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Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense

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ABSTRACT

In June 2016, the Supreme Court held in *United States v. Bryant* that uncounseled tribal court convictions could serve as predicate offenses under 18 U.S.C. § 117(a). Citing the public safety crisis in Indian country, the limitations of tribal court sentencing, and the legislative history of Section 117(a), the Court upheld the federal statute enacted to address domestic violence offender recidivism. Beyond Section 117(a), at stake in *Bryant* was a challenge to tribal sovereignty, tribal courts' ability to provide due process for their defendants, and protection for Indian victims of domestic violence. *Bryant* is simultaneously nested within a larger national conversation about the crisis of public defense in the United States, a due process right fundamental to Anglo-American jurisprudence. Due to tribes' preconstitutional status, procedural protections for defendants in tribal court stem not from the U.S. Constitution, but from tribal law and the Indian Civil Rights Act, which guarantees a right to counsel at the defendant's expense. Though the Sixth Amendment right to appointed counsel does not apply in tribal court, no liberal sovereign can be absolved of the imperative to protect the rights of the accused in its criminal proceedings.

Moving forward in the wake of *Bryant*, tribal courts must address this imperative. Procedural protections for tribal court defendants should be measured not by replication of state and federal public defense systems, but rather by analyzing tribal courts under international principles of comity to determine if a verdict is fundamentally fair. This Comment offers a two-layered proposal for addressing the public defense needs of tribal courts: calling first for a reformation of federal funding structures to promote strong federal and tribal partnerships, and second, by examining the models tribal courts across the country are using to ensure fairness and protect the rights of criminal defendants.

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INTRODUCTION

On June 13, 2016, the U.S. Supreme Court reversed and remanded an appeal from the Ninth Circuit that struck down valid, uncounseled convictions issued by the Northern Cheyenne Tribal Court serving as predicate offenses under 18 U.S.C. § 117(a).[1] The issue in *United States v. Bryant*[2] concerned whether Michael Bryant's tribal court convictions, for which he was not represented by a licensed attorney, could serve as predicate offenses under 18 U.S.C. § 117(a). The Supreme Court had to assess whether reliance on these convictions violated the Sixth Amendment of the U.S. Constitution.[3] The Court's decision to reverse *Bryant* most immediately affirms the legitimacy of the Northern Cheyenne Tribal Court's convictions, but moving forward it will undoubtedly shape the way the national legal community thinks about a tribal right to counsel.

The position of tribal courts in the larger criminal justice system of the United States is, in short, perplexing.[4] *Bryant* challenged tribal courts' ability to sentence defendants to a fair trial.[5] Challenges like this one, in which the legitimacy of tribal criminal jurisdiction is implicitly questioned, are by no means novel in Indian country.[6] For well over a century, the Supreme Court has heard such challenges and has subsequently abrogated tribal criminal jurisdiction to produce the piecemeal system we have at present, which weighs location, level of offense, and identity of the parties involved to determine which government—tribal, state, or federal—has the authority to prosecute.[7] Professor Matthew L.M. Fletcher predicted in 2009 that as the criminal justice systems of the three sovereigns converge, particularly in the realm of sentencing

1. United States v. Bryant, 136 S. Ct. 1954, 1958 (2016).
2. *Id.*
3. Brief for the United States, United States v. Bryant, 769 F.3d 671, 673 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 690 (2015) (No. 15-420), 2016 WL 355061; *see also* 18 U.S.C. § 117(a) (2012 & Supp. II 2014).
4. Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 658–69 (2013).
5. *Bryant,* 136 S. Ct. at 1961–62.
6. The term "Indian country" is used throughout this Comment. Indian country is defined by federal statute at 18 U.S.C. § 1151 (2012) to include all reservations, dependent Indian communities, and Indian allotments to which title has not been extinguished.
7. INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES vii–xi (2013), http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [https://perma.cc/4TF6-VHWX].

enhancements, tribal courts will be increasingly scrutinized for the ways in which they diverge from the federal system.[8]

Such scrutiny towards the institutional legitimacy of tribal courts is undoubtedly the basis of Michael Bryant's constitutional claim. While the Supreme Court recognized that the recidivism statute in *Bryant* is inseparable from the public safety crisis from which it emerged, the Court's decision comes at a critical moment for tribal courts. As sovereigns, tribal governments cannot be absolved of the imperative to protect the rights of the accused in their courts. Simultaneously, however, tribal courts' abilities to protect defendants should be legitimized not through their similarity to state and federal public defense systems, but by a standard of fundamental fairness.

There are 567 federally recognized sovereign Native American tribal nations[9] in the United States today.[10] As sovereign nations that predate the ratification of the U.S. Constitution, Indian tribal governments exercise power distinct from "federal powers created by and springing from the constitution of the United States."[11] Because tribal sovereignty does not derive from the U.S. Constitution, tribes, which are both preconstitutional and extraconstitutional, are not bound by it. Though much of the Bill of Rights was incorporated

8. Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45 CT. REV. 12, 19 (2009) ("[S]tate and federal judges will increasingly be confronted with prosecutors introducing prior tribal court convictions for sentencing and enhancement purposes."); *see also* Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. OF RACE & L. 317, 351–56 (2013). *See generally* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 241 (2009) ("[A]ny overarching questions in modern Indian law of how much normative space is available to tribes to employ tradition and custom that diverges from, and even trenches on, the dominant canon."); Frank Pommersheim, *Due Process and the Legitimacy of Tribal Courts*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 105–17 (Kristen A. Carpenter, Matthew L. M. Fletcher, & Angela R. Riley eds., 2012).

9. This Comment uses the terms "tribe" and "nation" interchangeably to refer to the sovereign groups of indigenous peoples who reside in the United States today. The use of the term "Indian" to refer to individual members of tribes and Native nations is employed widely in federal statutory and case law. This Comment also uses the terms "American Indian," "Indian," "Native American," and "Native" interchangeably throughout.

10. *See Who We Are,* BUREAU OF INDIAN AFFAIRS (May 3, 2016), http://www.bia.gov/WhoWeAre/ [https://perma.cc/VC8B-R7YR]; *see also* Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe, 80 Fed. Reg. 39,144 (July 8, 2015).

11. Talton v. Mayes, 163 U.S. 376, 382, 384 (1896) (holding that Cherokee Nation courts derive jurisdictional authority from the inherent sovereignty of the tribe and not the U.S. Constitution because tribes were not parties to the Constitution: "[T]he existence of the right in [C]ongress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States.").

against the states via the Tenth Amendment, the Bill of Rights is not similarly enforceable against tribal governments.[12]

The Indian Civil Rights Act (ICRA), passed in 1968, binds Indian tribal courts to many of the procedural restrictions of the Bill of Rights.[13] With respect to a defendant's right to counsel, Congress established in the ICRA that tribes cannot deny an Indian defendant assistance of counsel at the defendant's own expense in tribal court: "No Indian tribe in exercising the powers of self-government shall . . . deny to any person in a criminal proceeding . . . at his own expense to have the assistance of counsel for his defense . . . ."[14] The right in § 1302(a)(6) of the ICRA is a right to *retained* counsel. Writing for a unanimous Court in *Bryant*, Justice Ginsburg reiterated that the right to retained counsel under the ICRA guaranteed procedural fairness for defendants in tribal courts.[15] In contrast, the right guaranteed in state and federal courts under the Sixth Amendment is a right to *appointed* counsel.[16] Congress deliberately elected not to extend a Sixth Amendment right to appointed counsel to tribal governments through the ICRA.[17] As the legislative history indicates, the decision not to extend a statutory right to appointed counsel in tribal courts was driven by a recognition of tribal sovereignty, but perhaps more so by a concern about federal funding.[18]

