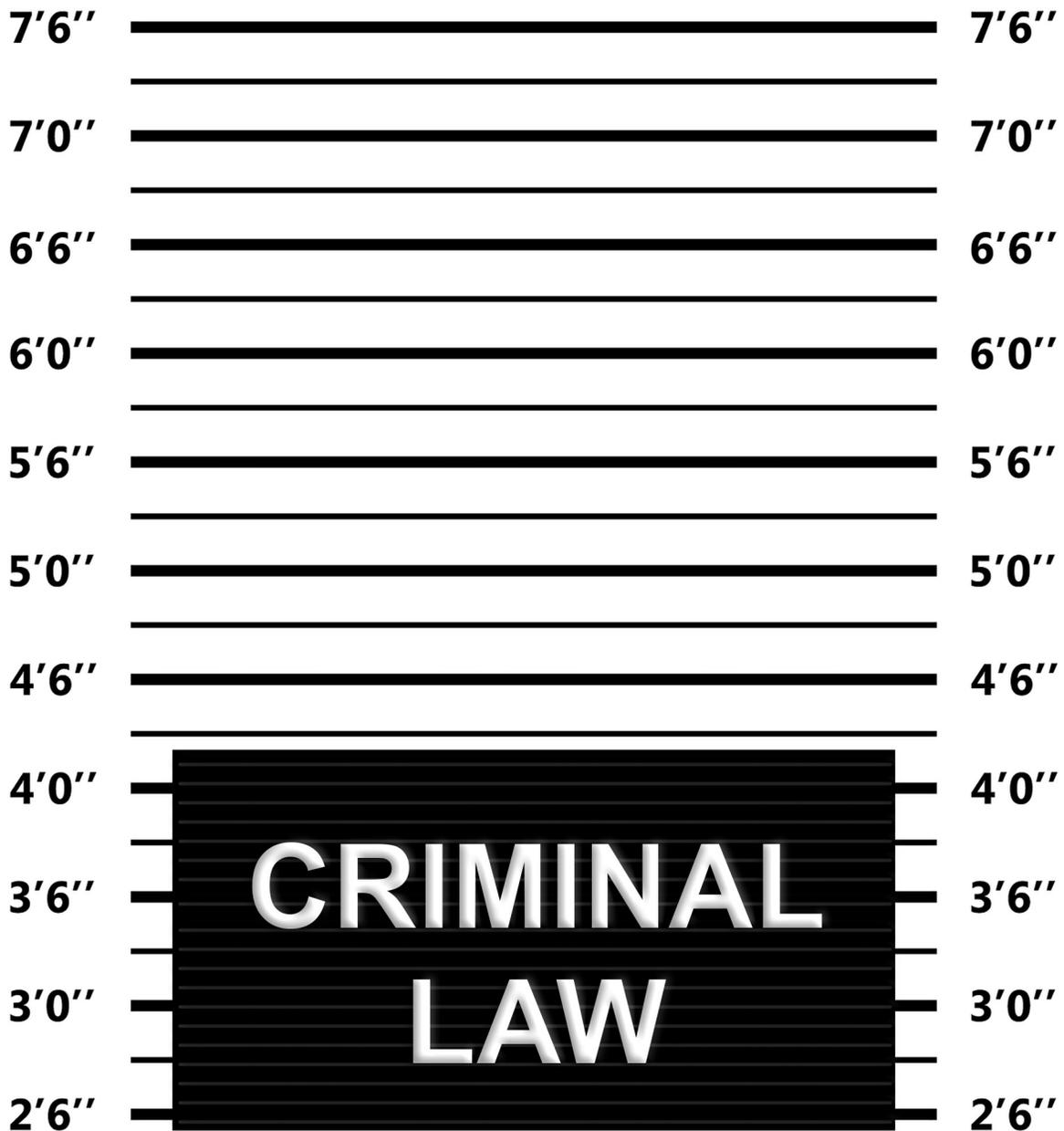


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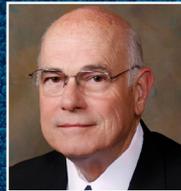
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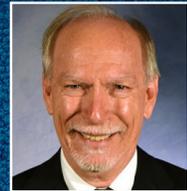
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Is your due process honest?

