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INTRODUCTION

In the summer of 2017, I found myself driving down a remote tribal road to attend an arraignment at a Tribal Court[1] for the first time. As I followed the directions provided, which were vague to an outsider unfamiliar with the common points of reference, I even found myself almost traveling down a road restricted for only Pueblo[2] member's use. I eventually arrived at the courthouse and entered a building that is normally used for tribal council meetings. As I had been invited to attend the court's docket, the judge came outside, greeted me, and showed me around. The Tribal Court is held in the Tribal Council Chamber. The chairs are pushed to the edges of the room, a normal table is placed at the front, and there is an additional table placed in front of where the defendant was to stand. Another table was pushed to the side and available for use by the Nation's Prosecution, when present. There were also microphones and a recording system set up for all those present. This set up resembled the look of a western-style court and was my first indication that some of what I was to observe would function somewhat like the courts I was accustomed to.

As a non-native law student trained in the western or Anglo-American justice system, I had anticipated seeing something completely unfamiliar. Instead, there were many similarities to a western-style criminal justice system. However it appeared to lack some of the civil rights protections of the western-style system. I watched as defendants entered pleas without counsel and struggled to understand the meaning of legal terms. The judge in this court was law-trained and explained that the judge's role in this court allowed provided more judicial power over the defendants. The defendants' lack of representation and ignorance of the law often means the judge is forced to both protect the defendants' due process while also considering the Pueblo's interest in convictions. This is

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[1] For the purposes of this paper I have chosen to keep the specific Pueblo anonymous. This decision was made to keep the focus on the issues presented by ICRA and to allow any tribe to see themselves in this case example. I hope that it will encourage tribal leaders to take a second look at the structures they have created to determine if there are any civil rights violations present and how best to address those.

[2] Throughout this paper, "Pueblo" will refer to the specific tribe I was researching and "pueblo" will refer generally to all pueblos.

especially true as BIA law enforcement officers, who function as both the law enforcement and the prosecution, are only present at trials, not arraignments.

The Tribal Court observed has a hybrid structure. The governance structure of the Pueblo was formed through a complex history of oversight from four sovereigns. The Pueblo utilizes its original chthonic law[3] as modified by the civil legal traditions of Spain and Mexico. One of the most recent modifications, the Indian Civil Rights Act of 1968 (ICRA),[4] was imposed by the fourth outside sovereign in the history of oversight, the United States. Some of the impacts to Pueblo court structures of the United States were the adoption of state's codes, separation of powers, and most significantly, the ICRA. Not all these changes resulted in positive outcomes, as I witnessed firsthand.

The ICRA imposed western values onto tribal governments and tribal court structures to enable tribal courts to work within the American construct. This has pushed the tribes towards more western court structures. However, due to the limitations of the ICRA, many tribes have not instituted western court structures with the full civil rights protections of western systems. One of those limitations is a defendant's right to counsel. In all state and federal jurisdictions, defendants have the right to counsel regardless of whether they can afford counsel. In contrast, under the ICRA, tribal members are given the right to counsel; however, they may only enjoy that right if they provide the counsel at their own expense. And, while some tribes have the financial capacity to create a public defender's office, others do not. Because the ICRA does not mandate that counsel be appointed to indigent defendants, many face situations like the one I observed, where a western court structure was adopted but defendants have no guide through an unfamiliar structure.

This paper will explore the ICRA and its practical application within one contemporary Pueblo court structure. Part I of this paper provides a brief background on the ICRA and how it came to be. Part II of this paper describes six arraignment hearings observed over the course of five months within one tribal court. To provide context to these cases, this section begins with a brief introduction into pueblo history and culture. This section will conclude with my overall observations of the court hearings. However, it is important to note that this paper represents only one pueblo

[3] Chthonic is a term to describe the various legal structures of indigenous or aboriginal peoples. "To describe a legal tradition as chthonic is thus to attempt to describe a tradition by criteria internal to itself, as opposed to imposed criteria. It is an attempt to see the tradition from within, in spite of all problems of language and perception, and to see it from a time prior to the emergence of colonial language." PATRICK H. GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN THE LAW 62 (5th ed. 2014).

[4] Indian Civil Rights Act, 25 U.S.C. §§ 13021-03 (1968).

court. Each pueblo has its own unique governance structure and culture, despite some broad similarities. One glaring similarity that the pueblos share is the common history of federal Indian law, including that of the ICRA.

I. History of the Indian Civil Rights Act

The history of the ICRA does not begin with its enactment in 1968, but rather shortly after the formation of this country in 1790. The ICRA was the culmination of a long history of legislation regarding the legal processes in Indian country. This legislative interference in Indian Country began in the 1790s when Congress passed various Trade and Intercourse Acts which defined jurisdiction over Indians and non-Indians.[5] The jurisdiction that was established by these acts was codified in the General Crimes Act of 1817 (GCA), also known as the Indian Country Crimes Act.[6] The Act "respected inherent tribal authority over internal affairs" and exempted Indian defendants whose crimes occurred on Indian land from federal prosecution.[7] This in turn supported inherent tribal sovereignty and upheld traditional tribal customs for those crimes which the tribe prosecuted.[8]

The GCA was followed by the Major Crimes Act of 1885 (MCA).[9] The MCA provides that the federal government has control over all serious crimes committed on Indian land, regardless of whether the defendant is Indian or non-Indian.[10] Prior to this Act, the federal government had jurisdiction only over crimes committed by Indians that were included in the Trade and Intercourse Acts or those which were included in specific treaty agreements.[11] All other crimes were handled by the traditional tribal

[5] These acts were permanently codified in 1834 with the passage of The Trade and Intercourse Act of 1834. Barbara Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 Mich. J. of Race & L. 317, 334 (2013).

[6] The act reads in full:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of
> offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

General Crimes Act, 18 U.S.C. § 1152 (2006) (originally enacted in 1817); TRIBAL COURT CLEARING HOUSE, *General Guide to Criminal Jurisdiction in Indian* Country, http://www.tribal-institute.org/lists/jurisdiction.htm.

[7] Creel, *supra* note 4, at 335.

[8] *See* Creel, *supra* note 4, at 335.

[9] Major Crimes Act, 62 Stat. 683 (codified at 18 U.S.C. § 1153 (2006)).