Among the reasons for differentiating the right to counsel in tribal court, the Departments of Justice and the Interior acknowledged that a blanket application of all Bill of Rights guarantees would disrupt tribal justice systems and, in fact, impede the effective administration of justice.[19] In his testimony before a subcommittee of the U.S. Senate Judiciary Committee, Solicitor of the Interior

12. *See* Settler v. Lameer, 507 F.2d 231, 241 (9th Cir. 1974) (citing the legislative history of the 1968 Indian Civil Rights Act, S. REP. NO. 721, at 2 (1968), *as reprinted in* 1967 U.S.C.C.A.N. 1837, 1864).
13. Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, 82 Stat. 73, 77–78 (1968), (codified as amended at 25 U.S.C. §§ 1301–02).
14. *Id.* at 77; Price, *supra* note 4, at 723–24. Similarly, tribal courts, which because of the limitations on federal court review are the principal interpreters of the statute, have understood ICRA to afford tribes flexibility to accommodate local traditions and practices, while nonetheless meaningfully constraining governmental action.
15. United States v. Bryant, 136 S. Ct. 1954, 1962 (2016).
16. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").
17. *See* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 591–92 (1972).
18. *Id.* at 591–92 ("[R]ather, it appeared that the BIA was reluctant to assume the initiative to obtain extra appropriations from Congress, as it had similarly failed to request adequate funds to maintain tribal libraries and other facilities.").
19. *Id.* at 590 ("The Department of the Interior and BIA also agreed that the blunt insertion of all constitutional guarantees into tribal systems would produce disorder and confusion.").

Frank Berry argued that a right to retained counsel was the only feasible path to providing counsel in adversarial tribal courts, given capacity constraints.[20] Arguably more influential to Congress was the effect that a tribal right to appointed counsel would have on federal financial resources. In enacting the ICRA, the Departments of Justice and the Interior acknowledged that "a right to indigent counsel [in tribal court] would require the United States to foot the bill . . . ."[21] At the heart of the Solicitor's testimony was the concern with federal funding, as it is the Department of the Interior's responsibility to support tribal court costs in fulfillment of the federal government's trust relationship to tribes.[22] As this Comment illustrates, the concern with federal responsibility and funding public defense in tribal courts continues to heavily influence policy decisions about the right to retained versus appointed counsel in tribal courts.

Congress has reexamined the ICRA right to retained counsel on several occasions since 1968, and each time has declined to extend a right of appointed counsel equivalent to that of the Sixth Amendment to tribes.[23] The distinction

20. Tom v. Sutton, 533 F.2d 1101, 1104 nn.3-4 (9th Cir. 1976) (citing *Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S. 968, S.J. Res. 40, to Protect the Constitutional Rights of American Indians, Before the Subcomm. on Constitutional Rights of the S. Comm.*, 89th Cong., 1st Sess. (1965)) ("[W]e have specified that the assistance of counsel will be provided at the expense of the Indian defendant. There are several reasons for this. One is that there are no attorneys on the reservations, neither prosecuting attorneys nor defense attorneys, and there would be no bar over which the court has jurisdiction from which it could select attorneys and over which it would have authority to say to an attorney, 'You must represent this litigant.' Accordingly, until a situation obtains where lawyers would be available, we think that it should not be required that the Indian tribes provide defense counsel.").

21. Fletcher, *supra* note 8, at 17.

22. *See* Burnett, *supra* note 17, at 591 ("Rather, it appeared that the [Bureau of Indian Affairs] was reluctant to assume the initiative to obtain extra appropriations from Congress, as it had similarly failed to request adequate funds to maintain tribal libraries and other facilities. In view of the Bureau's past performance, it was not surprising that it presented the choice essentially as one between the right to counsel at the defendant's expense or no right to counsel at all, instead of being prepared to seek funds for a balanced, professional tribal court system."); *see also* United States v. Doherty, 126 F.3d 769, 779 (6th Cir. 1997) ("Throughout the hearings, S. 961 was intensely criticized as overly intrusive of the tribes' right of self-governance. In particular, tribal representatives testified that their governments could not afford to provide counsel to indigent defendants, and that a bill that required them to do so without providing for federal funding would be disastrous.").

23. Brief of National Congress of American Indians as *Amicus Curiae* in Support of Petitioner at 22–23, United States v. Bryant, 769 F.3d 671 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 690 (2015) (No. 15-420), 2015 WL 6774576. Congress examined the right to counsel in tribal court proceedings in enacting the Indian Civil Rights Act (ICRA) in 1968, and again in 1986, when it amended the ICRA to extend tribal sentencing to allow tribal courts to imprison individuals convicted of a criminal offense for up to one year. *See* 25 U.S.C § 1302(7). Congress amended the ICRA again in 2010 when enacting the Tribal Law and Order Act, Pub. L. No. 111-211, tit. 2, § 234(a), 124 Stat. 2258, 2279–80 (codified at 25 U.S.C. § 1302(a), (b)), and again in the 2013

between the constitutional right to appointed counsel and the ICRA's statutory provision created a tension that leads to continued attacks on tribal court legitimacy.[24] That tension, however, is set against a backdrop of U.S. colonialism, where adversarial criminal justice systems were forced on tribes as a tool of assimilation.[25] As result of this colonial history, many tribal courts today balance tribal customary law[26] and Anglo-American jurisprudential principles. The uniqueness of tribal courts stemming both from this negotiation and the history between tribes and the United States differentiates them from state and federal forums.

Tribal courts do not exist in isolation, and because of the fragmented criminal jurisdiction in Indian country, the rates of violence, and particularly recidivist rates of violence, are both extremely high and grossly disproportionate to that of the general population.[27] The statute at issue in *Bryant* is 18 U.S.C. § 117(a), known as the Habitual Offender Provision, which was passed as part of the 2006 Violence Against Women Act (VAWA) in recognition of the federal government's underprosecution of domestic violence on tribal lands.[28]

Reauthorization of the Violence Against Women Act (VAWA), Pub. L. No. 113-4, § 904, 127 Stat. 54, 12023 (codified at 25 U.S.C. § 1304(b)(1)).

24. POMMERSHEIM, *supra* note 8, at 105 ("The essential legitimacy of tribal courts rests in many instances on their ability to provide basic civil rights such as due process within both a legal and cultural context grounded in affirmation and consent. General criticism of this effort arises from two different points of view. One view is that tribal courts do not implement these rights with sufficient vigor; the other view often suggests that Indian Civil Rights Act of 1969 is yet another federal incursion into tribal sovereignty.").

25. *See infra* Part I. Many of the courts of law in Indian country today are descendants of the Courts of Indian Offenses, where attorneys were forbidden and Indians were prosecuted for their own ceremonies.

26. This Comment uses the term "customary law" and "tribal custom and tradition" to refer to tribal law developed independent of the English common law tradition, often prior to European contact. *See generally* Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence,* 13 MICH. J. RACE & L. 57, 61 (2007) ("[T]he importance of customary law in American Indian tribal courts cannot be understated. . . . Tribal court litigation, especially litigation involving tribal members and issues arising out of tribal law, often turns on the ancient customs and traditions of the people.").

27. *See* Brief of *Amici Curiae* National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault in Support of Petitioner at 17–19, United States v. Bryant, 769 F.3d 671 (9th Cir. 2014), *cert. granted,* 136 S. Ct. 690 (2015) (No. 15-420) [hereinafter NIWRC Brief].

