UNCOUNSELED TRIBAL COURT CONVICTIONS: THE SIXTH AMENDMENT, TRIBAL SOVEREIGNTY, AND THE INDIAN CIVIL RIGHTS ACT

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Tribal courts tasked with the prosecution of Native American defendants are not constrained by many Constitutional provisions, including the Sixth Amendment right to counsel in criminal proceedings. Currently, the Indian Civil Rights Act only requires representation in tribal court prosecutions of indigent defendants that may lead to incarceration of more than one year. State and federal courts require the opportunity of representation for all defendants in criminal proceedings. This discrepancy between the rights afforded in tribal courts and in state and federal courts lead to unique legal issues for Native American defendants indicted in federal court after being convicted without counsel in a tribal court.

Native Americans prosecuted under federal repeat-offender statues could be exposed to harsher penalties based on prior uncounseled tribal convictions. Thus, even if a Native American lacked representation in tribal court, those convictions might be used as predicate offenses for the purposes of federal repeat-offender laws. Different approaches to this issue are presented from the Eighth, Ninth, and Tenth Circuits. This Note addresses the reasoning of each Circuit and offers a Recommendation that balances tribal sovereignty concerns, Sixth Amendment ramifications, and justice implications for both victims and defendants in the tribal court system.

I. INTRODUCTION

In *Gideon v. Wainwright,* Justice Black declared, "lawyers in criminal courts are necessities, not luxuries."[1] Historically, the Sixth Amendment right to counsel in criminal proceedings has been associated with judicial fairness, truth, and accuracy.[2] The precise application and scope of the Sixth Amendment right to counsel has developed and changed

* J.D. 2013, University of Illinois College of Law. B.A. 2010 University of Illinois at Urbana-Champaign. I would like to thank the editors and members of the *University of Illinois Law Review* for their hard work. I would also like to thank Angela Gilbert, Megan McMillen, and Steve Benathen for their suggestions. Finally, I would like to thank my family for their support and encouragement.

1. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

2. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 90 (1997).

over time.[3] The Supreme Court has slowly refined the legal applications of the Sixth Amendment right to counsel, though many intricacies of the amendment still remain ambiguous.[4] Numerous legal questions arise when considering the Sixth Amendment's protections in the context of tribal law.[5] Native American nations, sovereign entities prior to the signing of the Constitution, are considered "pre-constitutional" or "extra-constitutional" nations.[6]

In an effort to respect tribal sovereignty and autonomy, tribal courts are not fully constrained by the constitutional provisions that apply to federal and state courts, including the Sixth Amendment.[7] Instead, the Indian Civil Rights Act only requires appointment of counsel for indigent criminal defendants in tribal court for prosecutions that may result in a term of incarceration that is greater than one year.[8] The limited scope of the Indian Civil Rights Act raises legal questions for Native American defendants who are indicted in federal court following uncounseled convictions in tribal court. In *Burgett v. Texas*, the Supreme Court explained that a prior criminal conviction could not be used to bolster a defendant's sentence under a recidivist statute if the prior conviction occurred in violation of the defendant's Sixth Amendment right to counsel.[9] Recidivist statutes, often known as "repeat-offender" statutes or "three-strike" laws in many jurisdictions, often mandate enhanced sentences based on a criminal defendant's prior criminal history.[10] When a criminal defendant is convicted of multiple offenses following his or her release from prison, courts are commonly mandated to enhance the offender's criminal sentence.[11] Additionally, prior convictions may serve as

3. *See generally* Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635 (2003) (explaining the historical development of the Sixth Amendment).

4. *See id*. (describing the progression, development, and refinement of the Sixth Amendment); *see also* AMAR, *supra* note 2, at 89 ("The Sixth Amendment is the heartland of constitutional criminal procedure, yet the legal community lacks a good map of its basic contours, a good sense of its underlying ecosystem, a good plan for its careful cultivation.").

5. *See, e.g*., United States v. Cavanaugh, 643 F.3d 592, 605–06 (8th Cir. 2011); United States v. Shavanaux, 647 F.3d 993, 997–98 (10th Cir. 2011); United States v. Ant, 882 F.2d 1389, 1395 (9th Cir. 1989).

6. *See* 42 C.J.S. *Indians* § 26 (2006); *see also* Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 358 (2003).

7. *See Shavanaux*, 647 F.3d at 997.

8. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (2006); *see also Cavanaugh*, 643 F.3d at 596 ("Congress passed the Indian Civil Rights Act, selectively applying some, but not all, protections from the Bill of Rights to situations where an Indian tribe is the governmental actor.").

9. Burgett v. Texas, 389 U.S. 109, 115 (1967).

10. *See generally* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1143–46 (2010) (describing the general structure of recidivist statutes and sentencing).

11. *See id*. at 1143.

predicate offenses[12] for the purposes of prosecuting a defendant under a repeat-offender statute.[13]

Burgett's reasoning, which aims to prevent increased sentences based on constitutionally invalid prior convictions, encompasses Sixth Amendment violations in state and federal courts—not *tribal* courts.[14] Members of Native American tribes, considered dual citizens of both the United States and tribal nations, are not guaranteed the full protections of the Sixth Amendment in tribal court proceedings.[15] Consequently, a loophole currently exists in which members of Native American tribes may be prosecuted under federal repeat-offender statutes based on prior uncounseled tribal convictions.[16] Thus, even if a Native American were previously convicted of a crime in tribal court without the assistance of counsel, those convictions might still be used as predicate offenses for the purposes of federal repeat-offender laws.[17] Arguably, the *Burgett* rule should prevent uncounseled tribal convictions from being used to establish repeat-offender elements of a federal statute. Since the Bill of Rights does not explicitly constrain tribal court proceedings, however, the *Burgett* rule's application has become the subject of judicial scrutiny.[18]

The Eighth, Ninth, and Tenth Circuits have considered this precise issue and have arrived at conflicting conclusions. In *United States v. Cavanaugh*, the Eighth Circuit allowed the use of an uncounseled conviction in tribal court for the purposes of 18 U.S.C. § 117, which makes habitual domestic violence offenses a federal crime.[19] Similarly, in *United States v. Shavanaux*, the Tenth Circuit upheld the use of an uncounseled conviction in tribal court for the purposes of 18 U.S.C. § 117.[20] The decisions of *Shavanaux* and *Cavanaugh* directly contrast with an earlier decision in *United States v. Ant*. In *Ant*, the Ninth Circuit refused to consider a previous uncounseled tribal guilty plea in federal court while using the precedent of *Burgett*.[21]

12. BLACK'S LAW DICTIONARY 1188 (9th ed. 2009) (defining "predicate offense" as "[a]n earlier offense that can be used to enhance a sentence levied for a later conviction").

13. See 18 U.S.C. § 117 (2006) for an example of a federal repeat-offender statute, which requires a specific number of predicate convictions for the federal government to prosecute a defendant under this statute.

14. *See* United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011) (explaining that, since the Bill of Rights does not apply to proceedings in tribal court, the protections of the *Burgett* rule cannot logically apply to proceedings in tribal court).

15. *See* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1055–56 (2007).

16. *See, e.g.*, United States v. Cavanaugh, 643 F.3d 592, 605–06 (8th Cir. 2011); *Shavanaux*, 647 F.3d at 997–98 (providing examples of Native American defendants who were indicited under a federal repeat-offender statute following convictions in tribal court).

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

18. *See id.*; *see also* United States v. Ant, 882 F.2d 1389, 1395 n.8, 1395 (9th Cir. 1989) (providing examples of judicial uncertainty surrounding the application of the *Burgett* rule to prior tribal proceedings).

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

20. *Shavanaux*, 647 F.3d at 997–98.

21. *Ant*, 882 F.2d 1389 at 1396.

This Note examines the current approaches used by the Eighth, Ninth, and Tenth Circuits regarding the *Burgett* rule and uncounseled tribal convictions. Part II outlines the relevant legal guideposts, precedent, statistical data, and terminology relevant to the analysis of this issue. Part III explains the precise reasoning of the Eighth, Ninth, and Tenth Circuits. Additionally, Part III will analyze the strengths and weaknesses of the approaches used by modern courts. Finally, Part IV recommends a modified approach, which aims to balance the competing interests of preserving the autonomy of the tribal system, preventing unfair and inaccurate judicial proceedings, decreasing domestic violence rates in tribal communities, and preserving the integrity of the Sixth Amendment right to counsel.

II. BACKGROUND

Uncounseled criminal convictions have significant ramifications for numerous aspects of the criminal justice system. To adequately analyze these ramifications, specific concepts and relevant case law need to be described. First, the history and modern development of the Sixth Amendment right to counsel in the United States will be analyzed. Second, the purpose and importance of the right to counsel will be discussed. Third, the right to counsel in tribal court systems will be described. Fourth, a brief overview of crime and recidivism rates in Indian Country will be provided. Fifth, recidivist statutes and sentencing enhancements will be explained. Finally, the *Burgett* rule and the effects of uncounseled convictions will be explained. With these background concepts described, the competing perspectives of the Eighth, Ninth, and Tenth Circuits will be better illuminated.

A. The Development & Importance of the Sixth Amendment

The Sixth Amendment to the U.S. Constitution sets forth the principle that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[22] This protection has evolved and changed over time;[23] the precise meaning of the phrase "criminal prosecutions" within the Sixth Amendment has also been the subject of extensive judicial analysis.[24] Although the Sixth Amendment currently has a broad scope, the right to counsel did not originally extend to individuals charged with state crimes.[25] Each state was permitted to craft its own rules regarding right to counsel for criminal defendants.[26]

22. U.S. CONST. amend. VI.

23. Metzger, *supra* note 3, at 1637 (explaining that Sixth Amendment protections are not static and evolve within historical norms of the time period).

24. *See, e.g.*, United States v. Wade, 388 U.S. 218, 224–25 (1967) (illuminating the precise stages of criminal prosecution that are entitled to Sixth Amendment protection).

25. Metzger, *supra* note 3, at 1640–41; *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1041–42 (2006).

26. Metzger, *supra* note 3, at 1640–41.

Despite the adoption of the Fourteenth Amendment, the Sixth Amendment right-to-counsel was not incorporated and extended to the states.[27] States, however, slowly provided right-to-counsel protections to defendants through their own state constitutions, common law, and statutes.[28] Ultimately, while the Sixth Amendment did not mandate a right to counsel on the state level, "every state in the union had identified *some* circumstance in which the state was required to provide an attorney for an indigent defendant" by the early 1930s.[29] The state approaches varied, and different states provided unique standards for access to counsel depending on the nature and severity of the crime committed.[30] Although the differing state standards created a patchwork of nonuniform state systems, these systems demonstrated a general consensus that the right to counsel was to be offered to criminal defendants in specific circumstances.[31]

1. Historical Progression of the Right to Counsel in the United States

As time progressed, the Supreme Court slowly began to assess the legal facets of the Sixth Amendment's provisions for right to counsel. Throughout the twentieth century, several landmark decisions clarified and defined some of the precise circumstances in which an individual was entitled to counsel. First, in *Powell v. Alabama*, the Supreme Court held that a state's denial of counsel in a capital case violated the principles of due process.[32] Specifically, the Court held that the trial court's failure to give the defendants reasonable time and opportunity to procure counsel constituted a violation of the Fourteenth Amendment.[33] The *Powell* decision was limited to capital cases involving indigent defendants who were incapable of defending themselves due to "ignorance, feeble mindedness, illiteracy, or the like."[34] The *Powell* decision, while limited in its application, illuminated the concern that uncounseled capital proceedings could undermine the fairness and accuracy of judicial results.[35]

Shortly thereafter, in *Johnson v. Zerbst*, the Supreme Court found that federal courts have no "power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[36] Thus, the Court solidified the right to counsel for criminal defendants in federal court.[37] In contrast to *Powell*, the *Zerbst* Court mandated the appointment of counsel for even the most intelligent and sophisticated de-

27. *Id*.
28. *Id*. at 1641.
29. *Id*.
30. *Id*.
31. *Id*.
32. Powell v. Alabama, 287 U.S. 45, 73 (1932).
33. *Id*. at 71.
34. *Id*.
35. *See* Metzger, *supra* note 3, at 1643.
36. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).
37. *Id*.

