Case Note: *Navajo Nation v. Rodriguez* and the Traditional Navajo Principle of Hazhó'ógo

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ABSTRACT

In *Navajo Nation v. Rodriguez*, the Navajo Nation Supreme Court determined that the United States Supreme Court's holding in *Miranda v. United States* provides minimum safeguards against self-incrimination in the custodial interview context that are consistent with Navajo values. The Navajo Nation Supreme Court went beyond *Miranda's* requirements, holding that the traditional Navajo principle of *hazhó'ógo* requires truthful, transparent explanations to, and respectful treatment of, persons in police custody.[2] In conducting its analysis, the Court considered sources of relevant federal law, finding them consistent with fundamental Navajo principles. At the same time, the Court looked to and interpreted the Navajo Bill of Rights in a manner consistent with the Fundamental Laws of the Diné. The Court's opinion in *Rodriguez* fits squarely into both the Court's well-established practice of applying traditional Navajo principles to the resolution of legal disputes and the Court's more recent practice of implementing, wherever appropriate, the directive of the Fundamental Laws to make *Diné bi beehaz'áanii*, or Navajo Common Law, the fundamental basis for its decisions.

INTRODUCTION

The Navajo Nation police arrested Rafael Rodriguez in connection with a shooting at a trailer park in Kayenta, Arizona.[3] Kirk Snyder, an investigator with the Navajo Nation Police, Kayenta District, conducted a custodial interview of Mr. Rodriguez.[4] Investigator Snyder began the interview by telling Mr. Rodriguez that his acts could result in a federal prison sentence of up to 60 years and a fine of 1.5 million dollars.[5] He then proffered an "advice of rights" form to Mr. Rodriguez for his signature.[6] The English language form purported to set forth Mr. Rodriguez's rights, with a statement apparently modeled on the United States Supreme Court's decision in *Miranda v. United States*.[7] Mr. Rodriguez signed the waiver printed at

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[2] This case note takes into account opinions of the Supreme Court of the Navajo Nation published in the online VersusLaw database (http://www.versuslaw.com) as of January 18, 2007. The seed for this paper was planted by the October 21, 2005 presentations of Navajo Nation Supreme Court Justice Lorene Ferguson and Navajo Nation Supreme Court Clerk Paul Spruhan, discussing, respectively, the Fundamental Laws of the Diné and cases decided in 2004 and 2005, at a seminar in Albuquerque, New Mexico entitled "Crossroads of Navajo Law: Tradition & Innovation." This paper has also benefited from the instruction of Chief Justice Emeritus Robert Yazzie over two semesters at the University of New Mexico School of Law during which the author was fortunate to be his pupil and research assistant. The author also acknowledges fruitful discussions with Ernestine Tsinigine, University of New Mexico School of Law Class of 2007, who completed an externship with the Supreme Court of the Navajo Nation in 2005.

[3] *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, 2004.NANN.0000014, ¶ 13 (Navajo Sup. Ct. Dec. 16, 2004) (VersusLaw).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id. See Miranda v. United States*, 384 U.S. 436 (1966).

the bottom of the form and then wrote out a confession in which he admitted to being the shooter.[8] There was no evidence in the record that Investigator Snyder had explained any of the rights on the advice of rights form to Mr. Rodriguez.[9] The form contained numerous typographical, spelling and grammatical errors.[10]

Mr. Rodriguez was tried for the offense of Aggravated Assault in the Kayenta District Court.[11] At trial, the Navajo Nation gained admission into evidence of the advice of rights form and confession, over Mr. Rodriguez's objections.[12] The District Court found Mr. Rodriguez guilty and imposed a sentence of one year's incarceration. Mr. Rodriguez appealed his conviction to the Navajo Nation Supreme Court ("Supreme Court" or "the Court").[13] The Supreme Court heard oral argument on October 22, 2004.[14] Four days later, the Court vacated the conviction and ordered Mr. Rodriguez's immediate release.[15]

The Court treated the central issue of admissibility of Rodriguez's statement to police[16] as two separate sub-issues:[17] whether a coerced statement was admissible as evidence[18] and whether Rodriguez's confession was "knowing and voluntary," as required by the Navajo Bill of Rights, in view of deficiencies in the advice of rights form and the manner in which it was used.[19] The Court held that the fundamental right against self-incrimination is guaranteed under the Navajo Bill of Rights and required by the traditional Navajo prohibition on coercion.[20] The right against coerced self-incrimination attaches when a criminal defendant is first placed in custody and interviewed by police.[21] The Court further held that any degree of coercion violates the Navajo Bill of Rights, 1 N.N.C. § 8,[22] and that the impermissible coercion in Rodriguez's case might of itself be sufficient to vacate his conviction by the lower court.[23]

Turning to the issue of the admissibility of Mr. Rodriguez' confession, the Court held that it was not "voluntary" and was therefore inadmissible.[24] In reaching its conclusion, the Court considered numerous sources of federal law, including the United States Supreme Court's interpretation of the Fifth Amendment to the United

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[8] *Rodriguez*, ¶ 13 (VersusLaw).
[9] *Id.*
[10] *Id.* ¶ 53 n.6.
[11] *Id.* ¶ 14.
[12] *Id.*
[13] *Rodriguez*, ¶¶ 14-15. Mr. Rodriguez's first appeal was remanded to the District Court for entry of findings of fact and conclusions of law. *Id.*¶ 15. Mr. Rodriguez subsequently filed the appeal that is the subject of this case note. *See id*.
[14] *Id.* ¶ 16.
[15] *Id.*
[16] *Rodriguez* ¶ 21.
[17] *Id.* ¶ 23.
[18] *Id.* ¶¶ 26-28.
[19] *Id.* ¶¶ 30-41.
[20] *Id.* ¶¶ 26-27.
[21] *Rodriguez*, ¶ 27.
[22] *Id.* ¶ 28. 1 N.N.C. § 8 provides that criminal defendants cannot be "compelled to be a witness against themselves." *Id. See id.,* ¶ 26 (VersusLaw). The Navajo Nation did not dispute that Investigator Snyder threatened Mr. Rodriguez by suggesting that he might face lengthy incarceration and a large fine before he signed the advice of rights form. *Id.* ¶ 28. The Navajo Nation appears to have argued that Investigator Snyder's conduct constituted a "degree of coercion," without defining "degree." *Id.*
[23] *Rodriguez*, ¶ 30.
[24] *Id.* ¶ 41.

States Constitution in *Miranda v Arizona* and the Indian Civil Rights Act ("ICRA").[25] The Court also considered the Navajo Bill of Rights and the Court's related precedents.[26] Eschewing federal interpretations of the Navajo Bill of Rights and the ICRA,[27] the Court, noting its directive from the Navajo Nation Council to interpret ambiguous statutes consistent with the Fundamental Laws of the Diné,[28] ultimately based its decision on an interpretation of the Navajo Bill of Rights that is consistent with the Navajo Common Law concept of *hazhó'ógo*. The Court described *hazhó'ógo* as "a fundamental tenet informing [Navajos] how [they] must approach each other as individuals."[29] *Hazhó'ógo*, the Court stated, requires that Navajos conduct themselves with patience and respect for other Navajos, including in the custodial interview setting.[30] Investigator Snyder's conduct of the interview did not meet the standards of *hazhó'ógo*.[31] Those standards also require that police provide an advice of rights form and explain all rights on the form so that a criminal defendant has a "minimum understanding of the impact of any waiver."[32]

Because there was insufficient evidence that Investigator Snyder had explained each of the rights on the advice of rights form, Mr. Rodriguez's waiver of his rights was not "knowing and voluntary," even in the absence of coercion.[33] Noting the importance of the fundamental right against self-incrimination and the difficulty, in view of the District Court's reliance on the inadmissible confession, of retroactively reviewing the case without the confession in evidence, the Court vacated Rodriguez's conviction.[34]

This case note focuses on two aspects of *Rodriguez*: (1) the rationale developed by the Navajo Nation Supreme Court to hold that due process requires "knowing and voluntary" waivers for admissibility of confessions obtained while in police custody, and (2) how that rationale differs from that of the United States Supreme Court in *Miranda*. The latter relied upon the protection against self-incrimination present in the Fifth Amendment to the United States Constitution.[35] While the Navajo Nation Supreme Court considered federal sources, including *Miranda*, the Fifth Amendment, and the ICRA, it based its decision on an interpretation of the Navajo Bill of Rights that is consistent with the traditional Navajo concept of *hazhó'ógo*. Consistent with the directive of the Navajo Nation Council in the Fundamental Laws of the Diné, the Court's approach in *Rodriguez* takes into account, and fashions substantive law from, *Diné bi beehaz'áanii*, or Navajo Common Law.