28. *See* Petition for Writ of Certiorari at 25, United States v. Bryant, 769 F.3d 671 (2014) (No. 15-420) ("Before Section 117(a)'s enactment, Indian habitual offenders who committed repeated acts of domestic violence on tribal lands frequently escaped felony-level punishment."). The combination of the abrogation of tribal jurisdiction and the limitations of federal prosecution through the General and Major Crimes Acts, 25 U.S.C. § 1152 (2012) and 25 U.S.C. §1153 (2012), respectively, have created a jurisdictional scheme in Indian country whereby domestic violence offenses are generally not prosecuted until the violence escalates to the level of major crime. The major crimes, laid out by 25 U.S.C. § 1153(a) are: "Murder, manslaughter,

At the time the statute was enacted, all tribal governments were precluded by a separate provision of the ICRA from adjudicating felony offenses or imposing sentences greater than one year.[29] Felony jurisdiction for "major crimes" arising in Indian country is the concurrent jurisdiction of both the tribes and the federal government.[30] Unlike tribal governments, the U.S. Attorney's Office (USAO) is not similarly bound by the ICRA's sentencing limit.[31] Criminal offenses originating in Indian country that do not rise to the level of a "major crime"[32] are also within the jurisdiction of the USAO. Misdemeanor and more minor felony-level offenses are, as a collateral consequence of the USAO's prosecutorial discretion, attached to an extremely high declination rate.[33] The harrowing result is that criminal activity in Indian country frequently goes unprosecuted, and offenders may never face justice.[34]

Repeat offenders are common in domestic violence crimes, and violence often escalates over time.[35] Congress recognized that patterns of repeat

kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under 661 of this title within the Indian country." Section 117(a) was enacted by VAWA Reauthorization Action, 18 U.S.C § 117(a) (2006).

29. *See* United States v. Bryant, 769 F.3d 671, 675 n.5 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 690 (2015) (No 15-420). The Tribal Law and Order Act (TLOA) amended the ICRA to authorize tribes to opt in to imposing sentences of up to three years in tribal courts. Tribal Law and Order Act § 234(b). Ten tribes have begun to exercise the enhanced sentencing authority under TLOA, and another fifteen tribes are considered close to implementing enhanced sentencing as of October 5, 2015. *See also* Tribal Law & Policy Institute, *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing*, TRIBAL LAW & ORDER RESOURCE CTR. (Oct. 5, 2015), http://tloa.ncai.org/documentlibrary/2015/10/Copy%20of%20July%2024%20Implementation%2chart%20%20VAWA%20enhanced%20jurisdiction%20and%20TLOA%20enhanced%20sentencing_revised1.pdf [https://perma.cc/HA7L-Q6PQ].

30. Major Crimes Act, 18 U.S.C. § 1153 (2012).

31. Under the Major Crimes Act, an Indian must be involved in a major crime occurring in Indian country in order for the federal government to have jurisdiction. *Id.*

32. *See* NIWRC Brief, *supra* note 27, at 5.

33. *See generally* Tribal Law and Order Act, Pub. L. No. 111-211, tit. 2, § 234(a), 124 Stat. 2258, 2279–80 (codified at 25 U.S.C. § 1302(a), (b)).

34. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 66 (2007) (noting that "[t]he BIA was consistently among the investigating agencies with the highest percentage of cases declined by federal prosecutors").

35. *See* Brief of National Congress of American Indians, *supra* note 23, at 6 ("Repeat offenders are commonplace, with domestic violence 'often escalat[ing] in severity over time.'" (citing United States v. Castleman, 134 S. Ct. 1405, 1408 (2014))). The *Castleman* case notes domestic violence is a national concern that comes in varying degrees. Even seemingly minor acts are of particular concern because of the tendency of violence to escalate. The Supreme Court took note of this precedent in *Bryant,* noting the patchwork of criminal jurisdiction in Indian country and the effect of recidivism on critically high rates of domestic violence in Indian country. *See* United States v. Bryant, 136 S. Ct. 1954, 1960–61 (2016).

domestic violence offenders are exacerbated in Indian country because of the limitations on tribal criminal jurisdiction when it created a recidivist domestic violence statute in 18 U.S.C. § 117(a).[36] Under § 117(a), "any person who commits a domestic assault within the . . . territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State or Indian tribal court proceedings that would be, if subject to Federal jurisdiction—(1) any assault, sexual abuse or serious violent felony . . . (2) shall be fined under this title, imprisoned for a term of not more than 5 years, or both . . . ."[37]

While the conversation about right to counsel in tribal court must be read in light of criminal justice in Indian country, it is simultaneously part of the conversation about the crisis of public defense in the United States. The right to counsel in the United States is a procedural right guaranteed by the Due Process Clause of the Sixth Amendment.[38] The Supreme Court recognized the right to effective assistance of appointed counsel in *Gideon v. Wainwright*[39] in 1963, yet lack of adequate representation for indigent defendants continues to plague state and federal criminal justice systems.[40] Public defender's offices, charged with representing indigent defendants in criminal proceedings, are perpetuating systemic violations of the Sixth Amendment.[41] The failure to provide effective assistance of counsel to indigent defendants across the country is recognized as a national crisis of public defense.[42] This crisis has led scholars,

36. VAWA Reauthorization Act, Pub. L. No. 109-162, tit. 9, § 909, 119 Stat. 3084 (codified at 18 U.S.C. § 117(a) (2006)).

37. *Id.*

38. U.S. CONST. amend. VI.

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

40. *See generally* John Burkhardt, *The Crisis in Public Defense Funding: The Approaching Storm and What Must Be Done,* 62 LA. B.J. 360 (2015); *The Issue*, GIDEON AT 50, http://gideonat50.org/the-issue/ [https://perma.cc/FTY8-T2LZ] (noting that the public defense system is the cornerstone of American democracy, yet chronic underfunding and overwhelming caseloads put public defender's offices at risk of failing to ensure the constitutional right to counsel).

41. Public defenders' caseloads are frequently recognized as too large for attorneys to provide effective assistance of counsel. *See generally* United States v. Cronic, 466 U.S. 648 (1982) (holding that law-trained counsel is the means by which a right to counsel is secured); Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 9, 2008), http://www.nytimes.com/2008/11/09/us/09defender.html?_r=0 [https://perma.cc/9QA2-PHGT].

42. Radley Balko, *In Texas, a Novel Idea to Address the Public Defender Crisis,* WASH. POST (Jan. 28, 2014), https://www.washingtonpost.com/news/opinions/wp/2014/01/28/in-texas-a-novel-idea-to-address-the-public-defender-crisis/; Debbie Elliot, *Need a Public Defender? Get in Line*, NAT'L PUB. RADIO (Feb. 4, 2016, 4:59 AM), http://www.npr.org/2016/02/04/465452920/in-new-orleans-court-appointed-lawyers-turning-away-suspects [https://perma.cc/8FFU-HJ9S]; *'McJustice'—The Crisis of Indigent Defense in America*, INNOCENCE PROJECT (July 15, 2008), http://www.innocenceproject.org/mcjustice-the-crisis-of-indigent-defense-in-america/ [https://perma.cc/E88R-QU5H] [hereinafter INNOCENCE PROJECT].

politicians, and practitioners alike to begin reassessing the meaning of effective assistance of counsel.[43]

In the midst of this national conversation about systemic violations of the Sixth Amendment emerges the issue of right to counsel in tribal courts and a potentially different framework for understanding protection of rights of the accused in tribal justice systems. *Gideon* held that counsel must be appointed to an indigent criminal defendant absent a knowing waiver or retained counsel. While this principle is foundational to the U.S. criminal justice system, importing *Gideon* and related Sixth Amendment jurisprudence to the tribal court context presumes that all tribal courts mirror federal and state courts.[44] Yet federal and tribal courts have recognized that due process in tribal courts is not necessarily "coextensive with the notion of constitutional due process."[45]

Though the Supreme Court upheld Section 117(a) and recognized that the ICRA guarantees procedural fairness for tribal court defendants in *Bryant*, the Court's holding has rejuvenated conversations about tribal public defense.[46]

43. *See generally* Cara H. Drinan, *The National Right to Counsel Act: A National Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487 (2013); M.H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 N.Y.U. REV. L. & SOC. CHANGE 83 (2004); Robin G. Steinberg & David Feige, *Cultural Revolution—Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123 (2004); Andrew Cohen, *This Is the One Area Where America Really Needs More Lawyers*, WEEK (Jan. 22, 2014), http://theweek.com/articles/452623/area-where-america-really-needs-more-lawyers [https://perma.cc/8YAE-7XFR]; *The Crime Report: Can the 'Holistic Approach' Solve the Crisis in Public Defense*, BRONX DEFENDERS (Mar. 8, 2011), http://www.bronxdefenders.org/can-the-holistic-approach-solve-the-crisis-in-public-defense-the-crime-report/ [https://perma.cc/2STM-CCR4].