fendants in federal court, thereby broadening the Sixth Amendment's protective scope.[38] Despite the protections secured in *Powell* and *Zerbst* the Court drastically curtailed Sixth Amendment protections for defendants in criminal proceedings in state courts several years later.[39]

In *Betts v. Brady*, the Supreme Court held that the Sixth Amendment's protections only apply to trials in federal court.[40] The Court explained that the Fourteenth Amendment did not incorporate the guarantees of the Sixth Amendment.[41] Consequently, *Betts* declined to extend the Sixth Amendment's protections to state criminal proceedings.[42] The *Betts* Court, however, noted that criminal defendants in state court were entitled to counsel under "special circumstances" in which a trial without counsel would violate principles of justice and fundamental fairness.[43] The "special circumstances" standard, however, failed to give courts sufficient explanation and guidance.[44] As a result of this ambiguity, lower courts heard a large number of post-conviction claims surrounding the unconstitutionality of criminal convictions involving violations of due process.[45] Correspondingly, the Supreme Court reconsidered the *Betts* decision in 1963 in *Gideon v. Wainwright.*[46]

In *Gideon*, the Court held that the Constitution requires the appointment of counsel for all indigent defendants charged with any felony.[47] The Court set forth the principle that the Sixth Amendment's guarantees extended to state court criminal prosecutions and were incorporated to the states through the Fourteenth Amendment.[48] The Court also explained that the right to counsel in criminal proceedings is a necessity and not a luxury.[49] Consequently, *Gideon* overturned *Betts*, and the Court opined, "the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial."[50] Almost a decade later, in *Argersinger v. Hamlin*, the Supreme Court further extended the Sixth Amendment's guarantees at the state level.[51] Specifically, the Court explained that judges must determine, prior to trial, if a charge could result in incarceration.[52] If a charge could result in incarceration, counsel must be appointed—regardless of the amount of time of potential incarceration.[53] Thus, *Argersinger* extended

38. *Id*.
39. *See* Betts v. Brady, 316 U.S. 455, 461–62 (1942).
40. *Id*. at 461.
41. *Id*. at 461–62.
42. *Id*.
43. *Id*. at 462.
44. Metzger, *supra* note 3, at 1645.
45. *Id*.
46. Gideon v. Wainwright, 372 U.S. 335, 338 (1963).
47. *Id*. at 342–43.
48. *Id*.
49. *Id*. at 344.
50. *Id*. at 351 (Harlan, J., concurring).
51. *See* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).
52. *See id*.
53. *See id*. at 37–38.

the protections of the Sixth Amendment to charges for misdemeanors and petty offenses, provided these charges could result in incarceration.[54]

Powell, *Zerbst*, *Gideon*, and *Argersinger* provide the modern criminal justice system with the standards for determining whether the Sixth Amendment's provisions apply to particular defendants at the state and federal level. The scope of these protections is dictated by the modern doctrine known as the "critical stages" doctrine.[55] The "critical stages" doctrine dictates that the right to counsel attaches when formal adversary proceedings are initiated.[56] In *United States v. Wade*, the Supreme Court identified "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" as critical.[57] After years of ambiguity surrounding the term "critical stage," the Supreme Court clarified its definition in *Rothgery v. Gillespie County*.[58] The Court explained that a criminal defendant's Sixth Amendment rights attach "at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty."[59] Further, a defendant's Sixth Amendment right does not require that a public prosecutor, as opposed to a police officer, be aware of or involved in an initial appearance before a magistrate before the right will attach.[60]

2. The Importance of the Right to Counsel in the United States

The Sixth Amendment right to counsel has vital importance in the criminal justice system. Even for minor crimes, the ability to procure legal representation is necessary to ensure the fairness of the adversarial process. First, the guidance of counsel is necessary to ensure accurate and truthful judicial results.[61] Second, the guidance of counsel protects criminal defendants who are confronted by the "powerful forces of the state" in complex legal proceedings.[62] Finally, criminal charges involving relatively minor punishments can have extensive effects on the life of a criminal defendant even though these effects are not readily apparent.[63]

The guidance of counsel ensures the accuracy and truth of the judicial process.[64] Courts typically hear thousands of cases each year, and the need for efficient and speedy judicial proceedings creates a system of

54. *Id*. at 37.
55. Metzger, *supra* note 3, at 1636.
56. *Id*.
57. United States v. Wade, 388 U.S. 218, 226 (1967).
58. *See* Rothgery v. Gillespie County, 554 U.S. 191, 211–12 (2008).
59. *Id*. at 194.
60. *Id*. at 194–95.
61. AMAR, *supra* note 2, at 90.
62. State v. Newsome, 414 N.W.2d 354, 359 (1987).
63. *Id*.
64. See *id*.

"assembly-line justice."[65] This system often substitutes speediness for care, and the frequent result is inaccuracy and unfairness.[66] Judicial inaccuracy and unfairness undermine the core principles of the Sixth Amendment, which include the pursuit of truth and the protection of innocence.[67] The Sixth Amendment's right to counsel provision is an "engine [through] which an innocent man can make the truth of his innocence visible to the jury and the public."[68] Among other things, the assistance of counsel ensures that criminal defendants understand the precise nature of the pending charges, the potential punishment, and the legality of a prosecutor's actions.[69]

Moreover, assistance of counsel protects demographically diverse defendants from complex criminal procedures.[70] Even the most intelligent criminal defendants require the assistance of counsel to understand the complex and intimidating rules and procedures involved in criminal proceedings.[71] Misdemeanor criminal proceedings may appear seemingly straightforward, but these proceedings often involve complex legal analysis and strategy.[72] Consequently, the presence of counsel is necessary to promote accuracy and fairness. Without the presence of counsel, criminal defendants risk the imposition of an inaccurate conviction. Even inaccurate misdemeanor convictions can have significant effects on the future of a criminal defendant.[73] After release from prison, criminal convicts face numerous obstacles.[74] A criminal conviction, even for a relatively minor offense, has a lasting impact on an individual's future and reputation in the community.

First, a criminal conviction carries a negative stigma, thereby affecting the possibility of securing employment.[75] As a result of widespread Internet use, employers can often access information regarding the criminal history of potential employees.[76] Federal law does not protect individuals convicted of misdemeanors from employment discrimination, so misdemeanor convictions can complicate the employment process for many individuals.[77] Further, prior convictions may negatively impact the process of obtaining a professional license and admission to educational institutions.[78] Finally, prior criminal convictions can affect immigration,

65. Argersinger v. Hamlin, 407 U.S. 25, 34–36 (1972).
66. *Id*.
67. AMAR, *supra* note 2, at 90.
68. *Id*.
69. *Argersinger*, 407 U.S. at 34.
70. *See* Gideon v Wainwright, 372 U.S. 335, 343–45 (1963).
71. Powell v. Alabama, 287 U.S. 45, 68–69 (1932).
72. Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 170–72 (2009).
73. *Id*. at 172–87.
74. *Id*. at 172.
75. *Id*. at 174.
76. *Id*.
77. *Id*.
78. *Id*. at 174–78.

tenancy, and access to federal aid packages.[79] The assistance of counsel is therefore a vitally important protection due to the complexity of criminal proceedings, the risk of inaccurate results, and the resulting impact on an individual's future.

B. Criminal Procedure & Crime Rates in Indian Country

Native Americans, dual citizens of both the United States and tribal nations, are not guaranteed the full protections of the Sixth Amendment in tribal court proceedings.[80] Tribal governments, as sovereign nations, strive to maintain their unique cultural history and sovereign capacity to govern their citizens.[81] Legally, Native American nations are considered "'domestic' sovereigns," allowing them to assert cultural and political sovereignty.[82] Numerous distinctive legal problems arise because of this "'domestic' sovereign" legal structure. Specifically, "the nature of Indian tribes as separate 'nations' within a pluralistic, constitutional democracy leads to many complexities that have yet to be resolved."[83] Native American nations were sovereign entities prior to the signing of the Constitution, thereby solidifying their status as "pre-constitutional" or "extra-constitutional" nations.[84] Although their status as "'domestic' sovereigns" allows Native American tribes to retain political discretion over their domestic affairs, Native Americans often experience curtailed rights in tribal court, which has been the subject of scholarly analysis and criticism.[85]

1. The Right to Counsel in Tribal Court Systems

Native Americans are not explicitly afforded every protection of the Constitution during tribal court proceedings, including the Sixth Amendment right to counsel.[86] The protections of *Gideon* and *Argersinger*, therefore, are not constitutionally mandated protections for criminal defendants in tribal court. Not surprisingly, numerous members of Native American tribes sought to bolster their rights, and this effort ultimately resulted in the implementation of the Indian Civil Rights Act of 1968.[87] The Indian Civil Rights Act of 1968 protects, by federal statute, certain fundamental rights of individuals who are subject to tribal juris-

79. *Id*. at 172, 182–86.
80. *See* Riley, *supra* note 15.
81. *Id.* at 1056.
82. *See* Tsosie, *supra* note 6; *see also* N. BRUCE DUTHU, AMERICAN INDIANS & THE LAW 30–34 (2008).
83. Tsosie, *supra* note 6.
84. *Id*.
85. *Id*.
86. *See* Riley, *supra* note 15; *see also* BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL 197 (2003).
87. *See* Indian Civil Rights Act, Pub. L. No. 90-284, Title II, § 202, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)); *see also* Riley, *supra* note 15.

diction.[88] In the context of legal representation, however, the Indian Civil Rights Act only requires the appointment of counsel for indigent criminal defendants in tribal court for prosecutions that may result in a term of incarceration that is greater than one year.[89] The Indian Civil Rights Act, therefore, does not provide the full range of protections afforded by *Argersinger* and *Gideon*, which require that counsel be appointed if a charge could result in incarceration, regardless of the length of potential incarceration.[90]

As a result of perceived inequities in tribal law, scholars have pushed for expansion of federal civil rights in tribal communities.[91] These scholars often perceive inequities as infractions of civil rights by tribal governments.[92] Accordingly, scholars believe that the federal government should assert a stronger influence in the tribal community to ensure that individual liberty supersedes the ideals of political and cultural sovereignty.[93] These efforts, however, may not respect the value and importance of tribal sovereignty or recognize the dangers of intrusive federal action.[94] Native nations are distinctive entities, and widespread differences exist among them.[95]

Consequently, federal intrusion into the legal systems of culturally distinct tribal governments would threaten the values of cultural, political, and legal sovereignty.[96] Further, due to vast differences between tribal governments, "forcing a one-size-fits-all approach to civil liberties onto Indian tribes is not only unjustified, it would seriously endanger Indian differentness."[97] Therefore, reforms related to civil liberties should come from within the tribal governments themselves.[98] Tribal governments may have the greatest insight for structuring policies of reform that are both progressive and respectful of cultural tradition.[99] Ultimately, when analyzing the potential extension of the right to counsel to Native Americans, for instance, the legal system must balance the interests of individual liberty, tribal sovereignty, and cultural distinctiveness.

88. *See* 25 U.S.C. § 1302 (2006); *see also* Indian Civil Rights Act, § 202; Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1062 n.30 (1982) (explaining that the Indian Civil Rights Act provides protections for some federal rights, including equal protection, double jeopardy, and due process).

89. *See supra* note 8 and accompanying text.

90. *See* Argersinger v. Hamlin, 407 U.S. 25, 37–38 (1972); Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963).

91. *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 800 (2007).

92. *Id*.

93. *Id*.

94. *See id*.

95. *Id*. at 847.

96. *See id.* at 847–48; *see also* KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS at xiv–xv (2007).

97. Riley, *supra* note 91, at 847.

98. *Id*.

99. See *id*.

2. Native American Crime & Recidivism Rates in the United States

The intersection of uncounseled convictions and federal recidivist statutes is particularly relevant to the Native American community. As sovereign nations with particularized legal systems, Native American communities often struggle to balance the provisions of federal, state, and tribal law.[100] Accordingly, provisions of federal and state law often fail to harmonize with the ideals of tribal sovereignty. This tension creates unique legal problems for members of Native American tribes who have been charged with crimes in various levels of the judicial system.[101]

Public policy involving Native American criminal law must aim to promote crime reduction in the Native American community, as the violent crime rate on Native American land is more than twice the national average.[102] On a per capita basis, the incarceration rate of Native Americans is thirty-eight percent higher than the national rate.[103] The United States Attorney's Office is the main prosecutor of criminal cases involving violations of federal law in Indian Country.[104] In 2000, the Department of Justice reported that seventy-five percent of the investigations by the United States Attorney's office in Indian Country involved violent crimes.[105] A critical inquiry into the precise implications of criminal sentencing policy is therefore essential to the goal of crime reduction within this population.