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[25] *Id.* ¶¶ 31-37.
[26] *Id.*
[27] *Id.* ¶¶ 31-32.
[28] *Id.* ¶ 31. See Navajo Nation Council Res. No. CN-69-02 (November 1, 2002) (amending Title 1 of the Navajo Nation Code to recognize the Fundamental Laws of the Diné).
[29] *Rodriguez*, ¶ 38 (VersusLaw).
[30] *Id.* ¶¶ 38-39.
[31] *Id.* ¶ 39. The Court's guidance for proper use of advice of rights forms and conduct of police interviews will be discussed further in section IV (c), below.
[32] *Id.* ¶ 40. *See also id.* ¶ 34.
[33] *Id.* ¶¶ 26, 30, 40.
[34] *Id.* ¶¶ 43-44.
[35] *Miranda v. United States*, 384 U.S. 436, 439 (1966).

The structure of this case note is as follows: Following the introductory Section I, the case note continues, in Section II, with an introduction to the Fundamental Laws of the Diné and the Navajo Nation Supreme Court's implementation thereof, as well as a discussion of the Court's approach to interpreting the federal Bill of Rights, the Navajo Bill of Rights, and the ICRA. Section III provides a review of the two major sources of federal law considered by the Court in *Rodriguez*, namely the Fifth Amendment to the United States Constitution, as applied in the *Miranda* opinion, and the ICRA. Section IV discusses the Court's adoption and adaptation of *Miranda* so as to fashion uniquely Navajo guidelines to safeguard the right against self-incrimination in the context of custodial interviews. Section V attempts to place the Court's opinion in *Rodriguez* in context, suggesting that it fits comfortably both in the Court's well-established practice of applying Navajo Common Law to the resolution of legal disputes and also in the Court's more recent practice of implementing the directives of the Fundamental Laws of the Diné in all appropriate circumstances.

I. The Navajo Nation Supreme Court's Approach to Interpreting Constitutional and Statutory Sources of Law

A. The Fundamental Laws of the Diné

1. *Navajo Nation Council Resolution No. CN-69-02*

The Navajo Nation Council began the codification of Navajo customary or consuetudinary law with the adoption of the Fundamental Laws of the Diné, Navajo Nation Council Resolution No. CN-69-02 ("Fundamental Laws").[36] The Fundamental Laws directs the judges of the Navajo Nation courts to apply *Diné bi beehaz'áanii*, or Navajo Common Law[37] when interpreting laws and rendering judgments.[38] The need for further development and exposition of *Diné bi beehaz'áanii* was explicitly recognized:

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[36] Navajo Nation Council Res. No. CN-69-02, supra note 27. *See generally* Robert Yazzie, *Air, Light/Fire, Water and Earth/Pollen: Sacred Elements That Sustain Life*, 18 J. ENVTL. L. & LITIG. 191 (2003); Kenneth Bobroff, Diné Bi Beenahaz'áanii: *Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 TRIBAL L.J. (2004/2005), http://tlj.unm.edu/articles/volume_5/_dine_bi_beenahazaanii__codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php. Bobroff defines "consuetudinary law" as "the unwritten law of custom." *Id.* § I, note 2. "Consuetudinary law" has also been defined as "[a]ncient customary law that is based on an oral tradition." BLACK'S LAW DICTIONARY 900 (8th ed. 2004). Res. No. CN-69-02 grew out of the Navajo Common Law Project, commissioned in 1999 by Edward T. Begay, Speaker of the Navajo Nation Council. See Bobroff § IV; Henry Barber, Navajo Common Law Project: Researching Our Original Diné Laws 6 (Oct. 6, 2002) (unpublished manuscript prepared by the Office of the Speaker, Navajo Nation Council) (on file with the University of New Mexico School of Law Library).

[37] Bobroff, *supra* note 35, § II. *See also id.* §§ III, IV. According to the Fundamental Laws, "these laws have not only provided sanctuary for the Diné Life Way but [have] guided, sustained and protected the Diné as they journeyed upon and off the sacred lands upon which they were placed since time immemorial." Res. No. CN-69-02, supra note 27, ¶ 2. *See* Bobroff, *supra* note 35, § V.

[38] Bobroff, *supra* note 35, § V(B). "The leader(s) of the judicial branch *(Alááaji' Haskéé'ji Naat'ááh)* shall uphold the values and principles of *Diné bi beenahaz'áanii* in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments[.]" Res. CN-69-02, *supra* note 27, Exhibit "A,"§ 3(E).

> The Navajo Nation Council further finds that all the details and analysis of these laws cannot be provided in this acknowledgment and recognition, and such an effort should not be attempted; the Navajo Nation Council finds that more work is required to elucidate the appropriate fundamental principles and values which are to be used to educate and interpret the statutory laws already in place and those that may be enacted; the Council views this effort today as planting the seed for the education of all Diné so we can continue to Walk In Beauty[.][39]

Consistent with this recognition, the Fundamental Laws requires that judges learn, develop and teach the principles of Navajo law when they base their decisions thereon, for the benefit of all Navajos: "The Navajo Nation Council further finds that all elements of the government must learn, practice and educate the Diné on the values and principles of these laws; when the judges adjudicate a dispute using these fundamental laws, they should thoroughly explain so that we can all learn[.]"[40]

2. *The Navajo Nation Supreme Court and the Fundamental Laws*

The Supreme Court has implemented the directive of the Fundamental Laws to "interpret statutes consistent with Navajo Common Law" when "the plain language of a statute does not cover a particular situation or is ambiguous."[41] However, where "the plain language . . . applies and clearly requires a certain outcome[,]" the Court has applied the statutory language directly.[42] *Rodriguez* demonstrates the Court's commitment to carrying out the mandate of the Fundamental Laws:[43] Despite the inability of counsel at oral argument to discuss the relevant authority, the Court on its own initiative conducted an analysis and fashioned a basis for its decision that is consistent with *Diné bi beehaz'áanii*.[44] The Court's approach to the Fundamental Laws is considered in greater detail in Section V, below.

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[39] Res. CN-69-02, *supra* note 27, ¶ 9. *See* Bobroff, *supra* note 35, § VI.

[40] Res. CN-69-02, *supra* note 27, ¶ 8. *See* Bobroff, *supra* note 35, § VI. The Navajo Nation judiciary has a long history of applying and developing Navajo Common Law that predates the adoption of the Fundamental Laws. *See, e.g., id.* § II; Bennett v. Navajo Board of Election Supervisors, No. A-CV-26-90, 1990.NANN.0000016, ¶ 42 (Navajo Sup. Ct. Dec. 12, 1990) (VersusLaw) ("When the Navajo Nation and the United States concluded a treaty in 1868 to establish government-to-government relations, the Navajo People reserved their rights to self-government and to use their customs and traditions as law. . . . To the extent that those customs and traditions are fundamental and basic to Navajo life and society, they are higher law."). *See also* Paul Spruhan, *Case Note: Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, 1 TRIBAL L.J. (2000/2001), http://tlj.unm.edu/articles/volume_1/spruhan/index.php (non-member Indian married to Navajo is *hadane* or "in-law" under Navajo law and by virtue of such marriage consents to Navajo criminal jurisdiction).