44. Brief Amici Curiae of Professor Barbara L. Creel and the Tribal Defender Network in Support of Respondent, United States v. Bryant, 136 S. Ct. 690 (2015) (No 15-420) (arguing—as proponents of criminal defense and the tribal defender network, in their brief as amici curiae for respondent—that a right to trial is meaningless without a right to law-trained counsel); *see also Cronic*, 466 U.S. 648; Johnson v. Zerbst, 304 U.S. 458 (1938) (holding that the federal government is required to appoint a defendant an attorney where the defendant cannot afford one in order to protect her fundamental liberty); Powell v. Alabama, 287 U.S. 45 (1932) (holding that only counsel trained in the "science of the law" can guarantee a meaningful right to be heard at trial).

45. Pommersheim, *supra* note 8, at 109 (citing *Seymour v. Colville Confederated Tribes*: "The Court expressly held that due process under both the tribal statute and the Indian Civil Rights Act of 1968 is not 'coextensive with the notion of constitutional due process'").

46. United States v. Bryant, 136 S. Ct. 1954 (2016); Robert Barnes, *Supreme Court Reinstates Conviction of Domestic Abuser in Indian country*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-reinstates-conviction-of-domestic-abuser-in-indian-country/2016/06/13/47a52b94-318f-11e6-8ff7-7b6c1998b7a0_story.html [https://perma.cc/Q2Z5-6KPN]; Dominique Alan Fenton, *Poor on an Indian Reservation? Good Luck Getting a Lawyer,* MARSHALL PROJECT (June 13, 2016, 10:00PM), https://www.themarshallproject.org/2016/06/13/poor-on-a-native-american-reservation-good-luck-getting-a-lawyer#.8gKh9Xlds [https://perma.cc/H9TK-MQSV]; Daniel Fisher, *Supreme Court Endorses Tribal Courts; Bad News for Corporate Defendants?*, FORBES

The tension that emerges between the right to counsel in state and federal court and protections for the accused in tribal court brands tribal courts as institutions incapable of insuring due process for the accused in a criminal proceeding absent a right to retained counsel. This tension, evident in the *Bryant* case, leads to the thesis of this Comment. The right to counsel as guaranteed by the Sixth Amendment has never applied to tribal courts. Recognizing tribal sovereignty and the unique status of tribes, procedural protections for tribal court defendants do not and should not be perceived as stemming from the U.S. Constitution. Yet no liberal society can be absolved of an imperative to protect the rights of their accused in criminal proceedings. Procedural protections for tribal court defendants should be measured not by replication of state and federal public defense systems, but rather by analyzing tribal courts under international principles of comity to determine if a verdict is fundamentally fair. As sovereign governments, and in accordance with the historical congressional plenary framework, tribes have the inherent authority to shape procedural protections in their own courts, which must command the respect of the federal government.[47]

Thus, a discussion of protecting the rights of the accused in tribal courts must focus on ways to support tribes in guaranteeing fundamental fairness for tribal court defendants and addressing the underlying causes of criminal activity. The right to retained counsel is so intrinsic to American due process that any failure to replicate that right appears to be an affront to justice.[48] Rather than the Sixth Amendment procedural protections ceiling, tribal courts are uniquely situated to think creatively about insuring fundamental fairness to defendants while simultaneously addressing the underlying issues that bring individuals into contact with the criminal justice system.

This Comment proceeds as follows. Part I details a brief history of tribal justice systems in the United States, federal intervention in tribal courts, and the

(June 13, 2016, 4:49PM), http://www.forbes.com/sites/danielfisher/2016/06/13/supreme-court-endorses-tribal-courts-bad-news-for-corporate-defendants/#3a7c1a185e1b.

47. Paul Spruhan, *The Meaning of Due Process in the Navajo Nation*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 119 (Kristen A. Carpenter et al. eds., 2012) (proposing that questions about whether tribal courts should adopt the federal interpretation of due process or attempt to find unique tribal ways of thinking about due process "have driven the evolution of the concept of due process in the Navajo Nation, as its courts have been consistent with Navajo principles in giving meaning to the vague term, while considering and even sometimes incorporating federal approaches").

48. Brief Amici Curiae of Professor Barbara L. Creel, *supra* note 44, at 2 ("In our American system of justice, the right to counsel is provided for all defendants when life and liberty is in the balance . . . . A prosecutor's reliance on an Indian's prior convictions must be consistent with this guarantee to reflect the nation's constitutional values within the adversarial system.").

evolution of retained counsel. Part II discusses the claims of *United States v. Bryant*, the implications of the defendant's claim and the Supreme Court's decision on ongoing conversations about tribal court legitimacy, and why the international principle of comity should apply to tribal court proceedings. Part II then examines ways that tribes have shaped due process and a right to counsel grounded in tribal law and notions of fundamental fairness while looking to state and federal jurisprudence to inform procedural protections. In Part III, this Comment addresses why a broad amendment of the ICRA to enforce a right of appointed, rather than retained, counsel in tribal courts is an ineffective solution to address future challenges like Michael Bryant's. Part IV herein discusses the current tribal court landscape, as well as two possible avenues for partnership with the federal government to support tribal court development. Lastly, Part V analyzes six possible models for providing indigent defense representation to defendants in tribal courts.

I. A BRIEF HISTORY OF INDIAN TRIBAL COURTS

Today, there are approximately three hundred tribal courts in the United States, each upholding the laws of a separate sovereign and criminal justice system.[49] Tribal justice systems are recognized as playing an important role in advancing tribal sovereignty: "[T]ribally operated courts are the vanguard for advancing and protecting the right of tribal self-government . . . ."[50] Though unique to each tribe, indigenous justice is based on communal society and the bounds of relationships within the community.[51] Today's tribal courts represent a negotiation between tribal values and custom and Congress's execution of plenary power to limit and shape the scope of tribal court jurisdiction.[52] The effective administration of justice is key to government infrastructure, therefore tribal courts are essential to tribal economic development and self-sufficiency.[53]

49. Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts and the Future *Revisited*, 84 U. COLO. L. REV. 59, 60 (2013).

50. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 232 (1994).

51. *See id.* at 329; *see also* Sandra Day O'Connor, Remarks, *Lessons From the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 3 (1997).

52. O'Connor, *supra* note 51, at 2.

53. U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 78 (2003) ("Moreover, effective resolution of civil disputes is an essential component of the governance infrastructure that tribes must provide. Thus, in addition to ensuring order and justice, tribal courts are a key to economic development and self-sufficiency.").

