

Balancing Defendant's Rights and Victim's Right

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Hon. Ron J. Whitener & Adrian T. Smith

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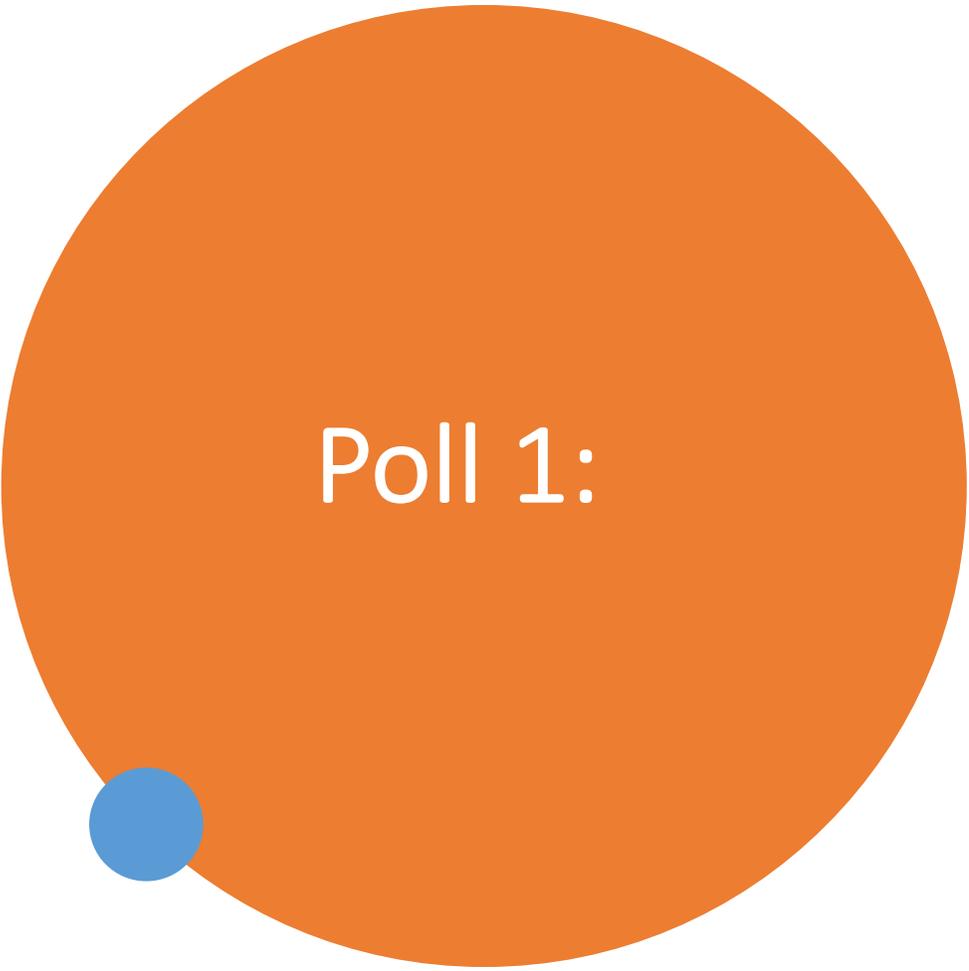


THE
INDIAN
CIVIL
RIGHTS
ACT AT
FORTY

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Overview of the ICRA – the Foundation of Defendant Rights



Poll 1:

- The U.S. Constitution applies in tribal courts:
 - True
 - False

Inapplicability of the U.S. Constitution to Tribal Governments

- Talton v. Mayes, 163 U.S. 376 (1896)
 - The United States Constitution does not apply to tribal governments
 - Federal courts do not have the authority to determine validity of tribal laws



Tribal Sovereignty is Inherently Tribal

- U.S. v. Wheeler, 435 U.S. 313 (1978)
 - Tribes are independently sovereign
 - Prosecutions by federally-recognized tribes are not an exercise of federal authority
 - No double jeopardy if a criminal act is prosecuted by the tribe and state/federal governments

