acquired gender role despite the necessary accommodation for their contrasting biology. Most notably, it was common for berdache to marry a man or woman of the opposite gender but of the same biological sex.<sup>6</sup> Since homosexuality was not culturally condemned so long as its participants were *heterogendered*, the stigma attached to same-sex marriages in contemporary American society generally did not appear in Native American culture.<sup>7</sup> Additionally, berdache were entrusted as either caretakers or adoptive

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possible, but I begrudgingly will resort to “berdache” when more generalized discussion is necessary.

3. See generally, Charles Callender & Lee M. Kochems, *The North American Berdache*, 24 CURRENT ANTHROPOLOGY 443 (1983).
4. *Id.* at 443.
5. WALTER WILLIAMS, *THE SPIRIT AND THE FLESH* 63 (2d ed. 1992).
6. *Id.* at 110–16; RAMON A. GUTIERREZ, *WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500–1846* 34 (1991); William Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1453 (1993); Elsie Clews Parsons, *The Zuni La'mana*, 18 AM. ANTHROPOLOGIST 521, 526 (1916).
7. See, e.g., Sabine Lang, *Various Kinds of Two-Spirit People: Gender Variance and Homosexuality in Native American Communities*, in *TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY* 100–04 (Sue-Ellen Jacobs, Wesley Thomas & Sabine Lang eds., 1997). Because intimate relationships were culturally regulated based upon whether individuals occupied the same gender role and not on whether they were of the same physiological sex, contemporary Euro-American understandings of sexual orientation (e.g. gay, straight, bisexual) cannot be neatly applied to berdache relationships.

parents of young children.<sup>8</sup> Berdachism, unlike transgenderism in contemporary American society, was thus a sanctioned practice in many Native American tribes.

This cultural sanctioning of the berdache role exhibits the wide divergence between Euro- and Native American understandings of the relationship between biological sex and culturally-defined gender. In Euro-American culture, when a child is born with particular genitalia, he or she is assigned an official sex (man or woman) as well as a host of societal behaviors related to occupation, demeanor, dress, and sexual activity which he or she is expected to assume throughout the course of life. These expectations comprise the child's male or female gender role. Because sex predetermines and is inextricably conflated with gender, gender is "intransitively" deduced in Euro-American culture.<sup>9</sup>

Native American gender, on the other hand, was induced from the particular proclivities of a child and is generally regarded as "transitive."<sup>10</sup> Although biological sex created a presumption of gender role, this presumption was rebuttable.<sup>11</sup> If a child showed a proclivity towards the behaviors and skills associated with the opposite gender, such a proclivity would not be suppressed, and he or she traditionally would be free to evolve into the gendered being that was most in accordance with his or her innate abilities. As Professor Valdes has insightfully observed, "[I]n native contexts, gender was the social and occupational performance of an individual personality profile, not the social and sexual performance of an official sex assignment."<sup>12</sup>

### *B. Cultural Components of Berdachism*

Transitive determination of gender in Native American culture reflects several key differences between Euro-American and Native American society. First, parenting in Native American tribes emphasized the autonomy of the child and not the right of the parent to prescribe a child's development. Second, matrilineality and matrilocality in tribes like the Navajo historically accorded masculinity and femininity equal social status in contrast with the subordinate status that femininity has occupied historically in Euro-American culture. Third, a societal empha-

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8. WILLIAMS, *supra* note 5, at 54-57.

9. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 39-55 (1995).

10. *Id.* at 212.

11. *Id.* at 216.

12. *Id.* at 217.

sis on tribal collectivism posited the gender development of a child as a means of bringing economic prosperity and efficiency to the tribe as a whole in contrast with the focus on the familiar insularity of Euro-American society.

### 1. Child Autonomy

Native American parenting, particularly among the Navajo, evinced a marked degree of deference to the autonomy of the child in his or her own self-determination. "The primary focus of parenting [among the Navajo] . . . is to encourage children to explore their surroundings and develop an understanding of their fit in both their immediate family and the larger world."<sup>13</sup> At a young age, Navajo children are taught the importance of *tdáweejit'éégó*, "self-determination."<sup>14</sup> As these children go through this process of self-determination, Navajo parents frequently shower their children with praise to instill the notion that they are valued and to impart a healthy sense of self-worth.<sup>15</sup> Rather than place a burden on a child to conform to the expectations of the family, Navajo and other Native American families are notable for accommodating the child, even when he or she develops differently from their expectations. "[A]mong the Navajos, a people who place great value on individual freedom, becoming a *nadle* is considered to be solely a reflection of the basic nature of the individual child. Parents would not try to impose such a role on a child, without the child's initiative."<sup>16</sup> Similarly in other tribes, early signs of berdachism were allowed to blossom and failed to

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13. H. Corine Frankland, Ann P. Turnbull, Michael L. Wehmeyer, & Lavine Blackmountain, *An Exploration of the Self-Determination Construct and Disability as it Relates to the Diné (Navajo) Culture*, 39 EDUC. & TRAINING DEVELOPMENTAL DISABILITIES 191, 197 (2004) (citing J.L. Connors & A.M. Donnellan, *Walk in Beauty: Western Perspectives on disability and Navajo family/cultural resilience*, in RESILIENCY IN NATIVE AMERICAN AND IMMIGRANT FAMILIES 159–82 (H.I. McCubbin, E.A. Thompson, A.I. Thompson & J.E. Fromer eds., 1998)).

14. *Id.*

15. *Id.* at 199; see also WILL ROSCOE, *THE ZUNI MAN-WOMAN* 35–36 (1991) (noting that the Zuni rarely use corporal punishment).

16. WILLIAMS, *supra* note 5, at 49. But see Richard Trexler, *Making the Berdache: Choice or Constraint*, 35 J. SOC. HIST. 612 (2002) (arguing that the decision to become berdache was imposed by the parents and not the result of child autonomy). Although there has been some evidence of compulsion to become berdache, this evidence largely comes from Spanish colonists, a questionable source for reasons exhibited in Part II, and does not pertain to the Navajo. If there is some compulsion to become berdache, however, it could still be consistent with the framework of the paper as such compulsion would be explained by a concern for the vitality of the collective tribe (explained herein).



elicit pronounced suppression. For instance, S.C. Simms met a Crow berdache who was “almost gigantic in stature, but was decidedly effeminate in voice and manner. [He] was told that, when very young, [berdache] manifested a decided preference for things pertaining to female duties.”<sup>17</sup> Because raising a berdache child was “more a matter of the family adjusting to the child” rather than vice versa, these preferences were generally accepted and accommodated.<sup>18</sup>

## 2. Gender Equality

In the absence of a hierarchical construction of masculine and feminine endeavors, the social pressure on men to disavow their “feminine” inclinations as they define their gendered selves is considerably lessened. Unlike in the Euro-American tradition of *feme covert*, Navajo women were relatively independent of the control of men and both owned and controlled the fruit of their labor.<sup>19</sup> Navajo origin tales reinforce this egalitarian status; the First Man and First Woman, unlike Adam and Eve, were created equally and at the same time.<sup>20</sup> The Navajo were a horticultural society in which women were heavily involved.<sup>21</sup> Such participation yielded the development of matrilineal descent and matrilocal residence, characteristics associated with a high degree of female autonomy and egalitarian relations between men and women.<sup>22</sup> Alice Schlegel has postulated that this high degree of respect for women’s work is a necessary antecedent for cultural encouragement or toleration of biologically male berdache.<sup>23</sup> According to Schlegel’s theory, if women

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17. WILLIAMS, *supra* note 5, at 50 (quoting S.C. Simms, *Crow Indian Hermaphrodites*, 5 AM. ANTHROPOLOGIST 580 (1903)).

18. *Id.*

19. Midnight Sun, *Sex/Gender Systems in Native North America*, in LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY 40, 45–46 (Will Roscoe ed., 1988); WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 41 (1998).

20. WILLIAMS, *supra* note 5, at 18–19. In this tale, First Man and First Woman live in bleak, unhappy worlds, so they escape to the third world. In the third world lived two twins, Turquoise Boy and White Shell Girl, who were the first berdache. These twins helped First Man and First Woman develop tools for survival and made them very happy. See also Mary Shepardson, *The Gender Status of Navajo Women*, in WOMEN AND POWER IN NATIVE NORTH AMERICA 160, 160–61 (Laura F. Klein & Lillian A. Ackerman eds., 1995).