[10] *Id.*

[11] *See* Creel, *supra* note 4, at 335.

law of the specific tribes.[12] This law extended federal jurisdiction over all defendants in Indian country for the specified crimes and severely limited the previously exclusive criminal jurisdiction of the tribes.[13] This change in the federal relationship was driven forward by a U.S. Supreme Court case, *Ex parte Kan-gi-shun-ca (Crow Dog)*.[14]

In *Ex parte Kan-gi-shun-ca*, a member of the Great Sioux Nation had murdered another Sioux Indian on the Great Sioux reservation in Dakota Territory.[15] The tribe, exercising its criminal jurisdiction and sovereignty, resolved the crime through their traditional system requiring Kan-gi-shun-ca's family to provide the victim's family with reparations totaling $600.00 in cash, eight horses, and one blanket.[16] He was also tried, convicted, and sentenced to death by the First Judicial District of the Dakota Territory.[17] Through a writ of habeas corpus to the U.S. Supreme Court, Kan-gi-shun-ca successfully challenged his conviction.[18] The court held that the federal court "was without jurisdiction to find or try the indictment against the prisoner, that the conviction and sentence [were] void, and that his imprisonment [was] illegal."[19] This meant that the United States Supreme Court was upholding the tribal court's decision, and finding that the United States had no jurisdiction over the crime. This decision to uphold tribal sovereignty and jurisdiction provided a means for Congress to enact a law establishing federal criminal jurisdiction over Indians who committed a crime against another Indian, the Major Crimes Act (MCA).[20]

The express purpose of the MCA was to further the so-called "civilization" of Indians, through criminal laws. Representative Cutcheon[21] stated that through this Act "many Indians would be civilized a great deal sooner by being put under federal criminal laws and taught to regard life and the personal property of others."[22] This was one of many direct assaults on the culture and sovereignty of the tribes. The establishment of Courts of Indian Offenses (CIO) followed the MCA.[23]

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[12] *Id.*

[13] The specified crimes include: murder, manslaughter, kidnapping, maiming, incest, felony assault, assault against a minor, felony child abuse or neglect, arson, burglary, and robbery. 62 Stat. 683.

[14] *Ex parte* Kan-gi-shun-ca, 109 U.S. 556 (1883).

[15] *Id.* at 557.

[16] *See* Creel, s*upra* note 4, at 336 n. 118.

[17] *Ex parte* Kan-gi-shun-ca, 109 U.S. 556, at 557.

[18] *Id.* at 572.

[19] *Id.*

[20] A similar bill was proposed in 1874 but was ultimately unsuccessful. Kevin Washburn, *Federal Criminal Law and Tribal Self*-Determination, 84 N.C. L. REV. 779, 798-803 (2006).

[21] Representative Cutcheon was the sponsor of the MCA.

[22] Keeble v. United States, 412 U.S. 205, 211-12 (1978) (quoting 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon)).

[23] Also referred to as CFR courts after the Code of Federal Regulation where the criminal laws are codified. 25 C.F.R. §§ 11.100-.1214.

In 1883 various federally run CIOs were established by the Secretary of the Interior to "be a step in the direction of bringing the Indians under the civilizing influence of the law."[24] The CIOs' main function was to criminalize the religious and cultural practices of the tribes.[25] However, they also took over all criminal jurisdiction, supplanting tribal jurisdiction where CIOs were established.[26] In addition to criminalizing simply being an Indian–by punishing cultural and religious practices–the court procedures often resulted in serious civil rights violations. The judges were Indians or the Indian police force.[27] Under a false impression that attorneys would confuse the judges and criminals would get away with crimes due to a technicality, attorneys were prohibited from the court room. [28] Without defense, the Indian defendants were put in jeopardy, "which was consistent with the purpose of the reservation and the court system to educate and civilize the Indian."[29]

The next change in tribal court systems occurred in 1934 with the Indian Reorganization Act (IRA). IRA provided:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, *the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers*: To employ legal counsel, the choice of counsel and fixing of fess to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in land, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.[30]

This tied the exercise of the stated rights and powers to the adoption of an IRA constitution, resulting in many tribes adopting an approved constitution to take advantage of the benefits. After Congress passed the IRA, the Bureau of Indian Affairs (BIA) created a draft

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[24] NORTH DAKOTA STUDIES, *Court of Indian Offenses*, https://www.ndstudies.gov/content/courts-indian-offenses (quoting Annual Report of the Secretary of the Interior, H. Exec. Doc. 1 (1883) (Serial Set 2190)).
[25] See North Dakota Studies, *supra* note 23; Creel, *supra* note 4, at 338-40.
[26] Creel, *supra* note 4, at 340.
[27] William T. Hagan, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 109 (Yale Univ. Press 1966); Creel, *supra* note 4, at 340.
[28] 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360-61 (May 19, 1961)); Creel, *supra* note 4, at 340; Hagan, *supra* note 26, at 120.
[29] United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) (defending the creation of the courts as necessary for the education and civilization of Indians); Creel, *supra* note 4, at 341 n. 153.
[30] Indian Reorganization Act, 48 Stat. 984, 73 Cong. Ch. 576 § 16 (1934) (emphasis added) (codified as 25 U.S.C. § 476(e) (1934)).

constitution for tribes to use.[31] The draft constitution was itself modeled after the U.S. Constitution and laws rather than tribal customs.[32] As a result, the tribal constitutions often included aspects of the federal criminal justice system, such as the western protections of individual rights and the prohibition on attorneys in the courtroom in CIOs.[33] While the federal prohibition on attorneys was eventually removed in 1961, tribes could only change their constitutions with the permission of the BIA.[34] Due to a cumbersome process, cultural practices, and economic situations, many tribes elected not to amend their constitutions.[35] At the time, 181 tribes adopted the IRA, although not all of them created constitutions.[36]

In 1961, the Senate Subcommittee on Constitutional Rights initiated an investigation into civil rights violations in Indian country.[37] This investigation was prompted by an independent study by the Fund for the Republic[38] and a Department of the Interior report which examined the civil rights problems of individual Indians.[39] The purpose of the Senate investigation was "to investigate the civil rights gap for tribal people due to the inapplicability of the Bill of Rights to tribal governments."[40] By 1968, Congress had determined how best to solve these civil rights problems in Indian country and enacted the ICRA.[41] The ICRA was not passed by

[31] It is not known how many of the tribes received this draft constitution but is was circulated to some of the tribes and was used as a model for BIA agents as they advised the tribes on what to include in their constitutions. DAVID E. WILKINS, *Introduction* to FELIX COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS, xxiii (2006).

[32] Creel, *supra* note 4, at 343.

[33] *Id.* This inclusion is not surprising as the government officials drafting model constitution would be heavily influenced by what they knew, the United States Constitution. However, the reason for these inclusions does not negate the impact created.

[34] *Id.* at 344.

[35] *Id.* at 343-344.

[36] The number of tribes who did adopt constitutions at the time is unclear. Wilkins, *supra* note 30, at xxii. Currently there are 573 tribes, approximately 440 of these tribes have constitutions. TRIBAL COURT CLEARINGHOUSE, *Tribal Constitutions* (last visited Nov. 11, 2017), http://www.tribal-institute.org/lists/constitutions.htm.

[37] Creel, *supra* note 4, at 344.

[38] *Id.* (citing FUND FOR THE REPUBLIC, REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN (William A. Brophy & Sophie D. Aberle eds., 1961)).