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

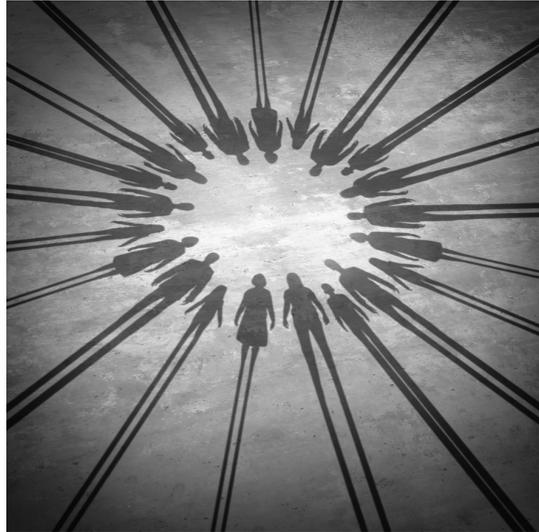
Rights of Members of Indian Tribes, supra note 23, at 127 (statement of John S. Boyden).

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.

“Where are all the Women?”

A Gender Analysis of the New Mexico Criminal Legal Profession.

By: Michelle S. Garcia and E. Nicole Manning

I. Introduction

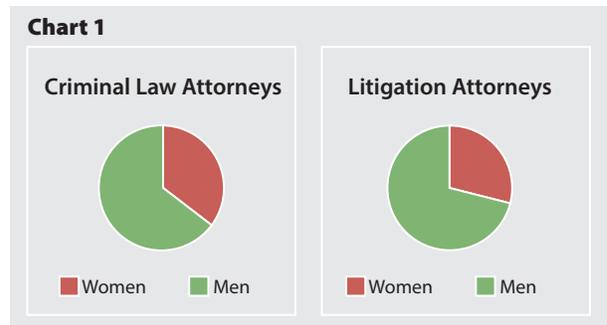
This paper examines the numbers of law graduates, registered members of the bar, and self-identified criminal and litigation attorneys, to evaluate the gender gap within the criminal law field in New Mexico. A cursory analysis of the raw numbers of women, compared to men, who practice law in New Mexico appeared to show that with regard to the number of criminal attorneys, there exists an imbalance of female to male practitioners—with men outnumbering the women in almost all fields. Encouragingly, the largest group of criminal attorneys appeared to be graduates of the University of New Mexico School of Law. The law school has matriculated women at a rate more than 50% for several years. In January 2016, the University of New Mexico School of Law celebrated the distinct achievement of being publicly ranked first in the nation for public defenders and prosecutors, noting that the most recent year of graduates showed 46.8% of former students were employed in the public sector, an increase of over 20% from the national average. The relatively high percentage of law graduates who entered the criminal field suggested that New Mexico’s sole law school provides an important pipeline into the practice of criminal law for the New Mexico bench and bar. The difference in the graduate to practitioner numbers prompted the authors to conduct a more thorough review of the available data in an attempt to more closely analyze the discrepancies and determine the true gender ratio of women attorneys in the criminal law field.

II. Reported Demographic Surveys and Methodologies

The key source of demographic information used in the creation of the datasets for this analysis came directly from the State Bar of New Mexico. This verified information included numbers on barred and registered attorneys currently practicing in the State of New Mexico. The most recently available data from the State Bar of New Mexico indicated that as of June 2018, the State Bar had a total of 7,428 active members. Of those members, 2,933, or 39.49%, were women. The state numbers tracked nationally reported statistics which showed that women made up 36% of the legal profession when reported in *A Current Glance at Women in the Law January 2017* as published by the American Bar Association (ABA).