21. Midnight Sun, *supra* note 19, at 45–46.

22. See *id.*; Shepardson, *supra* note 20, at 173.

23. Alice Schlegel, Comment, in Callender and Kochems, *supra* note 3, at 462–63; see also WILLIAMS, *supra* note 5, at 66 (“Since women had high status, there was no shame in a male taking on feminine characteristics.”).

constitute an important and respected element of Native American society, a diminution in the number of gendered males would not serve as a detriment to society; although balance of labor was certainly important, such diminution in the number of males would be offset by the increased number of equally-valued females.<sup>24</sup> Thus, “[t]he lack of heteropatriarchy in native culture(s) allowed individuals a high degree of sex/gender autonomy, which in turn allowed gender and sexual diversity to flourish.”<sup>25</sup>

### 3. Tribal Collectivism

In combination with this historical recognition of gender equality, a substantial concern with the economic and social vitality of the collective tribe yielded an affirmative motivation to act upon one’s natural proclivities despite their association with the opposing gender. The traditional Navajo worldview is discussed in terms of *sa’ah naaghái bik’eh hózhó*, a cyclical process by which all individuals are inseparable from each other and from the universe.<sup>26</sup> The interconnectedness of individuals that arises from such a worldview underlies a notable concern for members of the extended family and the tribe as a whole. As the economic health of the tribe historically required efficient allocation of economic responsibilities, Native American society had a great interest in accommodating gender development, which was closely linked with occupation and productivity.<sup>27</sup> For instance, when there was a notable absence of valued female laborers, facilitation of the berdache role would serve an attractive utilitarian purpose for Native American families.<sup>28</sup> The economic benefits of gender transitivity were historically absent in Euro-American families where male children typically yielded greater family income and there was no offsetting concern for the society as a whole.<sup>29</sup> Native American tribes thus had a great interest in allocating tribal responsibilities in the most efficient manner possible, and such efficiency is achieved not by subjecting individuals to the humiliation of

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24. See Schlegel, *supra* note 23, at 462–63.

25. Valdes, *supra* note 9, at 223.

26. Carolyn Epple, *A Navajo Worldview and Nádleehí: Implications for Western Categories*, in *TWO-SPIRIT PEOPLE*, *supra* note 7, at 174, 176.

27. See Valdes, *supra* note 9, at 219.

28. See Schlegel, *supra* note 23, at 462–63 (postulating that a lack of female laborers in a society highly valuing female labor yields greater acceptance of male berdachism); Parsons, *supra* note 6, at 525–26 (noting that if a Zuni household were short of women workers, a son would be more readily allowed to become berdache but that there was never any compulsion upon him to do so).

29. See, e.g., Schlegel, *supra* note 23, at 462–63; Parsons, *supra* note 6, at 525–26.

performing activities for which they are poorly suited, but rather by allowing innate talents to flourish. According to a Crow traditionalist, “[w]e don’t waste people, the way white society does. Every person has their gift.”<sup>30</sup> Unlike Euro-American society, where female inferiority and a lack of collectivist concern create incentives for families to discourage gender fluidity so that they retain the wealth inherent in sons, Native American society’s traditional high valuation of femininity and substantial concern for the economic health of the collective tribe create incentives for families to facilitate gender fluidity as a means to greater tribal vitality.

A fluid, transitive conception of gender was thus integral to traditional Native American societies such as the Navajo. An approach to child-rearing, gender equality, and collectivism that diverged from Euro-American norms yielded an understanding of gender that lacked the presumptions of a sex/gender conflation so prevalent in Euro-American society. Embracing gender fluidity and transitivity allowed great freedom for self-determination while at the same time benefiting the economic health of the tribal society.

### III. THE EROSION OF TRADITIONAL GENDER CONSTRUCTION

As Native American tribes became infiltrated with Euro-American beliefs, the key constituent elements of gender fluidity outlined in Part II were increasingly eroded, damaging both the transitivity of Native American gender and the vitality of the tribe as a whole. Throughout the period of Euro-American colonization, Native American gender beliefs were reviled and systematically repressed through a range of coercive measures. These efforts radically transformed the traditional Native American beliefs as to child autonomy, relative equality of the sexes, and commitment to the tribal community.

#### *A. Early European Encounters*

From the earliest days of Euro-American contact with Native American gender diversity, berdache were looked upon with horror and were the recipients of extensive castigation and marginalization. Early accounts of Spanish colonists reveal widespread condemnation of Native “sodomy,” a practice typically deemed worthy of persecution in heavily Christian Europe, but which was necessarily incident to a relationship

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30. WILLIAMS, *supra* note 5, at 57.

between men and male-bodied berdache.<sup>31</sup> The conquistador Hernán Cortés wrote to the Emperor Charles V in 1519 that the natives of Mexico were “all sodomites and have recourse to that abominable sin,” and similarly the chronicler López de Gomara reported that they “are sodomitic like no other generation of men.”<sup>32</sup> Because the Spanish believed that homosexuality was one of the most deplorable sins against God, its widespread practice aided in justifying the violent takeover of the Americas and the corresponding rape and pillage of Native American villages.<sup>33</sup> For example, in a battle in the 1530s, the conquistador Nuño de Guzmán recalled that “the last person taken in battle, who had ‘fought most courageously, was a man in the habit of a woman, which confessed that from a child he had gotten his living by that filthiness, for which I caused him to be burned.’”<sup>34</sup> Similarly, in his expedition across Panama, Vasco Núñez de Balboa “saw men dressed like women . . . learnt that they were sodomites and threw the king and forty others to be eaten by his dogs;” this action was praised by Antonia de la Calancha, an official in Lima, as “a fine action of an honorable and Catholic Spaniard.”<sup>35</sup> Thus from the earliest contact with berdachism, Europeans actively suppressed Native American gender expression as a sign of sinful barbarism.

Similar suppression continued in the Californian missions during the 18th and early 19th centuries. In recalling the founding of Mission Santa Clara, Father Francisco Palóu described one person who

‘by reason of the decorously worn dress, pagan ornaments, manner of working, sitting, etc., had all the appearances of a real women; but in facial appearance and the absence of breasts’ caught the attention of the Spanish priests . . . Spanish soldiers confronted the man, stripped him of his clothing, and kept him locked up for three days.<sup>36</sup>

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31. *Id.* at 134.

32. *Id.* at 136–37.

33. *Id.* at 137.

34. *Id.*

35. *Id.*

36. Quincy Newell, *The Indians Generally Love their Wives and Children*, 91 CATH. HIST. REV. 60, 68 (2005); accord Will Roscoe, *Strange Country This: Images of Berdaches and Warrior Women*, in *LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY* 50–51 (Will Roscoe ed., 1988) (quoting FRANCISCO PALÓU, FRANCISCO PALÓU’S LIFE AND APOSTOLIC LABORS OF THE VENERABLE FATHER JUNÍPERO SERRA, FOUNDER OF THE FRANCISCAN MISSIONS OF CALIFORNIA 215 (George Wharton, ed., C. Scott Williams, trans., 1913)).

In another incident in the 1780s, a Spanish priest burst in on a Chumash man “committing the nefarious sin” with a male berdache.<sup>37</sup> This act was punished, but “not with the severity it properly deserved.”<sup>38</sup> After incidents such as these, berdache were effectively excluded from the missions; that same priest reported that none of “these accursed people” ever again came to the Californian missions.<sup>39</sup>

### *B. American Policies of Subordination*

Once the United States had gained control over the former Spanish colonies in the West, it happily stepped into the role of cultural repressor and embarked upon a systematic mission to squelch traditional gender beliefs and disrupt corresponding cultural practices. In order to do so, the United States engaged in a series of practices designed to inculcate Native Americans with Euro-American values, monitor adherence to traditional values, and punish those who refused to assimilate.

The federal government’s ability to exert control over reservation affairs and consequently alter Native practices was rooted in the substantial broadening of federal powers in the 1880s through a series of legislative and judicial actions. First, in 1883, the Bureau of Indian Affairs established Courts of Indian Offenses on most reservations as a means of eliminating “heathenish practices.”<sup>40</sup> Rules for Indian Court criminalized traditional religious dances and medicine men practices and made failure to “adopt habits of industry or to engage in civilized pursuits or employments” a misdemeanor.<sup>41</sup> By the early 1900’s, these courts had jurisdiction over approximately two-thirds of reservations.<sup>42</sup>

Federal judicial control over on-reservation activities was further buttressed by the 1885 passage of the Major Crimes Act, which established federal jurisdiction over murder, manslaughter, rape, larceny, arson, burglary, and assault with the intent to kill, when those crimes were committed by an Indian, whether on or off the reservation.<sup>43</sup> These substantial intrusions into native sovereignty were approved and justi-

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37. WILLIAMS, *supra* note 5, at 139.