[39] *Id.* (citing TASK FORCE ON INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS, A PROGRAM FOR INDIAN CITIZENS (1961)).

[40] *Id.* at 344; Talton v. Mayes, 163 U.S. 376 (1896) (holding the U.S. Constitution and Bill of Rights inapplicable to tribal governments.).

[41] The Act provided, in part:

> Sec. 202. No Indian tribe in exercising powers of self-government shall—
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> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> (3) subject any person for the same offense to be twice put in jeopardy;

Congress without comment from Indian tribes. Among the various tribes who testified before Congress were the pueblos.[42] The main argument against the ICRA made by the pueblos was that the enactment of the ICRA was an unnecessary imposition of congressional oversight which restricted sovereignty and self-governance.[43] The pueblos already guaranteed the rights stated in the ICRA through their governance structures.[44] However, the values represented by the ICRA implicated western values which are not necessarily the values of the pueblos.[45]

Congress enacted the ICRA despite the many tribal objections. The ICRA applied almost all the Bill of Rights to the federally recognized tribes.[46] However, it "did not prohibit the establishment of a religion, provide for an automatic right to a jury trial, or require the appointment of counsel for indigents in criminal cases."[47] It also did not require a grand jury or presentment.[48] These exemptions were an attempt to compromise between the western and traditional values. In effect, the ICRA encouraged conformity with the western system while requiring limited civil rights protections.

One of the more problematic limitations is that of the right to

(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his factor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months for a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Sec. 203. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Indian Civil Rights Act, Pub. L. No. 90-284, § 202-03 (codified as amended at 25 U.S.C. §§ 1302-03 (2010)).

[42] *See*, LT. GOV. JUAN B. ABEITA, GOV. PAT CALABAZA, GOV. JUAN CHAVARRIA, GOV. ROBERT E. LEWIS, & GOV. DON SANCHEZ, *Rts. of Members of Indian Tribes: Hearings on H.R. 15419 and related Bills before the Subcomm. on Indian Aff. of the H. Comm. on Interior and Insular Aff.*, 90th Cong., 2nd Sess. 35-75 (1968).

[43] *Id.*

[44] *Id.* (The Pueblo Governor's stated that they provided defendants with a tribal representative in hearings, the right to a jury made up of tribal leaders, the right to freedom of speech and the right to freedom of religion. However, these were not provided in a way that is identical to the western system.).

[45] *Id.*

[46] *See* Pub. L. No. 90-284, § 202; U.S. Const. amend. I-X.

[47] Creel, *supra* note 4, at 346. See also Pub. L. No. 90-284, § 202.

[48] *See* Pub. L. No. 90-284, § 202; U.S. Const. amend. X ("No person shall be held to answer for a capital, or otherwise infamous crime…").

assistance of counsel "at his own expense."[49] The BIA resisted adding in the full constitutional protection of provided counsel in criminal cases due to monetary constraints and a foreseen imbalance in the courts if non-law trained judges were confronted with law trained counsel.[50] These arguments reflect western values of a highly trained legal structure and monetary compensation. Significantly, the limitation of the right to counsel included in ICRA was consistent with both federal and state law at the time. In 1938, the U.S. Supreme Court had only ruled the right to appointed counsel to extend to felonies in federal courts.[51] In 1963, the right to appointed counsel for felonies was extended to state jurisdictions.[52] It wasn't until 1972, four years after the ICRA, that the right to appointed counsel was required for both felonies and misdemeanors that could result in incarceration.[53] The ICRA limited tribal court criminal jurisdiction to the equivalent of misdemeanors, by stating that a tribe could not sentence for longer than six months and therefore matched the current federal and state requirements in 1968.[54] Congress never amended the ICRA to require tribes to provide counsel to indigents; however it did extend the maximum imprisonment length to one year in 1986.[55]

Since 1986, there have been two more congressional acts which have impacted tribal criminal jurisdiction. The first is the Tribal Law and Order Act of 2010 (TLOA).[56] This act allowed tribes to sentence defendants up to nine years in one proceeding if they implemented full federal protections for defendants, including providing counsel to indigent defendants.[57] In addition, tribes seeking to implement the greater sentencing scheme must provide "a legally trained judge to preside over the criminal proceeding; public access to tribal laws, rules of evidence, rules of criminal

[49] Pub. L. No. 90-284, § 202(6).
[50] Creel, *supra* note 4, at 346 (citing *The Constitutional Rights of the Amer. Indian: hearing Before the Subcomm. On the Constitutional Rights of the S. Comm. On the Judiciary*, 87th Cong. 13 (1961)).
[51] Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (holding "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.").
[52] Gideon v. Wainwright, 372 U.S. 335 (1970) (holding that it was unconstitutional to deprive the defendant in a felony trial of the right to counsel in state court); *See generally* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (courts interpreted the holding in *Gideon* to mean it applied only to a felony case until Argersinger).
[53] *Argersinger*, 407 U.S. 25, 37 ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."); *see also* Scott v. Illinois, 440 U.S. 367 (1979) (holding that actual imprisonment is what triggers the right to counsel); *contra* Wainwright v. Sykes, 433 U.S. 72 (1977)(concurring opinion states the test should be authorized imprisonment as opposed to actual imprisonment).
[54] Pub. L. No. 90-284, § 202(7).
[55] Indian Civil Rights Act, Pub. L. No. 99-570, 100 Stat. 3207 (codified as 25 U.S.C. § 1302(7) (1988)).
[56] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258 (codified at 25 U.S.C. § 1302).
[57] *Id.*

procedure, including rules governing recusal of judges; and a record of tribal criminal proceedings."[58] By requiring tribes to modify their structure to look like the western structure if they wished to incarcerate, the United States again encouraged assimilation, while simultaneously returning criminal jurisdiction and sovereignty to the tribes who could afford to provide these extended protections. Many others have been unable to regain sovereign authority over criminal jurisdiction and the ability to decide which punishments are appropriate due to an inability to implement the necessary changes.

The second change to tribal criminal jurisdiction occurred in 2013 with the enactment of the Violence Against Women Reauthorization Act (VAWA).[59] This act permitted tribes to "exercise special domestic violence criminal jurisdiction over all persons," including non-natives who had a special relationship with the tribe.[60] To assert VAWA jurisdiction, the tribe must provide the defendant with the enhanced rights described in TLOA, as well as the right to a trial by an impartial jury, and all other rights necessary under the United States Constitution.[61] As of March 2015, five tribes throughout the country possessed the authority to use this extended jurisdiction of VAWA.[62] VAWA has the same implications as TLOA in that it encourages conformity but also returns sovereignty to the tribes.

