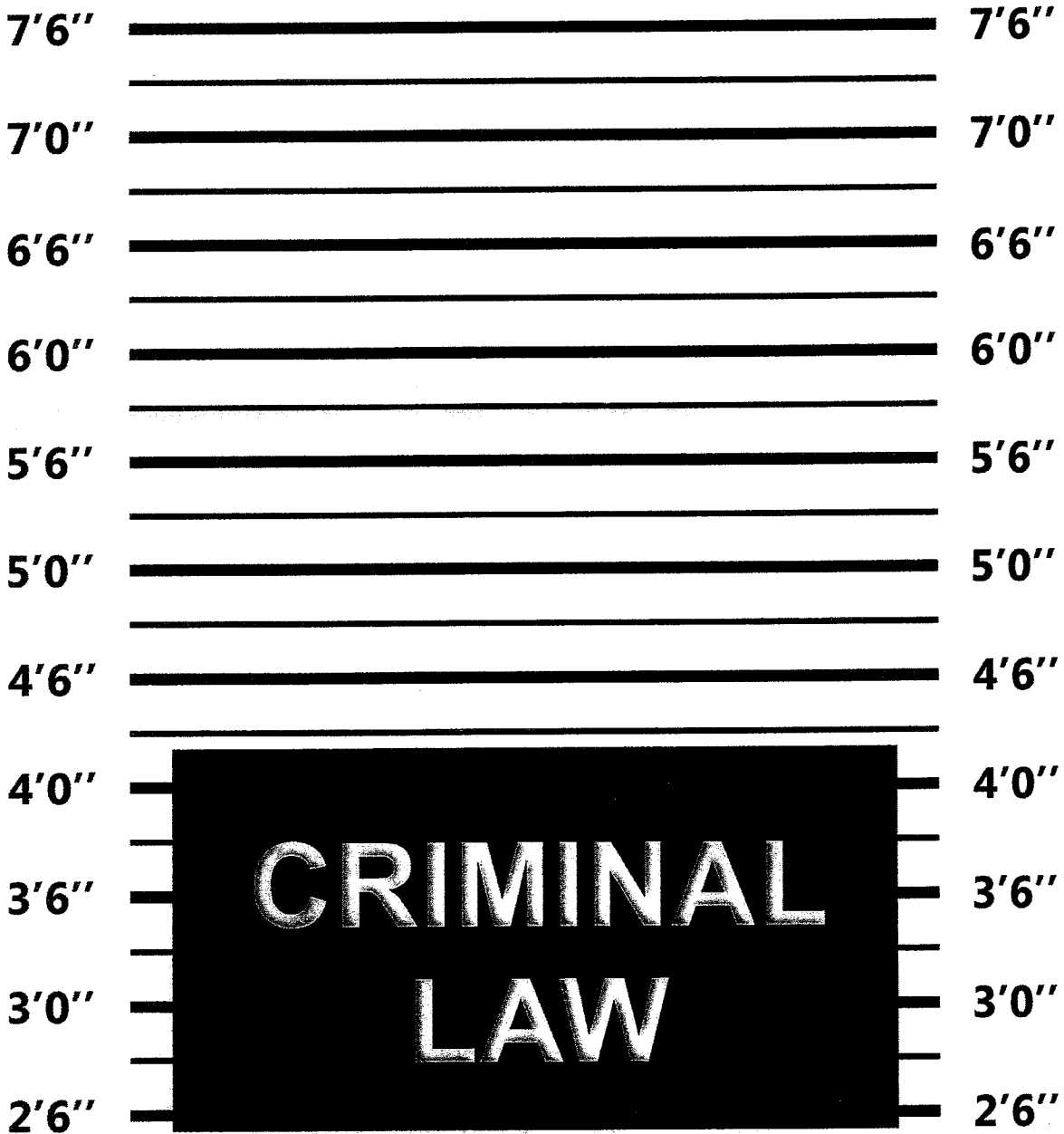


NEW MEXICO Lawyer

September 2018 Volume 13, No. 2

www.nmbar.org



Is your due process honest?

The protection of Pueblo tradition.