38. *Id.*

39. *Id.*

40. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 728 (1985–1986).

41. *Id.* (quoting Rules of Courts of Indian Offenses, 1883).

42. Carol Chiago Lujan & Gordon Adams, *U.S. Colonization of Indian Justice Systems: A Brief History*, WICAZO SA REV. Fall 2004, at 9, 15.

43. *Id.* at 16; *see also* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885).

fied in the Supreme Court's 1886 decision in *United States v. Kagama*,<sup>44</sup> which upheld the Major Crimes Act. In that case, the Court articulated Congress's plenary power over Native Americans, which confirmed the permissibility of the federal government's developing paternalistic role:

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them . . . there arises the duty of protection, and with it the power.<sup>45</sup>

*Kagama* thus removed any doubt about the federal government's authority to engage in its repressive assimilationist policies.

Finally, in the decade's last and most significant legislative action, Congress passed the Dawes Severalty Act, or General Allotment Act of 1887, which opened up 138 million acres of reservation land to ownership by non-Native Americans.<sup>46</sup> Geographic and economic ties between tribal members, their land, and each other were thus severely undermined in a damaging blow to tribal cultural, economic, and political sovereignty.<sup>47</sup>

Due to Congress's plenary power over Native Americans, as articulated in *Kagama*, federal agents on the reservations exercised absolute control over Native American behavior and were able to outlaw and punish any practice of berdachism.<sup>48</sup> As early as the 1870s, the agent for the Hidatsa tribe forced a berdache to adopt male dress and cut his hair short like a white man.<sup>49</sup> A similar incident was reported involving the agent among the Crow in the 1890s:

[h]e did more crazy things here. He tried to interfere with Osh-Tisch, who was the most respected [berdache]. The agent incarcerated the [berdache], cut off their hair, made them wear men's clothing. He forced them to do manual labor, planting these trees that you see here on the BIA grounds.<sup>50</sup>

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44. 118 U.S. 375 (1886).

45. *Id.* at 383–84.

46. Lujan & Adams, *supra* note 42, at 16; *see also* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

47. *See* Lujan & Adams, *supra* note 42, at 16.

48. *See Kagama*, 118 U.S. at 375.

49. WILLIAMS, *supra* note 5, at 178.

50. *Id.*

Native Americans were essentially without recourse to resist these suppressive actions. As reported by ethnographer George B. Grinnell in 1899:

An Indian agent has absolute control of affairs on his reservation . . . more nearly absolute than anything else that we in this country know of . . . . The courts protect citizens; but the Indian is not a citizen, and nothing protects him. Congress has the sole power to order how he shall live, and where.<sup>51</sup>

Native Americans on reservations were thus at the mercy of a federal official who was disposed to condemn their traditional practices.

A central ingredient in this cultural suppression and subsequent transformation was the development of American-style boarding schools in which Native American children were required to enroll. "These schools subjected the youth to a harsh military and Christian regimen through an educational curriculum that taught them that their religious traditions, languages, and ways of life were not only backward and uncivilized, but outright evil."<sup>52</sup>

The schools were so important to federal assimilation policy that enrollment was enforced through violent and coercive means. "Congress authorized [Indian] agents to withhold rations and annuities from families that refused to enroll their children."<sup>53</sup> For self-sufficient tribes such as the Pueblo, this tactic was ineffective, so military intervention was required to compel enrollment in these schools. In 1897, four Pueblo priests were imprisoned, conceivably as a coercive measure to force Pueblo school enrollment and eliminate disfavored religious practices.<sup>54</sup> After 18 months of imprisonment, the priests were freed, and the Pueblo agreed to place twenty-five children in an Albuquerque school.<sup>55</sup> As with all of its assimilationist measures, the federal government equipped its agents with a broad range of coercive powers to enforce its educational policies.

In sum, during the late nineteenth century, the United States government launched a targeted attack on traditional Native American cultures via a multi-pronged assimilationist agenda. The aims and means of this federal policy are well summarized in the 1889 Report of the Commissioner of Indian Affairs:

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51. *Id.* at 177.

52. Lujan & Adams, *supra* note 42, at 14.

53. Roscoe, *supra* note 15, at 113.

54. *Id.* at 118.

55. *Id.* at 119.

The Indians must conform to “the white man’s ways,” peaceably if they will, forcibly if they must. They must . . . conform their mode of living substantially to our civilization. . . . They can not escape it, and must either conform to it or be crushed by it. . . . The tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted. The allotment of lands in severalty, the establishment of local courts and police, the development of a personal sense of independence, and the universal adoption of the English language are the means to this end.<sup>56</sup>

By disrupting the economic, legal, and cultural traditions of Native American tribes, the American government sought to solve “the Indian problem” by making it literally disappear into the dominant society.

### *C. The Collapse of Traditional Gender Systems*

The government practices outlined above—allotment, federal agents with absolute power, and mandatory schooling—had significant detrimental effects upon the particular cultural characteristics that gave rise to a fluid and transitive notion of gender. Notions of child autonomy, gender equality, and collective ideals were all substantially impacted.

#### 1. Child Autonomy Undermined

The mandatory enrollment of children in American schools greatly undermined the ability of parents to instill notions of autonomy and self-determination in their children. In these schools, Native American children were indoctrinated into Euro-American conceptions of gender without having the traditional freedom to define their own gender roles free of coercive constraints.<sup>57</sup> In stark contrast with the general permissiveness and pacifism of traditional Navajo childrearing, the American schools were extremely strict and employed extensive corporal punishment.<sup>58</sup> “Indian children are by white standards indulged by their families, but at Indian boarding schools the youngsters were forbidden

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56. CAROLYN ROSS JOHNSTON, *CHEROKEE WOMEN IN CRISIS: TRAIL OF TEARS, CIVIL WAR, AND ALLOTMENT, 1838–1907* 129 (2003)(quoting Comm’r of Indian Affairs, Rep. of Sec’y of the Interior 4 (1889)).

57. See *supra* notes 54–56.

58. *Id.*



to speak their native tongues and were punished—often beaten—if they lapsed into their own languages.”<sup>59</sup> This tight restraint on linguistic expression was mirrored by the tight restraint upon gender expression. For example, posters were given to Native American schoolchildren with a list of exalted white Christian values; the second value delineated was “[c]ome out of your blanket, cut your hair, and dress like a white man.”<sup>60</sup> Accordingly, childhood inclinations towards berdachism were expediently suppressed. One known punishment for boys who cross-dressed was to force them to wear boy’s clothes.<sup>61</sup> Another reported punishment for cross-dressing boys who tried to run away was to shave their head and *require* them to wear a dress at school so as to disgrace them before their schoolmates.<sup>62</sup> “Such a practice effected a complete reversal of the attitudes toward berdache that Indian children would have learned in traditional times.”<sup>63</sup>

The boarding schools removed any possibility for Native American youth to follow their natural talents and proclivities in order to determine a gender identity that was most in accordance with such abilities. Because biological boys were strictly steered into a set of socioeconomic behaviors based entirely on biology, these boarding schools ensured that gender no longer had the transitive character that it did under traditional beliefs. Traditionally, children would be raised by caretakers who adjusted their own practices to accommodate the child as an autonomous individual, while in American boarding schools schoolchildren were required to adjust their innate desires to accommodate the expectations of a society with a stultifyingly narrow conception of sex and gender.

## 2. Gender Equality Dismantled

In addition to instituting a systematic denial of child autonomy, the denigration of traditional gender equality also significantly damaged the possibility of fluid gender construction. The most direct interference with the traditional balance of powers between the sexes was through the mechanics of the allotment system. Rather than respect traditional lineage and residency patterns, which were matrilineal and matrilocal in

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59. Strickland, *supra* note 40, at 729.

60. Donald A. Grinde Jr., *Taking the Indian Out of the Indian: U.S. Policies of Ethnocide through Education*, WICAZO SA REV., *supra*, note 42, at 25, 28.