Native Americans experience an estimated one violent crime for every ten residents age twelve or older.[106] Between 1976 and 2001, approximately 3738 Native Americans were murdered.[107] Additionally, substance abuse plays a major role in the commission of crimes in Indian Country.[108] In comparison to the national average of forty-two percent, approximately sixty-two percent of Native Americans experienced violence by an offender that was using alcohol at the time of the commission of the crime.[109] Recidivism rates within the Native American community also present a problem for crime reduction in this segment of the population. The Department of Justice reported, "[w]ithin 3 years of their re-

100. Carolyn Beeler, *Law Tackles Crime on American Indian Reservations*, NAT'L PUB. RADIO (July 29, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=128852980.

101. *See, e.g.*, United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011); United States v. Shavanaux, 647 F.3d 993, 997–98 (10th Cir. 2011); United States v. Ant, 882 F.2d 1389, 1395 (9th Cir. 1989) (offering examples of the unique legal problems that arise as a result of using uncounseled tribal convictions in federal court).

102. Beeler, *supra* note 100.

103. Eileen Luna-Firebaugh & Samuel Walker, *Law Enforcement and the American Indian: Challenges and Obstacles to Effective Law Enforcement, in* NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 117, 118 (Jeffrey Ian Ross & Larry Gould eds. 2006).

104. STEVEN W. PERRY, U.S. DEP'T JUSTICE, A BJS STATISTICAL PROFILE 1992–2002: AMERICAN INDIANS AND CRIME, at vii (2004), *available at* http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

105. *Id*.

106. *See id.* at 4.

107. *Id*. at 12.

108. *Id*. at 10.

109. *Id*.

lease from State prison in 1994, an estimated 3 in 5 American Indians were arrested for a new crime—a felony or a serious misdemeanor."[110]

In the area of domestic violence, Native Americans are the victims of rape and sexual assault at more than double the rate of other racial groups.[111] Specifically, one in three Native American or Alaskan Native women are raped within their lifetime, compared to approximately one in five women in the national population.[112] Furthermore, rates of severe domestic violence are higher in the Native American population than in the white population.[113] Overall, however, accurate statistics regarding domestic violence in Indian Country have been difficult to determine, as there is no federal or Indian agency that systematically collects data on these offenses.[114] Underreporting of crimes in Indian Country is a major obstacle, as many crimes are often unreported to tribal or federal authorities.[115] While analyzing crime statistics, therefore, it is necessary to consider the effects of underreporting on the general rates and crime trends in Indian Country.[116]

C. Recidivist Statutes and Sentencing: Goals & Criticism

Recidivist statutes may increase sentences for repeat offenders or allow defendants to be charged under the statute due to repeat offenses.[117] Commonly, recidivist statutes provide for "an enhanced penalty if the offender has committed a number of prior crimes."[118] The primary justifications for recidivist statutes include the principles of deterrence, retribution, and incapacitation.[119] These statutes largely aim to address the problem of criminal recidivism in the United States.[120] Up to half of all federal and state inmates are reconvicted of a crime after being released from prison.[121] Recidivist statutes are ubiquitous in both the state and federal systems, and their effectiveness is debated among legal scholars.[122]

110. *Id*. at viii.

111. *Id*. at 5.

112. NAT'L CONG. AM. INDIANS, STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 3 (2013), *available at* http://files.ncai.org/broadcasts/2013/February/VAWA toolkit_013113(2).pdf.

113. *Id*.

114. *See id*. at 1.

115. *Id*. at 8.

116. 151 CONG. REC. S4873 (daily ed. May 10, 2005) (statement of Sen. John McCain) (explaining, "while the national data on the rates of violence affecting Indian women are astounding, we do not know the full extent to which Indian women residing in Indian Country are impacted by domestic violence").

117. Russell, *supra* note 10, at 1135.

118. 24 C.J.S. *Criminal Law* § 2289 (2006).

119. Russell, *supra* note 10, at 1135.

120. *See* 39 AM. JUR. 2D *Habitual Criminals* § 2 (2011) (explaining that one of the purposes of recidivist statutes is "to protect law-abiding citizens from the clear danger posed by the high incidence of repeat offenses").

121. Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536, 553 (2006).

122. Russell, *supra* note 10, at 1139, 1143–44.

When sentencing enhancements appear in a recidivist statute, for instance, the enhancements are generally mandatory and leave little room for judicial discretion.[123] Some of these enhancements increase the maximum sentence a judge may impose based on prior convictions, and other statutory enhancements mandate a minimum sentence.[124] The effectiveness and necessity of such sentencing requirements remain contested within the legal community. The U.S. Sentencing Commission has recently suggested reconsidering the necessity of recidivist sentencing statutes, particularly statutes involving drug-related crimes.[125] The Commission noted that statutes with repeat-offender enhancements have contributed to federal prison overcrowding.[126]

The problem of prison overcrowding is substantial, and the Commission recently determined that the Federal Bureau of Prisons is over its capacity by thirty-seven percent.[127] Further, the Commission noted that sentencing enhancements are often "excessively severe and unjust," particularly when the crime in question did not involve physical violence or the threat of physical violence.[128] Similarly, some argue that the length of sentencing should mirror the likelihood of reoffending.[129] Sentences should arguably be "fine-tuned" to add or subtract prison time based on the statistical likelihood that a particular criminal defendant will reoffend based on situational factors.[130]

In particular circumstances, recidivist statutes may be unnecessary or overly harsh depending on the offense and the offender's personal characteristics. Ultimately, scholars and the U.S. Sentencing Commission still question the necessity and efficiency of recidivist statutes.[131] The potential unfairness and severity of recidivist statutes is heightened when a previously uncounseled conviction is utilized as a justification for prosecuting an individual under a recidivist statute. Without the guidance of an attorney, a criminal defendant may experience confusion or unfair pressure to plead guilty, which undermines the legitimacy of the criminal justice system.[132] Accordingly, the Supreme Court has addressed the effect of uncounseled convictions on future prosecution and punishment.

123. *Id*. at 1144.

124. *Id*.

125. *U.S. Study Urges Sentencing Reform*, UNITED PRESS INT'L, Oct. 31, 2011, http://www.upi.com/Top_News/US/2011/10/31/US-study-urges-sentencing-reform/UPI-13071320118822/.

126. *Id*.

127. *Id*.

128. *Id*.

129. *See* Leipold, *supra* note 121, at 554.

130. *See id*. at 554–55.

131. *See supra* notes 125–30 and accompanying text.

132. *See* John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 91–92 (1977).

D. Burgett v. Texas *& the Constitutionality of Uncounseled Convictions*

While *Argersinger* protects a criminal defendant's Sixth Amendment right to counsel for misdemeanor charges involving potential incarceration, defendants facing misdemeanor charges without the potential for incarceration have no constitutionally mandated Sixth Amendment right to counsel.[133] Since recidivist statutes often enhance a defendant's sentence if he or she has been previously convicted of a crime, the effect of an uncounseled misdemeanor conviction on future punishment has been the subject of judicial scrutiny.[134] In *Nichols v. United States*, the Supreme Court held that uncounseled misdemeanor convictions, which are valid in the absence of incarceration, can be used to enhance sentences in future criminal proceedings.[135] *Nichols* overruled a previous Supreme Court decision, *Baldasar v. Illinois*, which held that an offender's prior uncounseled misdemeanor conviction could *not* be used under an Illinois recidivist statute to enhance the punishment for a subsequent criminal conviction.[136] *Nichols* allows a future sentence to be enhanced because the uncounseled misdemeanor proceeding was constitutionally valid.[137] Courts, however, have also grappled with the problem of constitutionally *invalid* uncounseled convictions and their effect on future prosecution and sentencing.

The Supreme Court addressed the problem of uncounseled convictions in *Burgett v. Texas* in 1967.[138] In *Burgett*, the defendant was convicted of assault with malice aforethought and intent to murder.[139] The defendant had experienced four previous felony convictions: three in Tennessee and one in Texas.[140] Texas had a recidivist statute stating, "whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."[141] Thus, the Texas statute could be used to enhance the defendant's punishment based on his prior convictions.[142] The Supreme Court,

133. Scott v. Illinois, 440 U.S. 367, 374–75 (1979).

134. *See, e.g.*, Nichols v. United States, 511 U.S. 738, 740 (1994); Baldasar v. Illinois, 446 U.S. 222, 222 (1980); *see also* Burgett v. Texas, 389 U.S. 109, 114–15 (1967) (explaining the scenarios in which prior conviction can and cannot be used to bolster a subsequent sentence pursuant to a recidivist statute).

135. *Nichols*, 511 U.S. at 748–49 ("[W]e hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, 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.").

136. *Baldasar*, 446 U.S. at 227 ("We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has 'the guiding hand of counsel at every step in the proceedings against him,' his conviction is not sufficiently reliable to support the severe sanction of imprisonment.") (citation omitted).

137. *Nichols*, 511 U.S. at 748–49.

138. *See generally Burgett*, 389 U.S. at 109–16 (addressing the legal question of whether prior uncounseled convictions court can be used for the purposes of enhancing a criminal defendant's sentence under a recidivist statute).

139. *Id.* at 110.

140. *Id*. at 111.

141. *Id*. at 111 n.3 (citation omitted).

142. *See id*. at 111.

however, discovered that the certified records of the convictions in Tennessee did not show that the defendant had been counseled during the prior proceeding.[143] Further, the records indicated that the defendant had not waived his right to counsel.[144]

Ultimately, on their face, the records demonstrated that the defendant had been denied his right to counsel under the Sixth Amendment.[145] The Court concluded that the uncounseled convictions in Tennessee should have been deemed void and should not have been used to enhance the defendant's most recent sentence in Texas.[146] Hence, the *Burgett* Court established the general rule that a prior invalid uncounseled felony conviction cannot be used to enhance a defendant's sentence for a subsequent conviction under a recidivist statute.[147] The *Burgett* rule has profound implications for Native Americans who have been convicted in tribal courts without the assistance of counsel.

As previously discussed, Sixth Amendment protections do not explicitly apply to proceedings in tribal court.[148] When a Native American has been convicted of prior offenses in tribal court and is subsequently charged with an offense at the federal level, recidivist statutes may become an important concern. Under the *Burgett* rule, it is unclear whether uncounseled convictions in tribal courts can be used as the basis for charging a Native American under a federal recidivist statute. Several federal circuits have addressed this legal issue, and the courts have reached unique conclusions.

III. ANALYSIS

The constitutional and social aspects of uncounseled tribal convictions are analyzed differently across jurisdictions. Part III discusses the approaches taken in different federal jurisdictions regarding the use of uncounseled tribal adjudications in subsequent federal prosecutions. First, in *United States v. Ant*, the Ninth Circuit refused to consider uncounseled tribal guilty pleas in federal court using the *Burgett* precedent.[149] Second, in *United States v. Shavanaux*, the Tenth Circuit upheld the use of uncounseled tribal convictions in the federal system based on the assumption that the *Burgett* rule did not apply.[150] The *Burgett* rule, the Tenth Circuit concluded, does not apply to uncounseled convictions because the Sixth Amendment was never technically violated.[151] Finally, in *United States v. Cavanaugh*, the Eighth Circuit upheld the use of un-

143. *Id*. at 112.
144. *Id*.
145. *Id*. at 114–16.
146. *Id*. at 114, 116. ("Petitioner's right to counsel, a 'specific federal right,' is being denied anew. This Court cannot permit such a result unless *Gideon v. Wainwright* is to suffer serious erosion.").
147. *See id*. at 115.
148. *See supra* notes 80, 86 and accompanying text.
149. United States v. Ant, 882 F.2d 1389, 1393–95 (9th Cir. 1989).
150. United States v. Shavanaux, 647 F.3d 993, 997–98 (10th Cir. 2011).
151. *Id*.

counseled tribal convictions to bolster sentences in federal court despite concerns about constitutionality and reliability of uncounseled tribal convictions.[152] Each approach will be analyzed, and the legal and policy implications of each approach will be assessed.