[41] *Tso v. Navajo Hous*. Auth., No. SC-CV-10-02, 2004.NANN.0000013, ¶ 41 n.1 (Navajo Sup. Ct. Aug. 26, 2004) (VersusLaw) (declining to apply Navajo Common Law where language of Navajo Nation Code is clear and unambiguous).

[42] *Id.*

[43] *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, 2004.NANN.0000014, ¶ 24 (Navajo Sup. Ct. Dec. 16, 2004) (VersusLaw).

[44] *Id.*

B. Federal Interpretations of Ambiguous Constitutional and Statutory Provisions are not Binding on the Navajo Nation Courts

In considering sources of constitutional law such as the federal Bill of Rights, the Navajo Bill of Rights, and the ICRA, as well as both federal and Navajo statutory law that contain ambiguous language, the Court noted that it is not required to apply federal interpretations of such sources.[45] The Court's overarching duty is to interpret such sources consistent with the Fundamental Laws.[46] The Court stressed the importance of this approach when the Navajo Nation Council explicitly adopts language from federal sources, such as the Fifth Amendment or the ICRA, or enacts statutes with similar language: "Indeed, Navajo understanding of the English words adopted in statutes may differ from the accepted Anglo understanding."[47] The Court further noted that the ICRA does not require the Court to apply federal interpretations of civil rights provisions, but rather only requires that the Court apply similar language, interpreted consistent with tribal cultural values.[48]

While the Court is not required to apply federal interpretations, it does consider them in its analysis.[49] The Court considers "all ways of thinking and possible approaches to a problem . . . and weigh[s] their underlying values and effects to decide what is best" for the Navajo people.[50] The Court has in the past applied federal interpretations, augmented with traditional Navajo values, often resulting in broader rights than provided by federal law or federal interpretations of equivalent Navajo statutory law.[51] The Court considers this approach particularly appropriate where it adjudicates a dispute involving Navajo governmental institutions: "Our consideration of outside interpretations is especially important for issues involving our modern Navajo government, which includes institutions such as police, jails, and courts that track state and federal government structures not present in traditional Navajo society."[52]

III. Sources of Related Federal Law

The Court considered two sources of federal law in reaching its decision: the Fifth Amendment to the United States Constitution, as interpreted by the United States Supreme Court in *Miranda v. Arizona*, and the ICRA.[53] Each of these sources is addressed in turn.

[45] *Id.* ¶ 31.
[46] *Id.*
[47] *Id.*
[48] *Id.* The Court noted the agreement of federal courts with this approach: "Federal courts have declined to blindly apply federal interpretations of an equivalent constitutional provision in certain circumstances when tribal cultural values dictate a different outcome." *Rodriguez* ¶ 31.
[49] *Id.* ¶ 32.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*, ¶¶ 26, 35-38 (VersusLaw).

A. The Fifth Amendment Right of Freedom from Involuntary Self-Incrimination

In *Miranda v. United States*, the United States Supreme Court held that a criminal suspect's Fifth Amendment right to freedom from involuntary self-incrimination applied to statements obtained during interviews conducted in police custody.[54] The Court, stressing the importance and fundamental nature of the right,[55] provided specific minimum procedural safeguards for the admissibility of statements made during custodial interrogations:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.[56]

As noted by the Navajo Nation Supreme Court in *Rodriguez*,[57] the *Miranda* court pointed to the American colonists' reaction to 17th century English criminal procedure as a source of the Fifth Amendment:

> [I]f an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials . . . made the system so odious as to give rise to a demand for its total abolition. . . . So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.[58]

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[54] *Miranda v. United States*, 384 U.S. 436, 439, 444-445 (1966). The Fifth Amendment states, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V.

[55] *Miranda*, 384 U.S. at 444.

[56] *Id.* The United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

[57] *Rodriguez*, ¶¶ 35-37 (VersusLaw).

[58] *Miranda*, 384 U.S. at 442-443 (quoting Brown v. Walker, 161 U.S. 591, 596-597 (1896)). The *Miranda* court stated that the crucial event in the development of the right against self-incrimination came in the 1637 trial of John Lilburn, who refused to take the Star Chamber Oath, which would have

The *Miranda* court reasoned that the right against self-incrimination is founded on government's respect for the dignity and integrity of its citizens:

> [T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.[59]

The case of Ernesto Miranda presented the United States Supreme Court with a custodial interrogation that did not involve adequate procedural safe guards.[60] Mr. Miranda was arrested at home and taken into custody at a Phoenix police station, where he was identified by a witness.[61] Two police officers questioned him in 'Interrogation Room No. 2' of the detective bureau.[62] Within two hours, the officers had obtained a written statement signed by Miranda.[63] During the interrogation, the officers did not advise Miranda that he had a right to have an attorney present,[64] and there was conflicting evidence regarding whether the officers had told Miranda of his right to remain silent.[65] The Court described the advice of rights included in the statement as follows: "At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.'"[66] One officer read the advice of rights to Miranda, but only after he had made an oral confession.[67] Miranda was found guilty of rape and kidnapping, and his conviction was upheld by the Supreme Court of Arizona.[68]

required him to answer any and all questions put to him. 384 U.S. at 458-459. Lilburn claimed that it was a fundamental right that one not be compelled to testify against oneself. *Id.* at 459. Parliament subsequently abolished the Star Chamber, and the right against self-incrimination gained popular support. *Id.* "These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights." *Id.*

[59] *Id.* at 460 (internal citations omitted).

[60] Miranda's case was the lead case among four consolidated cases that the *Miranda* court decided. *See id.* at 491-499.

[61] *Id.* at 491.

[62] *Id.*

[63] *Id.* at 491-92.

[64] *Miranda* at 491.

[65] *Id.* at 492 n.66.

[66] *Id.* at 492.

[67] *Id.* at 492 n.67.

[68] *Id.* at 492.

For the *Miranda* court, such custodial interrogation without adequate safeguards preserving the right against self-incrimination did not satisfy the mandate of the Fifth Amendment:[69]

> The entire thrust of police interrogation [in cases such as Ernesto Miranda's] was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.[70]

The United States Supreme Court reversed Miranda's conviction because his waiver of his right against involuntary self-incrimination did not satisfy constitutional requirements: "The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."[71]

B. Indian Civil Rights Act

The Court in *Rodriguez* noted another federal source of law regarding the right against self-incrimination: the Indian Civil Rights Act ("ICRA").[72] The ICRA provides, in pertinent part: "No Indian tribe in exercising powers of self-government shall . . . compel any person in any criminal case to be a witness against himself."[73] While acknowledging the ICRA in passing, the Court did not focus its analysis or base its decision thereon, preferring instead to dwell on a similar provision in the Navajo Bill of Rights.[74] The Court's decision to focus in *Rodriguez* on the Navajo Bill of Rights rather than on the ICRA is not inconsistent with the Court's prior jurisprudence.[75]

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[69] The United States Supreme Court recently declined an opportunity to overrule or scale back *Miranda*, choosing instead to reaffirm it. *See Dickerson v. United States*, 530 U.S. 428 (2000) (affirming *Miranda* warnings as constitutionally based protection not susceptible to legislative abolition). *But cf. United States v. Patane*, 542 U.S. 630 (2004) (explaining *Miranda* and *Dickerson*) (failure to give *Miranda* warning does not require suppression of the physical fruits of a suspect's unwarned but voluntary statements).

[70] *Miranda*, 384 U.S. at 465 (discussing Escobedo v. State of Illinois, 378 U.S. 478 (1964)).

[71] *Miranda*, 384 U.S. at 492

[72] *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, 2004.NANN.0000014, ¶ 26 (Navajo Sup. Ct. Dec. 16, 2004) (VersusLaw).

[73] 25 U.S.C. § 1302(4) (West, Westlaw through November 22, 2005).