Notably, the State Bar of New Mexico allows attorneys to self-report information on their employment in the criminal law field by identifying practice areas, specialties, and voluntary membership in practice sections. Although all attorneys who practice within the state must maintain public address information in the State Bar of New Mexico’s *Bench & Bar Directory*, not all attorneys identify sub-specialties or areas of practice. Conversely, some attorneys identify multiple areas that identify a career involving criminal law and/or litigation. Within the numbers of those individuals who self-identified as practitioners of criminal law, women represented only 35.38% of the criminal lawyers. Even fewer women self-identified as litigation attorneys, a mere 28.86% of practitioners. See *Chart 1*.

The University of New Mexico School of Law tracks recent graduate employment information and the same data is re-reported in several national law school published rankings such as *US News and World Report*, *Forbes*, *The Princeton Review* as well as



the accreditation information through the ABA. The most recent graduate employment information from the ABA *Employment Summary Report for 2017 Graduates* for the University of New Mexico School of Law tracked job data for 106 graduates of which 79 were employed within the State of New Mexico (an additional four and two graduates were employed in Arizona and California respectively). Thus, strong data exists to support the correlation between the pipeline of University of New Mexico graduates into the criminal law field generally.

Nationally, the ABA also tracks numbers across states for the totals and percentages of women in law. Since 2000, the ABA has published the statistical snapshots by year of women in law from annual surveys through the ABA Commission on Women which show a general increase in women attorneys and the number of women attorneys as a percentage of the total attorney population. For example, in 2000, women made up 47% of law school students but only 28.9% of U.S. lawyers. In 2017 the same ABA surveys showed that women were 49.3% of first year law students and 36% of the total legal profession. The increase in women is also reflected in New Mexico. See *Chart 3*.

III. Contextualizing Population Trends

Without additional context, it can be difficult to compare the gender datasets meaningfully across time, since larger numbers of women attorneys is still a relatively recent development and sample sizes vary across the reported numbers. The rapid increase of women law students and practicing attorney from the 1960’s to the present appears to have caused the upward trend wherein younger women represent a greater percentage of the bar than preceding age groups. For instance, women aged 25-29 represent 52.34% licensed New Mexico attorneys within their age bracket. By contrast, women aged 30-34 years old represent only 47.00% of their age bracket. See *Chart 2*.

A second useful comparison can be made between the reported state data and the national data on women attorneys. Before women began joining the New Mexican legal profession in large numbers in the 1960’s, women attorneys were rare and the demographic changes that now have women as the majority of students in many law schools reflect that recent demographic change. Nationally, there has been a clear upward trajectory to both the total numbers of women practicing law and the subsection of women who practice criminal law as more women have entered

the legal field generally. New Mexico follows the national trends with some important departures. Namely, the number of women who enter the criminal law field in New Mexico has been, and remains, a higher percentage of the State Bar of New Mexico than in many states due to the high numbers of recent local graduates who become prosecutors and public defenders. Another important difference between New Mexico and the national statistics is represented in the number of women employed as State court judges. Nationally, the ABA has reported from its 2017 dataset that the 5,596 women judges make up only 31.1% of all State judges in the U.S. but in New Mexico has outperformed some judicial standards by having historically high percentages of women appellate judges.

A third comparison, with surprising results, was the wide variation of women attorneys who are active members of the State Bar of New Mexico per years in practice. For comparison, those women attorneys in New Mexico who had been practicing for 6-10 years account for 42.74%, but those women that had been practicing for 11-15 years represent 48.74% of that bracket. See Chart 3.

