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Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2008, University of Virginia. The author would like to thank John Harte for his expertise and sound advice on this area of law and the staff of the Catholic University Law Review for their tireless efforts working on this paper. The author also wishes to express sincere gratitude to her parents, Lee and Lisa Zimmerman, for their constant love and encouragement. This Comment is dedicated to the memory of the author's grandfather, Richard. P. McFeaters, who will be remembered for his quick wit, stalwart patriotism, and dedication to his family.

THE USE OF UNCOUNSELED TRIBAL COURT
CONVICTIONS IN FEDERAL COURT UNDER THE
HABITUAL OFFENDER PROVISION OF THE
VIOLENCE AGAINST WOMEN ACT: A VIOLATION
OF THE SIXTH AMENDMENT RIGHT TO COUNSEL
OR AN EXTENSION OF COMITY?

Rebecca Zimmerman⁺

During the early hours of July 7, 2008, Roman Cavanaugh, a member of the Spirit Lake Sioux Indian Tribe, was driving home with Amanda Luedtke,¹ his common-law wife, and three of their children.² Both Cavanaugh and Luedtke were intoxicated and began to argue.³ The fight escalated when Cavanaugh grabbed Luedtke's hair and repeatedly slammed her face into the dashboard.⁴ Afterward, with the children still in the car, Cavanaugh drove to a remote area in North Dakota and threatened to kill Luedtke.⁵ Luedtke escaped by rolling out of the car and hiding in the weeds alongside the road.⁶

Sadly, this was not Cavanaugh's first time abusing or threatening his partner.⁷ In fact, Cavanaugh had three prior convictions in the Spirit Lake Tribal Court for domestic assault.⁸ However, when the North Dakota Assistant United States Attorney charged Cavanaugh with domestic assault by a habitual offender under 18 U.S.C. § 117,⁹ a provision of the Violence Against Women

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1. See *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1065 (D.N.D. 2009), *rev'd*, 643 F.3d 592, 606 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

2. See Brief for the United States at 4–5, *Cavanaugh*, 680 F. Supp. 2d 1062 (No. 10-1154).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See *Cavanaugh*, 680 F. Supp. 2d at 1065.

8. *Id.* The tribal court sentenced Cavanaugh to a term of imprisonment after each conviction of domestic assault. Brief for the United States, *supra* note 2, at 6–7.

9. See 18 U.S.C. § 117(a) (2006). The habitual offender provision of the Violence Against Women Act (VAWA) provides that

[a]ny person who commits a domestic assault within the . . . territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate

Act (VAWA),¹⁰ the district court judge dismissed the case.¹¹ The court held that although Cavanaugh's previous convictions were valid under tribal law¹² and the Indian Civil Rights Act (ICRA),¹³ they were inadmissible in federal court as evidence of prior convictions because Cavanaugh, an indigent defendant,¹⁴ was not provided an attorney for those proceedings that resulted in incarceration.¹⁵ The district court judge concluded that Cavanaugh's constitutional right to counsel would be violated if the court admitted his previous uncounseled convictions in federal court.¹⁶ As a result, Cavanaugh escaped a possible ten-year prison sentence.¹⁷ To the contrary, if Cavanaugh's prior convictions for domestic assault had been in state or federal court instead of tribal court, he would have received counsel in accordance with the Sixth Amendment,¹⁸ and barring any glaring irregularities, the district court judge would have admitted his prior convictions for the purposes of 18 U.S.C. § 117.¹⁹

prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction . . . any assault, sexual abuse, or serious violent felony against a spouse or intimate partner . . . shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

Id. The statute defines domestic assault as "assault committed . . . by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a . . . person similarly situated to a spouse." 18 U.S.C. § 117(b).

10. See *infra* notes 74–78 and accompanying text (explaining the purpose of VAWA and Congress's intent in passing the Act to enhance investigation and prosecution of violent crimes perpetuated against women).

11. See *Cavanaugh*, 680 F. Supp. 2d at 1077 (granting Cavanaugh's motion to dismiss in part because using an uncounseled tribal court conviction to prove an element of a federal charge violates the Constitution).

12. *Id.* at 1074 (citation omitted) ("The Spirit Lake Nation Law and Order Code does not authorize court-appointed counsel at tribal expense. Instead, defendants in Spirit Lake Tribal Court are advised that they have the right to an attorney at their own expense, which is in accordance with the Indian Civil Rights Act.").

13. See 25 U.S.C. §§ 1301–1303 (2006); see also *infra* note 52 (providing the statutory text of the Indian Civil Rights Act).

14. *United States v. Cavanaugh*, 643 F.3d 592, 594 & n.1 (8th Cir. 2011) (noting that the court will not challenge Cavanaugh's claim that he was indigent at the time of his prior convictions), *cert. denied*, 132 S. Ct. 1542 (2012).

15. *Cavanaugh*, 680 F. Supp. 2d at 1075–76 (stating that the use of a conviction that violates the Sixth Amendment of the United States Constitution to support guilt of another crime is impermissible in federal court).

16. *Id.*

17. See 18 U.S.C. § 117(a) (2006) (providing that if "substantial bodily injury" results from an offense, the punishment is imprisonment for up to ten years).

18. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

19. See *Cavanaugh*, 680 F. Supp. 2d at 1076–77.

Cavanaugh's release is the curious result of Congress's incomplete application of the constitutional right to counsel in Indian tribal cases.²⁰ Although the ICRA and the recent Tribal Law and Order Act of 2010 (TLOA)²¹ mandate that tribal governments provide indigent criminal defendants with counsel in specific situations,²² due to their semi-sovereign status,²³ tribal governments are not obligated to provide counsel to the same extent as federal and state courts.²⁴ This has led to divergent opinions in the federal courts as to the admissibility of prior uncounseled convictions as evidence of prior offenses, most often to increase sentencing or to establish the prior history element of a recidivist statute.

In 2011, the U.S. Court of Appeals for the Eighth Circuit reversed the district court's decision in *Cavanaugh*,²⁵ and the U.S. Court of Appeals for the Tenth Circuit came to a similar result in *United States v. Shavanaux*.²⁶ Both courts held that prior uncounseled domestic assault convictions in tribal court satisfied the prior history element of the VAWA habitual offender provision.²⁷ Explicit within each analysis was an emphasis on the unique quasi-sovereign relationship between tribal nations and the federal government, as well as Congress's reluctance to extend full Sixth Amendment rights to Indians in the context of their relationship with tribal governments.²⁸ These decisions are contrary to *United States v. Ant*,²⁹ in which the U.S. Court of Appeals for the Ninth Circuit held that an uncounseled guilty plea in tribal court was

20. *United States v. Cavanaugh*, 643 F.3d 592, 604 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

21. Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, § 202, 124 Stat. 2258, 2262–63 (codified as amended at 25 U.S.C. §§ 2801–2815 (Supp. IV 2010)); *see also infra* note 61 and accompanying text (explaining how the TLOA aims for tribal governments to increase public safety).

22. *See* TLOA § 234(c)(1), 124 Stat. at 2280 (mandating that tribes must provide indigent defendants with counsel when the charged offense may result in a sentence of imprisonment of more than one year).

23. *See infra* notes 47–51 and accompanying text (explaining the quasi-sovereign status of Indian tribes).

24. *See* *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (holding that where actual imprisonment is punishment for an offense, as opposed to a fine or threat of imprisonment, the right to counsel shall be granted); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (ruling that absent a knowing and intelligent waiver, the defendant has a right to counsel); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (finding the right to counsel in criminal proceedings fundamental to a fair hearing).

25. *See Cavanaugh*, 643 F.3d at 594.

26. 647 F.3d 993, 998 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

27. *See id.* at 997 (providing that because the Bill of Rights is not applicable to Indian tribes, the prior uncounseled tribal court convictions cannot violate the Sixth Amendment); *Cavanaugh*, 643 F.3d at 595–606.

28. *Shavanaux*, 647 F.3d at 997; *Cavanaugh*, 643 F.3d at 595–96.

29. 882 F.2d 1389 (9th Cir. 1989); *see also Shavanaux*, 647 F.3d at 997 (recognizing that the court in *Ant* reached a different legal conclusion on similar, although not identical, facts); *Cavanaugh*, 643 F.3d at 604–05 (stating a similar proposition).

inadmissible in federal court.³⁰ In *Ant*, the Ninth Circuit relied on the United States Supreme Court's reasoning in *Burgett v. Texas*,³¹ in which the Court found unconstitutional the use of a prior uncounseled conviction to inflate the punishment of an offense under a recidivist statute.³² To date, neither Congress nor the Supreme Court have provided guidance on this specific, yet crucial, issue.³³

This Comment traces the legal development of the use of uncounseled tribal court convictions in federal court. Part One analyzes legal jurisprudence on the Sixth Amendment right to counsel as applied to criminal defendants in federal court. A discussion of the unique status of Indian tribes in the United States follows, focusing particularly on the extent to which the ICRA applies the right to counsel to Indians. Then, the Comment addresses recidivism in the context of 18 U.S.C. § 117, the domestic assault habitual offender provision under VAWA. Next, this Comment describes the varying Eighth, Ninth, and Tenth Circuit approaches to whether the Sixth Amendment right to counsel bars the use of uncounseled tribal court convictions as evidence in federal court to satisfy 18 U.S.C. § 117's prior history element. An analysis of each court's reasoning follows, with specific attention paid to the *Burgett* approach and principles of comity. This Comment concludes by advocating for an extension of comity to uncounseled domestic assault convictions in tribal court and for allowing admittance of such convictions in federal court to establish prior offenses under 18 U.S.C. § 117. At the same time, the Comment recognizes and encourages the need to temper such full recognition of the uncounseled tribal convictions by requiring federal courts to perform a preliminary review of the prior convictions for any due process violations.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL, TRIBAL SOVEREIGNTY, AND A CIRCUIT SPLIT

A. *Development of the Sixth Amendment Right to Counsel*

The Sixth Amendment right to counsel is an essential safeguard necessary to protect against "arbitrary or unjust deprivation of human rights."³⁴ Initially,

30. See *Ant*, 882 F.2d at 1396.

31. 389 U.S. 109, 115 (1967).