[74] *See Rodriguez*, ¶ 26 (VersusLaw); *id.* ¶ 27 ("Our Navajo Bill of Rights, as informed by the Navajo value of individual freedom, prohibits coerced confessions."). *See also* Eriacho v. Ramah District Court, No. SC-CV-61-04, 2005.NANN.0000001, ¶ 30 (Navajo Sup. Ct. Jan. 5, 2005) (VersusLaw) (discussing Rodriguez) ("We adopted the federal Miranda standard as consistent with the Common Law interpretation of the Navajo Bill of Rights to judge the validity of a waiver of the right against self-incrimination and an attorney while in police custody.").

[75] *See, e.g.*, *Duncan v. Shiprock Dist. Ct.*, No. SC-CV-51-04, 2004.NANN.0000017, ¶ 45 n.4 (Navajo Sup. Ct. Oct. 28, 2004) (VersusLaw) (where Navajo Bill of Rights recognizes greater right than that afforded by the ICRA, the Court need not consider federal interpretations of the latter); Bennett v. Navajo Board of Election Supervisors, No. A-CV-26-90, 1990.NANN.0000016, ¶¶ 32-34, 39-41

IV. Adopting and Adapting Miranda

A. The Navajo Bill of Rights' Protection against Coerced Self-incrimination

The Navajo Nation courts recognize the Navajo Bill of Rights as one source of the right against coerced self-incrimination.[76] In *Navajo Nation v. McDonald*, the Supreme Court held that this right against self-incrimination is fundamental and can only be waived under precise circumstances:[77] "An individual must not give information to be used for his or her own punishment unless there is a knowing and voluntary decision to do so."[78] In *McDonald*, the Court interpreted the Navajo Bill of Rights in light of the Navajo Common Law rejection of coercion.[79]

In *Rodriguez*, the Court reiterated and reaffirmed the principles it enunciated in *McDonald* [80] while extending *McDonald* to custodial interrogations.[81] The Navajo Nation police, as an arm of the Navajo government, must recognize and respect a person's rights to the same degree as do the courts.[82] Thus, the right against coerced self-incrimination attaches at the time a criminal suspect is taken into custody and interviewed.[83]

Inspector Snyder's use of an advice of rights form during Mr. Rodriguez's interrogation put the question of the applicability of *Miranda v. United States* squarely before the Court.[84] The Court held that Miranda's minimum requirements are consistent with the Navajo Bill of Rights' protection against coerced self-incrimination and with Navajo values.[85] Furthermore, these minimum requirements apply across the Navajo Nation.[86]

B. The Court Explains the Navajo Common Law Principle of Hazhó'ógo

The Court went further, holding that the mere provision of a standardized advice of rights form to a criminal defendant in custody does not satisfy the

(Navajo Sup. Ct. Dec. 12, 1990) (VersusLaw) (applying Navajo Bill of Rights rather than the ICRA to nullify an act of the Navajo Tribal Council).

[76] *Rodriguez*, ¶ 26 (VersusLaw).

[77] *Id.* (citing *Navajo Nation v. MacDonald*, No. A-CR-10-90, 1992.NANN.0000007, ¶ 90 (Navajo Sup. Ct. Feb. 13, 1992) (VersusLaw)).

[78] *MacDonald*, ¶ 90 (VersusLaw).

[79] *Id.* ¶ 91. "Navajo common law rejects coercion, including coercing people to talk. Others may 'talk' about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt." *Id. See also Rodriguez*, ¶ 26 (VersusLaw).

[80] *Rodriguez*, ¶ 27 (VersusLaw). "Our Navajo Bill of Rights, as informed by the Navajo value of individual freedom, prohibits coerced confessions." *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] The Court previously had occasion to consider the applicability of *Miranda v. United States*, but had not before *Rodriguez* explicitly held that *Miranda*'s minimum requirements are consistent with Navajo values. *Rodriguez*, ¶ 33 (VersusLaw).

[85] *Rodriguez*, ¶ 33 (VersusLaw). Miranda's minimum requirements, as adopted by the Court, are discussed further in section IV (c), below.

[86] *Rodriguez*, ¶ 33 (VersusLaw).

requirements of Navajo Common Law.[87] The relationship of the Navajo Nation government to its citizens requires more from the Navajo Nation police:

> The relationship between the Navajo Nation government and its individual citizens requires the same level of respect as the relationship between one person to another. In our Navajo way of thinking we must communicate clearly and concisely to each other so that we may understand the meaning of our words and the effect of our actions based on those words. The responsibility of the government is even stronger when a fundamental right, such as the right against self-incrimination, is involved.[88]

This government-to citizen relationship is consistent with the Navajo Common Law principle of *hazhó'ógo*.[89] This principle informs Navajos how they must approach each other as individuals:[90]

> When discussions become heated, whether in a family setting, in a community meeting or between any people, it's not uncommon for an elderly person to stand and say *"hazhó 'ógo, hazho'ogo sha'alchini."* The intent is to remind those involved that they are *Nohookaa Dine'e*, dealing with another *Nohookaa Dine'e*, and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Aaddd na'nile'dii el dooda*. This is *hazhó'ógo*, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions.[91]

The Court observed that the Navajo Nation's adopted ways, including court and police procedures, are to be conducted in accordance with *hazhó'ógo*.[92] Inspector Snyder's conduct toward Mr. Rodriguez, by contrast, was not in accordance with *hazhó'ógo*:

> The transaction between Rodriguez and Investigator Snyder, and the way that the advice of rights form was presented to Rodriguez does not conform with the ways that people should

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[87] *Id.* ¶ 34.

[88] *Id.* The Court's description of the proper government-to-citizen relationship is reminiscent of the *Miranda* court's own language. See *Miranda v. United States*, 384 U.S. 436, 460 (1966) (quoted hereinabove at section III, n.58). Indeed, the Court noted that the *Miranda* court's discussion of the origin of the right against coerced self-incrimination prompted its own application of *hazhó'ógo* to the case at hand. *See Rodriguez*, ¶ 38 (VersusLaw).

[89] *Rodriguez*, ¶¶ 38-40 (VersusLaw).

[90] *Id.* ¶ 38. The Court described *hazhó'ógo* as "a fundamental tenet informing [Navajos] how [they] must approach each other as individuals[,]" requiring that Navajos conduct themselves with patience and respect for other Navajos, including in the custodial interview setting. *Id.* ¶¶ 38-39.

[91] *Id.* ¶ 38. The Court offered translations of the following terms: *hazhó 'ógo, hazho'ogo sha'alchini*(*"hazhó'ógo, hazhó'ógo* my children"), *id.* ¶ 50 n.3; *Nohookaa Dine'e* ("Earth-surface-people (human beings)"), *id.* ¶ 51 n.4; and *Aaddd na'nile'dii el dooda* ("Delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences."), *id.* ¶ 52 n.5.

[92] *Id.* ¶¶ 38-39.

> interact. We must never forget that the accused is still *Nohookaa Diné'é*, and that he or she is entitled to truthful explanation and respectful relations regardless of the nature of the crime that is alleged.[93]

C. The Court Provides Specific Guidance for the Conduct of Custodial Interrogations Consistent with Hazhó'ógo

1. *Miranda's Minimum Requirements for Police Conduct Toward Persons in Custody*

Miranda's minimum requirements for custodial interrogations apply across the Navajo Nation.[94] Navajo Nation police must provide clear notice of the following to every person in custody: the right to remain silent and request the presence of an attorney during questioning; that any statements may be used in evidence against the person; the right to an attorney; and the right to appointment of an attorney, if indigent.[95]

2. *Ultra-Miranda Requirements*

a. *Hazhó'ógo* Requires Both Respectful Treatment and Meaningful Notice and Explanation of Rights

Police must act toward persons in custody in a respectful manner, with *hazhó'ógo* in mind.[96] *Hazhó'ógo* requires clear and concise communication in a manner that allows understanding of spoken words and the effects of actions taken based on those words.[97] All Navajos are entitled to "truthful explanation and respectful relations" regardless of the offense alleged.[98] "[A] police badge cannot eliminate an officer's duty to act toward others in compliance with the principles of *hazhó 'ógo*."[99]

b. Detailed Requirements for Admissibility of Statements Obtained through Custodial Interrogations