IV. Conclusions

Although the University of New Mexico School of Law has provided a clear influx of women into the criminal law field as prosecutors and public defenders, the population data sets for the makeup of the State Bar of New Mexico strongly suggest that a drop-off of women who practice as

criminal attorneys takes place sometime after those recent graduates enter the workforce and gradually becomes a much smaller percentage of the total criminal bar. Although it would be beyond the scope of the population data sets and statistics currently reported for the State of New Mexico to attempt to draw conclusions as to at the specific causes for this drop-off of women criminal attorneys, issues of gender diversity within the criminal field and more generally within the legal field remain a topic of intense debate and study by many national institutes and researchers. It is the hope of the authors that the collection and publication of the statewide statistics on gender diversity within New Mexico encourage additional analysis by members of the criminal bar to uncover what factors are causing women to leave the criminal legal field. ■

Michelle Garcia is a senior trial attorney for the State of New Mexico. She is a graduate of Loyola College of Law where she served as the managing editor of the Loyola Law and Technology Annual.

E. Nicole Manning is an assistant district attorney in the First Judicial District. She received a J.D. from the University of Richmond School of Law.

Endnotes

¹ The incoming Fall 2017 percentage of women students was 58.33% , in the 2016 school year the percentage of female students was 56%, between Winter 2016 and Fall 2017 the female gender enrollment was 55% of the law school student body.

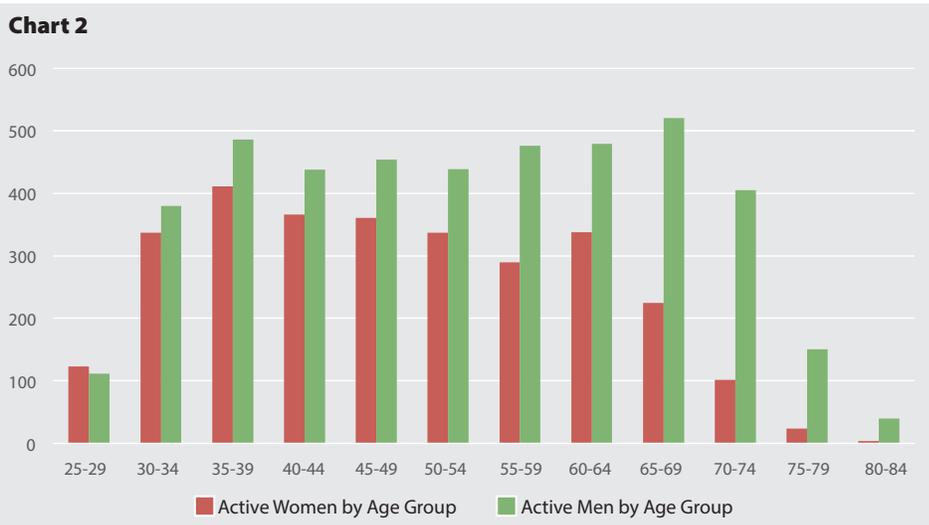
² For the complete articles on this topic please see, <http://lawschool.unm.edu/news/2016/01/prelaw.html> and http://www.nxtbook.com/nxtbooks/cypres/prelaw_2016winter/.

³ The authors are grateful for the data sets released by the State Bar of New Mexico, The University of New Mexico School of Law, the ABA sections on diversity and are indebted to the previously published research of Maureen Sanders in the 2009 Winter Issue of the New Mexico Law Review.

⁴ For example, an attorney may list as areas of practice: “DWT”, “criminal” and “litigation”- although either criminal or DWI would count this attorney as practicing criminal law for the purposes of this article, the litigation identifier would only do so if their other self-reported data indicated practice within the criminal law field.

⁵ The authors are indebted to the previously reported data from A Woman for Her Time and Our Future, 39 N.M. L.Rev. 29(2009) by Maureen Sanders who noted in her article that “[u]ntil the early 1960’s no more than 3 percent of the lawyers in the United States were women...in 2007, 2,275 women were active members of the State Bar of New Mexico. they comprised 36.8 percent of the State Bar membership.”

⁶ For a more thorough discussion of gender and diversity within New Mexico compared to other states, please see the 2010 Brennan Center for Justice Report on Improving Judicial Diversity which reported that women judges were 40% and 30% of the New Mexico State Supreme Court and Court of Appeals respectively using statistics from the 2010 ABA National Database on Judicial Diversity in State Courts which was the last year of collected data. Stable url available at, https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf



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