The adversarial criminal justice system[54] of the United States is "a foreign system imposed on tribes" that was "designed by the federal government to bring about the 'civilization' of the Indian."[55] While Anglo-American law is embedded in a tradition of English history and law, the indigenous peoples of North America held fundamentally different perspectives on justice, based on their own indigenous history and custom.[56] These indigenous justice systems more typically reflect the long-established practices indigenous communities used to resolve disputes and maintain balance.[57]

There was a great variety of traditional justice systems and customary law among the indigenous groups of North America, and disputes were historically often resolved by balancing the needs of the community, rather than strict adherence to a written code.[58] Unlike the Anglo-American adversarial model involving a prosecutor, judge, and defense attorney, "[t]he mechanism charged with performing this [in tribal communities] was not always a body of appointed or elected judges . . . ; rather, it often fell within the authority of the tribal chief, the council of elders or chiefs, the council of the warrior society leaders, or the religious leaders."[59] Many traditional dispute resolutions declined to focus on the concept of individual rights, which are at the heart of the Anglo-American adversarial system. Indigenous justice was more concerned with the collective rights of the community—balance, rather than formal legal boundaries to protect individuals from each other, guided dispute resolution.[60]

54. Spruhan, *supra* note 47, at 120 (describing the "plaintiff-versus-defendant" Anglo-American model of jurisprudence as with pleading and procedure as "adversarial"). This Comment uses the term "adversarial" to refer to state and federal courts that embody the plaintiff-versus-defendant model.

55. Creel, *supra* note 8, at 341; *see also* Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & POL'Y 18, 19 (1997) ("The history of tribal dispute resolution predates both state and federal courts. This history is as different from the history of state and federal courts as the Indian culture and value system are different from the dominant culture and its value system.").

56. Zuni, *supra* note 55, at 23 ("From initial contact native peoples experienced conflict in legal principles with the various colonizers. For example: with respect to ownership of land, the native concept was that one cannot buy and sell the land; native law was oral and theirs written; many native societies were matrilineal while the colonizers' societies were patrilineal.").

57. *Id.*

58. Carrie E. Garrow & Sarah Deer, *Tribal Criminal Law and Procedure*, *in* 2 TRIBAL LEGAL TEXTBOOK SERIES 10 (Jerry Gardner ed., 2004) (stating that "[a]mong the Iroquois Confederacy, the laws included the Great Law, which was written on wampum belts," while other concepts of justice were preserved in oral custom).

59. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 111 (1983); *see also* Garrow & Deer, *supra* note 58, at 15 (explaining that most Native communities did not use language like "prosecutor" and "police"; among the Osage, for example, it was the responsibility of the chiefs to restore peace if a conflict arose between individuals).

60. Garrow & Deer, *supra* note 58, at 202 (citing Mohawk scholar Taiaiake Alfred's explanation of conflict and the rights of criminal defendants).

Though the tribes in the southeastern United States began adopting Western governmental structures, including adversarial justice systems in the early 1900s,[61] the first formal federal intervention in tribal justice systems on reservations came in 1883 with the Courts of Indian Offenses, or Courts of Federal Regulations (CFR Courts).[62] The CFR Courts administered justice on tribal lands at the direction of a federal Indian Agent who would appoint a judge for the tribe.[63] The CFR Courts served to regulate law and order on the reservations by enforcing the Code of Indian Offenses, which criminalized the actions of tribal government and made participation in cultural practices such as dances, medicine men, and other ceremonies illegal.[64] These courts were blunt tools of assimilation wielded by the federal government under the guise of federal regulation for the purpose of "civiliz[ing]" the tribes.[65] Additionally, and notably, the CFR Courts also prohibited the appearance of all attorneys for either the prosecution or defense.[66]

During the New Deal Era, the federal government attempted to depart from the assimilationist policies that led to the CFR Courts by passing the 1934 Indian Reorganization Act (IRA).[67] The IRA offered tribes an opportunity to

61. Matthew L.M. Fletcher, "*A Perfect Copy": Indian Culture and Tribal Law,* 2 YELLOW MED. REV. 95, 103–04 (2007). While adversarial courts largely did not emerge in the southeastern United States until the early 1900s, there are limited exceptions. For instance, "[t]he Cherokee Nation long has had a tribal court system from the Treaty of Hopewell Period from the late 1700s to the Removal era, and then again from the early 1840s until the United States terminated the Nation." *Id.* at 103.

62. *See, e.g.*, Creel, *supra* note 8, at 340. Though the vast majority of the Courts of Federal Regulations (CFR Courts) were replaced by tribal courts under the Indian Reorganization Act (IRA), some CFR Courts are still in existence today. *See* 25 C.F.R. § 11.100(a). The CFR Courts were originally created to appoint federal magistrate judges to enforce the law and order codes designed to "stamp out Indian religions and culture." Fletcher, *supra* note 61, at 104.

63. Creel, *supra* note 8, at 340.

64. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("'[C]ourts of Indian offenses' are not the constitutional courts . . . but mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to elevate and improve the condition of these dependent tribes . . . . for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.").

65. DELORIA & LYTLE, *supra* note 59, at 115 ("[W]hen surveying the literature concerning their operation it is difficult to determine whether they were really courts in the traditional jurisprudential sense of either the Indian or the Anglo-American culture or whether they were not simply instruments of cultural oppression . . . .").

66. Creel, *supra* note 8, at 343 ("Tribal constitutions adopted under the Indian Reorganization Act of 1934 included the prohibition against attorneys, which began in the Interior Department's Courts of Indian Offense and was codified in the *Code of Federal Regulations*.").

67. 25 U.S.C. §§ 461–79; *see* Robert T. Anderson, *Criminal Jurisdiction, Tribal Courts and Public Defenders*, 13 KAN. J.L. & PUB. POL'Y 139, 141 (2004); *see also* Burnett, *supra* note 17, at 565 ("The [Indian Reorganization] Act authorized the establishment of tribal courts, to be manned by judges elected by the tribes or appointed by the councils and to be guided by rules drafted by the

restructure their governments and replace the CFR Courts with tribal court systems, subject to federal approval.[68] Although recognizing the inherent sovereignty of tribal governments to change their own governing structures, the IRA essentially presented a mold to which tribes were urged to conform to resume their own federally sanctioned self-governance.[69] Under the IRA, tribal courts began to adopt the structures and procedures of state and federal courts, a Western adversarial model similar to the CFR Courts in order to merit secretarial approval.[70] Exercising concurrent criminal jurisdiction, many of the reorganized tribal governments prosecuted defendants under new criminal laws, which were laid out in a template Law and Order Code drafted by the Department of the Interior.[71] The prohibition of attorneys, which had been codified in the Code of Federal Regulations, continued in the courts of the newly formed IRA tribal governments.[72]

With the formal introduction of Anglo-American governance structures came an increased focus on individual rights in tribal justice systems, and some tribes began enacting individual rights protections to formally protect the rights of the accused in their courts.[73] At the federal level, riding on the heels of national civil rights legislation, Congress passed the Indian Civil Rights Act of 1968, extending through statute many of the individual liberty guarantees of the Bill of Rights against tribal governments. Legislative history of the ICRA indicates that the federal motivation behind the Act was to integrate the tribes into the national legal system by "bringing the Constitution to the reservation."[74]

tribes themselves, subject to the Secretary [of Interior]'s approval. Wherever a tribal court was established, it superseded the court of Indian offenses if one existed.").

68. *See* Burnett, *supra* note 17, at 565 (stating that courts of law established by tribal governments under the IRA replaced CFR where they existed); *see also* 25 C.F.R. §11.100(c).

69. *See, e.g.*, Burnett, *supra* note 17, at 566 ("In fact, the 1934 Act strengthened the role of the BIA in tribal affairs, and the Secretary's review powers ensured that the BIA would still have considerable influence . . . ."); *see also* POMMERSHEIM, *supra* note 8, at 235–36 (noting that the Indian Reorganization Act had little support from tribes and presented tribes with a model constitution and corporate charters for economic development "without significant tribal input, [leading to] significant resentment within many tribes").

70. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998) ("The Indian Reorganization Act of 1934 was designed to put an end to coercion, but continued the policy of assimilation by requiring tribes seeking the benefits of the IRA to organize Western-style governments. While the IRA constitutions did not provide for a separate judicial branch, tribal legislatures began creating court systems."); *see also* Creel, *supra* note 8, at 342–43.