The Indian Civil Rights Act (ICRA) of 1968

- Tribal governments were only limited by their internal laws and traditions
- Individuals aggrieved by tribal governments wanted rights similar to the U.S. Constitution
- Congress created a set of rights more limited than the Bill of Rights
- It also limited the ability of individuals to seek federal redress

Purpose of
ICRA
(according to
United States
Supreme
Court)

- ICRA has competing purposes
 - To strengthen the position of individuals in relation to tribal authority
 - To promote the federal policy of furthering tribal self-government
- Tribal forums are the primary place to enforce ICRA
- Federal habeas corpus jurisdiction applies

Santa Clara Pueblo v. Martinez, 439 U.S. 49 (1978)

View from the Bench

- Why do we care about ICRA?
- Why do we protect a defendant's rights?
- What does this have to do with sovereignty?

The Indian Civil Rights Act (ICRA) of 1968

- **No double jeopardy**
 - Bench Response – Inquire as to likelihood of other jurisdiction charges
 - Prosecution Response – Make thoughtful charging decisions; be ready to argue the “mutually exclusive elements” in overlapping charges
 - Law Enforcement Response – Provide thorough investigations and keep Prosecution apprised of gaps in evidence and/or additional investigations
- **No forced self-incrimination**
 - Bench Response – Vigilance can be important during hearings and trials with with unrepresented Defendants
 - Prosecution Response – Avoid improper questioning
 - Law Enforcement Response – Advise Defendant of their rights; Cease questioning when a defendant claims their right to be silent or requests an attorney; Use proper interrogation techniques; Stay up to date on training

The Indian Civil Rights Act (ICRA) of 1968

- **Right to a speedy trial, to be informed of charges, confrontation, subpoenas, assistance of an attorney at own expense**
 - Bench Response – Minimize continuances; provide case schedule order; provide an advisement of rights; explain and moderate examinations; make time for necessary colloquies
 - Prosecution Response – Minimize continuances; ensure charging documents are clear; follow (or, if necessary, create) subpoena procedures; provide timely discovery
 - Law Enforcement Response – Work with prosecution to provide timely discovery; create clear system for service of process; clearly document all police work

Indian Civil Rights Act (ICRA) of 1968...

- **No excessive bail, fines, cruel and unusual punishments**
 - Bench Response – Consider the use of sentencing guidelines and bail schedules
 - Prosecution Response – Consider the use of sentencing guidelines and bail schedules or inter-office policies
 - Law Enforcement Response – Have consistent policies for jailing and releasing individuals
- **Limits on who can be prosecuted, imprisonment and fine amounts**
 - Bench Response – Familiarity with ICRA; remind defendants of their right to appeal/ensuring an appellate system of review
 - Prosecution Response – Make sure you understand federal recognition and who is members. (stories!)
 - Law Enforcement Response – Work closely with prosecution on issues related to jurisdiction, and charging

The Indian Civil Rights Act (ICRA) of 1968

- **No unreasonable search and seizure**
 - Bench Response – Be available for warrants; Provide clear, consistent, and reasoned rulings
 - Prosecution Response – Provide regular training to law enforcement about search and seizure standards (and consequences)
 - Law Enforcement Response – Have a strong process for obtaining warrants; understand any standards for warrantless search; consider what consent looks like; have a strong relationship with prosecution

Indian Civil Rights Act (ICRA) of 1968...

- **Jury of at least 6 in all criminal trials**
 - Bench Response – Have clear jury selection procedures; have clear jury instructions; have location to sequester jury
 - Prosecution Response – Have policies and parameters for plea negotiations; Have policies for jury trials (how much experience is necessary, when to have a second chair, etc.)
 - Law Enforcement Response – Provide training on how to testify and LE role in court
- **Freedom of bills of attainder or ex post facto laws**
 - Bench Response – Vigilance for the issue; participate in tribal code changes
 - Prosecution Response – Thoughtful charging; participate in tribal code changes
 - Law Enforcement Response – Be familiar with code changes regarding crimes