By Frank Demolli

Tradition...cannot be inherited, and if you want it you must obtain it by great labor. — T.S. Eliot

The traditions of the pueblos that I have served as a judge are lessons learned from thousands of years of experience. Properly practiced, pueblo justice reflects A'gin (a Tewa word conceptually interpreted as mutual respect), balance and a healthy, functioning community. Due process is not alien to pueblo justice. See Frank Demolli, *A Pueblo's Response to Strate v. A-1 Contractors*, 14:3 T.M. Cooley L. Rev. 547 (1997). However, the Pueblos have recognized that due process is good, but not good enough for true justice. Due process only begins the judicial process. As practiced by the dominant society, unfortunately, due process has sometimes led to manipulation, persuasion, misdirection and perversion of the truth. In contrast, honesty is the tradition that is most honored in the pueblo justice system. Honesty must accompany due process guarantees.

Fifty years ago, the pueblos of New Mexico and other tribes strenuously objected to the imposition of the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301-03). Tribes are not bound to the Bill of Rights, as they were not signatories to the U.S. Constitution. While the Indian Civil Rights Act (ICRA) was not identical to the Bill of Rights, the Tribes were "cautious . . . about taking large steps beyond their psychological preparedness or financial capability." (Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights Act"*, 9 Harv. J. on Legis. 557, 601 (1972). During the Congressional hearings, the Mescalero Apache Tribe president echoed the pueblos' concerns that "the Indian Civil Rights Act was an infringement on tribal right to self-government, that implementation of the ICRA's requirements would diminish or eliminate



tribal customs and traditions." *Rights of Members of Indian Tribes: Hearing Before the Subcomm. On Indian Affairs of the House Comm. On Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968) note 23, at 77 (testimony of Wendell Chino).

The pueblos' judicial traditions were shared by other tribes. As asserted by an attorney representing the Ute Indian Tribe:

The defendants' standard of integrity in many Indian courts is much higher than in the State and Federal Courts of the U.S.. When requested to enter a plea to a charge the Indian defendant, standing before respected

tribal judicial leaders, with complete candor usually discloses the facts. With mutual honesty and through the dictates of experience, the Indian judge often takes a statement of innocence at face value, discharging the defendant who has indeed, according to tribal custom, been placed in jeopardy. The same Indian defendants in off-reservation courts soon learn to play the game of "white man's justice," guilty persons entering pleas of not guilty merely to throw the burden of proof upon the prosecution. From their viewpoint it is not an elevating experience. We are indeed fearful that the decisions of the Federal and State

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Courts, in the light of non-Indian experience, interpreting “testifying against oneself” would stultify an honorable Indian practice

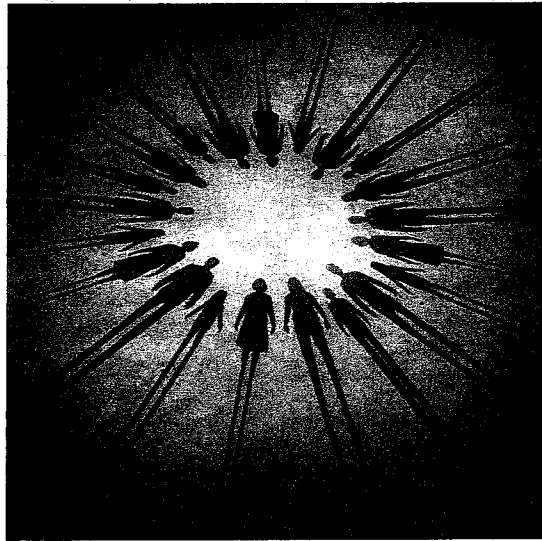
Rights of Members of Indian Tribes, supra note 23, at 127 (statement of John S. Boyden).

If we are to believe the testimony and accounts of 50 years ago, this “honorable Indian practice” of telling the truth was the norm. After hearing more than a thousand criminal cases in eight of the nine northern pueblos over the past 23 years, I can attest that telling the truth happens more often than not in a northern pueblo courtroom.

The pueblos and their supporters also explained one of the reasons that truth-telling obviated the need for juries. “The right of trial by jury, upon request, is a recognized but seldom used privilege with many tribes. Many accused Indian people feel they do not need a jury of peers to determine the facts already within the knowledge of the accused. The defendant enlightens a credulous court.” *Rights of Members of Indian Tribes, supra* note 23, at 128 (statement of John S. Boyden).