Neither TLOA nor VAWA changed the limitation in the ICRA which does not require tribal governments to provide indigent defendants with counsel in criminal proceedings where imprisonment is implicated. For tribal governments which have chosen to retain fully traditional court structures,[63] this may not be an issue. Traditional court structures have different value systems and ways to protect those values. For example, many traditional court structures use family members or group representation for the accused. Whether fully traditional court systems offer protections for civil rights is not the focus of this paper. Rather this paper will discuss hybrid tribal governance structures which have adopted a western court structure but not implemented full civil protections. The court observed is one such as these.

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[58] Creel, *supra* note 4, at 350 (citing Pub. L. No. 111-211, § 234).

[59] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54 (codified at 25 U.S.C. § 1304).

[60] The defendant must "(i) reside[] in the Indian country of the participating tribe; (ii) [be] employed in the Indian country of the participating tribe; or (iii) [be] a spouse, intimate partner, or dating partner of (I) a member of the participating tribe; or (II) an Indian who resides in the Indian country of the participating tribe." *Id.*

[61] *Id.*

[62] DEPARTMENT OF JUSTICE, VAWA 2013 PILOT PROJECT, https://www.justice.gov/tribal/vawa-2013-pilot-project (last updated March 13, 2015).

[63] Fully traditional court structures refers to tribal courts which are based on unique internal structure. Each tribe will define what it means to be fully traditional, commonly it is based on laws established pre-European contact.

II. Observations in a Pueblo Court in 2017

I observed one of the pueblo courts which has begun the process of adopting a western court structure. Before providing my observations at the court, I will detail a brief history of the pueblos, a brief profile of the court, and the court procedure which occurred in all six cases.

A. Brief "Legal" History of the Pueblos

The pueblos of New Mexico have a unique legal and cultural history. Currently, nineteen pueblos in New Mexico are federally recognized and fall under the policies discussed earlier in this paper.[64] While the pueblos are related and share a common origin story, each has its own unique culture, identity, and governance structure.[65] They were first contacted by the Spanish in the 1500s.[66] By the mid-1600s the Spanish had obtained control of the pueblos.[67] Unlike the colonizers on the east coast of the United States, the Spanish allowed the tribes to retain local control with some added government structures.[68] Prior to Spanish contact, the pueblos' governance structure consisted of a Cacique, his War Chiefs, and their assistants.[69] The Cacique was the head of the pueblo who led the tribe in all things, spiritual and secular.[70] He selected two other leaders, termed War Chiefs, who assisted him in enforcing the laws of the tribe.[71] The pueblos also had a complex social order consisting of moieties, which had various ceremonial responsibilities, and clans, which structured the familial relationships of the pueblos.[72]

The Spanish brought with them the civil legal system. They imposed other government positions, including that of the Governor, Lieutenant Governor, Sheriffs, and Fiscales.[73] The Governor and his Lieutenant were intended to impose Spanish rule; however, they often protected the religious leaders from persecution for practicing traditional ceremonies in secret.[74] The Sheriffs also enforced Spanish laws.[75] Lastly,

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[64] JOE SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY 7 (1991) (providing a full history of the Pueblos through the 1980s).
[65] *Id.*
[66] *Id.* at 47-52.
[67] *Id.* at 52-59, 248-249.
[68] *Id.* at 13.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 13, 30-35.
[73] *Id.* at 14.
[74] *Id.*
[75] *Id.*

the Fiscales served as an intermediary between the Catholic Church officials and the pueblo officials.[76] Notwithstanding the influence of the Spanish and the Catholic Church, the pueblos retained much of their own culture.[77] Pueblos' modern governance structures still include the traditional leaders and social organization as well as those positions introduced by the Spanish.

The Spanish provided crucial recognition that enabled tribes to survive much of the United States' processes of termination and assimilation. The Spanish government set aside land for the pueblos through land grants and allowed the pueblos to govern themselves if they also followed Spanish law.[78] The period of Spanish control was not without problems, including forced Indian labor, high taxes to the Spanish leaders, and suppression of the pueblos' traditional religion.[79] This lead to the Pueblo Revolt of 1680, and resulted in the overthrow of the Spanish government for twelve years.[80] When the Spanish returned, they struck an unofficial agreement in which the pueblos would respect Spanish authority, the Spanish government would not try to suppress their religion or culture, and both would work to protect the lands from attack by other Indians.[81] The Spanish government exercised control until 1824 when Mexico gained its independence.[82]

The newly formed Mexican government did little to influence the governments of the pueblos who continued their traditional governance and the Spanish modifications.[83] However, the Mexican government continued to recognize the land rights of the pueblos and attempted to protect those lands from being illegally taken.[84] Despite these efforts, there was loss of pueblo land through both legal and illegal means.[85] In 1848, the Mexican government signed the Treaty of Guadalupe Hidalgo (Treaty) to end the Mexican-American War.[86] The Treaty required the United States to recognize all current land ownership.[87] While the pueblos did not have treaties, as many other tribes did, they possessed the Spanish land grants which, in turn, were protected by the Treaty. During the years before New Mexico was granted statehood, the Territory of New Mexico treated the

[76] *Id.*
[77] *Id.* at 17.
[78] *See Id.* at 13-14, 59.
[79] *Id.* at 59-63.
[80] *Id.* at 63-70. For a full account of the Pueblo Revolt, *see , e.g.*, FRANKLIN FOLSOM, INDIAN UPRISING ON THE RIO GRANDE: THE PUEBLO REVOLT OF 1680 (Univ. of NM Press 1996) (1973).
[81] Sando, *supra* note 63, at 79-81.
[82] *Id.* at 70-81.
[83] *Id.* at 83-86.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 86.
[87] *Id.*

pueblos as any other municipality of the territory and did not apply federal Indian laws of the time.[88] This changed in 1910 when the United States granted the pueblos federal Indian status through the Enabling Act of New Mexico.[89] The act set forth guidelines for the new state governments of Arizona and New Mexico, including an express statement that the federal terms of "Indian" and "Indian Country" would include the pueblos.[90] This officially subjected the pueblos to federal Indian laws and policies, including the legislative history of criminal jurisdiction in Indian country outlined in Part I.

B. Profile of One Modern Pueblo Court Observed by an Outsider

Each pueblo has established court structures which range from fully traditional[91] to fully western, with most establishing hybrid courts somewhere in the middle of the two. The few who have completely adopted the western structure provide law trained judges, prosecutors, and public defenders, as well as written codes. There are others whose structures operate in a completely traditional fashion with all cases heard before the governor or tribal council without any representation. In these instances, the courts apply either customary law[92] in conjunction with tribal codes or the Code of Federal Regulations[93] (CFR) which the CIOs utilize or some combination of both.[94] In these courts there might be law-trained judges, prosecutors, and public defenders. There might also be lay judges, law officers who function as prosecutors, and lay representatives. There may also be a combination of both law-trained and lay-trained officials.