Differences Between ICRA and Constitution

- **No right to publicly-appointed counsel in criminal cases with less than risk of 1 year of imprisonment**
 - It's worth the money
- No ability to sue the tribal government in federal court to enforce the ICRA
- No waiver of sovereign immunity of tribes to sue in tribal courts to enforce the ICRA

ICRA Today

- Habeas Standards Generally
 - Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)- Only federal review of ICRA is through habeas corpus
 - Scudero v. Moran, 230 F.Supp.3d 980 (D.Alaska 2017)- Expansive use of habeas in ICRA setting
 - Coriz v. Rodriguez, 347 F.Supp.3d 707 (D.N.M. 2018); Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012); Alvarez v. Lopez, 835 F.3d 1024 (9th Cir. 2016)- Exhaustion standard

ICRA Today

- **Indian Status**

- United States v. Antelope, 430 U.S. 641 (1977)- Federal prosecution of Indians under Major Crimes Act not based on impermissible racial classifications
- United States v. Keys, 103 F.3d 758 (9th Cir. 1996) “Indian” status 2-prong test: 1) Indian blood; 2) Tribal recognition of Indian status
- Eagle v. Yerington Paiute, 603 F.3d 1161 (9th Cir. 2010)- Federal prosecutions under MCA must prove Indian status as an essential element/beyond a reasonable doubt

- **Habeas Due Process**

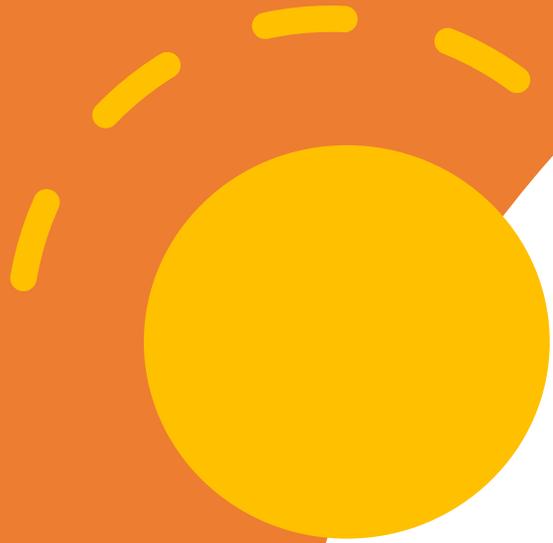
- Alvarez v. Lopez, 835 F.3d 1024 (9th Cir. 2016)- Habeas available where tribal form informed defendant of right to jury trial, but no explanation of how to invoke, no counsel, no tribal effort to ensure defendant knew of the right
- Randall v. Yakama Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988)- Habeas available for petitioner where tribal court dismissed an appeal as untimely when court failed to rule on motion to waive appeal fee

ICRA Today

- Search and Seizure
 - United States v. Cooley, 919 F.3d 1135 (9th Cir. 2019)- Exclusionary rule in federal court applies to evidence obtained in violation of the ICRA
 - Tribal officers may detain non-Indians for purpose of determining Indian status, and may hold until custody by state or federal officers
 - Tribal officers may not search non-Indians who they do not have criminal jurisdiction over
- Right to Counsel
 - United States v. Bryant, 589 U.S. ___, 136 S.Ct. 1954 (2016) Federal courts may use uncounseled tribal court convictions as predicate offenses for purposes of the federal habitual DV offender's criminal laws
 - United States v. Long, 870 F.3d 741 (8th Cir. 2017)- representation by appointed lay advocate in tribal court was sufficient to allow conviction as a predicate offense to possess firearm
 - United States v. Bundy, 966 F.Supp.3d 1175 (D.N.M. 2013)- Use of tribal conviction where judge did not make a knowing and voluntary colloquy with defendant could not be used as a federal predicate crime

ICRA Today

- Tribal Law and Order Act Enhanced Sentencing
- Violence Against Women Act Reauthorization