71. POMMERSHEIM, *supra* note 8, at 235; Creel, *supra* note 8, at 342–43.

72. Creel, *supra* note 8, at 343.

73. Garrow & Deer, *supra* note 58, at 202.

74. *See generally* Lawrence R. Baca, *Reflections on the Role of the United States Department of Justice in Enforcing the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 558–59 (Kristen A. Carpenter et al. eds., 2012).

This framing is problematic because it misconstrues the nature of the ICRA as constitutional, rather than statutory. Furthermore, this framing assumes that tribal courts are incapable of protecting the civil rights of their members, and continues to persist in rhetoric that views tribes as depriving defendants of procedural fairness.[75]

Yet initial responses to the ICRA were mixed. The efforts to pass the legislation were led by Senator Sam Ervin, who proposed to Congress that Indians were the minority group most in need of civil rights protections.[76] Some tribal courts saw the matter differently, viewing the ICRA as impeding their rights as sovereigns and misrepresenting tribal members as being deprived of civil rights by their tribal governments.[77] The judicial response to the ICRA was also mixed, with some tribes borrowing from the ICRA to develop due process doctrine coextensively with tribal law and others continuing to look beyond the ICRA to indigenous principles to shape fundamental fairness.[78]

Congress has amended the ICRA on multiple occasions since its original enactment, most recently in the Tribal Law and Order Act (TLOA) and VAWA Reauthorization of 2013.[79] Each time Congress has amended the ICRA, it has declined to extend a Sixth Amendment–equivalent right of appointed counsel to the tribes.[80] Federal case law subsequent to the passage of the ICRA repeatedly and explicitly reinforces that the individual statutory rights of the ICRA do not bring the tribes under the umbrella of the U.S. Constitution.[81] In the 1974 case of *Settler v.*

75. *See* Fisher, *supra* note 46.
76. Burnett, *supra* note 17, at 575–76.
77. Pommersheim, *supra* note 8, at 105–17; Fletcher, *supra* note 49, at 68 (describing the majority of tribal courts as welcoming the ICRA as a guide to procedural protections, while other tribal courts saw the ICRA as a great impediment to tribal governance).
78. Fletcher, *supra* note 49, at 63.
79. *See* Brief of National Congress of American Indians, *supra* note 23, at 12–15 (noting that Congress enacted the ICRA five years after the Supreme Court heard *Gideon v. Wainwright* and held that the right to counsel in criminal cases extended to defendants accused of felony-level offenses in state courts). Each of the subsequent sentencing amendments to ICRA that have examined the right to counsel came before Congress in the wake of not only the Gideon decision, but also *Argersinger v. Hamlin*, 407 U.S. 25 (1971). *Argersinger* held that the right to counsel was not dependent on a felony-level criminal prosecution and is particularly relevant in light of tribal court sentencing limitations under ICRA. *Id.* at 33; *see* 25 U.S.C. § 1302(a)(7)(B).
80. *See* Brief for the United States, *supra* note 3, at 51; Brief of National Congress of American Indians, *supra* note 23, at 12; sCreel, *supra* note 8, at 346–50 (examining each of the times that Congress has considered amending the right to counsel); *see also* 25 U.S.C. § 1302 (1988) (extending the sentencing authority of tribes from six months to one year and extending the limits on fines imposed by tribal courts from $1000 to $5000).
81. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (noting that the statutory rights under the ICRA, though similar to those contained in the Bill of Rights, are not identical); *see also* United States v. Bryant, 136 S. Ct. 1954, 1962 (2016).

Lameer,[82] the Supreme Court held that, because neither the Sixth nor Fourteenth Amendments apply to tribal courts, a defendant in the Yakima court could not challenge the adequacy of his proceedings by claiming a constitutional right to counsel in tribal court. Similarly, in the 1976 *Tom v. Sutton* decision,[83] the Court held that tribal courts were not bound by its interpretation of the right to counsel under the Constitution. And in 1978, in the seminal Indian civil rights case *Santa Clara Pueblo v. Martinez*,[84] the Supreme Court ruled that tribal courts, not federal courts, had the exclusive jurisdiction to adjudicate civil violations of the ICRA in their own courts.

In addition to the ICRA, the federal government's fragmentation of inherent tribal criminal jurisdiction has created a complex criminal landscape in Indian country.[85] Criminal jurisdiction in Indian country today is a complex maze and prosecutorial authority rests with federal, state, or tribal government, depending on the identity of the defendant (tribal member, non-tribal-member Indian, or non-Indian), the identity of the victim, the location of the crime, and the severity of the crime.[86] Though tribal governments have inherent jurisdiction over their people and land, the fracturing of tribal jurisdiction by the Supreme Court and Congress has created a structure wherein USAOs are often the only entity able to prosecute crimes on tribal lands on behalf of tribes.[87] The complex scheme of criminal jurisdiction in Indian country has generated much confusion and led to delays and denials of federal prosecution, resulting in inadequate prosecutions and sometimes a failure to investigate offenses at all.[88] This jurisdictional maze creates confusion and impairs the ability of any government to effectively administer justice for Native Americans.[89]

82. Settler v. Lameer, 507 F.2d 231, 241 (9th Cir. 1974) (finding that the defendant was not deprived of a right to counsel under the Sixth Amendment as the court was unable to find "any case prior to the enactment of the Indian Civil Rights Act of 1968 which guarantees the Sixth Amendment right of counsel to Indians appearing in tribal courts").

83. Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976) (holding that the due process language of the ICRA did not require tribes to provide appointed defense counsel under the Sixth Amendment).

84. *Santa Clara Pueblo,* 436 U.S. at 51–52 (holding that ICRA was intended to balance tribal sovereignty, and no private cause of action can therefore be brought in federal court under the ICRA).

85. INDIAN LAW & ORDER COMM'N, *supra* note 7.

86. *Id.*

87. AMNESTY INT'L, *supra* note 34, at 4, 61 (2007). In 2007, the Maze of Injustice Report revealed the crisis of public safety and loopholes in Indian country criminal jurisdiction. *Id.* at 66; *see also* INDIAN LAW & ORDER COMM'N, *supra* note 7, at 108.

88. AMNESTY INT'L, *supra* note 34, at 9.

89. INDIAN LAW & ORDER COMM'N, *supra* note 7, at viii.

The limitations of the federal government in adjudicating Indian country crime—in combination with the limitations in tribal court sentencing, the lack of federal funding to support public safety and court infrastructure, and the high prosecutorial declination rates—has created a public safety crisis of epidemic proportions in Indian country.[90] American Indians experience violent crime in their communities at a rate more than twice the national average.[91] The rates of sexual and domestic violence in Indian country are even more egregious relative to the general population.[92] The prevalence of violent crimes against Native women in particular is aggravated by the barriers that face Native Americans seeking justice: fear of breach of confidentiality, fear of retaliation, and lack of confidence that reports of violence will be prosecuted.[93]

Recognizing the public safety gap in Indian country as crisis of epidemic proportions has generated a national conversation around addressing systemic violence, resulting in recent landmark legislation—18 U.S.C. § 117(a), TLOA, and the 2013 VAWA Reauthorization—among others.[94] Section 117(a) is a provision of the Violence Against Women Act of 2006, establishing that prior tribal court convictions can serve as predicate offenses for a federal crime under Chapter 110A of Title 18 to the U.S. Code.[95] The statute addressed domestic violence recidivism, which has been recognized by the Supreme Court as an offense where recurrence is likely and the level of the offense is likely to escalate over time.[96]

The Tribal Law and Order Act, passed in 2010, is a comprehensive statute focused on the broad reduction of crime in Indian country by increasing federal accountability and tribal authority.[97] TLOA's three basic

90. *See generally* AMNESTY INT'L, *supra* note 34. In recognition of these concerns and the critical examination of violence against Native women conducted by Amnesty International in its 2007 *Maze of Injustice Report*, federal legislative changes have focused on the criminal justice gaps (to include underprosecution and tribal jurisdiction over domestic violence offenses) that are within the purview of the Departments of Justice and the Interior. This emphasis reflects the understanding that tribal courts are the most appropriate institutions for addressing public safety in Indian country. *See generally* INDIAN LAW & ORDER COMM'N, *supra* note 7.