The Tribal Court observed is a hybrid structure. The jurisdiction of the tribe was bifurcated into a Traditional Court and a Contemporary Court in 2016.[95] The Contemporary Court has the criminal jurisdiction and resembles a western court structure with some significant modifications. The Pueblo has one law-trained judge, BIA law enforcement officers acting as both police and prosecutor, and no public defender. The Tribal Court does allow attorneys in to the courtroom to represent clients, but few

[88] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 388-89 (1942), https://babel.hathitrust.org/cgi/pt?id=mdp.39015008574082;view=1up;seq=6.
[89] *Id.*; Act of June 20, 1910, 36 Stat. 557.
[90] *Id.*
[91] Based on my experience, fully traditional in the Pueblo context refers to the structure formed under Spanish control which utilizes both customary and civil law traditions.
[92] In my experience in Pueblo courts, these customary laws can be chthonic or a blend of Spanish and chthonic. In addition, they may be written or oral.
[93] 25 C.F.R. § 11.400-54 (2018).
[94] To determine what civil protections are built into the fully traditional Pueblo court structure, a separate case study would have to be done. The remaining Pueblos have various hybrid court structures.
[95] There is a complex set of rules which delineate the subject matter jurisdiction of each court.

defendants obtain outside defense. The Tribal Council has incorporated the CFR section that applies to the non-sovereign federal instrumentality CFR courts as its criminal code.[96] According to the Chief Judge, the court hears between 150-300 criminal cases per year for which most crimes have a possibility of incarceration. Of these cases, approximately 95% of the defendants pled guilty or no contest[97] at arraignment without any plea deal. The remaining five percent are pleas of not guilty. When this occurs, a trial date is set. However, the court has yet to have an actual trial since its creation three years ago. The cases are either dismissed or a plea deal is arranged between the BIA law enforcement officer and the defendant. The most common reason for dismissal is undue delay caused by unavailability of the BIA law enforcement officers and defense counsel who are often located at a distance from the Pueblo.

C. Court Procedure

Over a five-month period, I observed six arraignments in the Contemporary Court. Each of these arraignments followed the same procedure. The judge would begin by asking three preliminary questions to establish the court's jurisdiction and the defendant's ability to knowingly enter a plea:

1. If the defendant was a member of the Pueblo or other federally recognized tribe,
2. If the defendant understands the English language; and
3. If the defendant is currently under the influence of alcohol or any mind-altering drug.

If the defendant is not a member of any federally recognized tribe the case is dismissed for lack of jurisdiction.[98] If the defendant does not speak English, there is court staff available who speak the language of the Pueblo and are available to translate.[99] If the defendant indicates they are under the influence of alcohol or other mind-altering drug, the case is reassigned a court date. Once the jurisdiction and ability of the defendant to enter a plea is established, the judge moves on to an advisement of rights.

[96] 25 C.F.R. § 11.400-54.
[97] Defined as " a criminal plea in which the defendant does not argue innocence but impliedly accepts as true the charges and seeks a sentence without an express finding of guilt, in the hopes of a lighter sentence than might be levied if the defendant were convicted after contesting the charge or charges, but also in the expectation that some measure of civil liability or other consequence of a guilty verdict might be avoided." *Nolo Contendere (No Contest or Nolo or Non Vult Contendere)*, BOUVIER LAW DICTIONARY (Desk ed. 2012).
[98] *See* Oliphant v. Suquamish, 435 U.S. 191 (1978).
[99] In other courts there may be language barriers that implicate a due process violation, however it does not appear to be an issue in this court.

The judge then reads the defendant the following statement:

> You have these rights guaranteed under the Indian Civil Rights Act and under the laws of the [Pueblo]:
>
> 1. The right to know and understand the charges against you.
> 2. The right to enter the plea of Guilty, Not Guilty, or No Contest.
> 3. The right to an attorney at your own choosing and at your own expense.
> 4. The right to a speedy and public trial by the Tribal Court or Jury
> 5. The right to confront witness against you and to cross examine those witnesses
> 6. The right to call your own witnesses by subpoenas.
> 7. The right to be released on bail or under conditions determined by the court.
> 8. The right to remain silent and require the Pueblo to prove its case against you beyond a reasonable doubt.
> 9. Due to the sequestered hearings for persons under the age of 18, there is no right to a jury hearing.
> 10. The right to appeal a conviction.[100]

The defendant is provided the Advice of Rights Form, which he is asked to initial and sign in acknowledgement that he understands his rights. Once the defendant has signed the form, the judge reads into the record the accused charges. Afterwards, the judge asks the defendant what he wishes to plea to each charge. Once a plea is given, the judge confirms that the defendant intends to enter the plea and understands a plea of guilty or no contest waives some of the defendant's rights. The defendant must verbally acknowledge that he understands this waiver of rights. Then the pleas are entered. If the defendant plead guilty or no contest, the judge then asks if the defendant would like to say anything on their behalf before deliberating their sentence. If they do not wish to say anything, the judge normally asks a few questions, including: where the defendant lives, their ability to travel, whether they have a job, whether they have any children, any prior criminal history, and in cases of substance abuse, whether the defendant considers themselves to be an addict and if they have received any kind of in-patient treatment for their substance abuse. After all the pleas are entered, the judge retires to judicial chambers to deliberate on sentencing.

Sentences are entered on the same day. The judge takes a short recess and then returns to pronounce the sentence. The judge indicated that in most cases, a potential sentence was contemplated prior to the

[100] Modified from the court's Advice of Rights Form

arraignment hearing. After hearing the defendant's statements, the judge then reexamines the anticipated sentence and may adjust the sentence if necessary. Most of the cases observed were alcohol or drug related offenses which resulted in suspended jail time subject to completion of substance abuse programs. The Pueblo has an arrangement with an in-patient treatment facility for substance abuse and will pay for tribal members to attend this treatment program. During my observations, the judge used this option for all defendants who had not yet been to an in-patient treatment facility rather than imposing jail times, regardless of how many times they had previously been convicted of substance abuse related crimes.

D. Observations

Over the course of five months, I was able to observe three days of arraignment hearings, for a total of six arraignments.[101] This represents approximately four percent of the total cases estimated to have occurred during 2017. For each of the arraignments I will provide background on the defendant, the charges, their plea, the sentence, and any other unique aspects of their arraignment. It is important to note that none of the defendants had counsel present with them and none of them requested counsel. It is less clear if they waived the right to counsel as there was no question from the judge indicating they understood they were waiving their right to counsel prior to entering a plea. I was not provided any criminal history information unless it was discussed in open court. I will follow my observations with a short commentary on my overall perspective.