Overview of Federal Crime Victim's Rights Act—A framework for victim's rights

Poll 2

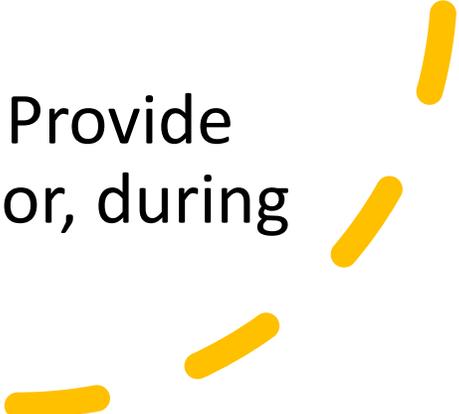
In criminal cases, the prosecution represents the victim:

- True
- False

Federal Crime Victim's Rights Act

- Right to be reasonably protected from the accused
 - Bench Response – Make sure that no-contact orders are almost automatic
 - Bench Response – Look at courthouse layout to allow separation
 - Prosecution Response – Look at ease of protection order processes
 - Law Enforcement Response – Look at filed protection orders
- 

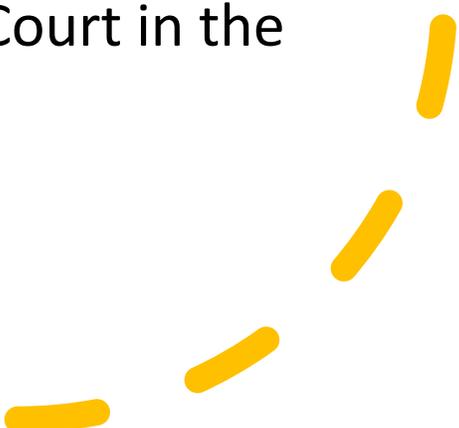
Federal Crime Victim's Rights Act

- Right to reasonable, accurate, and timely notice of any public court proceeding, or parole proceeding, involving the crime or of any release or escape of the accused
 - Bench Response – Add process to provide notice of all hearings to victims
 - Prosecution Response – Facilitate notice to victims and coordinate safety measures
 - Law Enforcement Response – Provide safety measures to victims prior, during and after court hearings
- 

Federal Crime Victim's Rights Act

- The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding
 - Bench Response – Add to bench processes
 - Prosecution Response – Be prepared to argue to support victim presence in hearings
 - Law Enforcement Response – Provide safety for victims who are excluded from the courtroom
- 

Federal Crime Victim's Rights Act

- The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
 - Bench Response – Add to bench processes
 - Prosecution Response – Request victim statement to the Court
 - Law Enforcement Response – Provide visible safety for victims who speak to the Court in the presence of the accused
- 

Federal Crime Victim's Rights Act

- The reasonable right to confer with the attorney for the Government in the case
 - Bench Response – Allow recesses to allow prosecution consultation with victims
 - Prosecution Response – Confer with victims prior to the hearings; Intro letter explaining processes/rights; coordination with Victim Advocate
 - Law Enforcement Response – Provide visible safety for victims during recesses
- 

Federal Crime Victim's Rights Act

- The right to full and timely restitution as provided in law
 - Bench Response – Develop strong processes for restitution including garnishment
 - Prosecution Response – Assist victims with compiling needed information on restitution
 - Law Enforcement Response – Assist prosecution with investigation of restitution needed and amounts



Federal Crime Victim's Rights Act

- The right to proceedings free from unreasonable delay
 - Bench Response – Manage continuances for cases involving victims
 - Prosecution Response – Prioritize releases of discovery for victim crimes to avoid delays on motions
 - Law Enforcement Response – Prioritize investigation and evidence testing to reduce needs for continuances