32. *Id.*; see also *Ant*, 882 F.2d at 1393.

33. See e.g., *Cavanaugh*, 643 F.3d at 605 ("Supreme Court authority in this area is unclear; reasonable decision-makers may differ in their conclusions."). In 2012, the Supreme Court denied the petitions for writs of certiorari in *Shavanaux* and *Cavanaugh*, thus passing on the opportunity to shed light on the issue and provide clarification. *Cavanaugh v. United States*, 132 S. Ct. 1542 (2012); *Shavanaux v. United States*, 132 S. Ct. 1742 (2012).

34. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938), *overruled on other grounds in* *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Zerbst*, the trial court convicted an unrepresented defendant for possession and use of counterfeit money and sentenced the defendant to four and a half years in prison. *Id.* at 459. On review of the defendant's petition for a writ of habeas corpus, Justice Hugo Black expounded the significance of the Sixth Amendment right to counsel:

courts interpreted the Sixth Amendment right to counsel as granting defendants the freedom to hire an attorney to assist in their defense.³⁵ Over time, this interpretation evolved such that an attorney must be provided to a defendant in order to guarantee his due process rights.³⁶ The Supreme Court's current interpretation of the Sixth Amendment right to counsel mandates the provision of counsel to indigent defendants sentenced to any amount of prison time for criminal felonies or misdemeanors,³⁷ absent a knowing and intelligent waiver.³⁸

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty

Id. at 462–63 (citation omitted). Justice Black also emphasized a court's responsibility to ensure that a defendant either has counsel or has knowingly waived his constitutional right to counsel. *Id.* at 468. However, the Sixth Amendment right to counsel does not extend to civil cases. *See Lassiter v. Dep't of Social Servs.*, 428 U.S. 18 (1981) (stating that the right to counsel only applies if the defendant will lose his or her physical liberty).

35. JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 20 (2002). Even before the Bill of Rights was ratified in 1791, many colonies recognized the right to assistance by counsel. *Id.* at 7–10. This tradition likely stemmed from English common law, whereby individuals prosecuted for high crimes were afforded the right to "counsel learned in the law." *Id.* at 6. The omission of enumerated rights in the proposed draft of the Constitution caused concern among delegates, and it was argued that "the right to obtain legal assistance was 'as necessary under the general government as under that of the individual states.'" *Id.* at 15, 17 (quoting Open Letter from Brutus to the Citizens of the State of New York (Nov. 1, 1787), in J.R. POLE, *THE AMERICAN CONSTITUTION: FOR AND AGAINST* 40 (1987)).

36. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932). In *Powell*, the Supreme Court found that an Alabama state court's failure to assign counsel to indigent black defendants on capital rape charges constituted "a denial of due process within the meaning of the Fourteenth Amendment." *Id.* at 49, 71; *see also* NATIONAL RIGHT TO COUNSEL COMMITTEE, *THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 18–19 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> (noting that the holding in *Powell* was "limited to capital proceedings in state criminal courts").

37. *See TOMKOVICZ, supra* note 35, at 59–60 (citing *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979)) (explaining that to meet this mandate, judges must make an initial determination of whether a prison sentence could result, no matter the length). Any sanction not involving jail time, such as a fine or a term of probation, does not trigger a defendant's constitutional right to counsel. *Id.* at 59. The Supreme Court has held that the right to counsel attaches at the outset of adversary judicial criminal proceedings, whether preliminary or formal in nature. *See Rothgery v. Gillespie Cnty*, 554 U.S. 191, 194 (2008) (citing *Brewer v. Williams*, 430 U.S. 387, 398–99 (1977)) (explaining that the Sixth Amendment applies when the defendant first appears before a judicial officer); *see also Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (providing that the Sixth Amendment attached after the commencement of adversarial proceedings); *United States v. Wade*, 388 U.S. 218, 226–27 (1967) (noting that the accused is guaranteed counsel at any phase of his prosecution when the absence of counsel may hinder his right to a fair trial, whether in or out of court).

38. *See Farretta v. California*, 422 U.S. 806, 835 (1975). A defendant makes a valid waiver of the right to counsel when he knowingly and intelligently relinquishes the "traditional benefits associated with the right to counsel." *Id.*

In *Gideon v. Wainwright*, the Supreme Court made the Sixth Amendment's right to counsel provision obligatory on the states through the Fourteenth Amendment,³⁹ asserting that "reason and reflection" led to the "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be ensured a fair trial unless counsel is provided for him."⁴⁰ *Gideon* underscores the importance of a defendant's counsel in a criminal proceeding, classifying attorneys in criminal cases as "necessities, not luxuries."⁴¹ The Supreme Court further extended the right to counsel in *Argersinger v. Hamlin*, holding that, absent a knowing waiver, a person may not be imprisoned regardless of the offense's classification, unless represented by an attorney at trial.⁴² In *Scott v. Illinois*, the Supreme Court clarified that the right is absolute for indigent defendants when incarceration is a possible outcome, even if the sentence is for just one day.⁴³ Today, the

39. 372 U.S. 335, 341–45 (1963). In *Gideon*, a trial court denied the defendant's request for a court-appointed attorney. *Id.* at 337. On appeal, the Supreme Court found the trial court's actions unconstitutional. *Id.* at 342–43; see also TOMKOVICZ, *supra* note 35, at 32 (noting that the court in *Gideon* concluded that "due process mandates a general entitlement to appointed representation in state trials"). Justice Black, speaking for the majority in *Gideon*, declared that "[e]ven the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him." *Gideon*, 372 U.S. at 345 (quoting *Powell*, 287 U.S. at 68–69).

40. *Gideon*, 372 U.S. at 344. Justice Black stated,

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id.

41. See *id.* ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries.").

42. 407 U.S. 25, 37 (1972). In *Argersinger*, the indigent defendant appealed his conviction and ninety-day jail sentence from a Florida state court for carrying a concealed weapon. *Id.* at 26. The defendant asserted that because no counsel was appointed, he was unable to present a proper defense. *Id.* In its opinion, the Supreme Court characterized misdemeanor courts as "assembly line[s]," wherein the workload created by the volume of cases could result in fair trials giving way to expeditious ones. *Id.* at 34–35. The Court further lamented that indigent defendants at these speedy trials will be "numbers on dockets, faceless ones to be processed and sent on their way." *Id.* at 35–36. Therefore, the Court found that the same concerns of due process and loss of liberty implicit in a felony trial are also present with misdemeanor charges because of the possibility of incarceration. *Id.* at 38.

43. 440 U.S. 367, 373–74 (1979). In *In re Gault*, the Supreme Court also applied the right to counsel to juvenile delinquency proceedings, stating that "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether he has a defense and to prepare and submit it." *In re Gault*, 387 U.S. 1, 36 (1967); see also *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (applying the right to counsel to a suspended sentence).

constitutional right to counsel is one of the most cherished and respected rights in the American judicial system.⁴⁴

B. Tribal Sovereignty and the Right to Counsel as Applied to Indian Governments Through the Indian Civil Rights Act

The Sixth Amendment right to counsel, however, does not extend to defendants in Indian tribal courts.⁴⁵ Even though members of Indian nations are United States citizens,⁴⁶ Indian tribes retain “inherent powers of a limited sovereignty which has never been extinguished”⁴⁷ and in deference to this “quasi-sovereign status,”⁴⁸ Congress does not impose constitutional limitations on tribal nations.⁴⁹ In *Talton v. Mayes*, when deciding whether the Fifth Amendment applied to the Cherokee Nation, the Supreme Court stated that because “the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the [Bill of

44. See John Pollock, *The Great Divide: Gideon and Civil Cases*, 14 THE YOUNG LAWYER (January 2010), available at http://www.americanbar.org/content/dam/aba/publishing/young_lawyer/yld_tyl_jan10_divide.authcheckdam.pdf (noting that media has provided the public with “common knowledge” that defendants have a fundamental right to counsel in criminal proceedings).

45. See John M. Sands, *No Right to Counsel in Tribal Prosecutions*, 27 THE CHAMPION 45, 45 (2003).

46. 8 U.S.C. § 1401(b) (2006) (extending citizenship in 1924 to Native Americans “born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe”).

47. *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301(2), *as recognized in* *United States v. Lara*, 541 U.S. 193, 196 (2004). In *Wheeler*, the Court described Indian tribes’ sovereignty as “unique and limited [in] character[,] . . . exist[ing] only at the sufferance of Congress and . . . subject to complete defeasance.” *Id.* at 322–23. Until an act by Congress, “tribes retain their existing sovereign powers” that stem from their autonomous state prior to European colonization of North America. *Id.*; see also Vincent C. Milani, *The Right to Council in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1283 (1994); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 690–94 (1989) (providing a thorough discussion of the relationship between Indian tribes and the federal government).