A. United States v. Ant & the Rejection of Uncounseled Guilty Pleas

The Ninth Circuit rejects the use of uncounseled tribal guilty pleas in subsequent federal proceedings.[153] In the 1989 case, *United States v. Ant*, the Ninth Circuit determined that an uncounseled tribal guilty plea could not be admitted as evidence in a subsequent federal prosecution for the same crime.[154] *Ant* addresses the integral issue of uncounseled tribal guilty pleas and their effect on subsequent federal proceedings. *Ant* established the foundation for the questions that have been recently considered in *Cavanaugh* and *Shavanaux*.[155] For the purposes of future federal proceedings, an uncounseled guilty plea closely resembles an uncounseled tribal conviction.[156] Uncounseled guilty pleas and uncounseled convictions are distinct legal concepts, but their legal effects address the same core issue: how an uncounseled establishment of guilt at the tribal level affects future proceedings in federal court.[157]

In 1986, the body of an Indian woman was discovered on the Northern Cheyenne Indian Reservation.[158] The woman was later identified as the niece of the defendant, Francis Floyd Ant.[159] Several months later, the tribal police and the Bureau of Indian Affairs arrived at Ant's residence and procured a confession from Ant.[160] Ant was placed under arrest for the tribal charges of battery and assault.[161] Shortly thereafter, Ant was arraigned in tribal court and pled guilty to both charges.[162] According to Ant, the tribal court judge "went immediately from reciting his rights to asking him if he were guilty or not guilty."[163] Ant replied that he was guilty, and he was sentenced to six months in jail.[164] After

152. United States v. Cavanaugh, 643 F.3d 592, 605–06 (8th Cir. 2011).

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

154. *Id*.

155. *See id.* (providing a first-impression judicial interpretation of the uncounseled tribal conviction and guilty plea concern which is also at issue in the *Cavanaugh* and *Shavanaux* cases).

156. *See* DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 136 (2d ed. 2012) ("A final guilty plea yields a conviction, which is a matter of public record. Finalized guilty pleas are admissible to the same extent as other criminal convictions . . . .").

157. *See id*. (explaining that, while guilty pleas and convictions are distinct, a final guilty plea technically yields a conviction).

158. *Ant*, 882 F.2d at 1390.

159. *Id*.

160. *Id*.

161. *Id*.

162. *Id*. at 1390–91.

163. *Id*. at 1391.

164. *Id*.

serving his six months, an indictment was filed in federal court charging Ant with voluntary manslaughter.[165]

During the federal proceedings, Ant moved to suppress his tribal court guilty plea on Sixth Amendment grounds.[166] Specifically, Ant wished to suppress his previous tribal court guilty plea due to lack of representation by counsel in violation of the Sixth Amendment.[167] Ant argued that the tribal court failed to inquire whether he had an attorney, wanted an attorney, or could afford an attorney.[168] The district court held that the previous tribal court proceedings and the guilty plea were consistent with the provisions of the Indian Civil Rights Act and tribal law and were therefore admissible in federal court.[169] In denying the motion to suppress Ant's previous tribal court guilty plea, the court explained, "'[c]omity and respect for legitimate tribal proceedings requires that this Court not disparage those proceedings by suppressing them from evidence in this case.'"[170] Ant was sentenced to three years in prison and promptly appealed the decision.[171]

On appeal, the Ninth Circuit was presented with the question of whether an uncounseled tribal guilty plea could be admitted as evidence of guilt in a subsequent federal prosecution.[172] The court noted that Ant's uncounseled guilty plea in tribal court met the legal requirements of both tribal law and the Indian Civil Rights Act.[173] Based on these laws, Ant was entitled to representation by an attorney at his own expense.[174] Ant was not, however, entitled to a court-appointed attorney in tribal court proceedings.[175] Even though Ant's uncounseled guilty plea in tribal court comported with the requirements of tribal law and the Indian Civil Rights Act, the uncounseled guilty plea would have been unconstitutional and in violation of the Sixth Amendment if the guilty plea had been made in federal court.[176] Thus, the Ninth Circuit argued, Ant's previous tribal court guilty plea should be analyzed as if it had been made in federal court.[177] Essentially, the Ninth Circuit interpreted the guilty plea through the framework of federal law instead of through the framework of tribal law and the Indian Civil Rights Act.[178]

165. *Id*. (Following Ant's entry of a guilty plea in tribal court, "[o]n January 7, 1987, a federal indictment was filed charging Ant with voluntary manslaughter, under 18 U.S.C. §§ 1112 and 1153 . . . .").
166. *Id*.
167. *Id*.
168. *Id*.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*.
173. *Id*. at 1395.
174. *Id*. at 1392.
175. *Id*.
176. *Id*. at 1395.
177. *Id*. at 1396.
178. *Id*.

Using the precedent of *Burgett v. Texas*, the court noted, "it is inherently prejudicial to admit a constitutionally infirm plea against a defendant at a subsequent trial on a new offense."[179] Ultimately, the Ninth Circuit held that Ant's guilty plea in tribal court could not be used in the subsequent federal proceeding because it had been an uncounseled guilty plea.[180] If Ant's tribal guilty plea had been made in federal court, the Ninth Circuit noted, Ant's Sixth Amendment rights would have been violated.[181] Specifically, since the tribal judge never inquired as to whether Ant had an attorney, wanted an attorney, or could afford an attorney, this proceeding would have been unconstitutional on the federal level, regardless of whether or not the provisions of tribal law and the Indian Civil Rights Act were fulfilled.[182] The court discussed the issue of tribal comity and dismissed the concern that suppressing the tribal guilty plea would, in effect, disparage the validity of Ant's proceedings in tribal court.[183]

In contrast to the district court in *Ant*, the Ninth Circuit did not consider a suppression of Ant's guilty plea made in tribal court to be a disparagement of the tribal court system.[184] The court explained that it was not attempting to discredit or review the validity of the guilty plea made in tribal court.[185] Rather, the Ninth Circuit was merely evaluating whether the plea met the "requirements of the U.S. Constitution for use in a federal prosecution in federal court."[186] In doing so, the court did not violate the "longstanding policy of encouraging tribal self-government."[187] Additionally, the Ninth Circuit noted that the principle of tribal-federal comity had only been utilized in the past to prevent "direct attacks on tribal proceedings in federal court."[188] The court continued to recognize the validity of Ant's tribal court guilty plea under tribal law but refused to use the uncounseled tribal guilty plea against Ant in federal court on Sixth Amendment grounds.[189]

The decision of the Ninth Circuit is beneficial for promoting accuracy and fairness of the guilty plea process. The presence of an attorney is vital during the guilty plea stage.[190] Without the assistance of counsel at the guilty plea stage, a criminal defendant will often misunderstand, mis-

179. *Id*. at 1393.
180. *Id*. at 1394–96.
181. *Id*. at 1394.
182. *Id*.
183. *Id*. at 1395–96.
184. *Id*.
185. *Id*. at 1396.
186. *Id*.
187. *Id*. (citations omitted).
188. *Id*.
189. *Id*.
190. *See* Barkai, *supra* note 132; *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698–700 (2002); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 963–65 (1989).

interpret, or underestimate the collateral consequences of a guilty plea.[191] Further, plea-bargaining can involve pressure from the court system for the defendant to plead guilty, which could undermine the voluntariness and accuracy of the agreement.[192] Without the support of an attorney, a criminal defendant is placed at an information disadvantage, and the judicial system is wise to question whether the defendant's conduct actually fulfilled all elements of a criminal charge brought against him.[193] With these realities in mind, the *Ant* court reasonably anticipated the possibility that Ant was not fully informed at the time of the guilty plea.[194] The Ninth Circuit took a firm stance on promoting the values of accuracy, voluntariness of plea agreements, and access to complete information regarding the charges and potential consequences of the plea agreement.[195]

Despite the importance of protecting these values, however, the Ninth Circuit's decision arguably impacts the notion of tribal sovereignty and may indirectly undermine the validity of tribal court decisions. As the district court in *Ant* noted, the federal government should support tribal sovereignty by recognizing the validity of the legal decisions made in tribal court.[196] Even though the *Ant* court did not overrule or declare the previous tribal decision invalid, its refusal to utilize the prior conviction may have implied that tribal court decisions are somehow less worthy of being considered by federal courts. To counter this argument, however, one might argue that the *Ant* court was simply acknowledging that tribal courts and federal courts have unique standards due to cultural differences.

Native American tribes have a strong interest in retaining their cultural traditions, and many of these traditions are connected to the tribal court system.[197] Scholars often argue that extensive federal intervention in the tribal system may cause tribal court systems to become instrumentalities, and perhaps "mirror images," of the federal system.[198] In an attempt to prevent assimilation of tribal court systems, the Supreme Court

191. *See* McMunigal, *supra* note 190, at 987–88.

192. *See* John E.D. Larkin, *A Proposed Framework for Evaluating Effectiveness of Counsel Under* Padilla v. Kentucky, 34 AM. J. TRIAL ADVOC. 565, 565–66 (2011).

193. *See* McMunigal, *supra* note 190, at 965 ("[T]he accuracy issue derives its deepest significance simply from the importance of avoiding the conviction and punishment of the innocent.").

194. United States v. Ant, 882 F.2d 1389, 1394 (9th Cir. 1989) (explaining that "the available facts do not support the conclusion that Ant knowingly and intelligently waived his Sixth Amendment rights under federal and Ninth Circuit standards").

195. *See id.* at 1394–96 (using reasoning that aims to ensure that plea agreements have been made in a manner that upholds the defendant's rights).

196. *Id*. at 1392.

197. *See* Recent Cases*, Civil Procedure–Statutory Full Faith and Credit–Wisconsin Supreme Court Applies Comity Principles in Determining Whether to Enforce A Tribal Court Judgment*–Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 117 HARV. L. REV. 988, 988 (2004) (stressing the importance of state and federal governments respecting the decision making power and sovereignty of tribal governments); *see also* DEAN HOWARD SMITH, MODERN TRIBAL DEVELOPMENT: PATHS TO SELF-SUFFICIENCY AND CULTURAL INTEGRITY IN INDIAN COUNTRY 38–39 (2000).

198. *See* Riley, *supra* note 91, at 836 (explaining that proposals which promote interference in the tribal court system will "essentially require tribal cultures to become mirror images of the dominant society").

has repeatedly held that Native tribes have the authority to independently enforce their criminal laws against members of the tribe.[199] Additionally, even though Native tribes are subject to "ultimate federal control," the tribes remain "a separate people, with the power of regulating their internal and social relations."[200] The traditions of the tribal court system differ significantly from the traditions of the federal system.[201] These differences demonstrate the importance of respecting the decisions and sovereignty of tribal courts.

Federal and state courts may not be equipped to interpret and analyze many of the decisions made at the tribal level. The tribal and American legal systems' fundamental goals are often in conflict.[202] While the American legal tradition is rooted in the concepts of punishment and retribution, the tribal legal tradition aims to integrate cooperation, consensus building, and restorative justice in the decision making process.[203] Further, the American tradition typically involves authority, control, and power.[204] These traditions often utilize "adversarial methods of coercion and force to control the behavior of individuals, whereas the foundation for most native-based systems results from a healing process."[205] The differing goals of the legal systems, scholars argue, can set the stage for individual and organizational conflict between tribal and federal courts.[206]

Federal judges, for instance, may be unable to scrutinize tribal court decisions due to uncertainty and unfamiliarity with tribal court practices.[207] Some argue that attempts by federal judges to examine the validity of tribal court decisions is in direct conflict with the concept that tribal courts are sovereigns of equal dignity and respect.[208] Arguably, challenging the validity of tribal decisions implies that tribal courts are not as civilized as state and federal courts.[209] As previously discussed, the Native American system involves disproportionately high rates of alcoholism, imprisonment, and victimization related to violent crimes.[210] To reduce these social problems, some scholars argue that tribes must retain their

199. *See* United States v. Wheeler, 435 U.S. 313, 322 (1978).

200. *Id*. (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

201. *See* Jeffrey Ian Ross & Larry Gould, *Native Americans, Criminal Justice, Criminological Theory, and Policy Development*, *in* NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 103, at 3–4; *see also* WILDENTHAL, *supra* note 86, at 202.

202. *See* Ross & Gould, *supra* note 201; *see also* Riley, *supra* note 91, at 841–42.

203. *See* Ross & Gould, *supra* note 201, at 3; *see also* Riley, *supra* note 91, at 841–43.