Statements obtained pursuant to signed waivers will be admissible as voluntarily given only where police (1) provide an advice of rights form and (2) explain to a person in custody his or her rights so that the person has sufficient understanding of the rights he or she is waiving.[100] Providing an English language form, without more, is insufficient.[101] Sufficiency of explanation requires that the

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[93] *Rodriguez*, ¶ 39 (VersusLaw).
[94] *Id.* ¶ 33.
[95] *Id. Cf. Miranda v. United States*, 384 U.S. 436, 444 (1966) (quoted hereinabove at section III, n.55).
[96] *Rodriguez*, ¶¶ 34, 38-39 (VersusLaw).
[97] *Id.* ¶ 34.
[98] *Id.* ¶ 39.
[99] *Id.*
[100] *Id.* ¶ 40.
[101] *Rodriguez* ¶ 40. The Court suggested that forms should be free from typographical, spelling and grammatical errors, since such errors might affect the required clarity or explanation. *Id.* ¶ 53 n.6.

rights be explained in Navajo to Navajo speakers and in English to those who do not speak or understand Navajo, "so that the person has a minimum understanding of the impact of any waiver."[102]

V. Putting Rodriguez in Context

The courts of the Navajo Nation have a long-established tradition, pre-dating the Fundamental Laws of the Diné, of applying Navajo customs and traditions to resolve legal disputes. The Navajo Nation Supreme Court's opinion in *Rodriguez* fits squarely within that tradition. At the same time, in *Rodriguez* and numerous opinions handed down since the adoption of the Fundamental Laws of the Diné by the Navajo Nation Council, the Court not only manifests its unrelenting commitment to that tradition but also develops the case law necessary to implement the Fundamental Laws and sends a clear message to the lower courts and practitioners alike: Where the Navajo Nation Code does not unambiguously dictate the outcome of a dispute, or case law that is consistent with *Diné bi beehaz'áanii* is unavailable, and there exists a decisional basis in *Diné bi beehaz'áanii*, one must argue *Diné bi beehaz'áanii* in the courts of the Navajo Nation.

A. A History of Applying Navajo Common Law

Well before the Navajo Nation Council promulgated the Fundamental Laws of the Diné, judicial courts operating within the Navajo Reservation employed Navajo customs and traditions as a decisional basis for resolving disputes, demonstrating a preference for Navajo Common Law rather than western law.[103] Navajo judges presiding in the Court of Indian Offenses, which operated in the Navajo Nation between 1892 and 1959, resolved disputes using Navajo customs despite the availability of and pressure from the federal government to apply a federal legal code and its western legal reasoning.[104] The practice of using Navajo customs and traditions to resolve legal disputes continued after the establishment of the courts of the Navajo Nation in 1959,[105] a practice initially

[102] *Id.* ¶ 40.

[103] *See Navajo Nation v. Platero*, No. A-CR-0491, 1991.NANN.0000001, ¶¶ 21-22 (Navajo Sup. Ct. Dec. 5, 1991) (VersusLaw); Bennett v. Navajo Bd. of Election Supervisors, No. A-CV-26-90, 1990.NANN.0000016, ¶ 42 (Navajo Sup. Ct. Dec. 12, 1990) (VersusLaw); Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y 74, 83-84 (1999); James W. Zion, *Law as Revolution in the Courts of the Navajo Nation*, 20 FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE 333, 344-51 (1995); Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, 32(2) JUDGES' JOURNAL 8, 10-11 (1993); Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992*, 18 AM. INDIANL. REV. 379, 383 (1993); Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15, 16 (1992). *See also* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1070-71, 1074 (2005); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1137-38 (2004).

[104] *See Platero*, ¶ 21 (VersusLaw); Zion, *supra* note 102, at 344-46; Austin, *supra* note 102, at 11; Tso, *supra* note 102, at 16.

[105] *See* 7 N.N.C. § 201 (2005) (history note); Zion, *supra* note 102, at 350 n.70 (Courts of the Navajo Nation established by Navajo Tribal Council Res. CO-69-58 (October 16, 1958) and CJA-5-59 (Jan. 9,

permitted by the Navajo Tribal Council (at least in civil cases)[106] and eventually mandated by the Navajo Nation Council.[107] The Navajo Nation Supreme Court's opinion in *Rodriguez*, which applies the traditional Navajo principle of *hazhó'ógo*, is clearly consistent with this well-established practice.

B. A New Practice, Yet Consistent with Tradition

But *Rodriguez* is also part of a more recent practice, adopted by the Navajo Nation Supreme Court since shortly after promulgation of the Fundamental Laws of the Diné, of explicitly applying *Diné bi beehaz'áanii* where possible in a manner that implements, explains, and is consistent with the Fundamental Laws themselves.[108],[109] To the extent that this more recent practice seeks to make use of Navajo Common Law as a decisional basis, it is consistent with the Court's aforementioned long-established practice. At the same time, the Court has

1959)). *See also* James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523, 536-44 (2001-2002); Lowery, *supra* note 102, at 387-88; Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 229-31 (1989). *See generally* Kristen A. Carpenter, *Considering Individual Religious Freedoms under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL'Y 561, 586-87 (2004-2005); Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141, 148-50 (1994). However, Navajo Common Law does not appear *in practice* to have been the law of preference in the courts of the Navajo Nation in at least the first two decades after their formation in 1959. *See* Stephen Conn, *Mid-Passage–The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 366 (1978). *See also* Zion, *supra* note 102, at 350-51. The publication of court opinions began in 1969. *See* Lowery *supra* note 102, at 390. *See also* Zion *supra* note 102, at 351; Wallingford, supra, at 153; Krakoff, *supra* note 102, at 1130.

[106] See Lowery, *supra* note 102, at 387-88; Tso, *supra* note 104, at 229-30. *See also* Bobroff, *supra* note 35, § III; Barber, *supra* note 35, at 6.

[107] 7 N.T.C. § 204 (Supp. 1985). *See* Lowery, *supra* note 102, at 387-88; Tso, *supra* note 102, at 16; Tso, *supra* note 104, at 230.

[108] A VersusLaw (online) search of cases decided by the Supreme Court of the Navajo Nation between November 1, 2002 and October 9, 2006 (the most recent opinion posted on VersusLaw as of January 18, 2007) uncovered 76 opinions, of which 38 (half) mention Navajo common or traditional law, *Diné bi beehaz'áanii*(or *beenahaz'áanii*), or the Fundamental Laws. Of these 38 cases, 29, including *Rodriguez*, cite and apply *Diné bi beehaz'áanii* or the Fundamental Laws or rely upon cases that do so, while seven apply Navajo Common Law without mentioning or citing cases that implement *Diné bi beehaz'áanii* or the Fundamental Laws. The absence of an explicit mention of the Fundamental Laws or *Diné bi beehaz'áanii* in most of the latter seven cases might be explained by the proximity of these decisions to the date of adoption of the Fundamental Laws and the relatively advanced stage of those proceedings as of that date. *See* Begay v. Navajo Nation Election Admin., No. SC-CV-27-02, 2003.NANN.0000008, ¶ 14 (Navajo Sup. Ct. July 31, 2003) (VersusLaw); In re Marriage of Whitehorse, No. SC-CV-30-00, 2003.NANN.0000009, ¶ 20 (Navajo Sup. Ct. Mar.17, 2003) (VersusLaw); Benally v. Mobil Oil Corp., No. SC-CV-05-01, 2003.NANN.0000023 (Navajo Sup. Ct. Nov. 24, 2003) (VersusLaw); Peabody Western Coal Co. v. Navajo Nation Labor Comm'n, No. SC-CV-14-03, 2003.NANN.0000001 (Navajo Sup. Ct. Aug. 1, 2003) (VersusLaw); Leuppe v. Wallace, No. SC-CV-21-2001, 2003.NANN.0000018, ¶ 16 (Navajo Sup. Ct. Jan. 10, 2003) (VersusLaw). The remaining two of the 38 cases neither apply the Fundamental Laws or Navajo Common Law nor rely on cases that do so.