48. See Milani, *supra* note 47, at 1283, 1291 (noting that the concept of limited sovereignty was first presented by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), when he referred to Indian tribes as “domestic dependent nations”). Indian nations retain special rights to organize their societies in a traditional manner according to their customs. Case Comment, *Equal Protection Under the Indian Civil Rights Act*: Martinez v. Santa Clara Pueblo, 90 HARV. L. REV. 627, 635 (1977). Fundamentally, “[t]hese special rights stem from a *quid pro quo* whereby [the Indian nations] gave up territorial rights in exchange for autonomy.” *Id.* at 635 & n.59 (citing Oliver La Farge, *Termination of Federal Supervision: Disintegration and the American Indians*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 42 (1957)).

49. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (explaining that Congress’s plenary power over tribal governments through the Indian Commerce Clause and the Treaty Clause could allow it to extend the Bill of Rights in full to Indians); see also Milani, *supra* note 47, at 1291.

Rights].”⁵⁰ Thus, as the reasoning in *Talton* suggests, although the rights Indians possess as citizens of the United States govern their relationships with the federal government, those rights do not reach into tribal courts.⁵¹

Despite the Sixth Amendment’s inapplicability to Indians in tribal court, the ICRA ensures that Indians have due process rights and other protections found in the Bill of Rights.⁵² These protections assure that a tribal government will not infringe upon an Indian’s rights.⁵³ However, unlike the broad right to counsel enjoyed by criminal defendants in state and federal courts, the ICRA “merely provides that no tribe shall ‘deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel.’”⁵⁴ In effect, the right to counsel offers no recourse for Indians incapable of affording such assistance.

The government’s policy of promoting self-governance, rather than assimilation,⁵⁵ has allowed Indian nations to develop their own judicial

50. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). In its holding, the Supreme Court emphasized the “semi-independent position” of Indian tribes, and expounded:

[T]hese relations are equally difficult to define. [Indian tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they reside.

Id. (citation omitted); see also Elise Helgesen, *Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians*, 22 U. FLA. J.L. PUB. POL’Y 441, 444 (2011) (discussing early Supreme Court cases that articulated the quasi-sovereign status of Indian nations).

51. See Case Comment, *supra* note 48, at 627.

52. 25 U.S.C. §§ 1301–1303 (2006). Similar to the restrictions placed on the federal government through the Bill of Rights, the ICRA provides that tribal governments must provide, among other things, freedoms of speech, religion, press, assembly, and petition as required by the First Amendment, freedom from unreasonable searches and seizures as required by the Fourth Amendment, freedom from double jeopardy and self-incrimination as required by the Fifth Amendment, and freedom from excessive bail, and fines, or infliction of cruel and unusual punishment under the Eighth Amendment. 25 U.S.C. § 1302(a)(1)–(7); see also Milani, *supra* note 47, at 1284 (explicating that the ICRA made most of the Bill of Rights applicable to the tribes); Resnik, *supra* note 47, at 728 (noting that most of the Bill of Rights’ protections apply to Indian tribes).

53. See Case Comment, *supra* note 48, at 627 (describing how the ICRA protects Indians within their internal tribal governments).

54. See Milani, *supra* note 47, at 1284 (citing 25 U.S.C. § 1302(a)(6) (2006)) (“Unless tribal law itself grants the right to a court-appointed professional attorney, an indigent defendant in tribal court must face trial uncounseled.”).

55. See Kevin Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 435 (2004) (explaining that all branches of the government have agreed that decision making should be shifted to tribal governments if possible). Before the Indian Reorganization Act (IRA) was passed in 1934, assimilation was the favored policy towards Indian nations. Milani, *supra* note 47, at 1281. The IRA shifted that policy towards self-determination and self-governance. *Id.* Since then, additional legislation, such as the Indian Self-Determination and Education Assistance

systems according to their members' needs and each tribe's unique history, culture, and traditions.⁵⁶ As a result, although some tribes, in response to their members' needs, have passed laws providing for court-appointed lawyers,⁵⁷ economic limitations have prevented others from doing the same.⁵⁸

Recently, the Obama administration has made a concerted effort to increase federal funding for tribal law enforcement and justice programs in response to the "unacceptable and sobering crime rates witnessed in Indian Country."⁵⁹ The administration placed particular emphasis on combating domestic and sexual violence against Indian women.⁶⁰ To accomplish this, the TLOA

Act of 1975, 25 U.S.C. § 450 *et seq.*, and the Tribal Self-Governance Act of 1994, 25 U.S.C. § 458, have continued this trend. *See Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/index.htm> (last visited May 28, 2012) (explaining the meaning of tribal self-determination and self-governance).

56. *See* Milani, *supra* note 47, at 1281 (noting how tribes are given greater autonomy to develop their own judicial systems).

57. CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 319 (2004).

58. *Id.* To provide defendants with some form of assistance, many tribal governments allow non-lawyers who are generally familiar with tribal customs and law to serve as "advocates" for a defendant. *Id.* at 319–20. The federal district court that heard the *Cavanaugh* case commended tribal courts' "herculean efforts" to provide assistance to defendants despite the severe lack of resources. *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1072 (D.N.D. 2009) (noting that "many tribal courts are so short on resources and personnel that they constitute a national embarrassment."), *rev'd*, 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012); *see also* Helgelsen, *supra* note 50, at 454 (explaining the lack of funding for Indian law enforcement); Milani, *supra* note 47, at 1290 (expressing concern that some tribal judicial systems "have become sufficiently complex so that forcing an indigent defendant to proceed without the guiding hand of counsel may constitute a denial of fundamental fairness"); Washburn, *supra* note 55, at 442 (describing the lack of resources in tribal governments and its effect on the criminal justice system). *But see Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women Before the S. Comm. on Indian Affairs*, 110th Cong. 16 (2007) (prepared statement of Alexandra Arriaga, Director of Government Relations, Amnesty International, U.S.A.) (arguing that tough sexual violence prosecution *does* occur in tribal court, despite the lack of funding, by imposing consecutive sentences for several offenses and sanctions other than imprisonment, such as restitution, community service, and probation).

59. Press Release, Dep't of Justice, Justice Department Awards \$118 Million to Enhance, Support Tribal Justice and Safety (Sept. 14, 2011), *available at* <http://www.justice.gov/opa/pr/2011/September/11-asg-1183.html>; *see also Cavanaugh*, 680 F. Supp. 2d at 1071 (citing 25 U.S.C. § 3651(3) (2006)) (acknowledging that the violent crime rate on Indian lands is twice the national rate).

60. Press Release, Dep't of Justice, Associate Attorney General Tom Perrelli Speaks at the Four Corners Indian Country Conference (Sept. 14, 2011), <http://www.justice.gov/iso/opa/asg/speeches/2011/asg-speech-110914.html> (proposing legislation that seeks to combat the growing violence epidemic against women in Indian Country). Government studies have shown that sexual violence against American Indian and Alaska Native women is more prevalent than among other women in the United States. *See, e.g., AMNESTY INTERNATIONAL, MAZE OF INJUSTICE 2* (2007). It has been estimated that Indian women are 2.5 times more likely to be raped or sexually assaulted than other women in the United States, and more than one in three Indian women will be raped in their lifetimes. *Id.* Recent studies suggest that these numbers actually underestimate the extent of sexual violence against Indian women.

provided additional tools to tribal governments to increase public safety⁶¹ and amended the ICRA to require tribal governments to provide an indigent defendant “effective assistance of counsel at least equal to that guaranteed by the United States Constitution and at the expense of the tribal government.”⁶² However, this requirement is only applicable when a tribal court is seeking to impose a prison term of more than one year.⁶³ Therefore, tribal courts remain unobligated to provide indigent defendants with counsel when exercising jurisdiction over criminal offenses when prison sentencing is less than a year.⁶⁴

Id. In 2007, the Chairman of the Senate Committee on Indian Affairs, Byron Dorgan, commented that the prevalence of these “crimes against Indian women have a demoralizing and long-term effect on the fabric of an entire community.” *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women Before the S. Comm. on Indian Affairs*, 110th Cong. 2 (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs).

61. Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended in scattered sections of 25 U.S.C. (Supp. IV 2010)). Congress found that due to the high volume of criminal activity in Indian territories, federal and state cooperation and assistance were necessary for public safety in Indian Country. TLOA § 202(a), 124 Stat. at 2262–63. In accord with this finding, the stated purposes of the TLOA include:

(1) to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country; (2) to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies; (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women; (5) to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and (6) to increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and tribal officials responsible for responding to and investigating crimes in Indian country.

§ 202(b), 124 Stat. at 2263; *see also* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1720 n.299 (2012) (reviewing the relevant provisions of the TLOA).

62. TLOA § 234(c), 124 Stat. at 2280.

63. *See id.*; *see also* AMNESTY INTERNATIONAL, *supra* note 59, at 29 (discussing the shortcomings of the ICRA and its amendments and noting that the law sends a message that “tribal justice systems are only equipped to handle less serious crimes”).

64. *See* *United States v. Cavanaugh*, 643 F.3d 592, 596 (8th Cir. 2011) (“[I]f a tribe elects not to provide for the right to appointed counsel through its own laws, Indian defendants in tribal court have no Constitutional or statutory right to appointed counsel unless sentenced to a term of incarceration greater than one year.”), *cert. denied*, 132 S. Ct. 1542 (2012). Note that the TLOA amended the ICRA to allow for sentencing up to three years per offense in tribal court, and up to nine years per case. *See* TLOA § 234. Federal courts have jurisdiction over certain intra-Indian crimes, such as rape, murder, manslaughter, kidnapping, and arson. *See* Milani, *supra* note 47, at 1286.