204. Ross & Gould, *supra* note 201, at 7.

205. *Id*. (citations omitted).

206. *Id*. at 3.

207. Riley, *supra* note 91, at 841–42.

208. *See* United States v. Ant, 882 F.2d 1389, 1397 (9th Cir. 1989) (O'Scannlain, J., dissenting) (arguing that that majority's decision necessarily disparages the integrity of the decision of the tribal court).

209. *See id*. (O'Scannlain, J., dissenting) (arguing that the majority calls the civility of tribal courts into question by suppressing Ant's previous tribal guilty plea).

210. *See* Duane Champagne, *Foreword* to NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 103, at x.

sovereignty over the criminal justice system and that the external influences of the federal system must be limited.[211]

Promoting tribal control and accountability in the administration of criminal justice is a necessary component of crime reduction.[212] "Communities that do not have control over their institutions of justice and are subject to external, colonial, and culturally incompatible control show higher rates of alienation, anomie, lawlessness, and criminality."[213] Further, until Native American communities can develop sovereign administration of the criminal justice system, Native Americans will continue to show high rates of crime, imprisonment, substance abuse, and criminality.[214] Many sociologists, including Max Weber and Emile Durkheim, believe that a primary purpose of government is administering a system of justice.[215] Based on this theory, it is vitally important for tribal court systems to retain sovereignty over the administration of justice in an attempt to maintain governmental legitimacy and control.[216] Control over the administration of justice preserves the loyalty and commitment of tribal members to the norms and laws of the tribal community.[217] The sovereign administration of justice is therefore a necessary step in the reduction of criminality in Native American communities.[218]

The *Ant* court, which refused to admit evidence of a tribal court guilty plea at the federal level, calls the principles of tribal sovereignty into question. Admittedly, the *Ant* court did not dispute the validity of the tribal court guilty plea for the purposes of the Indian Civil Rights Act and tribal law.[219] The refusal to utilize Ant's tribal court guilty plea in subsequent federal proceedings, however, may have discredited the tribal court's procedures.[220] While the majority in *Ant* aimed to protect defendants from the negative effects of uncounseled guilty pleas, the majority decision may undermine the authority of tribal courts to administer control over their criminal justice systems. By deeming the tribal court guilt plea "inherently prejudicial," the federal system may have indirectly delegitimized the decision making process of tribal courts. Even though the guilty plea fulfilled the requirements of tribal law and the Indian Civil Rights Act, the federal court system arguably failed to respect the guilty plea as a valid and legitimate decision.

211. *See id*.
212. *See id*.
213. *Id*.
214. *Id*.
215. Duane Champagne, *Justice, Culture, and Law in Indian Country: Teaching Law Students*, 82 N.D. L. REV. 915, 925 (2006).
216. *Id*.
217. *See id*.
218. *See* Champagne, *supra* note 210, at x.
219. *See* United States v. Ant, 882 F.2d 1389, 1395 (9th Cir. 1989).
220. *See id*. at 1397 (O'Scannlain, J., dissenting) (warning that the majority implies "that evidence from tribal court proceedings obtained in a way which clearly complies with ICRA and tribal law will be suppressed largely because we do not regard tribal courts to be as 'civilized' as state and federal courts").

B. United States v. Shavanaux *& Acceptance of Uncounseled Convictions*

In 2011, the Tenth Circuit upheld the use of uncounseled tribal convictions in subsequent federal proceedings.[221] In *United States v. Shavanaux*, the court held that the federal system's use of an uncounseled tribal court conviction to prosecute a repeat-offender did not violate the Sixth Amendment.[222] The court explained that the Native tribe and the tribal court itself were not constrained by the Bill of Rights.[223] Thus, the defendant's uncounseled tribal conviction did not violate the Sixth Amendment.[224] In addition to addressing Sixth Amendment concerns, the court highlighted the important policy goal of reducing domestic violence rates in Native American communities.[225] The court discussed the likelihood of domestic abusers to recidivate and used this evidence as a justification for prosecuting repeat offenders in the federal system.[226]

Adam Shavanaux, a member of the Ute Indian tribe in Utah, was indicted in federal court under 18 U.S.C. § 117 for assaulting his domestic partner after being convicted of domestic assault in tribal court twice before.[227] The pertinent part of that section applies to any person who commits a domestic assault within the United States or Indian Country who has two final convictions in state, federal, or tribal court for assault, sexual abuse, or a serious violent felony against a spouse or intimate partner.[228] Any individual who fulfills the habitual offender elements listed in 18 U.S.C. § 117 "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."[229] Section 117 aims to reduce habitual domestic violence offenses by imposing strict federal penalties on repeat offenders.[230] In addition, § 117 establishes federal jurisdiction over members of the Native American community in instances of habitual domestic assault.[231]

Shavanaux was convicted of domestic assault on two prior occasions in Ute tribal court.[232] In both prior domestic assault proceedings, Ute

221. *See* United States v. Shavanaux, 647 F.3d 993, 997–98 (10th Cir. 2011).
222. *Id*.
223. *Id*.
224. *Id*. at 997.
225. *Id*. at 1002.
226. *Id*.
227. *Id*. at 995.
228. 18 U.S.C. § 117 (2006) (defining domestic assault as "an assault committed by a current or former spouse, parent, child, or guardian of the victim, 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 spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim").
229. *Id*. § 117(a).
230. *See id*.
231. *See id*.
232. *Shavanaux*, 647 F.3d at 996.

tribal law did not entitle Shavanaux to appointed counsel.[233] Shavanaux established in a federal affidavit that he was not represented by an attorney and could not afford an attorney in the previous tribal court domestic assault proceedings.[234] In response to his indictment under § 117, Shavanaux filed a motion to dismiss the indictment.[235] Shavanaux argued that the Sixth Amendment and the Due Process Clause of the Fifth Amendment "forbid reliance on his uncounseled tribal misdemeanor convictions to support a charge under 18 U.S.C. § 117(a)."[236]

The district court determined that Shavanaux's previous domestic assault convictions in Ute tribal court satisfied the provisions of the Indian Civil Rights Act and the provisions of Ute tribal law.[237] Following similar reasoning as the *Ant* court, however, the district court found that utilizing "otherwise-valid" tribal court convictions for a § 117 prosecution would violate Shavanaux's Sixth Amendment rights.[238] Accordingly, the district court dismissed Shavanaux's § 117 indictment, and the government appealed the decision.[239] On appeal, the Tenth Circuit reversed the ruling of the district court, finding no Sixth Amendment violation.[240]

In determining whether Shavanaux's prosecution under § 117 would violate the Sixth Amendment, the Tenth Circuit first analyzed the relationship between the federal government and Native tribes.[241] The court explained that the Bill of Rights does not apply to Indian tribes.[242] Native tribes are considered independent, distinct political communities.[243] The Tenth Circuit quoted *Talton v. Mayes*, a previous Supreme Court decision.[244] In *Talton*, the Court explained that tribes are not subject to the authority of the U.S. Constitution, but that tribal power is still constrained by the "supreme legislative authority of the United States."[245] In passing the Indian Civil Rights Act, Congress asserted its plenary, legislative authority over Native affairs.[246] Thus, while the Constitution does not constrain tribal court systems, the Indian Civil Rights Act does constrain some facets of the tribal justice system.[247]

Ultimately, the Tenth Circuit concluded that since the Sixth Amendment does not constrain tribal court proceedings, Shavanaux's prior uncounseled tribal convictions for domestic assault could not tech-

233. *Id*.
234. *Id*.
235. *Id*.
236. *Id*.
237. *Id*.
238. *Id*.
239. *Id*. at 995.
240. *Id*.
241. *Id*. at 996–97.
242. *Id*.
243. *Id*. at 997 (quoting Talton v Mayes, 163 U.S. 376, 383 (1896)).
244. *Id*.
245. *Id*. (quoting *Talton*, 163 U.S. at 384).
246. *See id*.
247. *See id*.; *see also* WILDENTHAL, *supra* note 86, at 197–98.

nically violate the Sixth Amendment.[248] The court noted, "[a]lthough a tribal prosecution may not *conform* to the requirements of the Bill of Rights, deviation from the Constitution does not render the resulting conviction constitutionally *infirm.*"[249] The Tenth Circuit recognized that its decision is in conflict with the *Ant* decision.[250] The *Shavanaux* court explained that *Ant* overlooked the precedent of *Talton*.[251] Specifically, the *Shavanaux* court disagreed with the *Ant* court's determination that uncounseled tribal convictions are a violation of the Sixth Amendment.[252] Since the Bill of Rights does not apply to tribal court proceedings, the Tenth Circuit reasoned, Shavanaux's prior tribal convictions could not logically violate the Sixth Amendment.[253] Accordingly, Shavanaux's prior uncounseled convictions could not be considered constitutionally infirm for the purposes of the *Burgett* rule.[254] Since the Sixth Amendment was never violated at the tribal court level, the Sixth Amendment could not be violated "anew" simply because the previous tribal convictions were currently being utilized at the federal level.[255]

In addition to analyzing Shavanaux's Sixth Amendment claim, the Tenth Circuit also addressed Shavanaux's claim that § 117 violates the equal protection component of the Due Process Clause of the Fifth Amendment.[256] By singling out Native Americans for prosecution based on uncounseled tribal convictions, Shavanaux argued, § 117 promotes disparate treatment and prosecution falling "along racial lines."[257] The *Shavanaux* court rejected this argument, holding that the term "Indian" is a political classification, not a racial classification.[258] By virtue of his membership in the Ute tribe, the court argued, Shavanaux voluntarily chose to subject himself to tribal jurisdiction and Ute tribal law.[259] The Tenth Circuit proceeded to analyze the application of § 117 using a rational basis standard of review.[260]

Using a rational basis standard of review, the court determined that the application of § 117 for habitual domestic abusers was rationally tied

248. *Shavanaux*, 647 F.3d at 997 (explaining, "because the Bill of Rights does not constrain Indian tribes, Shavanaux's prior uncounseled tribal convictions could not violate the Sixth Amendment").

249. *Id*.

250. *Id*. at 997–98.

251. *Id*. at 998.

252. *Id*.

253. *Id*.

254. *Id*.

255. *Id*.

256. *Id*. at 998–1001. It should also be noted that Shavanaux raised an additional issue: whether the indictment under § 117 violated the Due Process Clause of the Fifth Amendment. *Id*. This claim, however, will not be analyzed for the purposes of this Note.

257. *Id*. at 1001.

258. *Id*. at 1001–02.

259. *Id*. at 1002 (citing United States v. Antelope, 430 U.S. 641, 646 (1977)).

260. *Id*. (utilizing the rational basis standard of review and noting that "[e]qual protection provides that a statute shall not treat similarly situated persons differently unless the dissimilar treatment is rationally related to a legitimate legislative objective" (quoting United States v. Weed, 389 F.3d 1060, 1071 (10th Cir. 2004))).

to Congress's "unique obligation toward the Indians."[261] Specifically, the court explained that protecting the Native American community from domestic violence is an important governmental interest.[262] Although application of § 117 subjects Native Americans to disparate treatment, there is a rational basis for doing so.[263] As previously discussed, the high rates of physical and sexual abuse against Native American women tend to legitimize governmental attempts to prevent these incidents from occurring.[264] Consequently, the *Shavanaux* court reversed the decision of the district court, which had previously dismissed the indictment under § 117.[265]

The *Shavanaux* decision involves both benefits and detriments when considering the competing issues at stake. First, the Tenth Circuit's avid support of tribal sovereignty promotes the interest of tribal court autonomy. By recognizing the importance of tribal autonomy, the *Shavanaux* decision upheld the principle that Native American tribes possess the "power to prescribe and enforce internal criminal laws."[266] In contrast to the *Ant* decision, *Shavanaux* declined to apply the Bill of Rights when analyzing the previous tribal court convictions.[267] By not considering the Bill of Rights and the protections of the Sixth Amendment, the *Shavanaux* court avoided calling the validity of the prior tribal court convictions into question. The *Shavanaux* court also avoided the possibility of disparaging the tribal court proceedings, which was an important concern addressed in the dissenting opinion of *Ant.*[268]

The court stated, "[a]lthough a tribal prosecution may not *conform* to the requirements of the Bill of Rights, deviation from the Constitution does not render the resulting conviction constitutionally *infirm*."[269] Thus, the *Shavanaux* court recognized the judicial validity of the previous tribal court decision instead of declaring the decision "inherently prejudicial," unlike the *Ant* court.[270] Arguably, labeling a prior tribal court proceeding "inherently prejudicial," despite its validity under tribal law and the Indian Civil Rights Act, impugns the ability of tribal courts to reach legitimate decisions.[271] By utilizing the prior tribal court decision at the federal level, the *Shavanaux* court recognized and legitimized the previous tribal proceeding, unlike the *Ant* court.