61. ROSCOE, *supra* note 15, at 199.

62. *Id.*

63. *Id.* (citing GEORGE A. TROTTER, FROM FEATHER, BLANKET AND TEPEE (1955); LOUISE UDALL, ME AND MINE: THE LIFE STORY OF HELEN SEKAQUAPTEWA (1969)).

tribes such as the Navajo,<sup>64</sup> the United States government imposed its own conceptions of “proper” property ownership by allotting land to male “heads of households.”<sup>65</sup> In stark opposition to traditional family property ownership, where a husband would move into a home owned by the wife’s (or berdache’s) family and in which the husband had no ownership rights,<sup>66</sup> the allotment system placed control over family property entirely into the hands of men, eradicating the socioeconomic protections that accompanied women’s traditional property rights.<sup>67</sup>

Navajo women’s socioeconomic prestige was particularly degraded via forced livestock reduction during the Great Depression. With fewer opportunities to sell livestock, dependency on wage labor, largely supplied by the federal government, became increasingly necessary.<sup>68</sup> Although many women were livestock owners, the new federal jobs were only open to men, thus economically disenfranchising Navajo women.<sup>69</sup> With Native American women suddenly in a position of economic subordination to Native American men, there arose a new disincentive for men to adopt a female gender role. Becoming a berdache would now yield socioeconomic penalties that previously had not existed.

Furthermore, the infusion of Christianity into Native American life through missions and boarding schools reinforced this economic subordination of women by adding religious justifications for the degradation of traditional gender equality. For example, in contrast with the Navajo origin myth in which First Man and First Woman were created equally and at the same time, in the Christian origin myth Adam is created first, in God’s image, while Eve is created derivatively from his rib.<sup>70</sup> This equation of female inferiority with “proper” Christianity was instilled in Native American women, particularly within mission schools: “[t]he mission schools’ goal for girls was to direct them away from the world of the native woman, away from the autonomy and prestige of females in traditional life, and toward the responsibilities of Christian womanhood with its emphasis on female piety, domesticity, submissiveness, and the

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64. See, e.g., Shepardson, *supra* note 20, at 160, 174.

65. WILLIAMS, *supra* note 5, at 176 (quoting Walter L. Williams, *United States Indian Policy and the Debate Over Philippine Annexation: Implications for the Origins of American Imperialism*, J. AM. HIST. 66, 810–31 (1980)).

66. See, Shepardson, *supra* note 20, at 160. Note that “ownership” is not being used in its literal sense, but to connote the right to use land, since the Navajo do not recognize land ownership. *Id.*

67. See WILLIAMS, *supra* note 5, at 176.

68. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 20–21 (1999).

69. *Id.* at 21–22.

70. See WILLIAMS, *supra* note 5, at 189.

patriarchal nuclear family.”<sup>71</sup> A clear message of female inferiority had thus invaded Native American socioeconomic patterns and religious beliefs.

### 3. Tribal Collectivism Degraded

As a result of the aggressive campaign to assimilate Native Americans into mainstream American belief systems, Native American commitment to the collective tribe and its tribal traditions unsurprisingly faltered. Commissioner of Indian Affairs in the late 1880s, John D.C. Adkins, articulated this goal by insisting that “they must abandon their tribal relations . . . they must learn to labor and must learn to rear their families as white people do.”<sup>72</sup> Adkins’s goal was largely realized, and many Native Americans became culturally, intellectually and spiritually estranged from their ancestral roots. A Taos Pueblo Indian, Sun Elk, related this process of tribal alienation within the government boarding schools:

A white man took us to Carlisle Indian School, and I stayed there seven years. . . . They told us that Indian ways were bad. They said we must get civilized. . . . It means “be like the white man.” I am willing to be like the white man, but I did not believe that Indian ways were wrong. But they kept teaching us for seven years. . . . We all wore white man’s clothes and ate white man’s food and went to white men’s churches and spoke white man’s talk. And so after a while we also began to say Indians were bad. We laughed at our own people and their blanket and cooking pots and sacred societies and dances. I tried to learn the lessons.<sup>73</sup>

Missionary-school educated children were no longer indoctrinated with a deep respect for the traditions of the tribe, and so the traditional value of tribal collectivism was eschewed and replaced by the foreign

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71. CAROL DEVENS, *COUNTERING COLONIZATION: NATIVE AMERICAN WOMEN AND GREAT LAKES MISSIONS, 1630–1900* 110 (1992).

72. BILL FRIEDHEIM, *Overview: Government Shapes the West, in THE IRON HORSE vs. THE BUFFALO: INDIAN-SETTLER CONFLICT ON THE GREAT PLAINS: 1869–90*, <http://socrates.bmcc.cuny.edu/bfriedheim/shapewest.htm> (last visited March 14, 2007).

73. Grinde, *supra* note 60, at 28 (quoting *NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO PRESENT, 1492–2000* 221–22 (Peter Nabokov ed.)(1999)).

emphasis on the individualistic, self-interested capitalist.<sup>74</sup> Children were taught “the value of a hard-earned dollar” and not to “waste [their] money on giveaways.”<sup>75</sup> Sacrifice for the good of the tribe at the potential expense of one’s own financial gain, for instance by allowing gender fluidity to balance labor supply, was no longer a valued principle under the coercive American regime.<sup>76</sup> The commitment to tribal vitality, which had been so central to transitive notions of gender, no longer played the prominent role that it had in earlier times.

With the constituent elements of traditional Native American gender understandings eroded, it is unsurprising that berdachism was largely extinguished. Children lacked the opportunity to act upon their natural proclivities to self-determine their gender identity, and the transgression of gender roles carried a new social stigma and economic penalty without a perceived countervailing benefit to the community. Even if the traditional gender dynamics surfaced and produced an incidence of berdachism, any manifestation of this gender identity would be swiftly suppressed by federal agents or schoolmasters. Although the berdache certainly receded dramatically from public life by the early twentieth century, it is unclear to what extent they were eradicated and to what extent they went underground.<sup>77</sup> Among the Navajo, *nádleehí* stopped cross-dressing by early in the twentieth century,<sup>78</sup> and Native Americans generally became reluctant to discuss the berdache with white ethnographers.<sup>79</sup> Regardless of any continued underground berdache identification, by 1934 the berdache no longer enjoyed the cultural endorsement and respect they traditionally had.<sup>80</sup>

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74. See, e.g., Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 52 (2002) (“Western capitalism, with its emphasis on individual accumulation and individual interest, runs counter to Native views.”)

75. See Grinde, *supra* note 60, at 28.

76. For discussions of the economic evolution of Native American tribes and the obstacles to it, see MICHAEL JOSEPH FRANCISCONI, *KINSHIP, CAPITALISM, CHANGE: THE INFORMAL ECONOMY OF THE NAVAJO, 1868–1995* (1998); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757 (2001).

77. See, e.g., WILLIAMS, *supra* note 5, at 183–87.

78. ROSCOE, *supra* note 15, at 200.

79. See WILLIAMS, *supra* note 5, at 183–87.

80. See *id.*

#### IV. NAVAJO TRIBAL COURT REINFORCEMENT OF TRADITIONAL GENDER CONSTRUCTION

##### *A. Rise of the Tribal Court*

Following the eventual demise of the federal allotment and assimilation strategy, Native American tribes were given the opportunity to establish independent legal institutions that would enable them to preserve their cultural traditions and promote the continuity of tribal identity despite the pervasive impact of mainstream American society. In the Indian Reorganization Act of 1934,<sup>81</sup> the federal government granted tribes the opportunity to set up their own sovereign governmental structures and establish tribal judiciaries. Although the boilerplate constitutions provided by the Bureau of Indian Affairs were rejected by the Navajo,<sup>82</sup> in 1958 the Navajo created the Navajo Judicial Branch, which operated as an independent tribal court system largely in the mold of Anglo-American judicial models.<sup>83</sup> The Navajo have seven judicial districts with general civil and criminal jurisdiction, as limited by federal law, and a three-justice Supreme Court.<sup>84</sup> While these tribal courts are bound by federal law, tribal ordinances and customs can also have the force of law.<sup>85</sup> When the courts were first established, judges looked to state law in cases where neither federal nor tribal statutes and regulations covered the issue at hand.<sup>86</sup> However, in 1985 the Tribal Code was amended to give judges the additional options of looking to the law of any state for guidance in these circumstances or fashioning their own remedies.<sup>87</sup> Furthermore, because the Navajo are neither federal entities nor states, they are not bound by the civil rights amendments of the Federal Constitution.<sup>88</sup> However, the Indian Civil

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81. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2000).

82. Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meetings of the Family*, 79 NEB. L. REV. 577, 589–90, 592 (2000).