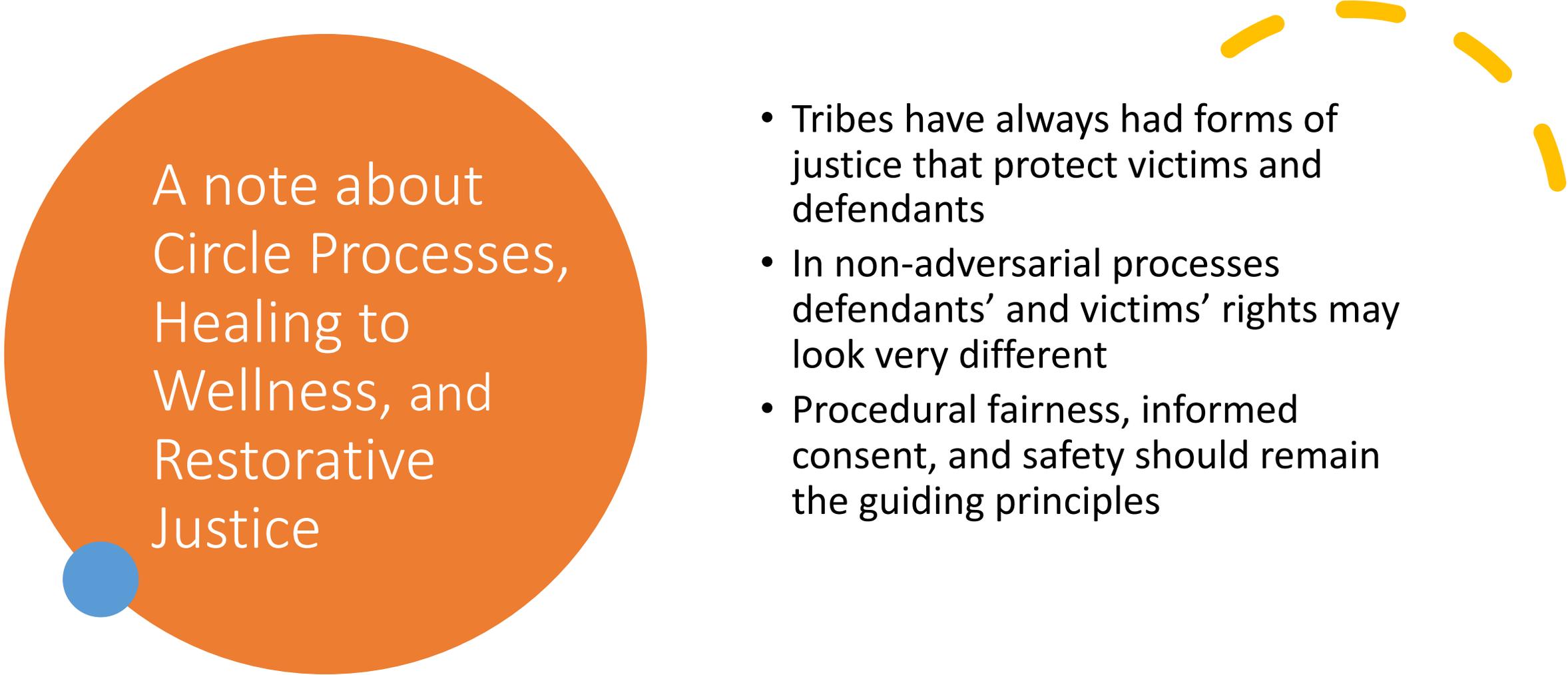


Federal Crime Victim's Rights Act

- The right to be treated with fairness and with respect for the victim's dignity and privacy
 - Bench Response – Manage the hearings to minimize re-traumatizing victims
 - Bench Responses – Ensure court systems do not violate privacy of victims
 - Prosecution Response – Ensure filings protect victim privacy
 - Law Enforcement Response – Be respectful even when victims are hostile to law enforcement
- 

Federal Crime Victim's Rights Act

- The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement
 - Bench Response – Ensure victim received notice prior to taking a plea change or diversion
 - Prosecution Response – Keep victim informed of plea negotiations
 - Law Enforcement Response – Prioritize law enforcement response to victims. Keep a victim list and prioritize calls involving them
- 



A note about
Circle Processes,
Healing to
Wellness, and
Restorative
Justice

- Tribes have always had forms of justice that protect victims and defendants
- In non-adversarial processes defendants' and victims' rights may look very different
- Procedural fairness, informed consent, and safety should remain the guiding principles