C. Recidivism and the Domestic Assault Habitual Offender Provision of the Violence Against Women Act

Using a defendant's criminal history, whether to increase sentencing or to establish an essential element of a recidivist statute,⁶⁵ is an "important means of crime control through incapacitation of likely future offenders."⁶⁶ The practice of increased sentencing for repeat offenders stems from the notion that a defendant's criminal history is "a good predictor of the risk that he will commit a crime in the future,"⁶⁷ and that a defendant "with a criminal history is more culpable" and thus more deserving of a higher sentence than a first-time offender.⁶⁸

Consideration of the levels of domestic violence⁶⁹ in the United States is sobering,⁷⁰ especially given the exorbitantly high recidivism rates of offenders.⁷¹ This is true even when the abuser has been through the court system and rehabilitative treatment programs.⁷² In an attempt to address the prevalence of domestic violence in the United States and tribal nations,⁷³

65. Recidivism is defined as the "tendency to relapse into a habit of criminal activity or behavior." BLACK'S LAW DICTIONARY 1384 (9th ed. 2009).

66. Washburn, *supra* note 55, at 441.

67. *Id.* at 414 (citing Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 591–92 (2003)).

68. *Id.* (noting that repeat offenders are more aware of the consequences of their actions).

69. See *Domestic Violence*, Dep't of Justice (May 2011), <http://www.ovw.usdoj.gov/domviolence.htm> (defining domestic violence as "a pattern of abusive behavior in any relationship," whether "physical, sexual, emotional, economic, or psychological," that is intended to exert dominance over an intimate partner).

70. See NAT'L INST. OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 26 (Nov. 2000), available at www.ncjrs.gov/pdffiles1/nij/183781.pdf (finding that 1.3 million women in the United States report being physically assaulted each year).

71. Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 3 (2005) (citing *Amend. Section 658 of Fiscal Year 1997 Omnibus Appropriations Act: Guns Ban for Individuals Convicted of Misdemeanor Crime of Domestic Violence Before the House Subcomm. on Crime, Comm. on the Judiciary*, 105th Cong. 155 (1997) (statement of Donna F. Edwards, Executive Director, National Network to End Domestic Violence)). May's article focuses on the overall impact of placing restrictions on people convicted of domestic violence, noting that without intervention from the justice system, abuse would likely intensify and occur again. *Id.* at 4 (highlighting how "two-thirds of domestic violence fatalities involve firearms"); see also *United States v. Skoien*, 614 F.3d 638, 644 (7th Cir. 2010) (citing multiple studies to support the proposition that persons convicted of domestic violence are likely to offend again), *cert. denied*, 131 S. Ct. 1674 (2011); Barbara Hart, *Battered Women and the Criminal Justice System* (1993), in 2 DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE 58, 59–60 (Patricia G. Barnes ed. 1998) (noting that when victims of domestic violence attempt to seek prosecution or leave an abusive relationship, their abusers are likely to retaliate against them).

72. May, *supra* note 71, at 3–4.

73. Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 188–80 (2008) (describing generally the prevalence of violence in Indian country and its effect on Indian

Congress passed VAWA in 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994.⁷⁴ VAWA increased penalties and provided grants to address rape, sexual assault, domestic abuse, and other gender-related violence.⁷⁵ In addition, § 117 of VAWA toughened penalties for repeat domestic and sexual assault offenders by imposing double prison sentences.⁷⁶ Under the law, an individual charged under § 117, who has two prior final convictions for domestic assault, faces the possibility of conviction and a subsequent term of imprisonment up to ten years.⁷⁷ However, in state and federal courts, prosecutors are unable to use prior uncounseled criminal convictions that had the possibility of jail time as evidence to provide the basis

women); *see also* Timothy Williams, *High Crime but Fewer Prosecutions on Indian Land*, N.Y. TIMES, February 21, 2012, at A14 (reporting that “[t]he country’s 310 Indian reservations have violent crime rates that are more than two and a half times higher than the national average,” yet federal prosecutors file charges in less than half of sexual assault cases, leaving tribal members frustrated with the “second-class system of justice that encourages law breaking”).

74. *See* S. REP. NO. 103-138, at 38 (1993).

The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical; the act is intended to educate the public and those within the justice system against the archaic prejudices that blame women for the beatings and the rapes they suffer; to the women the support and the assurance that their attackers will be prosecuted; and to ensure that the focus of criminal proceedings will concentrate on the conduct of the attacker rather than the conduct of the victim.

Id. Although Congress has consistently reauthorized VAWA since it was first passed in 1994, Congress has yet to reauthorize the law in 2012 (as of August 31, 2012) due to disagreement along partisan lines between the House and the Senate over additional contentious provisions, including new protections for immigrants, gays, and students, and additional protections for American Indians. *Legislation Left Undone as Congress Takes Off*, YAHOO NEWS, Aug. 3, 2012, <http://news.yahoo.com/legislation-left-undone-congress-takes-off-195431020.html>.

75. *See* S. REP. NO. 103-138, at 55–57.

76. *See id.* at 3 (specifying that repeat offenders face a term of imprisonment up to twice of what would otherwise be authorized); ISABELLE SCOTT, DOMESTIC VIOLENCE PRACTICE & PROCEDURE 640 (West 2011) (explaining how VAWA provides increased sentences for repeated offenders); *see also* United States v. Cavanaugh, 680 F. Supp. 2d 1062, 1076 (D.N.D. 2009) (citing 151 Cong. Rec. S4873-74 (May 20, 2005)) (“The legislative history [of 18 U.S.C. § 117] indicates the federal offense was created, in part, to prevent serious injury or death of American Indian women and to allow tribal court convictions to count for purposes of a federal prosecution, particularly because the Indian Major Crimes Act does not allow federal prosecutors to prosecute domestic violence assaults unless they rise to the level of serious bodily injury or death.”), *rev’d* 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

77. *See supra* note 9 and accompanying text. During hearings on the proposed bill that contained VAWA, Representative Charles E. Schumer, then Chairman of the Subcommittee on Crime and Criminal Justice, emphasized the need to address habitual offenders, stating “[w]e need tougher sentences for violent repeat offenders [as] [t]he American people demand it and they are right to demand it.” *Correcting Revolving Door Justice: New Approaches to Recidivism: Hearing Before the H. Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 2 (1994) (statement of Charles E. Schumer, Chairman).

for enhancing punishment for a subsequent offense.⁷⁸ Thus, any prior domestic assault convictions in state or federal court in violation of the Sixth Amendment right to counsel are unavailable to prosecutors seeking to convict a habitual offender under § 117.⁷⁹

D. *Burgett v. Texas*

In 1967, in *Burgett v. Texas*, the Supreme Court held that to “permit a conviction obtained in violation of [the Sixth Amendment right to counsel] to be used against a person either to support guilt or enhance punishment for another offense is to erode” fundamental principles of fairness and equality in the law.⁸⁰ In *Burgett*, the defendant was charged with assault with the intent to murder after using a knife in an attempt to slash the victim’s throat.⁸¹ The defendant was indicted under a Texas recidivist statute requiring proof of at least two previous felony convictions.⁸² The prosecution offered evidence of the defendant’s four prior felony convictions to establish the prior history element of the statute.⁸³ It was determined on appeal, however, that the defendant was not offered assistance of counsel during his previous felony convictions, and that he would be deprived of his Sixth Amendment rights if the court permitted use of the uncounseled prior convictions as evidence of criminal history for a new offense.⁸⁴ In effect, *Burgett* established an explicit prohibition against the use of uncounseled criminal convictions that impose a prison sentence for purposes of proving prior criminal convictions.⁸⁵

After *Burgett*, the issue of whether prior uncounseled misdemeanor convictions could be used to satisfy the prior convictions element of a recidivist statute remained unanswered.⁸⁶ In *Nichols v. United States*, the

78. See 24 C.J.S. CRIMINAL LAW § 2321 (2006) (providing that, absent a valid waiver, an uncounseled conviction cannot be used to enhance punishment).

79. See *id.* (stating that a conviction secured in violation of a defendant’s Sixth Amendment right to counsel cannot be used to enhance punishment for a subsequent offense).

80. 389 U.S. 109, 115 (1967).

81. *Id.* at 110–11. The petitioner was convicted of “assault with malice aforethought with intent to murder; repetition of offense.” *Id.* at 110.

82. *Id.* at 111 & n.3 (citing TEX. PENAL CODE ANN. § 12.42 (2011)).

83. *Id.* at 111 (detailing how the indictment contained allegations that the defendant had four prior felony convictions for burglary and forgery).

84. *Id.* at 115.

85. *Nichols v. United States*, 511 U.S. 738, 743 n.9 (1994) (citing *United States v. Tucker*, 404 U.S. 443, 447–49 (1972)) (“A subsequent sentence that was based in part on a prior invalid conviction must be set aside.”). Use of the uncounseled prior conviction as evidence thereby renders the subsequent conviction constitutionally infirm. *Id.*

86. The Supreme Court’s per curiam response in *Baldasar v. Illinois*, 446 U.S. 223 (1980), to this question was unclear. See *Nichols*, 511 U.S. at 740. In *Baldasar*, the Supreme Court held that a prior uncounseled misdemeanor conviction could not be used as evidence to convert a second misdemeanor conviction into a felony. *Baldasar*, 446 U.S. at 223–24, *overruled by Nichols*, 511 U.S. 738. The multiple opinions in *Baldasar* left no clear consensus as to the Court’s reasoning. TOMKOVICZ, *supra* note 35, at 61–62.