83. *Id.* at 592. For a more detailed discussion of jurisdictional issues within the Navajo court system, see Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 McGEORGE L. REV. 973 (2000).

84. See Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 227–28 (1989).

85. *Id.* at 229.

86. *Id.* at 230 (citing NAVAJO TRIBAL CODE tit. 7, § 204(a) (1984–85)).

87. *Id.* (citing NAVAJO TRIBAL CODE tit. 7, § 204(c) (1984–85)).

88. See *Billie v. Abbott*, 16 Indian L. Rptr. 6021, 6024 (Navajo 1988) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)); Atwood, *supra* note 82, at 631–32

Rights Act (ICRA), a federal statute, does impose similar language upon the tribe.<sup>89</sup> Despite this continued oversight by Congress, the emergence of the tribal courts undeniably represented a substantial increase in judicial and political independence for the Navajo Nation.

Although there has been criticism that the American judicial model imports very different societal values into Navajo courts,<sup>90</sup> the existence of an independent Navajo judiciary reinfused traditional cultural elements into legal relationships among the tribe and on the reservation. Because Navajo courts are free to rely on tribal custom where there is no applicable federal law, Navajo judges have had the opportunity over the past fifty years to develop a "Navajo common law."<sup>91</sup> This term "emphasizes the fact that that Navajo custom and tradition *is* law and . . . reflects the similarity in the treatment of custom between Navajo and English common law."<sup>92</sup> While Navajo courts parallel American courts in their adversarial method and tiered appellate structure,

[t]he law produced in tribal codes and courts does not necessarily retain the discrete elements from Anglo-American legal culture with the same meaning and value as in the contributor culture or jurisprudence. In . . . tribal law . . . there is an innovative result that is consistent with a pervasive characteristic of the indigenous nations: the capacity to change as an evolving culture.<sup>93</sup>

Tribal courts thus have freedom to shape legal doctrines in accordance with the unique cultural needs and traditions of the Navajo,

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(citing *Talton v. Mayes*, 163 U.S. 376 (1896); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958).

89. See 25 U.S.C. §§ 1301–1303 (2000).

90. See, e.g., Alex Tall Chief Skibine, *Troublesome Aspects of Western Influences on Tribal Justice Systems and Law*, 1 TRIBAL L.J. 2 (2000); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

91. *Dawes v. Yazzie*, 5 Navajo Rptr. 161, 165 (Navajo 1987).

92. *Id.*

93. Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 83 MINN. L. REV. 927, 960 (1999) (quoting Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 256–57 (1994)); see also Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: the Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509 (1998) (surveying Indian Common Law in the areas of land, theft, repossession, inheritance, environment, family law, contracts, torts, and criminal law and noting substantive difference with American jurisprudence); Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17 (1997) (describing how tribal courts preserve, strengthen, and incorporate native concepts of justice).

regardless of the degree of similarity such doctrines may share with their American counterparts. For example, although the ICRA and the Navajo Bill of Rights (NBR) both guarantee due process under the law,<sup>94</sup> the Navajo courts have expressly declared that they “are not bound by the rationale nor the holding of any case construing” due process under the Fourteenth Amendment.<sup>95</sup> Rather, “[d]ue process under the ICRA and the NBR must be interpreted in a way that will enhance Navajo culture and tradition. . . . 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.”<sup>96</sup> Due to their broad grant of interpretive independence, Navajo courts have boldly asserted their right to shape their laws in accordance with tribal beliefs and have therefore elevated these traditional beliefs to the binding authority of law.

### *B. Reinstating the Foundations of Gender Fluidity*

Navajo courts have utilized this interpretive freedom in order to re-introduce and preserve the traditional notions of gender that were eroded during the period of Euro-American subjugation. Although the Navajo courts have not published any opinion directly dealing with berdachism, they have published numerous opinions that address the underlying cultural characteristics which enabled such gender fluidity to exist in traditional Native American cultures. In these opinions there has been a concerted effort by the courts to resolve familial and other gender-related disputes in a manner that reflects the before-mentioned values of child autonomy, gender equality, and a concern for the collective. When dealing with domestic relations issues, the tribal courts have utilized their interpretive independence to depart from American family law jurisprudence and instead to shape the legal relationships between men, women, children, and the greater tribe in accordance with these three values. By reintroducing these values, which had been lost in the fray of colonial assimilation, the Courts have re-infused Navajo society with the requisite cultural values that traditionally gave rise to the berdache gender identity.

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94. NAVAJO TRIBAL CODE tit. 1, § 3 (1977); 25 U.S.C. § 1302(8) (2000).

95. See *Billie*, 16 Indian L. Rptr. at 6024.

96. *Id.*

## 1. Child Autonomy

When confronted with cases concerning parent-child relationships, the Navajo courts have resolved the issues presented in a manner that reflects traditional notions of child autonomy and departs from the repressive child-rearing values inherent in American traditions. In contrast with the 19th Century American boarding schools, which strictly imposed a limited range of acceptable gender behaviors, Navajo courts have approached child-rearing in a manner that allows children to pursue their innate talents and embark upon their own self-determination.<sup>97</sup> In delineating the cultural context in which adoption disputes should be considered, the Window Rock District Court explained:

Navajos believe that each person has a right to speak for oneself and to act as one pleases. The mutual rights and duties of kinsmen normally discussed under the concept of the jural relation are best described as mutual expectations, rather than obligations . . . Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded. Coercion is always deplored.<sup>98</sup>

Although duties to the family and community remain important, the individuality of a child should not be stifled or made subordinate to the expectations or desires of his or her caregiver. The "Navajos do not view children as property or possessions, but value them as individuals in a community."<sup>99</sup>

In accordance with this cultural respect for children's individuality, Navajo courts emphasize the child's needs in custody and adoption disputes and explicitly subordinate the interests of parents to those of the child.<sup>100</sup> In *Goldtooth v. Goldtooth*, the court ordered joint custody of five children so that they could maintain maximum contact with both

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97. See *supra* notes 90–91.

98. In re J.J.S., 4 Navajo Rptr. 192, 194 (Navajo D. Ct. 1983) (quoting GARY WITHERSPOON, *NAVAJO KINSHIP AND MARRIAGE* 94–95 (Univ. Chicago Press 1975)).

99. *Alonzo v. Martine*, 6 Navajo Rptr. 395, 395 (Navajo 1991).

100. It had been argued that despite the "best interests of the child" standard often used in American custody and adoption disputes, parental rights are the primary focus of these actions, leaving children legally marginalized. See, e.g., Andrea Charlie, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 *YALE L. & POL'Y REV.* 267 (1987); see also *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down a Washington non-parental visitation statute as violation of parental due process).



parents and extended families.<sup>101</sup> Although this order did in effect consider the parents' needs, the court noted that it "will enforce the childrens' rights in custody and it will only incidently provide for the rights of the parents, where they are in harmony with those of the children."<sup>102</sup> In *In re J.J.S.*, the court echoed a related sentiment in describing the differences between American and Navajo adoption:

Many Navajo adoptions have a different focus than Anglo-European Law. As such it is not principally concerned with the exchange of legal parents. "Navajo adoption is based on need, mutual love and help. Children may or may not change the surname. Either way the family is a unit with strong, supportive, extended family and clan ties. It has worked for hundreds of years without adoption agencies and courts of law."<sup>103</sup> . . . "Anglo-European law is primarily concerned with immediate parent and child relationship while Navajo Law is concerned with the relationship of a child to a group which shares the expectation that its members will take care of each other's children."<sup>104</sup>

The self-interest of a Navajo parent is thus subsumed by the interest of the tribe in providing for the needs of a developing child.

The "special duty" of support to a child has been emphasized in several Navajo court opinions<sup>105</sup> and represents a rejection of the coercive and violent practices of the American boarding schools in favor of traditional permissiveness and pacifism towards children. By adhering to a children's rights standard and only protecting parents "incidentally," the Navajo courts have moved the tribe away from the American prac-

101. *Goldtooth v. Goldtooth*, 3 Navajo Rptr. 223 (Navajo D. Ct. 1982).

102. *Id.* at 227.

103. 4 Navajo Rptr. at 194-95 (quoting Carl N. Gorman, *The Navajo Nation is Made up of Many Conference*, in *DEVELOPMENT FOR GENERATIONS TO COME* (1982)).

104. *Id.* (quoting Op. Solicitor to the Courts of the Navajo Nation, No. 83-10 (1983)).