Defendant 1: Male, member of the Pueblo, Adult. Charged with Assault[102] and Disorderly Conduct.[103] During arraignment, the defendant appeared confused on what each of the pleas meant and changed his plea multiple times. He seemed to be inclined to admit guilt but feared the consequences. When the judge asked if he understood the pleas, he stated he did not. The judge proceeded to further explain the differences. The defendant claimed to understand the pleas and proceeded to enter pleas of no contest. He changed his mind once more to pleas of guilty. At this point the judge was inclined to enter pleas of not guilty on behalf of the defendant

[101] This represents a snapshot of the court and is not enough to demonstrate an accurate sample size. Observations were difficult to schedule due to the court's low case numbers and holiday schedules. See author notes for specific dates.

[102] 25 C.F.R. § 11.400 ("Assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor."); *Id.* § 11.450(a) (A misdemeanor may result in "Up to 1 year in prison, or a fine of up to $ 5,000, or both.").

[103] *Id.* § 11.441 ("An offense under this section is a petty misdemeanor if the actor's purpose is to cause substantial harm or serious inconvenience, or if he or she persists in disorderly conduct after reasonable warning or request to desist."); *Id.* § 11.450(b (A petty misdemeanor may result in "up to 6 months in prison, or a fine of up to $ 2,500, or both.").

so that he might have a chance to form a plea agreement with the BIA officer in charge of his case. It was hard to follow what the outcome of the pleas were while observing. I was later informed by the Judge that the defendant pled guilty to the charge of Disorderly Conduct and not guilty to the charge of Assault.

The defendant was sentenced to 120 days of supervised probation plus a fee of $185.00 for the crime of Disorderly Conduct. At a later pre-trial hearing the defendant took a plea deal for the Assault charge and was sentenced to an additional 120 days of supervised probation for a plea of guilty.[104]

Defendant 2: Male, member of the Pueblo, Adult, currently on probation for a federal conviction. Charged with Assault,[105] Public Intoxication,[106] Possession of a Controlled Substance,[107] Open Container,[108] and Possession with Intent to Distribute.[109] The defendant entered pleas of no contest to all charges except Possession with Intent to Distribute. The defendant pled not guilty to Possession with Intent to Distribute and is currently awaiting trial on this charge. When allowed to speak to the court the defendant made the statement, "I know I'm going back to jail," presumably about the violation of his federal probation with the tribal arrest.

The defendant was sentenced to 60 days incarceration for the Assault charge and an additional 30 days incarceration for the charge of Possession of a Controlled Substance. He was also charged a fine of $100.00 for the charge of Public Intoxication and fine of $100.00 for the charge of Open Container. This is the only defendant whose sentences were not deferred.

Defendant 3: Male, member of the Pueblo, Adult. The defendant was charged with Driving while Intoxicated (DWI)[110] and Public

[104] This information was provided by the Court, the pre-trial hearing process was not observed for this paper.

[105] 25 C.F.R. § 11.400 ("Assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.") § 11.450(a) (A misdemeanor may result in "up to 1 year in prison, or a fine of up to $ 5,000, or both.").

[106] Per Tribal Ordinance intoxication is punishable with up to 30 days incarceration or $300.00 fine or both. *See* author notes.

[107] 25 C.F.R. § 11.452 ("Violations of paragraph (a) of this section are punishable as a misdemeanor."); *Id.* § 11.450(a) (A misdemeanor may result in "Up to 1 year in prison, or a fine of up to $ 5,000, or both.").

[108] Per Tribal Ordinance Open Container is punishable with up to 30 days incarceration or $300.00 fine or both. *See* author notes.

[109] Per Tribal Ordinance Possession with intent to Distribute is punishable with up to 1-year incarceration or find up to $5,000.00 or both. *See* author notes.

[110] 25 C.F.R. § 11.445 ("A person who shall drive, operate or be in physical control of any motor vehicle when his or her alcohol concentration is 0.10 or more shall be guilty of driving while intoxicated, a misdemeanor."); *Id.* § 11.450(a) (A misdemeanor may result in "up to 1 year in prison, or a fine of up to $ 5,000, or both.").

Intoxication.[111] He pled no contest to both charges. This was the only defendant who openly spoke to the judge about his personal circumstances. He admitted being an alcoholic and stated that he wanted help with his alcoholism. He also admitted that his actions were improper and that he should have known better.

He was fined $600.00 for the DWI which was suspended subject to completion of six months of supervised probation and the DWI prevention program which is paid for by the tribe. He was fined an additional $100.00 for the Public Intoxication charge, which was not suspended.

Defendant 4: Female, member of the Pueblo, Adult. Charged with Neglect of Child[112] and Public Intoxication.[113] The judge mentioned that there probably should have been three counts of Neglect of Child as normally there is one count per child and she is a single parent to three children. However, the judge stated that this is an error in the charges which he would not correct without motion by the BIA law enforcement officer. She pled guilty to both charges. After entering her pleas, the judge asked her various questions. The defendant stated she had been previously incarcerated for eight months for a DWI which resulted in a car crash while her children were with her. Since her release, she had been sober and claimed this was her first relapse. She thought that an in-patient treatment for her alcoholism might be beneficial to her. She was also worried about having her children removed. The defendant was employed but she was terminated two weeks previously. She was currently looking for new employment. Before leaving to deliberate on her sentence, the judge reminded the defendant of the consequences of her actions, focusing on the impact to her children who were unattended while she was inebriated. Due to her lack of supervision they were found in a dangerous situation, which is why the police were called. There was a member of the Pueblo's social services department present; because it is likely there will be a civil case to remove the children from the home for which the result of the criminal charges will be significant.

The defendant was sentenced to three months imprisonment for Neglect of Children which was suspended subject to her completion of 12 months supervised probation and a 180-day in-patient treatment program. While awaiting admission to the treatment program, she was required to

[111] Per Tribal Ordinance, Public Intoxication is punishable with up to 30 days incarceration or $300.00 fine or both. *See* author notes.

[112] 25 C.F.R. § 11.424 ("A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he or she knowingly endangers the child's welfare by violating a duty of care, protection or support."); *Id.* § 11.450(a) (A misdemeanor may result in "up to 1 year in prison, or a fine of up to $ 5,000, or both.").

[113] Per Tribal Ordinance, Public Intoxication is punishable with up to 30 days incarceration or $300.00 fine or both. *See* author notes.

wear an ankle alcohol monitoring bracelet. She was also fined $100.00 for the Public Intoxication. The judge indicated that the outcome of this case would likely have been more severe if she had already been given the opportunity to go to an in-patient treatment program for her prior conviction. The judge stated he often will only defer to treatment programs if they have not already gone through one.

Defendant 5: Male, member of the Pueblo, Adult. The defendant was charged with DWI,[114] Open Container,[115] Liquor Control Ordinance Violation.[116] The defendant pled guilty to all charges. The defendant made no statement on his behalf and answered the judge's questions with little to no explanation.

The defendant was fined $600.00 for the DWI which was suspended subject to completion of six months of supervised probation and the DWI prevention program. Defendant was also fined $100.00 for the Open Container charge and another $100.00 for the Liquor Control Ordinance Violation.