Supreme Court answered this question by holding that “an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.”⁸⁷ In *Nichols*, the defendant’s sentencing term on his charge of conspiracy to possess cocaine increased due to a prior felony drug possession and a state misdemeanor conviction for driving under the influence (DUI).⁸⁸ The defendant’s lack of counsel for his DUI adjudication did not concern the Court, because it found that “concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of his liberty” by incarceration.⁸⁹ Thus, *Burgett* and *Nichols* prohibit prosecutors’ use of prior uncounseled misdemeanor or felony convictions as evidence to enhance the sentence for a subsequent conviction, unless the prior conviction did not result in incarceration.⁹⁰

D. A Circuit Split over the Use of Uncounseled Tribal Court Convictions in Federal Court to Fulfill the Prior History Element of a Recidivist Statute

Although the law regarding the use of uncounseled convictions as a basis for enhancing a sentence is well-established, U.S. courts of appeal disagree on the law regarding the use of such uncounseled convictions attained in tribal courts for subsequent cases in federal court.⁹¹ The Ninth Circuit first addressed this issue in *United States v. Ant*, holding that a defendant’s uncounseled guilty plea in tribal court violates the defendant’s Sixth Amendment right to counsel, and is therefore inadmissible as evidence in future cases in federal court.⁹² Two decades later, the Eighth and Tenth Circuits considered the same important issue, but reached a different legal conclusion.⁹³

I. Ninth Circuit: United States v. Ant

In 1989, in *United States v. Ant*, the Ninth Circuit held that even though the defendant’s uncounseled guilty plea in tribal court complied with tribal law and the ICRA, it was nevertheless inadmissible in federal court because the prior conviction would have been constitutionally infirm if it had been

87. *Nichols*, 511 U.S. at 748–49.

88. *Id.* at 740.

89. *Id.* at 750 (Souter, J., concurring).

90. See 24 C.J.S. CRIMINAL LAW § 2321 (2006) (specifying that an uncounseled conviction may not be used to enhance a subsequent punishment if the prior conviction resulted in incarceration).

91. Compare *United States v. Cavanaugh*, 643 F.3d 592, 605 (8th Cir. 2011) (allowing the use of an uncounseled conviction from tribal court in federal court), *cert. denied*, 132 S. Ct. 1542 (2012), and *United States v. Shavanaux*, 647 F.3d 993, 1000–01 (10th Cir. 2011) (holding that the use of an uncounseled tribal conviction does not violate the Due Process Clause), *cert. denied*, 132 S. Ct. 1742 (2012), with *United States v. Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989) (determining that uncounseled pleas in tribal court are not admissible in federal court).

92. See *Ant*, 882 F.2d at 1395.

93. See *Cavanaugh*, 643 F.3d at 605; *Shavanaux*, 647 F.3d at 1000–01.

rendered in state or federal court.⁹⁴ The defendant, Francis Floyd Ant, was arrested for the murder of his niece whose body was found on the Northern Cheyenne Indian Reservation.⁹⁵ Ant subsequently was arraigned in the Northern Cheyenne tribal court.⁹⁶ The tribal court advised Ant of his right to counsel at his own expense pursuant to the tribe's laws and the ICRA.⁹⁷ However, Ant waived his right to obtain counsel, pled guilty to assault and battery, and was sentenced to six months in jail.⁹⁸ During Ant's indictment in federal court for voluntary manslaughter for the same incident,⁹⁹ federal prosecutors sought to introduce Ant's tribal court guilty plea as evidence of guilt.¹⁰⁰

The Ninth Circuit accepted the district court's finding that Ant's guilty plea complied with tribal law and the ICRA,¹⁰¹ but proceeded to examine independently the "constitutional validity of Ant's earlier tribal court guilty plea," as if it had been made in federal court.¹⁰² The court determined that the available facts did not support a conclusion that, under federal standards, Ant's waiver of his right to counsel was knowing and intelligent. This led to a

94. *Ant*, 882 F.2d at 1395 (determining that, as a matter of first impression, a valid guilty plea, under tribal law and the ICRA, is inadmissible in federal court).

95. *Id.* at 1390. The Northern Cheyenne Indian Reservation is located in southeastern Montana. See NORTHERN CHEYENNE TRIBE (2011), <http://www.cheyennenation.com/index.html>.

96. See *Ant*, 882 F.2d at 1390.

97. *Id.* at 1390–92. The applicable law of the court in which Ant pleaded guilty states that "[a]ny Indian charged with an offense, . . . at his option and expense, may be represented in Tribal Court by professional legal counsel, or, by a member of the Tribe." *Id.* at 1391–92 (citing Northern Cheyenne Tribal Law, Revised Law and Ordinances of the Northern Cheyenne Reservation of Montana, Ch. 1, § 9). According to the ICRA, "[n]o Indian tribe . . . shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have assistance of counsel for his defense." 25 U.S.C. § 1302(6) (2006 & Supp. VI 2011). Notwithstanding the ICRA's due process clause, the Ninth Circuit has held that there is no federal right to appointed counsel in tribal criminal proceedings. *Tom v. Sutton*, 533 F.2d 1101, 1103–04 (9th Cir. 1976). Hence, Ant's right to counsel in tribal court extended only to counsel that he could afford. *Ant*, 882 F.2d at 1391–92.

98. *Ant*, 882 F.2d at 1390–91.

99. A subsequent prosecution by the federal government following a tribal conviction for an offense arising under the same incident is not barred by the Double Jeopardy Clause. See *Milani*, *supra* note 47, at 1286 (citing *United States v. Wheeler*, 435 U.S. 313, 315 (1978), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301, *as recognized in United States v. Lara*, 541 U.S. 193 (2004)) ("Double jeopardy does not bar a prosecution in federal court under the Major Crimes Act, where the defendant has been convicted in federal court of a 'lesser included offense' for acts arising out of the same incident."); see also 40 Geo. L.J. Ann. Rev. Crim. Proc. 497–99 & n.1502 (2011).

100. See *Ant*, 882 F.2d at 1391 (explaining how Ant moved to suppress his tribal court convictions under a theory that these convictions violated the Sixth Amendment).

101. *Id.* at 1392.

102. *Id.* at 1393–95.

finding that the circumstances under which the guilty plea was made were constitutionally invalid.¹⁰³

Therefore, in accordance with *Burgett*, the court reversed the district court's decision to admit the guilty plea in federal court.¹⁰⁴ By applying the *Burgett* standard to Ant's previous uncounseled guilty plea in tribal court, the Ninth Circuit effectively held tribal courts to the same constitutional standard applicable to state and federal courts.¹⁰⁵ By excluding previous uncounseled tribal court guilty pleas, valid under tribal law and the ICRA, the Ninth Circuit paid mere lip service to the quasi-sovereign status of Indian governments,¹⁰⁶

103. *Id.* at 1394 (“In order for a defendant to effectuate a valid waiver of the Sixth Amendment right to counsel, the trial court must undertake a thorough inquiry to ensure that the defendant has made an informed decision. The standard for waiver in the Ninth Circuit is that the trial court should discuss with the defendant in open court whether the waiver is being made knowingly and intelligently, with an understanding of the charges, the possible penalties, and the dangers of self-representation.” (citation omitted)).

104. *Id.* at 1393, 1395 (citing *Burgett v. Texas*, 389 U.S. 109, 114–15 (1967)).

105. *Id.* at 1396 (evaluating whether the defendant's plea met the requirements of the Constitution). The majority, in response to a strong dissent, noted that suppression of Ant's guilty plea would not denigrate tribal proceedings or violate principles of comity, because the court was not reviewing the plea's validity; instead the court argued that it was merely determining whether the proceedings could later be admitted in federal court. *Id.* The Ninth Circuit has also applied Sixth Amendment constitutional standards when determining whether prior tribal convictions could serve as the basis for enhancing a prison sentence for a subsequent conviction in federal court. *United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991), *overruled on other grounds*, *Nichols v. United States*, 511 U.S. 738, 742 (1994). In *Brady*, the defendant, a member of the Northern Cheyenne Indian Tribe, was convicted in federal court of voluntary manslaughter and assault with a dangerous weapon and sentenced to 180 months in prison. *Id.* at 845–46. The pre-sentence report recommended a term of 51 to 63 months of imprisonment based on the offense and criminal history of the defendant. *Id.* at 846. The recommended range, in conformance with the United States Sentencing Guidelines, did not take into account the defendant's previous assault and misdemeanor convictions in tribal court when evaluating criminal history. *Id.*; see Washburn, *supra* note 55, at 440–41 (“Under current [sentencing] policy, in the average case, a defendant with a lengthy tribal criminal history will be sentenced in the same manner as a first time offender, unless the court takes extraordinary steps of an upward departure.”). The district court sentenced the defendant to a term of imprisonment outside the guideline range, in part because the court believed that the sentence range was not an adequate reflection of the defendant's propensity to commit new crimes. *Brady*, 928 F.2d at 846; see U.S.S.G. § 4A1.3, p.s. (2011) (allowing courts to depart from the normal sentencing guidelines). The Ninth Circuit reversed, holding that because Brady was uncounseled during his prior tribal convictions, these convictions could not be used for the purposes of enhancing sentencing for a subsequent offense in federal court. *Brady*, 928 F.2d at 854 (holding that prior tribal court convictions must be held to the same constitutional standards as convictions obtained in state and federal court).