105. *In re Custody of S.R.T.*, 18 Indian L. Rptr. 6158 (Navajo 1991); *see also* *Burbank v. Clarke*, 26 Indian L. Rptr. 6078 (Navajo 1999) ("a parent who brings a child into the world has a duty imposed by natural and spiritual law to provide for the child's needs until the child is capable of self-support."); *In re J.J.S.*, 4 Navajo Rptr. at 192 ("children . . . are highly valued and wanted. The basis for the Navajo life ethics was that the original parents of the first human infant pronounced a death penalty on any creator or being who mistreated the first child. . . . Therefore in the Navajo religious context inhumane cruelty to a child was prohibited.") (quoting, *CHILD WELFARE SERVICES, NAVAJO CHILD REARING CONCEPT, CHILD ABUSE AND NEGLECT—A NAVAJO PROSPECTIVE, NAVAJO CHILDREN'S LEGAL SERVICES*, (1983)); *Tom v. Tom*, 4 Navajo Rptr. 12 (Navajo 1983) ("[A] man must pay as much as is necessary for the child, given his abilities and resources at any given time.")

tice of requiring children to accommodate the expectations of the family and towards the traditional understanding that it is the parents who must themselves accommodate the particular needs of a child while he is determining his or her own identity. This accommodation of a child's autonomous development is a necessary antecedent to traditional gender transitivity and symbolizes the tribal court's commitment to preserving traditional notions of gender.

## 2. Gender Equality

The tribal courts have also gone to great lengths to preserve the second necessary antecedent for traditional gender diversity: gender equality. In several cases, the Navajo tradition of equality among the genders has been explicitly recognized and used as an underpinning of the court's holding. Although the outcome in some of these cases would likely be the same in American courts, the Navajo courts have stressed that these similar outcomes arise from very different cultural discourses. In *Navajo Nation v. Murphy*, the Navajo Supreme Court differentiated between the Navajo and American rationales for the spousal privilege against testifying in a criminal trial:

American jurisprudence has traced the husband-wife privilege to . . . [m]edieval jurisprudence, [which] did not recognize a wife's separate legal existence from her husband, because the husband and wife were considered one and the husband was the one . . . .

The original justification for the privilege has no support in Navajo tradition and culture. . . . Navajo tradition and culture have always revered the role of Navajo women within Navajo society; thus, the husband-wife privilege, as utilized in Navajo jurisprudence, must be based upon a [different] rationale . . . [it] is then justified by Navajo society's interest in preserving the harmony and sanctity of the marriage relationship.<sup>106</sup>

While such an explanation might be unnecessary considering that American jurisprudence has adopted a similar "sanctity of marriage" rationale for spousal privilege, *Murphy* signals the Navajo judiciary's desire

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106. *Navajo Nation v. Murphy*, 6 Navajo Rptr. 10, 12–13 (Navajo 1988).

to distance itself from the tradition of coverture in American law<sup>107</sup> and to place men and women in a legal relationship distinct from that tradition. Similarly, in *Davis v. Davis*, the Navajo Supreme Court distinguished the Navajo and American rationales for a woman's right to challenge the paternity of a child born in wedlock:

Under non-Navajo common law a married woman lacked standing to assert that her child is illegitimate. The rule was used to prevent a married women from gaining custody of a child in a divorce proceeding solely upon assertions of illegitimacy. Public policy and the preservation of good morals also precluded the assertion of illegitimacy by a married woman. . . . [A] child born in wedlock is considered legitimate, and the mother cannot bastardize him.<sup>108</sup> Under non-Navajo common law only a husband had standing to dispute the paternity of his wife's child. The modern trend is to allow [both to challenge paternity]. . . .

[T]he Navajo people have traditionally recognized that Navajo women have equal status with Navajo men to participate in decisions affecting family and tribe. Based upon tradition and custom, the wife has equal standing in Navajo courts.<sup>109</sup>

*Davis* therefore recognized that despite similarities in modern jurisprudence, the Navajo's respect for gender equality, as reflected in tribal common law, has far deeper historical roots than the recent infusion of gender equality into American jurisprudence. This recognition of women's traditional equality might prove to be effective in overcoming the damage inflicted by the disruption of traditional property distribution and Christianity's emphasis on female subordination. The courts have made concerted efforts to remind those in their jurisdiction that their culture rejects notions of inherent female inferiority. Navajo courts have emphasized the tradition of gender equality integral to the *berdache* institution in the face of assimilation into American culture, which is only beginning to learn the lessons of feminism.

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107. Coverture refers to traditional women's legal status under Anglo-American law whereby she would lose her separate legal existence from her husband. See generally Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002).

108. *Davis v. Davis*, 5 Navajo Rptr. 169, 171 (Navajo 1987) (citing *Sacas v. Olmos*, 143 P.2d 871 (N.M.1943)).

109. *Id.*

Furthermore, the Navajo courts have not only emphasized the philosophical *equality* of the genders but have also rooted their decisions in the socioeconomic *advantages* traditionally associated with the female gender. As discussed earlier, the matrilineal and matrilocal tradition of Navajo society allowed women to assert a marked degree of control over property and family,<sup>110</sup> and the inherent socioeconomic value associated with femininity created incentives for youths and their families to embrace male berdachism.<sup>111</sup> In *Naize v. Naize*, the Navajo Supreme Court invoked this tradition in order to support an award of spousal maintenance:

Traditional Navajo society is matrilineal and matrilocal, which obligates a man upon marriage to move to his wife's residence. The property the couple bring to the marriage mingle and through their joint labors create a stable and permanent home for themselves and their children. The wife's immediate and extended family benefit directly and indirectly, in numerous ways, from the marriage.

If the marriage does not survive, customary law directs the man to leave with his personal possessions . . . and the rest of the marital property stays with the wife and children at their residence for their support and maintenance . . . This long-standing customary law is akin to modern spousal maintenance.<sup>112</sup>

This passage from *Naize* essentially summarizes the traditional economic incentives of femininity and similarly male berdachism. It not only provides a reminder of the matrilocal system from which Navajo spousal maintenance derives but also asserts that "the system itself is law."<sup>113</sup> The socioeconomic relations among genders embedded in both Navajo history and the berdache tradition have thus been preserved in Navajo jurisprudence.

Navajo courts have endeavored to preserve the traditional socioeconomic power of women despite the potential conflict with civil rights

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110. *See supra* Part II(B)(2).

111. *Id.*

112. *Naize*, 24 Indian L. Rptr. at 6152.

113. *Id.*; *see also* NAVAJO TRIBAL CODE, tit. 9, § 1002 (19) (1977) (providing that "the domicile of a child born out of wedlock is that of the natural mother unless otherwise established in the father"), quoted in and construed by *In re custody of S.R.T.*, 18 Indian L. Rptr. at 6158.

laws. In *Ration v. Robertson*,<sup>114</sup> the court was confronted with the question of whether the traditional obligation of a male to relinquish personal property upon dissolution of a marriage conflicts with the Equal Rights provision of the Navajo Bill of Rights.<sup>115</sup> Rather than construe the Navajo Bill of Rights formalistically, the court successfully deferred the question, stating that “this case simply is not ripe for a review, and the Court of Appeals will not consider the important matter of the Equal Rights provision elimination an ancient Navajo custom” without extensive briefing on the issue by both parties.<sup>116</sup> Although the issue was never later addressed in published opinion, this case evinces a general hesitancy on the part of the court to defer to statutes that would override the traditional socioeconomic relations between the genders.<sup>117</sup> A tradition of gender equality, enhanced by the socioeconomic advantages of matrilineality and matrilocality, has been enforced by the Navajo courts wherever possible.

### 3. Tribal Collectivism

The third significant prerequisite to traditional gender diversity, a concern for the collective tribe, has also been preserved within Navajo jurisprudence. After nearly a century of submission to Euro-American

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114. 4 Navajo Rptr. 15 (Navajo 1983).