Despite upholding the value of tribal autonomy, the *Shavanaux* court's decisive refusal to apply the Sixth Amendment to members of

261. *Id*.
262. *Id*.
263. *Id*.
264. *Id*.
265. *Id*.
266. *Id*. at 997 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)).
267. *Id*.
268. *See* United States v. Ant, 882 F.2d 1389, 1397 (9th Cir. 1989) (O'Scannlain, J., dissenting) (arguing that that majority's decision disparages the integrity of the tribal court's judicial proceedings).
269. *Shavanaux*, 647 F.3d at 997.
270. *Id*. at 997–98.
271. *See supra* notes 181–84 and accompanying text.

Native tribes in tribal courts raises important concerns regarding the accuracy and fairness of convictions. By automatically accepting the validity of prior uncounseled tribal convictions for domestic assault, the *Shavanaux* court did not address the possibility that prior tribal court convictions were inaccurate, unfair, or negatively impacted due to a lack of attorney representation. Without constitutional checks from the federal system, the accuracy of Shavanaux's prior convictions could not be ensured. *Ant* closely considered the possibility that uncounseled judicial proceedings may contribute to misunderstanding and confusion on the part of the criminal defendant. Thus, the *Ant* court highlighted a genuine concern regarding judicial accuracy that the *Shavanaux* court chose to disregard.[272]

Although the *Shavanaux* court underestimated the possibility of inaccurate prior convictions in the tribal court system, the court addressed[273] one of the most troubling social problems in the Native American community: domestic violence.[274] The domestic violence rates on Native American reservations are a cause for serious concern.[275] According to the Department of Justice, Native American women have a thirty-three percent chance of being sexually assaulted in their lifetimes.[276] On some reservations, women are murdered at a rate more than ten times the national average.[277] Advocates for victims of domestic violence have noted that the federal government has been hindered in prosecuting habitual domestic abusers in federal court, tribal courts have retained most authority in prosecuting domestic abusers.[278] Consequently, advocates argue, many domestic violence offenses have "piled up" in tribal court, and the federal government has had difficulty intervening.[279]

In the eyes of the federal government, its lack of authority is particularly troubling due to the relatively lax sentences imposed by tribal courts for violent domestic offenses.[280] Tribal courts typically impose a maximum sentence of a year in jail for domestic violence convictions.[281] In federal court, however, harsher punishment is the norm.[282] Section 117, for instance, prescribes more severe punishment than tribal courts impose.[283] Consequently, advocates for victims of domestic violence be-

272. *See Ant*, 882 F.2d at 1394.

273. *Shavanaux*, 647 F.3d at 1002.

274. PERRY, *supra* note 104, at 32; *see also Rulings Could Bring Crackdown on Domestic Violence*, BOSTON GLOBE, Dec. 12, 2011, [hereinafter *Rulings Could Bring Crackdown*] (describing the recent *Cavanaugh* and *Shavanaux* decisions and their potential impact on domestic violence in the tribal community), *available at* http://www.boston.com/news/nation/articles/2011/12/12/rulings_could_bring_crackdown_on_domestic_violence/.

275. *See Rulings Could Bring Crackdown*, *supra* note 274.

276. *Id*.

277. *Id*.

278. *Id*.

279. *Id*.

280. *Id*.

281. *Id*.

282. *See id*.

283. *See* 18 U.S.C. § 117 (2006).

lieve that the *Shavanaux* decision will help slow the cycle of domestic abuse in tribal communities by targeting habitual offenders.[284] By obtaining jurisdiction through § 117, U.S. Attorneys can more adequately deter habitual offenders from committing violent acts in the future.

From a public policy standpoint, the *Shavanaux* decision makes great strides to reduce domestic violence, but these strides come at a cost. Without the assurance that an attorney has represented Native defendants in previous tribal proceedings, the United States Attorney cannot ensure that the previous convictions were fair, accurate, and just. Further, although the *Shavanaux* decision technically reinforces the validity of the decisions of tribal courts, § 117 effectively gives the United States Attorney strong authority over habitual domestic violence offenses, which were previously handled only in tribal court.[285] By giving the United States greater authority to prosecute these crimes, the autonomy and sovereignty of tribal courts will be reduced. Consequently, regardless of whether prior uncounseled convictions are recognized at the federal level, the autonomy and sovereignty of tribal courts will be affected in some way.

On one hand, some argue, failing to recognize and admit prior tribal court guilty pleas or convictions due to "inherent prejudice" impugns the legitimacy and validity of the prior tribal court decisions.[286] In *Ant*, for instance, the notion of tribal comity was arguably threatened because the tribal court guilty plea was not admitted in a subsequent federal proceeding.[287] The principle of comity aims to promote the "recognition and effectuation of the laws of other states or countries."[288] By deeming a tribal court's decision "inherently prejudicial" even though the decision complied with the Indian Civil Rights Act and tribal law, the federal court system arguably chose to disregard the principle of comity and delegitimized the decision making ability of the tribal courts.[289]

In *Shavanaux*, however, a similar infringement of tribal sovereignty occurs. Although the *Shavanaux* court upheld the use of prior uncounseled tribal convictions[290] for the purposes of § 117, the statute itself allows U.S. Attorneys to assert more authority in the area of domestic violence in tribal territory.[291] Instead of allowing tribal courts to handle this problem through the tribal court system, § 117 and *Shavanaux* allow federal prosecutors to usurp control over the domestic violence situation in Indian Country.[292] Federal prosecutors can utilize prior uncounseled tribal court convictions as the basis of prosecuting defendants in the fed-

284. *See Rulings Could Bring Crackdown*, *supra* note 274.
285. *See id*.
286. *See supra* notes 183–87 and accompanying text.
287. *See supra* notes 183–87 and accompanying text.
288. 15A C.J.S. *Conflict of Laws* § 6.
289. *See supra* notes 183–87 and accompanying text.
290. United States v. Shavanaux, 647 F.3d 993, 997–98 (10th Cir. 2011).
291. *See Rulings Could Bring Crackdown*, *supra* note 274.
292. *See id.*

eral system.[293] Although *Shavanaux* may lead to decreased domestic violence rates, the precedent threatens the ability of tribal courts to handle crimes independently. Thus, both *Ant* and *Shavanaux* encroach upon tribal autonomy and sovereignty in distinct ways despite their inconsistent holdings. Consequently, neither approach can definitively protect the legitimacy and autonomy of tribal court procedures.

C. United States v. Cavanaugh *& Acceptance of Uncounseled Convictions*

In 2011, the Eighth Circuit addressed the use of prior tribal court convictions for the purposes of prosecuting a defendant under § 117 in *United States v. Cavanaugh*.[294] Roman Cavanaugh, the defendant, is a repeat domestic-abuse offender and an enrolled member of the Spirit Lake Sioux Tribe.[295] Cavanaugh was convicted in Spirit Lake Tribal Court of misdemeanor domestic abuses in March 2005, April 2005, and January 2008.[296] During the three proceedings in tribal court, Cavanaugh was informed that he was entitled to retain counsel at his own expense.[297] Cavanaugh, however, did not retain counsel of any kind.[298] The court noted that, "Cavanaugh [did] not allege any irregularities in the proceedings that led to his prior tribal-court convictions beyond the absence of counsel."[299] The lack of other alleged irregularities, the court later explained, was of great importance to the court's ultimate conclusion.[300]

Cavanaugh was charged in federal court under § 117 for the assault of his common-law wife.[301] Cavanaugh and his common-law wife were together in a vehicle with their children, and both adults were intoxicated at the time of the offense.[302] A fight ensued, and Cavanaugh "grabbed the victim's head, jerked it back and forth, and slammed it into the dashboard."[303] After Cavanaugh pulled the vehicle into a field, the victim jumped from the car and hid.[304] Shortly thereafter, authorities arrested Cavanaugh and charged him with assault under § 117.[305] The district court concluded that Cavanaugh's prior tribal court convictions could not be utilized to satisfy the habitual offender elements of § 117 because the Sixth Amendment applies in federal courts.[306] The "use of such convictions would . . . give rise anew to a Sixth Amendment violation by impos-

293. *See id.*
294. United States v. Cavanaugh, 643 F.3d 592, 593 (8th Cir. 2011).
295. *Id*. at 594.
296. *Id*.
297. *Id*.
298. *Id*.
299. *Id*.
300. *See id*. at 594, 605.
301. *Id*. at 594.
302. *Id*.
303. *Id*.
304. *Id*.
305. *See id*.
306. *Id*. at 594–95.

ing federal punishment, in part, based upon the uncounseled conviction."[307]

On appeal, Cavanaugh argued that the prior tribal court convictions were invalid in tribal court because the Spirit Lake Tribal Court did not provide him court-appointed counsel.[308] The Eighth Circuit rejected this argument and explained the precise legal rights Native Americans are entitled to in tribal court.[309] The court explained that Native Americans are citizens of the United States and are therefore entitled to the same protections against state and federal actions as other citizens.[310] The court further explained that the Constitution "does not apply to restrict the actions of Indian tribes as separate, quasi-sovereign bodies."[311] Because tribes existed as separate sovereigns preexisting the Constitution, tribal courts are not constrained by the same constitutional provisions that constrain the actions of the state and federal courts.[312]

Despite the sovereignty afforded to tribal courts, the court explained, Congress still retains power to regulate tribal affairs through the Indian Commerce Clause[313] and the Treaty Clause.[314] Accordingly, Congress passed the Indian Civil Rights Act, which applied some of the protections from the Bill of Rights to situations in which a Native American tribe is the governmental actor.[315] Currently, the Indian Civil Rights Act only requires the appointment of counsel for indigent criminal defendants in tribal court for prosecutions that can result in a term of incarceration greater than one year.[316] Thus, the Eighth Circuit explained, if the Spirit Lake Tribal Court did not ensure the right to counsel through its own tribal laws, Cavanaugh was not statutorily or constitutionally entitled to counsel unless he was at risk of a term of incarceration that was greater than one year.[317] Consequently, the Eighth Circuit rejected Cavanaugh's argument that his prior tribal court convictions were invalid because the tribal court did not provide court-appointed counsel.[318]

The Eighth Circuit recognized an important tension that arose "when such a conviction—valid at its inception as a matter of federal and tribal statutory law and as a matter of Constitutional law–is brought into federal or state court in an effort to establish or enhance a term of . . . in-

307. *Id*. at 595.
308. *Id*.
309. *See id*. at 595–96.
310. *Id*. at 595.
311. *Id*.
312. *Id*. (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).
313. *See* U.S. CONST. art. I, § 8, cl. 3; *see also Cavanaugh*, 643 F.3d at 595.
314. *See* U.S. CONST. art. II, § 2, cl. 2; *see also Cavanaugh*, 643 F.3d at 595.
315. *See* Indian Civil Rights Act, Pub. L. No. 90-284, Title II, § 202, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)); *see also Cavanaugh*, 643 F.3d at 595 (explaining the applicability of the Indian Civil Rights Act in determining the validity of Cavanaugh's prior tribal court convictions).
316. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (2006).
317. *Cavanaugh*, 643 F.3d at 596.
318. *Id*. at 595.

carceration."[319] The court recognized that the ability of tribal courts to impose a term of incarceration of up to one year upon defendants without the assistance of counsel directly contrasts with the precedent set forth in *Gideon* and *Argersinger*.[320] Despite this tension, however, the United States government argued that Cavanaugh's prior convictions were valid under tribal law and the Indian Civil Rights Act.[321] Thus, the convictions should be considered valid for use in federal court "to prove the elements of the present § 117 violation."[322] The Eighth Circuit, therefore, was faced with the legal question of whether valid tribal convictions could serve as predicate convictions for the purposes of charging a defendant under § 117.[323] Ultimately, the Eighth Circuit found that Cavanaugh's tribal convictions, which were not alleged to be otherwise unreliable, could be utilized to satisfy the elements of § 117.[324]

In reaching this conclusion, the court recognized that its decision did not accord any special weight to "the 'gap' in the right to counsel caused by incomplete extension of Sixth Amendment coverage to Indian tribes through the Indian Civil Rights Act."[325] The court further noted that other courts have failed to reach consensus regarding this issue and proceeded to compare and contrast the instant case with previously established case law.[326] First, the *Cavanaugh* court addressed *Ant*, which held that it was impermissible to use a prior, uncounseled guilty plea in a subsequent federal proceeding.[327] The *Cavanaugh* court distinguished the facts of the instant case from the facts of *Ant*.[328]

Specifically, the *Cavanaugh* court explained that *Ant* differed from the instant case because "the government in *Ant* sought to use the guilty plea from tribal proceedings to prove, not the fact of a prior conviction, but rather the truth of the matters asserted in the plea."[329] Further, the court explained that the federal proceedings in *Ant* arose out of the same incident that was at issue in tribal court.[330] The federal government chose to prosecute Ant for the same incident in federal court after he was pre-

319. *Id*. at 596.