[109] Additional evidence of the Court's recent practice may be seen from a search of all Navajo Nation Court cases posted on VersusLaw as of January 18, 2007: Twenty-five cases mention *Diné bi beehaz'áanii* (or *beenahaz'áanii*), only four of which were decided prior to November 1, 2002. *See* Davis v. Means, No. A-CV-23-93, 1994.NANN.0000006 (Navajo Sup. Ct. Sept. 27, 1994) (VersusLaw); Bennett v. Navajo Bd. of Election Supervisors, No. A-CV-26-90, 1990.NANN.0000016 (Navajo Sup. Ct. Dec. 12, 1990) (VersusLaw); Rough Rock Cmty. Sch. v. Navajo Nation, No. SC-CV-06-94, 1995.NANN.0000008 (Navajo Sup. Ct. Nov. 8, 1995) (VersusLaw); Howard v. Navajo Bd. of Election Supervisors, No. A-CV-65-90, 1991.NANN.0000019 (Navajo Sup. Ct. Mar. 6, 1991) (VersusLaw).

undertaken to carry out the explicit directive of the Fundamental Laws to "uphold the values and principles of *Diné bi beenahaz'áanii* in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments"[110] while interpreting the directive for the benefit of lower court judges, practitioners, and the Navajo people. The Court's dedication to this undertaking is exemplified in *Rodriguez* and numerous other cases cutting across numerous areas of law, including[111] civil rights,[112] criminal procedure,[113] civil procedure,[114] appellate procedure;[115] residential and commercial landlord-tenant law,[116] employment law,[117] contracts,[118] and domestic relations.[119]

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[110] Navajo Nation Council Res. No. CN-69-02, *supra* note 27, Exhibit "A,"§ 3(E).

[111] The assignment of cases to particular areas of substantive law in the footnotes that follow is intended only as a suggestive guide and is non-exhaustive. Many of the cases cited below could be assigned to more than one area of substantive law.

[112] *See Navajo Nation v. Kelly*, No. SC-CR-04-05, 2006.NANN.0000012, ¶¶ 27-30 (Navajo Sup. Ct. July 24, 2006) (VersusLaw) (protection against double jeopardy); Duncan v. Shiprock Dist. Ct., No. SC-CV-51-04, 2004.NANN.0000017, ¶¶ 37-39, (Navajo Sup. Ct. Oct. 28, 2004) (VersusLaw) (right to a jury trial for counterclaims in repossession case); Navajo Hous. Auth. v. Bluffview Resident Mgmt. Corp., No. SC-CV-35-00, 2003.NANN.0000021, ¶¶ 34-35 (Navajo Sup. Ct. Dec. 17, 2003) (VersusLaw) (analyzing right to hearing prior to dissolution of injunction); A.P. v. Tuba City Family Ct., No. SC-CV-02-05, 2005.NANN.0000007, ¶ 33 (Navajo Sup. Ct. May 26, 2005) (VersusLaw) (writ of mandamus proper where due process violated by district court's issuing exclusion order without a hearing).

[113] *See Navajo Nation v. Rodriguez*, No. SC-CR-03-04, 2004.NANN.0000014 (Navajo Sup. Ct. Dec. 16, 2004) (VersusLaw) (waiver of right against self-incrimination in custodial interview); Eriacho v. Ramah Dist. Ct., No. SC-CV-61-04, 2005.NANN.0000001, ¶¶ 34, 36 n.1 (Navajo Sup. Ct. Jan. 5, 2005) (VersusLaw) (waiver of right to jury trial); *Thompson v. Greyeyes*, No. SC-CV-29-04, 2004.NANN.0000009, ¶¶ 27-28 (Navajo Sup. Ct. May 24, 2004) (VersusLaw) (granting writ of habeas corpus for defendant wrongfully detained for violation of domestic violence protective order); *H.M. v. Greyeyes*, No. SC-CV-63-04, 2004.NANN.0000018, ¶ 24 (Navajo Sup. Ct. Oct. 13, 2004) (VersusLaw) (procedure for obtaining, and scope of, writ of habeas corpus in juvenile cases); *Navajo Nation v. Morgan*, No. SC-CR-02-05, 2005.NANN.0000018, ¶¶ 19-20 (Navajo Sup. Ct. Nov. 8, 2005) (VersusLaw) (guilty plea in criminal case invalid where not made knowingly and intelligently); *Navajo Nation v. Badonie*, No. SC-CR-06-05, 2006.NANN.0000003, ¶ 25 (Navajo Sup. Ct. Mar. 7, 2006) (VersusLaw) (right to speedy trial in criminal cases); Seaton v. Greyeyes, No. SC-CV-04-06, 2006.NANN.0000005, ¶¶ 26-27 (Navajo Sup. Ct. Mar. 28, 2006) (VersusLaw) (same).

[114] *See Judy v. White*, No. SC-CV-35-02, 2004.NANN.0000007, ¶ 55 (Navajo Sup. Ct. Aug. 2, 2004) (VersusLaw) (initial pleading requirement) (Resolution CN-69-02 instructs judges and justices to take notice of *Diné bi beehaz'áanii* in their decisions, when applicable, but does not impose requirement that *Diné bi beehaz'áanii* be raised in the initial pleading); *Mitchell v. Davis*, No. SC-CV-52-03, 2004.NANN.0000012, ¶ 23 (Navajo Sup. Ct. Aug. 16, 2004) (VersusLaw) (Rule 60 of the Navajo Rules of Civil Procedure (relief from judgment or order) embodies Navajo principles of fairness and finality).

[115] *See Fort Defiance Hous. Corp. v. Lowe*, No. SC-CV-32-03, 2004.NANN.0000005, ¶17 (Navajo Sup. Ct. Apr. 12, 2004) (VersusLaw) (interpreting bond requirement of forcible entry and detainer statute in residential context); *Fort Defiance Hous. Corp. v. Allen*, No. SC-CV-01-03, 2004.NANN.0000010, ¶¶ 36 n. 3, 37 n.4 (VersusLaw) (prospective application of holding regarding conflict between statute and court rule with respect to timely appeals in forcible entry and detainer cases); Allen v. Fort Defiance Hous. Corp., No. SC-CV-05-05, 2005.NANN.0000019, ¶¶ 20-25 (Navajo Sup. Ct. Dec. 14, 2005) (VersusLaw) (allowing de novo review of facts, but not an entire new trial, on appeal in forcible entry and detainer cases); In re Bizardi, No. SC-CV-55-02, 2004.NANN.0000016, ¶¶ 19-20 (Navajo Sup. Ct. Nov. 9, 2004) (VersusLaw) (concept of mootness and bar on advisory opinions consistent with Navajo principle of *k'é*).

[116] *See Navajo Nation v. Arviso*, No. SC-CV-14-05, 2005.NANN.0000009, ¶¶ 31-35 (Navajo Sup. Ct. Aug. 11, 2005) (VersusLaw) (forcible entry and detainer in commercial lease context) (_Diné bi beehaz'áanii_ does not recognize "equitable lease" for business purposes). *Cf. Lowe*, ¶¶ 20-22, 28, 30 (VersusLaw) (providing guidelines to trial courts regarding due process requirements for eviction orders in residential forcible entry and detainer cases).