106. See *supra* notes 48–49 and accompanying text (explaining how tribes have quasi-sovereign status).

the federal policy of tribal self-governance,¹⁰⁷ and the belief that tribes are allowed to craft their own judicial systems.¹⁰⁸

2. *Eighth and Tenth Circuits: United States v. Cavanaugh and United States v. Shavanaux*

The Eighth and Tenth Circuits have reached a different conclusion, holding that uncounseled convictions in tribal court are admissible in federal court for purposes of establishing prior criminal history.¹⁰⁹

In *United States v. Cavanaugh*, the defendant, a member of the Spirit Lake Nation, was charged with assaulting his common-law wife.¹¹⁰ A federal prosecutor charged the defendant as a “habitual offender” under 18 U.S.C. § 117 of VAWA due to the defendant’s prior tribal court convictions for domestic assault.¹¹¹ The district court dismissed the case because Cavanaugh’s prior convictions were uncounseled and resulted in incarceration.¹¹² The court determined that introduction of the prior uncounseled tribal court convictions violated the defendant’s right to counsel and due process when offered to prove an essential element of a federal statute.¹¹³

On review, the Eighth Circuit reversed, noting that “the ‘gap’ in the right to counsel caused by incomplete extension of Sixth Amendment coverage to Indian tribes” presents difficulties.¹¹⁴ The court found that the defendant’s prior convictions involved no actual constitutional violations because tribal courts are outside the bounds of the Constitution; therefore, the court was not “free to preclude use of the prior conviction merely because it *would have been*

107. See *supra* note 55 and accompanying text (detailing how federal government policy shifted from assimilation to self-governance).

108. See *supra* notes 55–56 and accompanying text (explaining how the federal government allows, and encourages, tribes to develop their own judicial systems).

109. See *United States v. Cavanaugh*, 643 F.3d 592, 594 (8th Cir. 2011) (admitting the prior tribal conviction), *cert. denied*, 132 S. Ct. 1542 (2012); *United States v. Shavanaux*, 647 F.3d 993, 1000 (10th Cir. 2011) (holding that the prior uncounseled tribal conviction was admissible in federal court), *cert. denied*, 132 S. Ct. 1742 (2012).

110. *Cavanaugh*, 643 F.3d at 594.

111. *Cavanaugh*, 643 F.3d at 593–94; see also 18 U.S.C. § 117(a) (2006).

112. *Cavanaugh*, 643 F.3d at 594 n.1 (noting that the district court and appellate court concluded that the prior convictions resulted in incarceration solely based on the defendant’s statements).

113. *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1076 (D.N.D. 2009) (distinguishing *Ant* on the facts and noting that the uncounseled tribal court convictions were “not being offered in this case for purposes of sentencing enhancement, for purposes of impeachment, or as evidence under Fed. R. Evid. 404(b)”), *rev’d* 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012). The court stated that it was “unable to contemplate another situation in which it would permit a party to introduce evidence obtained in violation of the United States Constitution and allow it to be offered as substantive evidence to prove an essential element of a federal offense.” *Id.* at 1076.

114. *Cavanaugh*, 643 F.3d at 604.

invalid had it arisen from a state or federal court.”¹¹⁵ Thus, the court held that, with no purported irregularities or claims of innocence, the defendant’s prior uncounseled criminal history was admissible to prove the pertinent essential element of 18 U.S.C. § 117.¹¹⁶

Similar to *Cavanaugh*, the Tenth Circuit in *United States v. Shavanaux* held that a defendant’s uncounseled prior domestic assault convictions in tribal court, valid under the ICRA, were admissible in subsequent federal prosecutions.¹¹⁷ The defendant, a member of the Ute Indian Tribe, was indicted in federal court for assaulting his domestic partner under 18 U.S.C. § 117.¹¹⁸ As in *Cavanaugh*, the prosecutor offered evidence of Shavanaux’s two prior domestic assault convictions in tribal court to establish the habitual offender element of the statute.¹¹⁹ The Tenth Circuit found that even though the defendant was neither represented by counsel nor offered the right to appointed counsel under tribal law¹²⁰ and the ICRA, the Ute tribal court convictions were admissible in federal court for a subsequent case because they did not violate the Sixth Amendment.¹²¹

In contrast to the Ninth Circuit in *Ant*, the court in *Shavanaux* found that even though a tribal prosecution does not afford all of the rights guaranteed by the Bill of Rights, the absence of court-appointed counsel did not make the convictions unconstitutional.¹²² Following this syllogism, the Tenth Circuit stated that the “[u]se of tribal convictions in a subsequent prosecution cannot

115. *Id. Compare* State v. Spotted Eagle, 71 P.3d 1239, 1245–46 (Mont. 1003) (allowing the use of a prior uncounseled tribal conviction to enhance DUI charges in state court and reasoning that the Sixth Amendment right to counsel does not apply to tribal court proceedings), with *United States v. Ant*, 882 F.2d 1389, 1396 (9th Cir. 2011) (refusing to admit into evidence an uncounseled tribal conviction based on a guilty plea because the conviction was obtained in violation of the Sixth Amendment).

116. *See Cavanaugh*, 643 F.3d at 605; *see also* 18 U.S.C. § 117 (2006).

117. *United States v. Shavanaux*, 647 F.3d 993, 1001 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

118. *Id.* at 995.

119. *Id.* at 995–96; *see* 18 U.S.C. § 117(a) (outlining the habitual offender provision of VAWA).

120. *Shavanaux*, 647 F.3d at 996. The pertinent section of the Ute Indian Tribe’s Rules of Criminal Procedure provides that

[i]n all criminal proceedings . . . The Defendant may represent himself or be represented by an adult enrolled Tribal member, or by any attorney admitted to practice before the Ute Tribal Court, but no Defendant shall have the right to have appointed professional counsel provided at the Tribe’s expense.

UTE INDIAN R. OF CRIM. PROC. 3, available at <http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm>.

121. *Shavanaux*, 647 F.3d at 996–97 (noting that the Bill of Rights does not “constrain” Indian tribes).

122. *Id.* at 997.

violate ‘anew’ the Sixth Amendment . . . because the Sixth Amendment was never violated in the first instance.”¹²³

The court in *Shavanaux* also emphasized the importance of recognizing valid tribal court convictions under principles of comity, “‘requir[ing] that a court give full effect to the valid judgments of a foreign jurisdiction according to that sovereign’s laws.’”¹²⁴ The court was compelled by the notion that the failure to recognize tribal courts’ convictions would undermine the ICRA’s goal of promoting self-governance.¹²⁵ To this end, the Tenth Circuit cited multiple court opinions for the proposition that federal courts should liken Indian tribes to foreign states when considering whether to recognize tribal court convictions.¹²⁶ For example, the Ninth Circuit in *Wilson v. Marchington* found that “[f]oreign-law nations are not *per se* disharmonious with due process” even though their laws do not reflect “common-law notions of procedure.”¹²⁷

II. A DIFFERENCE OF OPINION: A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL OR AN EXTENSION OF COMITY?

As the court in *Cavanaugh* rightly noted, when using prior uncounseled tribal court convictions in subsequent federal proceedings to fulfill the habitual offender element under section 117 of VAWA, an inherent tension exists between respecting a defendant’s constitutional right to counsel and affording deference to the laws and procedures of semi-sovereign tribal governments.¹²⁸

123. *Id.* at 998 (citation omitted).

124. *Id.* at 999 (quoting *State v. Spotted Eagle*, 71 P.3d 1239, 1245 (Mont. 2003)). A “valid” foreign judgment is one that, according to the Restatement (Third) of Foreign Relations § 482, is obtained through “procedures compatible with due process of law” and is rendered by a court with appropriate jurisdiction over the defendant. *Id.*

125. *Id.* at 1000. The court warned, however, that “[e]xtending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.” *Id.* at 999 (quoting *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)).

126. *Id.* at 998 (citing *Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987), *MacArthur v. San Juan Cnty*, 309 F.3d 1216, 1225 (10th Cir. 2002), *cert denied*, 130 S. Ct. 2378 (2010), *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006), *Marchington*, 127 F.3d at 810, and *Spotted Eagle*, 71 P.3d 1239, 1245–46 (Mont. 2003)).

127. *Marchington*, 127 F.3d at 811; *see also Shavanaux*, 647 F.3d at 999 (“Unless a tribal conviction has been vacated through habeas proceedings or on other grounds, it constitutes a valid conviction for the purposes of 18 U.S.C. § 117(a) and its use does not violate a defendant’s right to due process in a federal prosecution.”).

128. *United States v. Cavanaugh*, 643 F.3d 592, 596 (8th Cir. 2011) (“This tension exists because the tribal-court ability to impose a term of incarceration of up to one year based upon an uncounseled conviction is inconsistent with *Gideon v. Wainwright* . . . and *Scott v. Illinois*.”), *cert. denied*, 132 S. Ct. 1542 (2012); *see also id.* at 606 (Bye, J., dissenting) (noting that “the lack of clarity [in case law and Supreme Court jurisprudence] means reasonable decision-makers are likely to differ on the conclusions they reach with respect to allowing or prohibiting such use of an uncounseled tribal court conviction”).