91. *See generally* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, A BJS STATISTICAL PROFILE, 1992–2002: AMERICAN INDIANS AND CRIME (2004).

92. *See* AMNESTY INT'L, *supra* note 34, at 2.

93. *Id.* at 16.

94. Major Crimes Act, 25 U.S.C. § 1302 (2012); 18 U.S.C. § 117(a) (2012); General Crimes Act, 25 U.S.C. § 1303 (2012); Violence Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010); 2013 Reauthorization of the VAWA, Pub. L. No. 113-4, § 904, 127 Stat. 54, 12023 (codified at 25 U.S.C. § 1304(b)(1)).

95. 18 U.S.C. §117(a).

96. *See* Brief of National Congress of American Indians, *supra* note 35; *see also* United States v. Bryant, 136 S. Ct. 1954 (2016).

97. *See generally* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

purposes are to (1) make the federal government more accountable to tribes; (2) give tribes more authority in implementing their own justice systems; and (3) improve coordination between tribal, federal, and state governments.[98] Additionally, TLOA created the Indian Law and Order Commission (ILOC), an independent advisory committee directed to conduct a comprehensive study of crime in Indian country.[99] TLOA also amended the ICRA to allow a tribe to exercise enhanced sentencing authority if the tribe elects to comply with certain prerequisites in the statute.

Prior to TLOA's enactment, tribal courts were limited under the ICRA to accord punishment for a criminal conviction no greater than one year in prison and a fine no larger than $5000.[100] TLOA amended the ICRA to allow tribal courts to opt in to enhanced jurisdiction and sentencing up to three years and fines of $15,000. Tribes that elect to exercise enhanced jurisdiction under TLOA, however, are required by the ICRA to provide *appointed* counsel for indigent criminal defendants who may face a jail sentence of greater than one year.[101]

VAWA has been reauthorized several times since its initial enactment in 1994, most recently in 2013. Title IX of the 2013 VAWA Reauthorization was enacted in response to the public safety crisis affecting Native American women. Section 904 enables tribes to opt in to Special Domestic Violence Criminal Jurisdiction (SDVCJ) to prosecute non-Indians through the exercise of inherent criminal jurisdiction for exclusive SDVCJ crimes, provided that the tribe complies with federal prerequisites.[102] With respect to the right to counsel, both VAWA and TLOA create three requirements for tribal courts: (1) the tribe must provide, at its own expense, an attorney to every indigent person charged with a crime under these two acts; (2) the attorney must be licensed to practice law by a licensing board that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; and (3) the court must ensure that the attorney provides, at a minimum, effective assistance of counsel equal to that required by the U.S. Constitution.[103]

At the federal level, this recent legislation recognizes that tribal courts must be supported and respected by federal and state governments to address

98. INDIAN LAW & ORDER COMM'N, *supra* note 7, at vii.
99. *Id.* at 3.
100. Tribal Law and Policy Institute, *supra* note 29, at 16.
101. 25 U.S.C. § 1302(c).
102. *Id.* at 18–20.
103. 25 U.S.C. § 1302(c); Tribal Law and Policy Institute, *supra* note 29, at 79.

challenges of criminal justice and jurisdiction in Indian country.[104] As the U.S. Civil Rights Commission wrote over a decade ago, "tribal justice systems are the primary institutions for maintaining order on reservations." Devoting sufficient resources to tribal criminal justice systems and maximizing tribal input in federal agency and congressional action is essential for closing the public safety gap in Indian country. Section 117(a) is an extension of federal efforts to close the public safety gap in Indian country, creating a recidivist offense that gave weight to tribal court verdicts.[105] Justice Ginsburg recognized in writing for the Court that the case of *United States v. Bryant* exists because of the epidemic of violence in Indian country, the same epidemic that led to the passage of Section 117(a) in 2006.[106] Should the Court have held in favor of the respondent—that the Northern Cheyenne tribal court convictions are invalid for purpose of serving as predicate offenses—the decision would have had the effect of "significantly impair[ing] efforts to prosecute and prevent domestic violence in Indian country."[107]

II. *UNITED STATES V. BRYANT* AND UNDERSTANDING TRIBAL DUE PROCESS

Congress has, over the course of the previous two decades, repeatedly recognized its support of tribal courts.[108] As established, the differences between tribal courts and federal and state courts of law are not limited to the right to counsel. Through the CFR Courts, the IRA governments, and the body of federal Indian law and policy codified in Title 25 of the U.S. Code, the United States has imposed Anglo-American legal norms, structures, and practices onto

104. INDIAN LAW & ORDER COMM'N, *supra* note 7, at ix; *see also* Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes, 79 Fed. Reg. 73,905 (Dec. 12, 2014) (notice) [hereinafter Attorney General Guidelines].

105. Brief for the United States, *supra* note 3, at 43 ("Congress enacted Section 117(a) in response to an epidemic of domestic violence in Indian country and a jurisdictional void that permitted offenders to perpetuate cycles of abuse. Against that backdrop, Congress rationally—and constitutionally—concluded that federal felony prosecution was warranted for any domestic-assault offender whose prior tribal-court convictions did not deter him from future acts of violence.").

106. *See generally* United States v. Bryant, 136 S. Ct. 1954 (2016).

107. Brief of National Congress of American Indians, *supra* note 23, at 4.

108. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 408 (2004) (noting that Congress has broadly upheld tribal self-determination policy in Indian country legislation and further "has specifically singled out tribal courts and has repeatedly expressed its confidence in, and support of, these growing institutions").

tribal communities.[109] While the English legal tradition is embedded in Anglo-American law, the precontact justice systems of the indigenous peoples of North America inhere in fundamentally different perspectives of justice based on their own histories and customs.[110]

The courts of Indian country today are a blend of indigenous justice and American law. Despite the history of colonialism and federal influence in shaping courts in Indian country, much remains unknown about the tribal court landscape. While shaped by federal policy, tribal governments, as sovereigns, are not subject to federal regulation. As a result, there is a general lack of publicly available federal data on tribal courts.[111] In TLOA, Congress recognized the need for authenticated tribal justice statistics to address criminal justice needs in Indian country and subsequently improve tribal access to federal resources. As a result, TLOA mandated that the Bureau of Justice Statistics (BJS) conduct tribal court data collection as necessary.[112]

Prior to TLOA, the most recent comprehensive survey of tribal courts was conducted in 2000 by the American Indian Law Center.[113] The *Survey of*

109. JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 136–37 (3d ed. 2015).

110. Zuni, *supra* note 55, at 23.

111. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY 19 (2002) (demonstrating that tribal courts are derivative or are subject to appeals in the federal system). The data on Indian country is not consistent, as reports do not always report on the same information. For instance, the 2002 Census conducted by the Bureau of Justice Statistics did not survey Alaska Native communities; therefore, there is not currently a clear articulation of exactly how many and what kinds of tribal courts are currently administering justice in the United States. *Id.*; *see also* Fletcher, *supra* note 49, at 71 ("[N]o one knows with certainty how many tribal courts there are in the United States . . . .").