The chairman of the All Indian Pueblo Council added another reason that jury trials were opposed: “it [was] no more logical to use a jury system for the settlement of internal matters within the extended ‘family’ that makes up a Pueblo than it would be to use a similar system within the framework of an Anglo-American family as a means for enforcing internal rules or resolving internal disputes.” *Rights of Members of Indian Tribes, supra* note 23, at 14 (testimony of Domingo Montoya).

What exactly is the tradition of pueblo justice? Traditionally, the role of carrying out justice was placed squarely on the shoulders of pueblo leaders. Historically, the offender would appear before a pueblo leader. The leader would judge the offender according to acknowledged norms of the community, and an appropriate corrective action was passed. Often overlooked by pueblo legal historians was the subsequent community act of forgiveness for the offender who was truthful about his behavior and who successfully carried out the assigned corrective actions. The former offender was highly admired by the community and eligible to resume responsible positions within the pueblo.



Today, this role of carrying out justice is shared by the judges in both the traditional and “modern” pueblo courts. Each of the 19 pueblos has a traditional court, a modern court, or both.

The choice to appear before a traditional or a modern court may be left to the offender. If a pueblo judge in a modern court is fortunate, he or she has been schooled in the pueblo ways by the elders and leaders of the pueblo. He or she explains the consequences of the defendant’s actions, ensures that the victim has a say and passes a corrective action crafted to change the offender’s behavior and to heal the community. As telling the truth is as the preferred pueblo way of life, it is essential in showing that the offender understands what is right and expected. The pueblo judge then echoes the admonition of the wisest of pueblo leaders and pueblo people: “We are all human.” The pueblo judge can then point out the behavior that creates conflict in the community and in the offenders’ daily life.

Over the objections of the pueblos, ICRA was imposed on all tribes in 1968. Since that time, the “white man’s game” has been in play in the pueblo courts.

The specter of the “white man’s game” loomed larger in 2002. The state of New Mexico attempted to assert criminal jurisdiction over pueblo members accused of crimes against non-Indians occurring within the pueblos. For the pueblos, the larger issue was whether the pueblos’ traditions of being judged within their own belief systems would survive. The pueblos had witnessed that receiving justice as interpreted by one’s own community is not always favored outside the pueblo.

In 2003, I was appointed by the All Pueblo Indian Council to shepherd the Pueblo Land Act Amendments (“PLA”) through Congress. The PLA clarified criminal jurisdiction within the pueblos. Under the PLA of 2005, only a tribal court and/or a federal court would have jurisdiction over the allegation of a criminal offense committed by an Indian against a non-Indian within the boundaries of a pueblo. On a parallel track with congressional deliberations over the PLA, New Mexico courts considered whether New Mexico had jurisdiction over criminal cases occurring within the pueblos when the alleged offender was an Indian and the alleged victim was a non-Indian. In 2005, I participated in the oral argument on criminal jurisdiction before the New Mexico Supreme Court.

The Pueblos prevailed in Congress (Public Law 109-133, Indian Pueblo Land Act Amendments of 2005, 119 Stat. 2573; December 20, 2005) and in the courts. *State v. Romero*, 140 N.M. 299 (2006), *cert denied*, 127 S. Ct. 1494 (2007). During the congressional and court proceedings, I was inspired by the words of the tribes who, in their quiet ways, articulated the reasons they struggled mightily to preserve their truthful tradition.

Void of guile, the Indian inquires, do we not have inalienable rights to be protected as our customs and traditions require? Or must we relinquish our right to self-government and submit to an alien code of the reasoning that someone else knows better than we the safeguards of our sacred rights?

Rights of Members of Indian Tribes, supra note 23, at 127 (testimony of John S. Boyden).

The pueblos’ practice of telling the judge the truth is still honored. Whether a criminal justice system that promotes due process while ignoring the need for telling the truth can earn the respect of its community is for others to judge. ■

Frank Demolli has been involved in criminal justice systems since 1971. From 1995 to 2012, he served, alternatively, as chief counsel, chief judge or judge pro tem at seven of the eight northern pueblos of New Mexico. Since 2012, he has served as the Santa Clara Pueblo chief judge. The opinions included in this article are solely his own.