320. *Id*. (explaining that *Gideon* and *Scott* "h[eld] that federal and state courts cannot constitutionally impose *any* term of incarceration at the time of a conviction unless a defendant received, or validly waived the right to, counsel").

321. *Id*.

322. *Id*.

323. *Id*. at 594.

324. *Id*.

325. *Id*. at 604 (referring to the discrepancy between the protections of Indian Civil Rights Act and the *Gideon* and *Argersinger* cases, which provide that an indigent criminal defendant is entitled to court-appointed counsel when facing a term of incarceration greater than one year).

326. *Id*.

327. *Id*. (citing United States v. Ant, 882 F.2d 1389, 1394 (9th Cir. 1989)).

328. *Id*.

329. *Id*.

330. *Id*. ("*Ant* differed from the present case in that the federal proceedings in *Ant* arose out of the same alleged incident as the tribal proceedings at issue in the case.").

viously convicted in tribal court for the same incident.[331] In contrast, the federal proceedings in Cavanaugh's case only utilized prior, distinct incidents to satisfy the repeat offender elements of § 117.[332] The federal court was not recharging Cavanaugh for the incidents that were previously adjudicated in tribal court.[333] Rather, the convictions were merely serving as predicates for convicting Cavanaugh under § 117.[334] The *Cavanaugh* court therefore did not use *Ant* as precedent in analyzing Cavanaugh's case due to factual inconsistencies between the two cases.[335]

Second, the *Cavanaugh* court addressed *State v. Spotted Eagle*, a Montana case.[336] In *Spotted Eagle*, Montana sought to use a prior tribal court conviction to "enhance a state DUI charge to felony status."[337] The *Spotted Eagle* court declined to treat a tribal proceeding as though it violated the Sixth Amendment.[338] Consequently, the *Spotted Eagle* court upheld the use of a prior tribal court conviction to enhance the defendant's state DUI charge.[339] The court stressed the importance of avoiding interference "with the tribal courts and the respective tribe's sovereignty."[340] Additionally, the Montana court explained that the principles of comity require that the court "give full effect to the valid judgments of a foreign jurisdiction according to that sovereign's laws. . . ."[341] The state court, ultimately, refused to consider the prior uncounseled tribal court proceeding invalid, using similar reasoning as the district court in *Ant*.[342] The *Cavanaugh* court found the *Spotted Eagle* court's analysis of comity to be convincing and utilized this reasoning to assess sovereign tribal court decisions.[343]

After considering *Ant* and *Spotted Eagle*, the *Cavanaugh* court explained that Supreme Court precedent in this area is ambiguous.[344] Moreover, the court concluded, "reasonable decision makers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of [tribal court] convictions."[345] As a matter of first impression, the Eighth Circuit explained, the court would not preclude the use of prior uncounseled tribal court proceedings.[346] Importantly, the Eighth Circuit explained that its decision hinged on

331. *See Ant*, 882 F.2d at 1391 (explaining that, following Ant's entry of a guilty plea in tribal court, "[o]n January 7, 1987, a federal indictment was filed charging Ant with voluntary manslaughter, under 18 U.S.C. §§ 1112 and 1153").
332. *See Cavanaugh*, 643 F.3d at 594.
333. *See id*.
334. *See id*.
335. *Id*. at 604–05.
336. *Id*. at 605 (citing State v. Spotted Eagle, 71 P.3d 1239 (Mont. 2003)).
337. *Id*. (citing *Spotted Eagle*, 71 P.3d at 1241).
338. *Spotted Eagle*, 71 P.3d at 1245.
339. *Id*. at 1245–46.
340. *Id*. at 1245.
341. *Id*.
342. *See id*.; *see also supra* notes 183–87 and accompanying text.
343. United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011).
344. *Id*.
345. *Id*.
346. *Id*.

Cavanaugh's failure to introduce any claims of actual innocence or any allegations of judicial irregularities other than the Sixth Amendment claim.[347]

Notwithstanding ambiguous Supreme Court precedent in this area, the Eighth Circuit should have further analyzed several important points of law within its opinion. First, the Eighth Circuit should have addressed the concept of foreign court convictions in greater depth. The *Cavanaugh* court briefly mentioned the notion of respecting and upholding previous criminal convictions in foreign jurisdictions.[348] Specifically, the court recognized the importance of giving "full effect to the valid judgments of a foreign jurisdiction according to that sovereign's laws."[349] The court, however, failed to fully develop the importance of this concept. The *Cavanaugh* court could have justified its ultimate conclusion by discussing foreign criminal convictions in greater depth. Generally, federal courts give great deference to the validity of foreign court convictions and guilty pleas.[350] Federal courts, consequently, utilize prior foreign convictions in federal proceedings on a frequent basis.[351]

In *Flynn v. Shultz*, the Seventh Circuit established that foreign jurisdictions are not bound by the requirements of the U.S. Constitution, specifically the Sixth Amendment.[352] Specifically, there was "no indication from the debate leading to [the] ratification of the Constitution and the Bill of Rights that application of the Sixth Amendment to foreign court prosecutions was contemplated."[353] Further, in *United States v. Nolan*, the Tenth Circuit determined that a conviction in an English court could be admitted as evidence in a federal criminal trial.[354] Although the defendant's foreign conviction in *Nolan* was obtained in a manner that was inconsistent with the Constitution, the conviction was still admitted in federal court and the *Burgett* rule was disregarded.[355]

Finally, in *Ennis v. Smith*, the Supreme Court established that evidence of judicial proceedings in foreign jurisdictions could be considered admissible in the federal system.[356] The aforementioned cases establish a clear trend: federal courts largely recognize the judicial decisions of foreign jurisdictions, even if these decisions were not made in accordance with the Constitution.[357] Accordingly, the *Cavanaugh* court could have

347. *See id*.; *see also supra* note 300 and accompanying text.

348. *See Cavanaugh*, 643 F.3d at 605 (citing State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003)).

349. *Spotted Eagle*, 71 P.3d at 1245.

350. Sheldon K. Shapiro, Annotation, *Valid Judgment of Court of Foreign Country as Entitled to Extraterritorial Effect in Federal District Court*, 13 A.L.R. FED. 208 (1972) (explaining, "American courts follow [the] practice of recognizing foreign judgments unless there are clear reasons not to do so in particular case such as where recognition of foreign judgment would be contrary to public policy").

351. *See id*.

352. *See* Flynn v. Shultz, 748 F.2d 1186, 1197 (7th Cir. 1984).

353. *Id*. at 1197 n.10.

354. *See* United States v. Nolan, 551 F.2d 266, 270 (10th Cir. 1977).

355. *Id*.

356. *See* Ennis v. Smith, 55 U.S. 400, 430 (1852).

357. *See, e.g*., *Flynn*, 748 F.2d at 1197; *see also* Shapiro, *supra* note 350.

enhanced its reasoning by analogizing tribal decisions to foreign decisions. Tribal decisions, like foreign decisions, should arguably be respected by the federal system. The *Cavanaugh* court could have established that tribal court convictions, although commonly based on uncounseled proceedings, should be considered valid in federal proceedings. Instead, the court briefly mentioned the issue without fully developing its argument.

Although the Eighth Circuit failed to adequately analyze foreign decision making, the *Cavanaugh* court properly addressed the legislative intent of Congress. In passing § 117, Congress hoped to reduce the societal impact of repeat domestic violence offenses.[358] Section 117 was crafted, in part, to prevent death and serious injury of Native American women.[359] Congressional Senate records indicate, "due to the unique status of Indian tribes, there are obstacles faced by Indian tribal police, Federal investigators, tribal and Federal prosecutors and Courts that impede their ability to respond to domestic violence in Indian Country."[360] Previously, the judicial remedies for federal intervention were quite limited.[361] The Indian Major Crimes Act does not allow the federal government to prosecute domestic offenders unless the assaults involve serious bodily injury or death.[362] Consequently, under the previous statutory scheme, domestic violence perpetrators could "escape felony charges until they seriously injure[d] or kill[ed] someone."[363]

Thus, § 117 aimed to address concerns regarding domestic violence recidivism rates and increasingly severe domestic violence offenses.[364] Arguably, the *Cavanaugh* decision respected the legislative intent surrounding § 117. By allowing federal prosecutors to prosecute repeat offenders, some argue, the § 117 and the *Cavanaugh* decision can "enhance the ability of each [federal and tribal] agency to respond to acts of domestic violence when they occur."[365] Despite the positive intentions of Congress, § 117 and *Cavanaugh* overlook the vital importance of attorney representation in the tribal court system. Although reduction of domestic violence rates is a compelling interest, *Cavanaugh* encourages questionable federal prosecution tactics to promote this interest.

In *Cavanaugh*, the Eighth Circuit noted that Cavanaugh did not "allege any irregularities in the proceedings that led to his prior tribal-court convictions beyond the absence of counsel."[366] Ultimately, because

358. 151 CONG. REC. S4873 (daily ed. May 10, 2005) (statement of Sen. John McCain) (explaining that, nationally, "domestic violence costs $4.1 billion each year for direct medical and mental health services.").

359. *See id*.

360. *Id*.

361. *See id*.

362. *See* 18 U.S.C. § 1153 (2006).

363. 151 CONG. REC. S4873 (daily ed. May 10, 2005) (statement of Sen. John McCain).

364. *Id*. (stressing the dangerous tendency of perpetrators to become increasingly more violent over time).

365. *Id*.

366. United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011).

Cavanaugh did not allege any judicial irregularities or claims of actual innocence involving the prior tribal-court convictions, the Eighth Circuit failed to preclude the use of these convictions in federal court.[367] The Eighth Circuit, however, failed to consider that Cavanaugh did not allege any prior irregularities because he was unable to recognize that any irregularities existed. Attorney representation is vital for uncovering judicial irregularities, and representation ensures that criminal defendants understand the precise nature of the pending charges, the potential punishment, and the legality of a prosecutor's actions.[368]

Even though Cavanaugh did not allege prior irregularities, his failure to allege irregularities should not prove that irregularities did not exist. Without an attorney to object to irregularities, unrepresented criminal defendants like Cavanaugh may be largely unaware of judicial irregularities that have occurred. Even the most intelligent criminal defendants require the assistance of counsel to understand the complex and subtle judicial irregularities that occur on a frequent basis.[369] Thus, the *Cavanaugh* court placed far too much weight on the failure of Cavanaugh to allege other judicial irregularities.

In addition to overlooking the risk of inaccuracies and irregularities in tribal court, *Cavanaugh* may encourage questionable federal strategies to reduce crime in tribal communities in the future. While *Cavanaugh* reaffirms the ability of federal prosecutors to target repeat domestic abusers through § 117, the court failed to consider the broad consequences of the precedent that would be established. Admittedly, domestic violence is a compelling and serious societal problem, but the *Cavanaugh* and *Shavanaux* courts may have reached their respective decisions for the purposes of cracking down on domestic violence without considering the broad-reaching implications of their decisions. Specifically, since the *Cavanaugh* and *Shavanaux* courts interpreted this legal question with domestic violence in the forefront of their minds, the reasoning of these decisions may have been impacted by the mere fact that these crimes involved domestic violence.[370] If, for instance, the prior uncounseled tribal convictions were for crimes other than domestic violence, one might consider if the courts would have reached the same decision.