The Court has also sought to clarify how and when the directive of the Fundamental Laws requires the Court to apply and teach *Diné bi beehaz'áanii* rather than other sources of law.[120] The Court in *Tso v. Navajo Housing Authority,* No. SC-CV-10-02 (Navajo Sup. Ct. Aug. 26, 2004), citing cases in which it had interpreted statutes in accordance with the mandate of the Fundamental Laws, and others in which it had applied the plain language of the statute, explained its approach as follows:

> We have *applied this mandate* when the *plain language* of a statute *does not cover* a particular situation or *is ambiguous*, but have *applied the plain language directly* when it *applies and clearly requires a certain outcome*. This approach flows from the relationship between the judicial and legislative branches in our current Navajo form of government, as it is ultimately the responsibility of the Navajo Nation Council to make policy for the Navajo people, and our Court to apply it when clear and valid. When unclear, we apply the tools of statutory interpretation given to us by the Council, which require us to *give meaning to the Council's ambiguous language consistent with the fundamental principles of the Navajo people*.[121]

Thus, the Court will not apply the Fundamental Laws to the exclusion of or in derogation of unambiguous, controlling Navajo statutory

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[117] *See Goldtooth v. Naa Tsis' Aan Cmty. Sch., Inc.*, No. SC-CV-14-04, 2005.NANN.0000008, ¶ 31 (Navajo Sup. Ct. July 18, 2005) (VersusLaw) (applying concept of *naat 'aanii,* an individual with a persuasive role within a community, to find apparent authority and uphold employment agreement); *Etsitty v. Dine Bii Ass'n for Disabled Citizens, Inc*., No. SC-CV-48-04, 2005.NANN.0000015, ¶¶ 28-29 (Navajo Sup. Ct. Dec. 5, 2005) (VersusLaw) (setting forth factors for test to determine whether an employee is an independent contractor); *Kesoli v. Anderson Sec. Agency*, No. SC-CV-01-05, 2005.NANN.0000013, ¶ 27 (Navajo Sup. Ct. Oct. 12, 2005) (VersusLaw) (shouting by supervisor constitutes "harassment" under Navajo Preference in Employment Act and just cause for termination); *Taylor v. Dilcon Cmty. Sch.,* No. SC-CV-73-04, 2005.NANN.0000012, ¶ 20 (Navajo Sup. Ct. Oct. 7, 2005) (VersusLaw) (doctrine of exhaustion of administrative remedies is consistent with fundamental Navajo principles); *Tso v. Navajo Hous.* Auth., No. SC-CV-10-02, 2004.NANN.0000013, ¶ 41 n.1 (Navajo Sup. Ct. Aug. 26, 2004) (VersusLaw) (termination for cause) (notwithstanding the Fundamental Laws, Navajo Nation courts must directly apply provisions of the Navajo Nation Code where they control and clearly require a particular outcome); *Smith v. Navajo Nation Dep't of Head Start*, No. SC-CV-50-04, 2005.NANN.0000011, ¶ 24 (Navajo Sup. Ct. Sept. 21, 2005) (VersusLaw) ("[O]rdinarily a violation of a clear rule set out in a personnel manual for which termination is a result of non-compliance is 'just cause.' However, an employee may challenge the enforcement of that rule as impossible to fulfill under the circumstances of the case or as violating Navajo public policy.").

[118] *See Allstate Indem. Co. v. Blackgoat*, No. SC-CV-15-01, 2005.NANN.0000002, ¶¶ 26-27 (Navajo Sup. Ct. Jan. 12, 2005) (VersusLaw) (prejudgment interest in insurance claim arising out of auto accident), *aff'd*, Allstate Indem. Co. v. Blackgoat, No. SC-CV-15-01, 2005.NANN.0000017, ¶¶ 14, 31 (Navajo Sup. Ct. May 20, 2005) (VersusLaw) (declining to reverse previous ruling in same case because of the strong public policy of the Navajo Common Law concept of *nályéél*).

[119] *See Begay v. Chief*, No. SC-CV-08-03, 2005.NANN.0000004, ¶¶ 25-27 (Navajo Sup. Ct. May 18, 2005) (VersusLaw) (refusing to recognize common law divorce); *Kascoli v. Kascoli*, No. SC-CV-08-05, 2005.NANN.0000014, ¶¶ 22, 24 (Navajo Sup. Ct. Nov. 15, 2005) (VersusLaw) (remanding to trial court with instructions to consider applicability of *Diné bi beehaz'áanii* to distribution of property).

[120] *See, e.g.*, Tso, ¶ 41 n.1 (VersusLaw) (declining to apply Navajo Common Law where language of Navajo Nation Code is clear and unambiguous).

[121] *Id.* (internal citations omitted) (emphasis added).

law.[122],[123] Furthermore, the Court will not disturb, but rather will apply established precedents that interpret the plain meaning of statutory language.[124] Where, however, the language of the Navajo Nation Code is ambiguous or does not control the disputed issue, the court will look to *Diné bi beehaz'áanii* to fashion a resolution.[125]

Rodriguez's progeny shows that the Court continues both to heed the directive of the Fundamental Laws and build on its precedents that apply it. For example, the Court in *Eriacho v. Ramah District Court*, No. SC-CV-61-04 (Navajo Sup. Ct. Jan. 5, 2005) again applied the traditional Navajo principle of *hazhó'ógo* where the knowing and intelligent waiver of the right to a jury trial was at issue,[126] stating that the court would look both to *Diné bi beehaz'áanii* and federal law to address issues relating to criminal procedure:

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[122] *Id. See also Smith v. Navajo Nation Dep't of Head Start*, No. SC-CV-50-04, 2005.NANN.0000011, ¶¶ 24, 27-28 (Navajo Sup. Ct. Sept. 21, 2005) (VersusLaw) (violation of clear rule set out in personnel manual is "just cause" for termination under Navajo Preference in Employment Act provided rule does not violate the public policy of the Navajo Nation as expressed by the Council in the Navajo Nation Code or in *Diné bi beehaz'áanii*). Thus, the Supreme Court of the Navajo Nation interprets the Fundamental Laws of the Diné as a directive to fill in the interstices of, and resolve ambiguities in, the Navajo Nation Code using Navajo Common Law, not an invitation to supplant the Code with Navajo Common Law. *See Tso*, ¶ 41 n.1.

[123] Editor's note: The opinions reviewed for this case note (those decided prior to October 10, 2006 and published in the VersusLaw database as of January 18, 2007) neither squarely posit nor conclusively resolve the question of whether an applicable provision of the Navajo Nation Code controls even if the Court determines the provision conflicts with *Diné bi beenahaz'áanii*. However, in *In re Lee*, No. SC-CV-32-06 (Navajo Sup. Ct. Aug. 11, 2006) (not yet available on VersusLaw as of April 11, 2007), the Court invalidated the residency and continuous presence provisions of the Navajo Election Code, enacted prior to passage of the Fundamental Laws of the Diné, as inconsistent with *Diné bi beenahaz'áanii*. *See* Ernestine Tsinigine, *The Fundamental Laws of the Diné*, (unpublished student paper, University of New Mexico School of Law) (on file with the author) .

[124] *Begay*, ¶ 25 (VersusLaw) ("case law stating the plain meaning of statutory language still controls the outcome of later cases"). *See also* Navajo Nation v. Badonie, No. SC-CR-06-05, 2006.NANN.0000003, ¶ 25 (Navajo Sup. Ct. Mar. 7, 2006) (VersusLaw) (applying factors for evaluating allegation of violation of right to speedy trial established by case law, interpreted in light of *Diné bi beehaz'áanii*). *But see* Eriacho v. Ramah Dist. Ct., No. SC-CV-61-04, 2005.NANN.0000001, ¶ 36 n.1 (Navajo Sup. Ct. Jan. 5, 2005) (VersusLaw) (a previous interpretation of statutory language is not binding if the language is unclear and the Court did not consider Navajo Common Law in its analysis).