115. NAVAJO TRIBAL CODE tit. 1, § 3 (1977).

116. *Id.*

117. But see *Help v. Silvers*, 4 Navajo Rptr. 46 (Navajo 1983) which rejects a presumption that would favor mothers over fathers in custody disputes under the Equal Rights Amendment. The court’s willingness to disallow such a presumption in this context might be explained by the focus on children’s rights and not parental rights in Navajo custody disputes. *Help*, however, made no mention of *Lente v. Notah*, 3 Navajo Rptr. 72 (Navajo 1982), decided one year earlier, which affirmed the existence of custom favoring maternal custody and allowing such custom to inform custody disputes. *Atwood*, *supra* note 82, at 637. *Help* could therefore be read as either overruling *Lente* or, more consistently with cases like *Ration*, as rejecting a *presumption* of maternal custody while allowing the traditional custom to serve as a persuasive factor in custody determinations. See also *Winnebago Tribe of Nebraska v. Bigfire*, 24 Indian L. Rptr. 6232 (Winnebago Tribal Ct. 1997) (protecting categorical distinctions between mothers and fathers from challenge under the ICRA or Bill of Rights due to the difference in substance and origin of Winnebago constitutional protections); *Atwood*, *supra* note 82, at 630–34 (outlining these cases in the context of general Native American approaches to motherhood and fatherhood).

It is important to note that tribal courts have broad discretion to interpret the ICRA in accordance with tribal customs, and review by federal courts is limited to petitions for *habeas corpus*. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (permitting the Pueblo to enforce a membership ordinance that treated males and females disparately).

notions of individualistic capitalism, the tribal courts have recognized that their decisions can directly impact the continuity of a cohesive tribal society. In order to maintain this continuity, individuals must be able to see incentives in strengthening tribal vitality, even if economically detrimental to the immediate family. This principle was fundamental to the conceptualization of the berdache as providing a balanced labor supply and has remained essential to furthering the interests of a tribe battered by colonial intervention.<sup>118</sup> Recognizing the vital importance of a concern for the collective, the tribal courts have given it the force of law:

[T]he 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*.<sup>119</sup>

In *Ben*, the Navajo Supreme Court applied the principle of *k'e* by requiring appellant to honor her oral agreements "to maintain social order" despite the tolling of the statute of limitations.<sup>120</sup> Ensuring that responsibilities to those in the broader community are honored, even at personal expense, requires a flexible application of procedural barriers.

This commitment to the broader community has been particularly emphasized in the areas of marital relations and childrearing. In the context of traditional gender fluidity, positing familial relationships in a broader tribal framework allowed families to consider the positive externalities that gender fluidity provided in the process of making domestic decisions. As explained by the Navajo Supreme Court:

"Navajos think of such relationships [kinships] in a much broader and different sense than does the general American population."<sup>121</sup> There is the biological family, with husband, wife and unmarried children; the extended family which adds

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118. See Schlegel, *supra* note 23.

119. *Ben v. Burbank*, 24 INDIAN L. RPTR. 6001, 6001 (Navajo 1996).

120. *Id.* at 6002.

121. *Ariz. Pub. Svc. Co. v. Office of Navajo Labor Relations*, 17 Indian L. Rptr. 6105 (Navajo 1990) (quoting BRODERICK JOHNSON, NAVAJO STORIES OF THE LONG WALK PERIOD xix (1973)).

married daughters and their husbands as well as unmarried children; the outfit, with mixes of extended or biological families; the clan, with relationships which are not restricted to biological connections; and linked clans, with relationships among clans.<sup>122</sup>

In accordance with this understanding of kinship, the Navajo Supreme Court invalidated the Arizona Public Service Company's anti-nepotism policy as "ridiculous in the Navajo context because of the strong ties and obligations to relations outside the scope of the policy."<sup>123</sup> Furthermore, obligations to a broad network of kinsmen have been particularly emphasized in the area of parenting. In *Goldtooth v. Goldtooth*, the Window Rock District Court's joint custody award derived from the principle that childrearing should concern the broader community:

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. . . . [T]he 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 childrens' place in the entire extended family in order to make a judgment based upon Navajo traditional law.<sup>124</sup>

In the context of childrearing, this principle of broad kinship and collective concern holds special weight. In order to maintain commitment to the tribe, in spite of the draws of American assimilation, a sense of respect and obligation to the Navajo community must be instilled from an early age. American educational practices were extremely successful in intercepting the inculcation of such respect and obligation in Native American children,<sup>125</sup> and in order to overcome this substantial setback, Navajo children require active affirmation of the importance of traditional values. As Navajo courts have emphasized, "children are viewed as the future, ensuring the existence and survival of the Navajo

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122. *Id.* at 6105 (citing JOHNSON, *supra* note 121, at xix–xxi).

123. *Id.* at 6112.

124. 3 Navajo Rptr. at 223.; *see also In re J.J.S.*, 4 Navajo Rptr. at 192, 195 ("Navajo law is concerned with the relationship of a child to a group which shares the expectation that its members will take care of each other's children.")

125. *See supra* Part III(C)(1).

people in perpetuity.”<sup>126</sup> The continuity of Navajo customs and traditions, including traditional incentives for gender fluidity, require that domestic decisions be resolved with explicit concern for the collective vitality of the tribe.

The Navajo courts have therefore utilized their broad authority to craft Navajo common law in ways that reinforce traditional notions of gender and strive to reverse Euro-American erosion of such traditions. By emphasizing the autonomy of children and the preeminence of children's rights vis-à-vis their parents, Navajo courts have given children a degree of cultural space for individual self-determination that had been lost during the era of coercive assimilation. The courts have strived to provide these self-determining children with a sense of gender equality that was significantly degraded during the allotment era. Furthermore, this process of self-determination has been reinfused with notions of responsibilities to the broader community and respect for the traditions of the tribe. This landscape of child development closely mirrors the traditional cultural characteristics that gave rise to the fluid and transitive understanding of gender underpinning the berdache identity. While the legacy of Euro-American subjugation has yielded substantial cultural, religious, political, and economic barriers to a full rejuvenation of traditional gender fluidity, it does appear that the courts have put some of the most important pieces back in place.

#### V. CONCLUDING REMARKS: THE PAST, PRESENT, AND FUTURE OF THE BERDACHE

The berdache were an integral part of many traditional Native American tribes, such as the Navajo, and the eradication of this culturally-sanctioned gender role represented a substantial loss in the battle against full assimilation into mainstream Euro-American life. The following passage, related to W.W. Hill by a Navajo man he interviewed in the early twentieth century, captures both the great importance of the berdache in traditional Navajo society and the harm caused by the *nádleehí*'s demise:

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126. Burbank v. Clarke, 26 Indian L. Rptr. at 6078; see also *In re Custody of S.R.T.*, 18 Indian L. Rptr. at 6158 (“There is no resource more vital to the continued existence and integrity of the Navajo nation than our children.”); *In re J.J.S.*, 4 Navajo Rptr. at 192 (using encouragement of the Navajo cultural upbringing of the child as a factor determining child custody).



“They know everything. They can do the work of a man and a woman. I think when all the *nadle* are gone, that it will be the end of the Navaho. . . . If there were no *nadle*, the country would change. They are responsible for all the wealth in the country. If there were no more left, the horses, sheep and Navaho would all go.”<sup>127</sup>

However, although the *nádleehí* have gone, the Navajo have not, thus begging the question: what about the *nádleeh* was so essential and determinative of Navajo existence?

Rather than being functionally necessary to Navajo existence, it appears that the *nádleeh* was a product of the structures of traditional Navajo society that were themselves functionally necessary to the survival of the traditional Navajo culture. The existence of *nádleehí* and correspondingly transitive conceptions of gender are symptomatic of a society which highly values the three cultural characteristics outlined above: child autonomy, gender equality, and a concern for the collective. It is these characteristics that are essential both to the emergence of the *nádleehí* and the cohesive vitality of Navajo culture. In preserving these cultural elements, the tribal courts have not acted with the intent of reviving *berdachism* per se; rather, they have preserved such elements in an effort to restore a culture in which the berdaches were able to thrive.

Nevertheless, there still remain substantial obstacles to a true re-emergence of traditional gender diversity, whereby the interplay of child autonomy, gender equality, and tribal communalism would yield a fluid, transitive conception of gender. First, the economic obstacles facing most reservations today make the labor efficiency characteristic of traditional gender systems difficult to replicate. With unemployment commonly exceeding 50%,<sup>128</sup> an efficient division of labor among genders, whereby allocation of employment is unhindered by biological sex, is impossible because opportunities for labor are extremely scarce. Second, despite judicial efforts to accord women their traditional social prestige, Native American women have struggled to reap the benefits of equal legal status, as domestic violence and rape are particularly prevalent on contemporary reservations.<sup>129</sup> The scarcity of employment mixed

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127. W. W. Hill, *The Status of the Hermaphrodite and Transvestite in Navaho Culture*, 37 AM. ANTHROPOLOGIST 273, 274 (1935).