The lack of clear direction from the Supreme Court and Congress has caused divergent opinions among the lower courts as evidenced by the incongruous Eighth, Ninth, and Tenth Circuit decisions.¹²⁹

A. *The Ninth Circuit's Burgett Approach*

As the Supreme Court held in *Burgett v. Texas*, admitting evidence of prior criminal convictions that were unconstitutional under the standards of *Gideon v. Wainwright* is “inherently prejudicial.”¹³⁰ At the heart of this principle is the importance of ensuring constitutional due process rights, including the right to counsel.¹³¹ To this end, the Ninth Circuit in *United States v. Ant* placed heavy emphasis on due process considerations when it denied as evidence a defendant’s prior uncounseled tribal court guilty plea in federal court.¹³²

This approach focuses not on the “validity of the tribal court proceedings or . . . the tribal justice system, but instead . . . evaluate[s] whether the convictions satisfy constitutional requirements for use in a federal prosecution in federal court.”¹³³ The preclusion of uncounseled tribal court convictions in federal court does not in turn place any restrictions on the tribal court’s use of that conviction.¹³⁴ Not only does this approach protect a defendant’s due process rights, but it has minimal effects on tribal sovereignty since it does not denigrate the tribal conviction.¹³⁵

However, as noted by some courts and scholars, this approach presupposes that uncounseled tribal court convictions are unreliable¹³⁶ and based on inadequate due process standards.¹³⁷ In particular, the failure to recognize uncounseled tribal court proceedings in federal court is a rejection of the “underlying assumption implicit in Congress’s enactment of the ICRA . . . that . . . tribal courts will not deny fundamental fairness, since there is no reason to assume Congress would legislatively encourage judicial forms which would foster injustice.”¹³⁸ Thus, without a careful examination of the tribal court’s

129. See *supra* notes 20–31 and accompanying text (providing an overview of the Eighth Circuit and Tenth Circuit split with the Ninth Circuit).

130. *United States v. Burgett*, 389 U.S. 109, 115 (1967).

131. *Cavanaugh*, 643 F.3d at 606 (Bye, J., dissenting).

132. *United States v. Ant*, 882 F.2d 1389, 1396 (9th Cir. 1989).

133. *Cavanaugh*, 643 F.3d at 607 (Bye, J. dissenting) (quoting *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1075 (D.N.D. 2009)).

134. *Cavanaugh*, 643 F.3d at 605.

135. Milani, *supra* note 47, at 1290. Even if a tribal court conviction is not admitted into evidence to establish an element of a crime or to enhance sentencing of a subsequent crime, the tribal court conviction and any resulting sentence remain valid and binding. *Id.*

136. See Washburn, *supra* note 55, at 433–34 n.163 (postulating that Justice Thurgood Marshall would consider uncounseled tribal convictions as unreliable for federal sentencing purposes).

137. See *Ant*, 882 F.2d at 1394–96.

138. See Milani, *supra* note 47, at 1289. Congress emphasized tribal self-governance and self-determination over Sixth Amendment protections, believing that “the incidental loss of the

proceedings to determine whether due process standards were met,¹³⁹ courts applying the *Burgett* approach may exclude sufficiently valid and fairly-rendered convictions.

This approach has a discouraging impact on the intended effect of recidivist statutes, such as VAWA's habitual offender provision. The *Burgett* approach prioritizes constitutional due process considerations, especially an indigent defendant's right to appointed counsel, over imposition of enhanced sentences for Indian domestic violence recidivists.¹⁴⁰ The Ninth Circuit's narrow focus on due process impedes the joint efforts of Indian tribes and the federal government to bring national attention to the domestic violence epidemic in Indian country and to punish Indian recidivists proportionally.¹⁴¹ Instead, a case-by-case review of the prior proceedings to determine whether there was unfair prejudice to the uncounseled defendant would help these efforts, while also preserving the defendant's due process rights.

B. A Comity Approach

As noted in both *Cavanaugh* and *Shavanaux*, questions regarding the legitimacy of tribal proceedings still remain.¹⁴² Tribal nations are semi-sovereign entities shaped by a unique relationship with the U.S. federal government and centuries of history, tradition, and culture.¹⁴³ The *Cavanaugh* and *Shavanaux* courts were concerned that the federal courts' failure to recognize uncounseled tribal court convictions, which complied with tribal law and the ICRA, would disparage tribal courts and "reflect[] a lack of regard for the legitimacy of tribal proceedings."¹⁴⁴ By advocating for a comity-like approach¹⁴⁵ to tribal court proceedings, in which federal courts

individual rights of the [Indian] defendants [was] an acceptable consequence" in light of Congress's "assum[ption] that uncounseled proceedings in tribal courts would not be fundamentally unfair to Indian criminal defendants." *Id.* at 1290.

139. See, e.g., Craig Smith, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CAL. L. REV. 1393, 1433 (2010) (explaining that state courts may be wary of accepting tribal decisions without an examination of the process the tribal courts offered the parties). Smith's article, which primarily discusses full faith and credit, is insightful when discussing issues of comity. See Brian S. Faughnan, *Half Full Faith and Credit is No Full Faith and Credit At All: Tennessee's Unconstitutional Interpretation of the Full Faith and Credit Clause and Other Deficiencies in Modern Understanding of the Full Faith and Credit Clause*, 28 U. Mem. L. Rev. 1135, 1139 (1998) (explaining that both principles of comity and full faith and credit apply to the enforcement of judgments).

140. *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1077 (D.N.D. 2009), *rev'd* 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

141. See *supra* notes 59–60 and accompanying text (explaining how the federal government has increased funding to tribal law enforcement, particularly for domestic and sexual violence).

142. See *supra* notes 124–27 and accompanying text.

143. See *supra* note 47 and accompanying text (discussing tribal semi-sovereign status).

144. See Milani, *supra* note 47, at 1300.

145. See Smith, *supra* note 139, at 1394 (citing *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)). In Smith's article, he explains that "comity [is] a doctrine that the Supreme Court

recognize foreign court rulings, the Eighth and Tenth Circuits placed greater emphasis on acceding to the validity of Indian courts' judgments.¹⁴⁶

Under this approach, courts have analogized tribes to foreign nations¹⁴⁷ as well as to states.¹⁴⁸ Similar to foreign nations, tribes are not restricted by the Bill of Rights.¹⁴⁹ However, dependence on the federal government and Congress for funding as well as recognition likens the relationship between tribes and the federal government to the relationship between the federal government and the states.¹⁵⁰ Whether compared to foreign nations or states, the unique relationship between Indian tribes and the federal government is readily apparent, and the resulting intricacies of tribal-federal jurisprudence are easy to recognize.¹⁵¹

A comity approach toward uncounseled tribal court convictions¹⁵² furthers the congressional policy of tribal self-governance and empowerment.¹⁵³ As the

described as ‘neither a matter of absolute obligation . . . nor of mere courtesy and good will.’” *Id.* (quoting *Hilton*, 159 U.S. at 163–64). However, Smith also suggests that a comity approach has disadvantages, namely that comity’s “dated rhetoric” often causes courts to measure tribal court standards against a “federal or state normative baseline.” *Id.* at 1408. This in turn may cloud a “court’s ability to appreciate the possibilities of a deep diversity model of tribal-national relations, whereby tribal norms can diverge from federal and state norms and yet still be recognized as valid expressions of American identity deserving respect and legal recognition.” *Id.* at 1407–08.

146. See e.g., *State v. Spotted Eagle*, 71 P.3d 1239, 1245 (Mont. 2003) (explaining that Montana courts follow the Tenth Circuit comity approach to tribal court judgments); see also *United States v. Cavanaugh*, 643 F.3d 592, 605 (8th Cir. 2011) (agreeing with *Spotted Eagle*), *cert. denied*, 132 S. Ct. 1542 (2012); *United States v. Shavanaux*, 647 F.3d 993, 1001–02 (10th Cir. 2011) (utilizing principles of comity to recognize that the use of the defendant’s prior tribal conviction in a subsequent federal prosecution did not violate the defendant’s due process rights), *cert. denied*, 132 S. Ct. 1742 (2012).

147. *Shavanaux*, 647 F.3d at 1000.

148. See Washburn, *supra* note 55, at 434 (“Because of the Indian Civil Rights Act and the Fourteenth Amendment, tribal courts simply have much more in common with the courts of Arizona or Montana than with foreign courts, even those of Australia, Canada and the United Kingdom, which share common legal roots with American courts.”).

149. *Shavanaux*, 647 F.3d at 998.

150. See Washburn, *supra* note 55, at 408 (noting how the EPA is required to treat tribes as “states”).

151. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (“The condition of the Indian [tribes] in relation to the United States is perhaps unlike that of any other [relationship] in existence.”).

152. See Karla L. Engle, *Red Fox v. Hettich: Does South Dakota’s Comity Statute Foster Unwarranted State Court Intrusion into Tribal Jurisdictional Authority over Civil Disputes?*, 38 S.D. L. REV. 706, 706 & n.1 (1993) (citing S.D. Codified Laws § 1-1-25 (2011)) (specifying when a court may recognize a tribal conviction through principles of comity). South Dakota state law contains a provision that recognizes tribal court judgments, so long as they comport with various requirements including proper jurisdiction and an “impartial administration of justice.” *Id.*

153. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (noting that the congressional intent underlying legislation like the ICRA is to provide tribes with the autonomy to self-govern); see also notes 55–56 and accompanying text (explaining how self governance allows tribes to shape their own judicial systems).

court in *Shavanaux* commented, failure to extend full recognition to uncounseled tribal court convictions quietly imposes on tribes Sixth Amendment standards despite Congress's refusal to do so when it enacted the ICRA.¹⁵⁴ Although the Ninth Circuit's ruling did not expressly pass judgment on the validity of tribal court convictions,¹⁵⁵ a tribal court that wants its judicial rulings to be recognized in the Ninth Circuit's jurisdiction must conform to the due process standards of the federal government.¹⁵⁶ However, if federal courts extended comity to uncounseled tribal court convictions, tribal governments could continue to develop their laws and judicial procedures in accordance with their own values and principles.