Although *Cavanaugh* and *Shavanaux* involved § 117, these decisions establish precedent that may be used in the context of other repeat offender laws in the future. Specifically, the precedent of *Cavanaugh* and *Shavanaux* could be used to legitimize federal prosecution of repeat offenders based on uncounseled tribal court convictions in other con-

367. *Id*.

368. *See supra* notes 190–93 and accompanying text.

369. *See supra* note 38 and accompanying text.

370. *See Cavanaugh*, 643 F.3d at 595 ("[S]ituations involving facts like those alleged in Cavanaugh's case are precisely the type of situations Congress intended to bring within the bounds of § 117."); *supra* note 227 and accompanying text.

texts.[371] These decisions may indirectly encourage lawmakers to implement repeat offender laws similar to § 117 for the purposes of asserting federal control over other serious crimes in the tribal community.[372] The *Cavanaugh* and *Shavanaux* courts should have closely considered the future use of uncounseled convictions in the context of other federal repeat offender statutes. Ultimately, the federal system must consider whether there are alternative strategies for reducing crime in tribal communities that do not involve the use of uncounseled tribal court convictions.

IV. RECOMMENDATION

The *Ant*, *Shavanaux*, and *Cavanaugh* decisions raise a number of competing interests that cannot be easily reconciled. First, this line of cases addressed the issue of uncounseled representation in tribal courts and the potential inaccuracies that may result from uncounseled proceedings.[373] Second, the *Ant* court addressed the concept of comity and importance of respecting the legitimacy of prior tribal court decisions.[374] By comparing tribal court decisions to foreign court decisions, the *Cavanaugh* court briefly discussed the importance of respecting the validity of a sovereign court system's judicial decisions, even if the decisions were not made in direct accordance with the U.S. Constitution.[375]

Finally, the *Cavanaugh* and *Shavanaux* courts discussed the importance of allowing federal prosecutors to charge repeat-offenders under § 117 due to high rates of domestic violence in tribal communities.[376] The federal court system has been unable to adequately balance these interests, particularly with a lack of Supreme Court authority in this area. To address this ambiguity, the legislative branch must amend the Indian Civil Rights Act to expand the right to counsel in tribal court proceedings. The full protections established by *Gideon* and *Argersinger* are not provided to Native American defendants in tribal court, and providing these protections will alleviate many of the concerns addressed by the *Ant*, *Shavanaux*, and *Cavanaugh* courts.

371. If, for instance, Congress enacts a similar law in the future targeting repeat offenders for crimes that do not involve domestic violence, the *Cavanaugh* and *Shavanaux* decisions may have a direct bearing on the use of uncounseled tribal convictions for the purposes of such a statute. As such, the federal system must carefully consider whether the *Cavanaugh* and *Shavanaux* decisions should be extended to repeat offenses that do not involve domestic violence.

372. As previously discussed, legislative history indicates that § 117 was implemented, in part, to allow the federal system to respond to the problem of domestic violence in the tribal community. 151 CONG. REC. S4873 (daily ed. May 10, 2005) (statement of Sen. John McCain). Thus, the *Cavanaugh* and *Shavanaux* decisions may serve as encouragement for the legislature to create similar statutes, thereby allowing the federal system to assert control over crime problems that were previously handled by tribal courts.

373. *See* United States v. Ant, 882 F.2d 1389, 1392 (9th Cir. 1989).

374. *See id*. at 1391.

375. *See supra* note 343 and accompanying text.

376. *See supra* notes 225, 370 and accompanying text.

A. Expanding the Right to Counsel Through Amendment of the Indian Civil Rights Act

Currently, the Indian Civil Rights Act only provides appointed counsel to indigent Native American defendants in tribal court proceedings when the defendant faces a term of incarceration that is greater than one year.[377] Consequently, when indigent Native American defendants face terms of incarceration that are less than one year, they are not provided counsel in tribal courts. Congress should amend the Indian Civil Rights Act to provide counsel to indigent Native American defendants if they face *any* term of incarceration—not just incarceration that is greater than one year. By assuring that indigent defendants are provided counsel in tribal court, fairness and accuracy of tribal court proceedings will be promoted.

Due to the close intersection between tribal and federal proceedings in the context of § 117, the federal system has utilized prior uncounseled tribal convictions for the purposes of achieving legislative goals. Specifically, legislative history indicates that § 117 was developed to combat the serious problem of domestic violence in tribal communities.[378] The *Cavanaugh* and *Shavanaux* courts, consequently, have allowed the use of uncounseled tribal court convictions as the basis for prosecuting repeat domestic abusers in federal court.[379] The goal of reducing domestic violence is vitally important. The rates of domestic violence in tribal communities are staggering, and initiatives to reduce domestic violence are warranted.[380] Initiatives to reduce domestic violence, however, should be based on accurate and fair judicial proceedings.

Thus, by amending the Indian Civil Rights Act and expanding attorney representation in tribal court, the federal government can continue prosecuting repeat domestic abusers under § 117, but federal prosecutors can be more confident that the previous convictions in tribal court were based on counseled, rather than uncounseled, proceedings. Amending the Indian Civil Rights Act, therefore, will allow repeat offenders to be held accountable for their actions in federal court, but these offenders will be charged based on fully counseled tribal convictions. This approach strikes a balance between ensuring that dangerous offenders are punished for domestic assault while also ensuring that these offenders are provided representation in tribal court.

Further, this approach increases the likelihood of accurate and fair convictions in tribal court. Accurate convictions are not only vital for ensuring that an individual's liberty is not unfairly jeopardized—accurate convictions are also important for ensuring that the federal government

377. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (2006); *see also* United States v. Cavanaugh, 643 F.3d 592, 596 (8th Cir. 2011).

378. *See* 151 CONG. REC. S4873 (daily ed. May 10, 2005) (statement of Sen. John McCain).

379. *See Cavanaugh*, 643 F.3d at 605; *see also* United States v. Shavanaux, 647 F.3d 993, 997–98 (10th Cir. 2011).

380. *See supra* notes 111–13 and accompanying text.

is using its prosecutorial resources wisely. The federal government has limited resources, and prosecutors must use their resources to prosecute high-risk individuals who have been convicted in tribal court based on accurate and fair proceedings. Prosecuting offenders in federal court based on questionable, uncounseled tribal court convictions may not be the wisest and most appropriate means of utilizing prosecutorial resources. Extending appointed representation in tribal courts for indigent defendants could ensure that the federal government is prosecuting defendants who should be held the most accountable for their actions.

Similarly, § 117 is an example of a statute that aims to allow federal prosecutors to assert control over a serious tribal problem: domestic violence.[381] In an attempt to assert control over other crime trends in the tribal community, the federal government may consider implementing repeat-offender statutes such as § 117 for crimes other than domestic violence in the future. If more federal repeat-offender statutes are implemented in the future, there must be assurance that Native American defendants are not prosecuted under repeat-offender statutes based on uncounseled convictions. If the Indian Civil Rights Act is amended to extend attorney representation, Native American defendants will not be tried under potential future repeat-offender statutes based on uncounseled convictions. Ultimately, if the federal government intends to assert control over tribal crime issues in the future, it must ensure that Native Americans are receiving fair representation in the process.

Finally, by amending the Indian Civil Rights Act and expanding attorney representation, federal courts will not have to question whether tribal court decisions are inherently prejudicial, suspect, or unreliable. Instead of questioning the validity and decision making ability of tribal courts, federal courts will be able to confidently accept tribal court convictions as a basis for prosecuting repeat offenders in federal court. Since the tribal court convictions will occur as the result of counseled (rather than uncounseled) proceedings, federal courts will not have to analyze the potential prejudice and inaccuracy associated with previous tribal convictions. Consequently, expanding attorney representation in tribal courts will allow tribal courts to retain their autonomous ability to convict defendants in an accurate and fair manner. Federal courts, therefore, will no longer have to scrutinize or potentially disparage the ability of tribal courts to render decisions that are worthy of being utilized in subsequent federal prosecutions.

Amending the Indian Civil Rights Act and expanding attorney representation in tribal court will require funding and support from the community. If Congress mandates attorney representation for individuals facing any period of incarceration, the demand for qualified lawyers will increase dramatically. Tribal governments may experience increased funding demands, and the federal government must ensure that tribal

381. *See* 18 U.S.C. § 117 (2006).

governments have the funds to provide legal representation to defendants in tribal court. Amending the Indian Civil Rights Act without providing adequate funding may create budgetary constraints for tribal governments, so the federal government must actively support efforts to fund aspects of the tribal court system. Ultimately, to combat the problems of crime and domestic violence in tribal communities, the federal government must ensure that funding accompanies the expansion of attorney representation in tribal court.

B. Promoting Therapeutic Initiatives and Prosecutorial Assessment of Tribal Court Accuracy

Efforts to amend the Indian Civil Rights Act will require time, and changes will not occur spontaneously. Accordingly, the federal government must take steps to protect the rights of Native Americans in the interim period. Federal prosecutors throughout the United States must be proactive and take legitimate steps to determine whether prior tribal court convictions were based on fair and accurate proceedings. Using prosecutorial discretion, U.S. Attorneys must engage in extensive analysis of the uncounseled tribal court convictions before charging an individual under a federal repeat-offender statute. Despite the importance of reducing domestic violence, federal prosecutors must carefully scrutinize the fairness of prior uncounseled tribal convictions to uphold the notions of justice and fairness in the federal system. Particularly in the context of § 117, federal prosecutors must remember that their ultimate goal should be the pursuit of a justice and not the pursuit of an effortless conviction.

Moreover, if Native Americans are charged and convicted of crimes under statutes such as § 117, the federal judiciary must take steps to ensure that Native Americans are afforded extensive and high-quality domestic violence therapy during incarceration or upon release from prison. The federal government has expressed its desire to assert control over domestic violence and crime in tribal communities by constructing statutes such as § 117. In asserting this authority, the federal government must also take steps to provide Native Americans with therapy targeted at reducing violence, recidivism, and substance abuse.

V. CONCLUSION

Throughout our nation's history, the Sixth Amendment right to counsel has been associated with the principles of justice, accuracy, and fairness.[382] As the law currently exists, the Indian Civil Rights Act fails to protect the rights of Native American defendants who are charged with crimes in tribal and federal court. The Act only ensures that a Native American defendant is provided counsel in tribal proceedings when the

382. *See supra* note 2 and accompanying text.

defendant faces a term of incarceration that is greater than one year.[383] The Act, therefore, does not provide defendants the full protections of *Gideon* and *Argersinger* in tribal court proceedings.[384] Consequently, numerous criminal defendants are not represented during proceedings in tribal court and are subsequently charged in federal court under repeat-offender statutes.[385] As a result, numerous Native Americans are caught in a loophole that threatens the ideals of the Sixth Amendment.

Without the assistance of counsel in tribal court, the federal system cannot adequately ensure that tribal court convictions were based on accurate and fair proceedings. The *Cavanaugh* and *Shavanaux* courts did not preclude the use of uncounseled tribal court convictions as a basis for charging Native Americans under § 117, a statute aimed at reducing domestic assaults in tribal communities.[386] Particularly for the *Shavanaux* court, the use of uncounseled tribal convictions was largely rooted in the priority of the federal government to reduce domestic violence rates in tribal communities.[387] Domestic violence is an extremely compelling societal problem, and repeat offenders *should* be prosecuted to protect members of tribal communities. Congress, however, should amend the Indian Civil Rights Act to provide representation to indigent Native Americans when they are charged with domestic assault in tribal court—regardless of the length of potential incarceration.

By amending the Indian Civil Rights Act and expanding right to counsel in tribal courts, Congress can ensure that federal prosecutors are charging repeat offenders based on more accurate and fair convictions in tribal court. Providing Native American defendants with more expansive attorney representation will allow federal prosecutors to continue utilizing § 117 to combat violence in the Native American community. Unlike the status quo, however, prosecutors will be charging Native American repeat offenders based on counseled rather than uncounseled convictions. Amending the Act will allow the federal system strike a balance between promoting the ideals of the Sixth Amendment, decreasing domestic violence rates, and respecting the validity and legitimacy of tribal court proceedings.

383. *See supra* note 8 and accompanying text.
384. *See supra* notes 86–89 and accompanying text.
385. *See supra* notes 149–52 and accompanying text.
386. *See supra* note 379 and accompanying text.
387. *See supra* notes 290–92 and accompanying text.