128. For example, during 2000–2001, 53.88% of reservation Navajos were unemployed. See Ezra Rosser, *This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 253–54 (2005).

129. See Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 123 (2004) (“[t]he National Violence Against Women Survey, for exam-

with risks of violence certainly limit the gender-“crossing” incentives of traditional gender systems.

Although tribal court decisions have influenced gender construction in contemporary tribes, the influences of American culture continue to pervade tribal life. With several generations of Native Americans alienated from tribal society due to American boarding schools, parents of the youngest generations have been unable to effectively relate Navajo history and culture to their children.<sup>130</sup> A 28-year-old gay-identifying Navajo, Teles, recounted to Margaret Ann Waller and Roland McAllen-Walker this sense of detachment in his upbringing, specifically as to the *nádleeh* tradition:

I hear about [the idea of the traditional bisexuality of American Indians] in the dominant gay culture, but I have no response because I’ve never heard of it. In my family, as I was growing up I did not see any reverence toward Navajo individuals who were gay. I was aware of the opposite . . . . The two-spirit people did have a very definite role in the community. You know I don’t, I didn’t see that in my family when I was growing up. I didn’t see that. My family has like totally closed themselves off from the teachings about two-spirit people. They never shared it with me. It’s a closed subject.<sup>131</sup>

Teles’s story underscores how deeply Euro-American scorn for the berdache gender role has permeated tribal consciousness. Constructing legal relations in accordance with traditional cultural characteristics creates substantial opportunities for reclaiming fluid concepts of gender. However, the socioeconomic legacy of American domination remains a considerable impediment to such goal.

Nevertheless, there are signs that the reinforcement of these key constituent elements, child autonomy, gender equality, and tribal collectivism, have indeed yielded some renewed appreciation for gender

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ple, concluded that 34.1% of American Indian and Alaska Native women will be raped during their lifetime. The National Crime Victimization Survey indicates that American Indian and Alaska Native women suffer a rate of sexual assault of 7 per 1000 people, compared to 2 per 1000 for all women.”); THE CENTER ON CHILD ABUSE AND NEGLECT, HISTORY OF VICTIMIZATION IN NATIVE COMMUNITIES, (March 2000), available at <http://ccan.ouhsc.edu/History%20of%20Victimization%20Issues.pdf>.

130. Coker, *supra* note 68, at 22–26.

131. Margaret Ann Waller & Roland McAllen-Walker, *One Man’s Story of Being Gay and Diné (Navajo): A Study in Resiliency*, in QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 90, 98 (Mary Bernstein & Renate Reimann eds., 2001).

diversity and berdachism within Native American societies. Although tribal courts have hardly addressed any issues relating to sexual minorities, in at least one case, *In re the Adoption of A.F. and K.F.*,<sup>132</sup> the prospective adoptive parents' lesbianism did not impact the court's decision, unlike in some states where parents' homosexuality is explicitly weighed against granting custody.<sup>133</sup> Among the Navajo, the berdache tradition was a factor in the debate over a same-sex marriage ban in the tribal code. Although the ban passed over the Navajo President's veto,<sup>134</sup> the berdache tradition was explicitly heralded by the legislation's opponents.<sup>135</sup>

Contemporary gay and lesbian Native Americans have embraced the berdache tradition, as evidenced by their rejection of mainstream LGBT labels in favor of the term "two-spirit."<sup>136</sup> This term captures the

132. 1996 ML 146 (Conf. Salish & Kootenai).

133. *Id.*; see Atwood, *supra* note 82, at 619–21.

134. Remember that in traditional Navajo society, a "modern" gay marriage would not have been culturally sanctioned. Although berdache marriages were "same-sex" marriages, they were deemed acceptable so long as they were "opposite gendered." It is unclear, however, whether the Navajo Marriage Act would bar a marriage between a male-bodied berdache and a man. It is even less clear whether the statute would be "constitutional" under Navajo customary law if it did indeed bar such marriage. Even further unclear is whether a "modern" gay couple could facially challenge the Marriage Act as overbroad. However, the constitutionality of the Marriage Act is sadly beyond the scope of this Article.

135. See, e.g., Sherrick Roanhorse, *A Traditional Navajo*, THE ADVOCATE, September 27, 2005, at 26 ("The Navajo people have a history of accepting LGBT individuals into traditional society . . . . These stories include nádleeh, a male-bodied woman or a manly female. In the Navajo creation story, when men and women separated because of a domestic dispute, nádleeh served as caregivers to the men. Today, LGBT Navajos still serve similar functions in their families."); Pamela G. Dempsey, *Marriage Act Opponents Speak Out* (June 2, 2005), <http://www.gallupindependent.com/2005/june/060205act.html> ("Navajo oral traditions of the Nádleeh were and are about Nádleeh being revered, held in high-esteem, are balancing factors in culture, language, arts, society, economy, and most important, maintaining good family ties and values' . . . . 'To say gay people are ruining lives is false . . . when did Christian values become traditional for Navajo culture?"); Jason Begay, *Battle Lines Drawn in Gay Marriage Debate* (May 19, 2005), <http://www.nativeout.com/dinemarriage/modules.php?name=News&file=article&sid=14> ("Critics have also argued that gay men and lesbian woman [sic] have always been a part of Navajo culture and are considered third and fourth genders."); Pamela G. Dempsey, *Navajo Nation Officially Bans Same-Sex Marriage* (April 23, 2005), <http://www.gallupindependent.com/2005/apr/042305samesex.html> ("One observer said traditionalists opposed the legislation, citing a traditional story when Nádleeh, a Navajo word for one who has both male and female spirits, did the work of women successfully including weaving, grinding corn, and creating cooking utensils while Navajo men and women were separated for four years due to a power struggle.")

136. See generally WILLIAMS, *supra* note 5, at 192–200; Sue-Ellen Jacobs, Wesley Thomas & Sabine Lang, *Introduction*, in TWO-SPIRIT PEOPLE, *supra* note 7, at 1.

unique ancestry of Native American homosexuality stemming from berdachism and the mix of male and female spirits that the traditional identity involved. Not all contemporary gay and lesbian Native Americans share Teles' pronounced alienation from berdachism. The berdache tradition has served as a means for individuals and families to posit their struggle to accept homosexuality in the historical legacies of Native American acceptance and perseverance:

That my family treated me with respect and expected excellence was not an accident nor an isolated phenomenon. The fact that my family has been assaulted by assimilationist policies for four generations and is still capable of progressive thinking toward someone of an alternative sexuality is not happenstance . . . .

In today's world, it is easy to become confused by titles: gay, straight, bi, *winkte*, or queer. For me once I realized that my family was responding to me and interacting with me with respect and acceptance, and once I realized that this respect and acceptance was a legacy of our traditional Native past, I was empowered to present my whole self to the world and reassume the responsibilities of being a two-spirited person.<sup>137</sup>

While the berdache has not reemerged in its fully-sanctioned and highly-respected capacity, the tradition of the berdache has begun to resonate after decades of silence.

The berdache symbolized a conception of gender foreign to and incompatible with Euro-American conceptions of gender. Sex and gender among traditional Native American societies were distinct and separable, and a child was free to explore the gender identity that most closely fit his or her innate talents despite his or her biological features. As these societies became subjugated by Euro-American cultural hegemony, the juxtaposition of their transitive understanding of gender against the narrow and intransitive Euro-American understanding of gender brought into stark relief the repression inherent in Euro-American society's understanding of gender and sexuality.

The demise of the berdache did not involve merely a superficial deletion of one aspect of Native American life; it involved a wholesale restructuring of Native American society. Children were prohibited from engaging in individual self-determination and were required to mold

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137. Michael Red Earth, *Traditional Influences on a Contemporary Gay-Identified Sisseton Dakota*, in *TWO-SPIRIT PEOPLE*, *supra* note 7, at 215–16.

themselves according to the strict guidelines of their American wards. Women were forced to give up the equality they traditionally enjoyed and to assume a subordinate status as Euro-American property traditions and religious beliefs were actively imposed. Lastly, all members of a tribe were encouraged to disavow their deep respect and commitment to their extensive networks of kinsmen in order to compete in a capitalist economy based on selfish individualism. The transformation of traditional transitive gender construction reveals not only the extraordinary measures Euro-American society will take to impose its cultural beliefs, but also the deeply repressive societal characteristics that underlie such beliefs. The actions taken by the tribal courts are just one step towards reversing the harms of this pervasive cultural invasion. ❀