Extending comity to tribal court convictions, including uncounseled convictions in compliance with the ICRA, effectuates the purposes of recidivism statutes such as the habitual offender provision of VAWA.¹⁵⁷ In both *Cavanaugh* and *Shavanaux*, the prosecutors charged the defendants under VAWA's habitual offender provision to obtain higher sentences than would be permissible under similar statutes that did not account for prior criminal history.¹⁵⁸ The increased sentencing under VAWA's habitual offender provision indicates the federal government's determination to crack down on domestic violence,¹⁵⁹ especially in Indian country.¹⁶⁰ Specifically, these provisions are enacted to protect Indian woman from recidivists and prevent recidivism.¹⁶¹ Extending comity to tribal court convictions to establish a record of prior criminal history is a significant and necessary step toward protecting Indian women from domestic violence.¹⁶²

154. *Shavanaux*, 647 F.3d at 1000.

155. *United States v. Ant*, 882 F.2d 1389, 1396 (9th Cir. 2011) (explicating that the court was looking past the question of validity to determine whether constitutional due process was upheld).

156. *See Milani*, *supra* note 47, at 1287–88 (explaining the rationale of the *Ant* holding and that it did not conform with applicable Sixth Amendment jurisprudence).

157. *See supra* notes 65–68 and accompanying text (explaining the purposes of the habitual offender statutes).

158. *United States v. Cavanaugh*, 650 F. Supp. 2d 1062, 1066, 1069–70 (D.N.D. 2009), *rev'd*, 643 F.3d 592, 594 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012); *Shavanaux*, 647 F.3d at 995–96.

159. *See supra* notes 76–77 and accompanying text (describing the intent of VAWA's habitual offender provision).

160. *See supra* note 73 and accompanying text (detailing how rates of domestic violence among Native American women are higher than among white American women).

161. *Shavanaux*, 647 F.3d at 1002 (specifying that Congress passed § 117 due to the high rates of domestic violence against Indian women and detailing the high incidence of recidivism among domestic violence offenders).

162. *Id.*

III. STRIKING A BALANCE: DEFERENCE TO TRIBAL SOVEREIGNTY WITH AN EYE TOWARDS DUE PROCESS

As illustrated by the scenario at the beginning of this Comment, neither party involved in *Cavanaugh* could predict, due to the varying approaches taken by courts, whether the defendant's tribal court conviction would be admitted into evidence. The Supreme Court or Congress must address this uncertainty in order to "bring greater certainty to litigants in tribal courts."¹⁶³

To do this effectively, courts must weigh constitutional due process concerns¹⁶⁴ against the need to recognize legitimate tribal court rulings.¹⁶⁵ Courts must also consider whether the Sixth Amendment right to appointed counsel in federal and state court is commensurate with the Indians' right to counsel at one's own expense as mandated by the ICRA, or whether the difference is insurmountable.¹⁶⁶ Therefore, courts must find a balance. When considered in the narrower context of the habitual offender provision of VAWA, the balance must resolve the disparity in sentencing between similarly situated Indian and non-Indian defendants.¹⁶⁷

When determining whether an uncounseled conviction in tribal court can be admitted in federal court for purposes of enhanced sentencing or establishing prior criminal history, courts should give substantial deference to the tribal court's findings.¹⁶⁸ This should be accomplished with the recognition that even though tribal courts do not utilize exactly the same procedures as federal courts, they are nonetheless guided by common principles of justice and fairness.¹⁶⁹ In fact, a Tenth Circuit judge, Monroe McKay, testified before the Senate Select Committee on Indian Affairs in 1991 that, despite the limited resources and funding available to Indian communities, tribal courts are just as capable of administering justice as federal courts.¹⁷⁰

163. Smith, *supra* note 139, at 1435 (arguing that recognition of full faith and credit will also advance tribal sovereignty); *see also supra* note 33 (noting that the petitions for writs of certiorari in the *Cavanaugh* and *Shavanaux* cases were denied by the Supreme Court in 2012).

164. *See supra* Part II.A.

165. *See supra* Part II.B.

166. *See supra* note 58 and accompanying text.

167. *See United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1077 (D.N.D. 2009), *rev'd* 643 F.3d 592 (8th Cir. 2011) (providing that the result of the case is in accord with placing all of the defendants on a level playing field), *cert. denied*, 132 S. Ct. 1542 (2012).

168. *Cavanaugh*, 643 F.3d at 603–04.

169. *See supra* note 138 and accompanying text (noting the implicit assumption underlying Congress's enactment of the ICRA—that tribal courts would ensure fundamental fairness for defendants in tribal court proceedings, despite the inapplicability of the Sixth Amendment's right to counsel to those proceedings).

170. *See Milani, supra* note 47, at 1294–95.

However, courts should also independently consider whether prior uncounseled convictions comport with notions of due process.¹⁷¹ Notably, the independent examination should resemble the more flexible review standard employed by the Eighth Circuit in *Cavanaugh*,¹⁷² as opposed to the rigid standard in *Ant*.¹⁷³ In *Cavanaugh*, the court reviewed the prior uncounseled convictions for domestic assault to determine whether there were any allegations of irregularities or claims of actual innocence that might imply disregard for due process.¹⁷⁴ This approach advances tribal sovereignty¹⁷⁵ by acknowledging and respecting the legitimacy of tribal practices and institutions¹⁷⁶ while also paying heed to the importance of providing counsel to defendants.¹⁷⁷

IV. CONCLUSION

An indigent defendant's right to appointed counsel is a fundamental right that helps ensure the defendant's due process rights.¹⁷⁸ However, because the Sixth Amendment does not apply to Indian governments,¹⁷⁹ and because the ICRA only mandates that an indigent defendant has a right to counsel at his

171. *See supra* notes 101–05 and accompanying text; *see also* *United States v. Ant*, 882 F.2d 1389, 1393–96 (1989) (detailing how the court independently examined the constitutional validity of *Ant*'s tribal conviction).

172. *Cavanaugh*, 643 F.3d at 605 (“[I]n the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior convictions, we cannot preclude the use of such a conviction in the absence of an actual constitutional violation.”); *see also* *Engle, supra* note 152, at 736–37 (specifying how courts should apply a lenient comity approach).

173. *Ant*, 882 F.3d at 1395–96 (evaluating whether *Ant*'s conviction met constitutional requirements).

174. *See Cavanaugh*, 643 F.3d at 605.

175. *See Helgesen, supra* note 50, at 472 (2011) (advocating for federal policies that promote tribal self-determination). A federal court's recognition of an uncounseled tribal court conviction as a valid predicate offense also bolsters the cause of tribal self-determination. *Id.* (noting that self-determination policies and the provision of additional resources empower tribal governments to address the needs of their communities and pronounce judgment on individuals “committing crimes against their own people”).

176. *See id.* (“The tribes must be empowered internally with more resources, education, and training . . . [causing a change that is] systemic . . . [and] long-term, meaning that the government must commit to granting tribal self-determination.”).

177. *See Johnson v. Zerbst*, 304 U.S. 458, 462 (1938), *overruled in part*, 451 U.S. 477 (1981). To be clear, the balance proposed does not disregard the importance of the fundamental right to counsel, nor does it undercut the progress tribes should strive to make in providing as many indigent defendants with counsel as possible. This Comment simply evaluates a narrow circumstance in the context of Section 117 of VAWA, in which uncounseled tribal court convictions valid under the ICRA and tribal law are used in subsequent federal or state court proceedings as evidence of prior domestic assault convictions.

178. *See supra* Parts I.A and I.D.

179. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008) (recognizing that the Bill of Rights does not apply to Indian tribes).

own expense,¹⁸⁰ an inherent tension developed regarding the use of uncounseled tribal court convictions in federal court for purposes of establishing criminal history under recidivist statutes.¹⁸¹ Not surprisingly, lower courts are split on the issue and are unable to find a balance between the Sixth Amendment and principles of comity.¹⁸² The diverging decisions compromise the intended goals of Congress in enacting the habitual offender provision of the Violence Against Women Act as well as the current administration's efforts to address and decrease the prevalence of domestic violence against Indian women. The Supreme Court and Congress can and must present a workable solution by instructing courts to give substantial deference to court proceedings in semi-sovereign Indian nations and to independently review the tribal court convictions to ensure that the proceedings complied with tribal law and the ICRA.

180. 25 U.S.C. § 1302(a)(6) (2006 & Supp. IV 2011).

181. *See United States v. Cavanaugh*, 643 F.3d 592, 596 (8th Cir. 2011) (recognizing the tension inherent in using an uncounseled tribal court conviction to enhance a subsequent conviction's punishment), *cert. denied*, 132 S. Ct. 1542 (2012).

182. *See supra* Part I.E (outlining the circuit split on whether uncounseled tribal court convictions are admissible in federal court to enhance sentencing).