Defendant 6: Female, member of the Pueblo, Adult. The defendant was charged with Public Intoxication,[117] Domestic Violence,[118] and two counts of Neglect of Children.[119] She pled guilty to all charges but the Neglect of Children charges, which were set for trial. During the arraignment she expressed confusion about the procedure and how the plea fit into it. After the judge explained it further, she stated she understood, and the trial proceeded. However, she still had a quizzical look on her face, indicating she might still have been confused. There were two letters also submitted to the judge on her behalf. The first was from a tribal employee who works with the Pueblo's home visiting program. This program helps parents in the home to become better parents. It stated she had been in the program for one and a half years and was a fit parent during that time. The second was from her employer which detailed that the employer had

[114] 25 C.F.R. § 11.445 ("A person who shall drive, operate or be in physical control of any motor vehicle when his or her alcohol concentration is 0.10 or more shall be guilty of driving while intoxicated, a misdemeanor."); *Id.* § 11.450(a) (A misdemeanor may result in "up to 1 year in prison, or a fine of up to $ 5,000, or both.").

[115] Per Tribal Ordinance, Open Container is punishable with up to 30 days incarceration or $300.00 fine or both. *See* author notes.

[116] The Pueblo is a dry reservation, meaning that the mere possession of alcohol is a crime.

[117] Per Tribal Ordinance, Public Intoxication is punishable with up to 30 days incarceration or $300.00 fine or both. *See* author notes.

[118] 25 C.F.R. § 11.454 ("A person who commits domestic violence by inflicting physical harm, bodily injury, or sexual assault, or inflicting the fear of imminent physical harm, bodily injury, or sexual assault on a family member, is guilty of a misdemeanor."); *Id.* § 11.450(a) (A misdemeanor may result in "up to 1 year in prison, or a fine of up to $ 5,000, or both.").

[119] 25 C.F.R. § 11.424 ("A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he or she knowingly endangers the child's welfare by violating a duty of care, protection or support."); *Id.* § 11.450(a) (A misdemeanor may result in "up to 1 year in prison, or a fine of up to $ 5,000, or both.").

previously worried about the defendant but that she was doing better and was a hardworking employee.

The defendant was fined $600.00 and five days of incarceration for the Domestic Violence charge which was suspended subject to completion of six months unsupervised probation. She was also fined $100.00 for the Public Intoxication charge.

E. Civil Rights Commentary on Arraignments

The three crucial issues I observed at court were: (1) the lack of a public defender[120] or public defense system, (2) the unclear role of the judge, and (3) the foreign nature of the Pueblo's proceeding. First, the justice system lacked public defenders. The complete lack of public defense led to several critical failures in the adversary system – namely confusion, easy conviction, and severe collateral consequences.

Two of the six defendants I observed stated they were confused about the proceedings and the pleas they were entering. Both continued to have quizzical looks after the judge provided further explanations. This indicated to me that they likely did not understand the charges and consequences. I am also inclined to believe that most of the other defendants were also confused, but simply did not express that confusion by any outward means. The exception to this might be the defendant who had previously been through the federal system, although the differences from federal proceedings may have still led to confusion. Confusion is not an uncommon thing in the courtroom. Individuals in state and federal court are likely often confused. The difference is that they have an individual with them who is not. That individual is an attorney, whether provided by the government or retained by the individual, who understands the system and can explain, as well as, advise them on the best course of action. The judge can only go so far to explain the situation to the defendant and he certainly cannot advise the defendant on what course of action to take.

In addition, none of the individuals advocated for reduced or deferred sentences. A public defender advocates for reduced or deferred sentences. While this judge frequently uses deferment programs, there is no guarantee that they will be offered, especially as defendants are likely unaware of them prior to trial. This is the problem. The defendants are not knowledgeable enough in the law to properly defend or advocate for themselves and thus must rely on the goodwill of the judge. It could be argued that due to the fact most received reduced or deferred sentences,

[120] Public defender is used here to refer to an individual who understands the legal system in which the trial occurs and advocates for the defendant in court. Whether this person is a lay advocate or someone with a degree and state bar license is a question for future discussion.

defendants do not need representation. However, under *Argersinger*, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense … unless he was represented by counsel at his trial."[121] Three of the defendants were sentenced to actual incarceration and of those, one served the sentence. The other two were given deferred sentences but had a possibility to serve the actual time given a violation of the deferment. Had these cases been in state or federal court, the defendants would have been provided counsel if the court wished to sentence the defendants to jail time. In addition, without anyone to review the file, there is a possibility the charges could have been dismissed for lack of evidence, improper evidence gathering, or other technical reasons. This leads into the second issue.

The second issue is the confusion surrounding the judge's role. As an observer I was confused as to the limits of the judge's power. The Judge confirmed that there was a shift in power towards the judge in this setting. The Judge also was unsure of where the limits to judicial power were and erred on the side of following United States law due to the Judge's legal training. In the United States common law structure, a judge can create and interpret laws, accept pleadings, act as referee between attorneys and sentence defendants according to guidelines set forth by the government.[122] Judges do not make findings of fact or identify civil rights violations in criminal jury trials.[123] Facts are left to the jury in most criminal trials, and it is the role of the defense attorney to find and bring forth civil rights violations.[124] Judges simply rule on those violations when brought forth.[125] In civil law traditions, the judge has a slightly different role. "The judge is presumed to know the law and has to apply it, where it should be applied."[126] The charges are often brought by the judge, who questions witnesses, and determines the appropriate remedy as indicated by the code.[127] The attorney's presence ensures that the civil rights are not violated, but the judge is expected to identify and address civil rights violations in their application of the law.[128]

In this Pueblo court, the judge must play a careful balancing game, where he must look for the civil rights violations to protect the defendant,

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[121] 407 U.S. 25, 37 (non-binding in tribal courts imposing the ICRA right to retain counsel).
[122] VIVIENNE O'CONNOR, PRACTITIONER'S GUIDE: COMMON LAW AND CIVIL LAW TRADITIONS, 23-24 (International Network to Promote the Rule of Law 2012).
[123] *Id*. at 24. Jury trials are only an automatic right in the U.S. structure when the defendant faces a possibility of six months imprisonment. Scott v. Illinois, 440 U.S. 367 (1979).
[124] *Id.*
[125] *Id.* at 23-24.
[126] GLENN, *supra* note 2, at 144.
[127] In some civil law countries there are prosecutors who have varying levels of activity during the investigation and trial. O'CONNOR, *supra* note 119, at 20-21 (International Network to Promote the Rule of Law 2012). https://www.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%20Traditions.pdf.
[128] *See, Id.*

while simultaneously representing the government's interest in convicting criminals as the BIA officers only appear during trials, not arraignments. This is like the civil law tradition, but it still lacks a defense attorney. During arraignment, there is no witness examination which means the judge is ruling based on the presumption that the law enforcement officer has presented accurate facts in his report. All of this shifts the power in the courtroom towards the judge. The judge then has an immense amount of power without anyone in the room to check him, unlike both the civil and the common law legal traditions which provide defense attorneys.[129] The Judge observed is very conscious of this fact and tries to be impartial and fair to the defendant. This is likely why there have been so many dismissals for undue delay.