[125] *See, e.g.*, *Duncan v. Shiprock Dist. Ct.*, No. SC-CV-51-04, 2004.NANN.0000017, ¶¶ 37-39 (Navajo Sup. Ct. Oct. 28, 2004) (VersusLaw) (ambiguity of term "miscellaneous" in statute in the context of a fundamental right requires interpretation consistent with *Diné bi beehaz'áanii*); *H.M. v. Greyeyes*, No. SC-CV-63-04, 2004.NANN.0000018, ¶ 24 (Navajo Sup. Ct. Oct. 13, 2004) (VersusLaw) (ambiguity in Rule 26 of the Navajo Rules of Civil Appellate Procedure (governing writ practice) requires examination of *Diné bi beehaz'áanii*, or Navajo Common Law principles, on the status of children); *Kesoli v. Anderson Sec. Agency*, No. SC-CV-01-05, 2005.NANN.0000013, ¶ 27 (Navajo Sup. Ct. Oct. 12, 2005) (VersusLaw) ("Lacking any guidance in the [Navajo Preference in Employment Act], the Court adopts Anderson's suggested definition of 'harassment' as consistent with the policies of the statute and *Diné bi beehaz'áanii"*).

[126] *Eriacho*, ¶¶ 30-31 (VersusLaw) (criminal defendant's alleged waiver of right to jury trial not "knowing and intelligent" where arraignment waiver form failed to explain right may be waived by inaction). See also *Navajo Nation v. Kelly*, No. SC-CR-04-05, 2006.NANN.0000012, ¶¶ 27-30 (Navajo Sup. Ct. July 24, 2006) (double jeopardy). The Court in Eriacho stated:

As Hozho'go requires meaningful notice and explanation of a right before a waiver of that right is effective, it requires, at a bare minimum, that the Nation give notice that the right to a jury trial may be waived by inaction. For notice to be meaningful, and therefore a waiver to be effective, the Navajo government must explain to the defendant that the jury trial right is not absolute, as it may be waived by doing nothing within a certain time. Absent this explanation, the information received by a defendant is

> This means that we are not bound to follow previous case law that applies federal standards to our Bill of Rights without consideration of Common Law, but may review the question again in light of Navajo principles. However, we still consider federal approaches to the problem, particularly when the use of non-traditional devices such as courts, police, and jails are at issue.[127]

The Court again applied *hazhó'ógo* in *Navajo Nation v. Morgan*, No. SC-CR-02-05 (Navajo Sup. Ct. Nov. 8, 2005), following both *Rodriguez* and *Eriacho*, holding invalid a guilty plea that was not made knowingly and intelligently.[128] In addition, the Court has also adopted and adapted state law where necessary, augmented by traditional Navajo principles, much as the *Rodriguez* court adopted and adapted the federal law of the United State Supreme Court's *Miranda*opinion.[129]

The Court's opinion in *Rodriguez* provides additional teaching regarding the implementation of the Fundamental Laws, admonishing the district courts of the Navajo Nation and practitioners alike to apply *Diné bi beehaz'áanii* where appropriate. Impelled by the directive of the Fundamental Laws, the Court on its own initiative conducted an analysis and fashioned a basis for its decision that is consistent with *Diné bi beehaz'áanii*. [130] The Court made the following "preliminary observation" concerning the oral argument before the Court:[131]

> Neither side was prepared to discuss the confession admissibility issue. Rodriguez's brief contains no citation to any statute, case law, or Navajo common law or principle concerning confessions, and his counsel did not submit any at the oral argument. When asked about the Indian Civil Rights

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incomplete, as it appears the right is automatic and perpetual, like the federal constitutional right. Without this information, the waiver by inaction is not truly knowing and intelligent, and would violate the defendant's right to due process. As the description of the right to jury trial in the waiver of arraignment form does not include a statement that the right must be exercised within fifteen days, Eriacho's failure to request it within that time was not a knowing and intelligent waiver.

E Eriacho, ¶ 31 (VersusLaw) (emphasis added). See also id. ¶ 30 (discussing application of same Navajo Common Law principle of hozho'go in Rodriguez). The author notes the different orthographic representations for the same Navajo Common Law principle. Compare Navajo Nation v. Rodriguez, No. SC-CR-03-04, 2004.NANN.0000014, ¶¶ 38-39 (Navajo Sup. Ct. Dec. 16, 2004) (VersusLaw) (hazhó'ógo) with Eriacho, ¶¶ 30-31 (VersusLaw) (hozho'go).

[127] *Eriacho*, ¶ 36 n.1 (VersusLaw).

[128] *Navajo Nation v. Morgan*, No. SC-CR-02-05, 2005.NANN.0000018, ¶¶ 19-20 (Navajo Sup. Ct. Nov. 8, 2005) (VersusLaw) (failure of courts and other governmental officials to proceed carefully and patiently, clearly explaining a defendant's rights before accepting a waiver thereof, is inconsistent with *hazhó'ógo*).

[129] *See Etsitty v. Dine Bii Ass'n for Disabled Citizens, Inc.*, No. SC-CV-48-04, 2005.NANN.0000015, ¶¶ 28-29 (Navajo Sup. Ct. Dec. 5, 2005) (VersusLaw) (adapting New Mexico Supreme Court "control test," setting forth factors to determine whether an employee is an independent contractor, to include additional factors to "foster harmony by honoring the expectations of the parties under the Navajo principle of *k'é*.").

[130] *Rodriguez*, ¶¶ 24, 31-34, 38 (VersusLaw). *Cf.* Goldtooth v. Naa Tsis' Aan Cmty. Sch., Inc., No. SC-CV-14-04, 2005.NANN.0000008, ¶¶ 31, 38 n.4 (Navajo Sup. Ct. July 18, 2005) (VersusLaw) (applying traditional Navajo concept of *naat'aanii*, or individual with a persuasive role within a community) ("This Court questioned both sides at oral argument as to the effect, if any, on the case if the Executive Director were considered a *naat'aanii*.")

[131] *Rodriguez*, ¶ 24 (VersusLaw).

> Act, the Navajo Bill of Rights, and the possible application of *Miranda v. Arizona*, 384 U.S. 436 (1966), his counsel admitted having no knowledge of any of these sources of law. The Navajo Nation, though showing knowledge of these laws, admitted having no knowledge of the actual facts in this case to apply them, asserting that she was not the attorney who presented the case to the lower court. *Ordinarily, we rely on the parties*, especially the appellant, *to argue their points and provide us with guidance* on the relevant law and its application to the record in the case. We would be severely limited in our discussion if we were to rely on the parties in this case. *Because the issues are of such importance to the Navajo Nation, we cannot limit ourselves to the arguments made by the parties.*[132]

If there is a general "take-home message" in *Rodriguez* for practitioners and judges in the courts of the Navajo Nation,[133] it is that arguing and using Navajo Common Law as a decisional basis for legal disputes is mandatory, not optional, whenever the Navajo Nation Code is ambiguous or silent on a contested issue and case law that is consistent with *Diné bi beehaz'áanii* is unavailable.[134] As the Navajo Nation Supreme Court demonstrated in *Rodriguez*, counsel who fail to provide a decisional basis in *Diné bi beehaz'áanii* law may find that the Court will provide its own rationale, one that is not informed by, and is possibly unrelated to, the arguments counsel presented to the Court.

VI. Conclusion

In *Rodriguez*, the Navajo Nation Supreme Court settled the question of whether *Miranda* applies on the Navajo Nation but went much further, placing additional evidentiary requirements on voluntary waivers obtained through custodial interrogations. The Court derived these requirements by looking to the Navajo Common Law principle of *hazhó'ógo* and applying it to the police custody context. In doing so, the Court fulfilled its directive from the Navajo Nation Council to consider the Fundamental Laws of the Diné in reaching its decision and to explain its reasoning for the benefit of all Diné.

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[132] *Id.* (emphasis added).

[133] The fact-specific take-home message of *Rodriguez* is its specific holdings regarding the right against self-incrimination in the context of, and the proper conduct of, custodial interviews. *Id.* ¶ 40.

[134] The message might also be stated as follows: If the Navajo Nation Code, or settled precedent that is consistent with *Diné bi beehaz'áanii*, does not unambiguously dictate the outcome of a dispute, and if there exists a decisional basis in *Diné bi beehaz'áanii*, or Navajo Common Law: then find it, argue it, and base the holding on it. If you don't, the Supreme Court of the Navajo Nation may well do it for you.