Due to recent habeas corpus petitions[130] against tribal court convictions which have cited judicial bias, there is reason to believe that without stated limits on judicial power there is a likelihood of improper judicial discretion.[131] The Judge has done a good job in dealing with this imbalance, but a different judge may have made different choices, such as adding additional charges to Defendant 4 due to the knowledge that she had endangered multiple children, or not recommending deferment to treatment for all defendants. A defendant would likely not be able to identify this as a violation of court rules and due process. Even if a defendant was able to identify this issue, they might be hesitant to argue against the additional charges due to the culture of the Pueblo.

The final issue is that the Tribal Court observed does not require accommodation of cultural values. The judge informed me that within the

[129] While both the traditions provide attorneys for criminal defendants, their roles are very different. In the common law tradition, the defense attorney can investigate, call witnesses, and play a very active role in presenting their case. In the civil law tradition, the defense attorney cannot investigate, speak to witnesses, call witnesses, and overall plays a reduced role in the case. They however can still explain proceedings to their client, view the case file, and ask the judge to ask witnesses questions or consider certain aspects of the case. *Id.* at 19-20.

[130] Defined as a petition "to obtain immediate relief from illegal confinement; to liberate those who may be imprisoned without sufficient cause, and to deliver them from unlawful custody; or to obtain a proper custody of persons illegally detained from the control of those who are entitled to the custody of them." *Habeas corpus*, BALLENTINE'S LAW DICTIONARY (LexisNexis 2010).

[131] *See*, Romero v. Goodrich, No. 1:09-CV-232-RB-DJS (D.N.M. Mar. 9, 2010) (habeas petition alleging "lack of counsel, judicial bias, and the failure to have his Miranda rights read to him") (dismissed for mootness); Cantrell v. Jackson, No. 1:16-CV-33-GF-BMM (D. Mont. Aug. 30, 2016) (habeas petition alleging "unlawful release of medical records, judicial bias, denial of competency evaluation, denial of effective assistance of counsel ...") (dismissed for lack of exhaustion); *See also* Aguilar v. Rodriguez, No. 1:17-CV-1264 JCH/SMV (D.N.M. Sep. 18, 2018) (dismissed for lack of exhaustion); Coriz v. Rodriquez, No. 1:17-CV-1258 JB/KBM (D.N.M. June 7, 2018); Tortalita v. Geisen, No. 1:17-CV-684-RB-KRS (D.N.M. May 31, 2018) (petition granted and conviction vacated); Van Pelt v. Giesen, No. 1:17-CV-647-RB-KRS (D.N.M. May 11, 2018) (petition granted and conviction vacated); Toya v. Toledo, No. 1:17-CV-17-0258-JCH-KBM (D.N.M. Sep. 26, 2017) (petition granted and conviction vacated); Talk v. Southern UTE Det. Ctr., No. 1:17-CV-00669-WJ-KK (Aug. 15, 2017); Garcia v. Elwell, No. 1:17-CV-00333-WJ-GJF (D.N.M. May 25, 2017).

Pueblo culture they value admitting wrongdoing.[132] As a member of the culture, one should always admit wrongdoing and seek ways to make amends to the community. This is in opposition to the western culture where we value the presumption of innocence until proven guilty. While the western courts experience an equitable percentage of guilty pleas, those pleas are often the result of plea deals that were entered prior to the arraignment or shortly after an entry of not guilty, as sentencing does not always happen the same day.[133] While it is true that defendants have the right to represent themselves, and can enter a plea without a negotiated plea settlement, the presence of an attorney in a public defense system plays a critical role. The attorney is present to assist in making the decision and guiding the defendant to the best choice for them. Only one of the above defendants entered a plea deal. In federal court, nine in ten defendants enter negotiated plea deals.[134] While in this Pueblo court, one in six entered a negotiated plea deal and six out of six pled guilty to at least one charge without a plea deal. This is a stark difference caused by a court structure that does not accommodate the values of the culture in which it sits.[135] The judge did reward the defendants above for their admittance of guilt and thereby accommodated the cultural value. However, this is not a procedural requirement of their system; it is again the goodwill of the judge. These three issues come together to create fertile ground for civil rights violations. Due to the high level of habeas corpus petitions from tribal courts without written protections, there is a heightened risk of future civil rights violations in this court.

CONCLUSION

The ICRA was created to continue a long history of federal regulation over tribal jurisdiction. This history was not arbitrary, rather it stems from the policy of assimilation that is present throughout federal Indian law. By requiring tribes to conform to values that might not be present in their system, the ICRA pushed tribal criminal courts towards the

[132] *See also*, Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*, 73 Fordham L. Rev. 2133, 2156 (2005) (socialization to accountability in Indigenous societies runs against bedrock principles of Anglo-American criminal law of pleading innocence/guilt and the right to remain silent).

[133] 97% of federal cases are pled guilty. U.S. DISTRICT JUDGE JOHN L. KANE, *Plea Bargaining and the Innocent*, https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent (Dec. 12, 2014). 90% of cases are pled through negotiated plea deals. SARA J. BERMAN, *The Basics of a Plea Bargain*, https://www.nolo.com/legal-encyclopedia/the-basics-plea-bargain.html (last accessed Nov. 26, 2017).

[134] 90% of cases are pled through negotiated plea deals. SARA J. BERMAN, *The Basics of a Plea Bargain*, https://www.nolo.com/legal-encyclopedia/the-basics-plea-bargain.html (last accessed Nov. 26, 2017).

[135] Because the western system is formed from an entirely different value system, finding a way for the western structure to accommodate the values of the Pueblo is extremely difficult, if not impossible.

western adversarial system. This system does not always fit the local communities and can result in civil rights violations.

The disconnect between the legal system and the cultural values of the community was seen during my court observations at the Tribal Court. While there were no civil rights violations witnessed, there were areas of concern because of the lack of protections. This was especially troubling as other pueblo courts have seen an increase in habeas corpus petitions stemming from the areas of concern witnessed, specifically the lack of a public defense system, a shift in the judge's power, and indirect punishment for adherence to pueblo cultural traditions.

Tribal leaders should examine the structure they have created in response to the implementation of the ICRA to determine if there are civil rights violations occurring. If there are violations, they should look at the history of their tribe and its cultural values to find ways to solve those violations. In addition, the solutions should be implemented with the consent of the tribal government as well as the tribal people. Tribes are sovereign nations and can make decisions for themselves. The federal government should find a better way to allow tribes to exercise this sovereignty.