112. "The [National Survey of Tribal Court Systems] will provide long-term benefits for tribes; update the 2002 Census of Tribal Agencies; serve as an authenticated source for tribal court statistics; foster greater transparency in addressing the problems of crime and justice in Indian country; and enrich tribal eligibility for justice program funding resources, prevention programs, and justice services." U.S. DEP'T OF JUSTICE, 2012 NATIONAL SURVEY OF TRIBAL COURT SYSTEMS (citing 42 U.S.C. § 3732(d)(2)), http://www.aisc.ucla.edu/iloc/resources/documents/DOJ_BJS_2012NationalSurveyTribalCourtSystems_508.pdf [https://perma.cc/3WBY-RJZZ]. The final results of the survey conducted under TLOA will provide a clearer picture of justice in Indian country for tribal leaders, intertribal organizations, and national tribal organizations advocating for support of tribal courts. The results of the 2014 survey will provide a more detailed picture of tribal funding streams and judicial priorities, which will inform and improve allocation of federal resources.

113. This survey was authorized by the Indian Tribal Justice Act in consultation with tribes to determine resources necessary to support the expeditious and effective administration of justice in Indian county. *See* Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, § 102, 107 Stat. 2004, 2006–07 (codified as amended at 25 U.S.C. § 3612 (1994)); AM. INDIAN LAW CTR., SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES 3 (2000); *see also* Fletcher, *supra* note 49, at 71 (estimating that there are as many as fifty more tribal courts today than there were in 2000: "Each year, tribal justice systems grow in numbers, quality and

Tribal Justice Systems & Courts of Indian Offenses revealed important information about tribal justice systems, including the total number of tribal justice systems, then approximately 246.[114] The survey found the needs and structures of tribal justice systems to be incredibly diverse, rebutting any presumption that there exists a "typical" tribal court.[115] Many tribal courts surveyed sought restorative justice and alternative dispute resolution, either in lieu of or in collaboration with adversarial justice in the Anglo-American sense.[116] The survey also demonstrated that the infrastructure, training, and technical assistance needs of tribal courts were woefully underfunded.[117] Furthermore, tribal court funding proves to be somewhat unique in that tribal court budgets support not only standard judicial functions but also more typically executive functions such as prosecutors, public defenders, probation officers, parole officers, and other social service needs.[118]

The responsibility of a criminal court of law generally is to balance the rights of the defendants and victims in adjudicating an alleged offense.[119] Tribal courts, however, are often tasked with not only balancing the rights of the defendants and victims in the adjudicatory process, but also balancing the rights of the tribal community as a whole.[120] In describing tribal courts as the "third sovereign," Justice Sandra Day O'Connor stated that tribal courts have an additional legitimizing responsibility: "To fulfill their role as an essential branch of tribal government, the tribal courts must provide a forum that commands the respect of both the tribal community and the non-tribal community, including courts, governments, and litigants."[121] Tribal courts integrating both indigenous customary law and Anglo-American principles in their justice systems produce unique jurisprudence adapted to the specific needs and traditions of the community.[122] Justice O'Connor's words ring particularly strong in the

sophistication . . . . While no one knows with certainty how many tribal courts there are in the United States, my estimate places that number at approximately three hundred" (footnotes omitted)).

114. AM. INDIAN LAW CTR., *supra* note 113, at vii.
115. *See id.* at 22.
116. *Id.*
117. AM. INDIAN LAW CTR., *supra* note 113, at 34; *see also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 53, at 79.
118. AM. INDIAN LAW CTR., *supra* note 113, at 24.
119. *Id.* at 27–28.
120. *Id.*
121. O'Connor, *supra* note 51, at 2.
122. Zuni, *supra* note 55, at 26 (describing the balancing of judicial principles in tribal courts); *see also* O'Connor, *supra* note 51, at 3 ("The development of different methods of solving disputes in tribal legal systems provides the tribal courts with a way both to incorporate traditional values *and* to hold up an example to the nation about the possibilities of alternative dispute resolution.").

context of the *Bryant* case[123] as failing to recognize the validity Northern Cheyenne tribal court's verdict stood to strip the court of its respect as a legitimate judicial forum.

Michael Bryant was indicted by the United States District Court of Montana under 18 U.S.C. § 117(a) for two counts of felony domestic assault committed as a habitual offender in 2011.[124] Mr. Bryant moved to dismiss his indictment on the grounds that the government's reliance on his uncounseled tribal convictions violated his right to counsel under the Sixth Amendment to the U.S. Constitution.[125] Mr. Bryant did not contend that his convictions were themselves unconstitutional, but rather that using the tribal court convictions to prove an element of a federal prosecution was a Constitutional violation.[126] The Ninth Circuit held in his favor despite conflicting precedent in the Eighth and Tenth Circuits holding that valid uncounseled tribal court convictions, issued by preconstitutional sovereigns, did not violate the Constitution when used as predicate offenses.[127] The Ninth Circuit's decision in favor of Bryant rendered his tribal court convictions unreliable, undermining not only the authority of the Northern Cheyenne Tribal Court, but of tribal courts across the United States.[128] The Ninth Circuit's holding, in a sweeping gesture of binding precedent, ignored the realities and diversity of tribal courts responsible for negotiating and resolving indigenous value systems.

The petitioners in *United States v. Bryant* assert that the specific Northern Cheyenne proceedings by which Mr. Bryant was initially convicted were both fundamentally fair and compliant with ICRA.[129] The immediate effect of the Ninth Circuit's decision is that Michael Bryant's tribe is unable, because of federal constraints on the Northern Cheyenne Tribe's jurisdiction, to sentence him to more than a single year of imprisonment. The Northern Cheyenne court is unable to address Mr. Bryant's recidivism nor public safety concerns of the community, despite the fact the same court has convicted Mr. Bryant of more than one hundred separate offenses on various occasions.[130] This case cannot be isolated from its facts, nor can the federal statute at issue,

123. 136 S. Ct. 1954 (2016).
124. Brief for the United States, *supra* note 3, at 2. In total, Mr. Bryant has been convicted more than one hundred times for various criminal offenses, many for domestic assault. *Id.* at 7.
125. Brief for the Respondent at 4., United States v. Bryant, 136 S. Ct. 690 (2015) (No. 15-420).
126. *Id.* at 5.
127. Brief for the United States, *supra* note 3, at 11.
128. *See generally* Brief of National Congress of American Indians, *supra* note 23.
129. Brief for the United States, *supra* note 3, at 53–54; *see also* Brief of National Congress of American Indians, *supra* note 23, at 3–5.
130. Brief for the United States, *supra* note 3, at 7.

18 U.S.C. § 117(a), be disaggregated from the public safety crisis that led Congress to enact it in 2006. The epidemic of violence in Indian country remains a public safety crisis. Even the most conservative estimates of domestic violence in Indian country demonstrate that Native women are far more likely to be raped, battered, and sexually assaulted than any other population in the United States.[131] The statute was intended to fill the void wherein individuals who repeatedly abuse Native women are not comprehensively prosecuted, and 117(a) does so by relying on valid convictions issued by tribal courts.

United States v. Shavanaux[132] and *United States v. Cavanaugh*[133] are the respective Tenth and Eighth Circuit decisions addressing whether valid tribal court convictions violated the Sixth Amendment when used as predicate offenses for § 117(a). The Eighth Circuit in *Cavanaugh* held: "[W]e do not believe we are free to preclude use of the prior conviction merely because it *would have been* invalid had it arisen from a state or federal court."[134] Citing *State v. Spotted Eagle*,[135] the Eighth Circuit also held that because nothing in the tribal court's adjudication indicated fundamental unfairness or deprivation of the defendant's rights, there was no reason to bar the tribal court verdicts from serving as predicate offenses in federal court.[136] Reaching the same conclusion in *Shavanaux*, the Tenth Circuit held: "[B]ecause the Bill of Rights does not apply to Indian tribes, tribal convictions cannot violate the Sixth Amendment. Shavanaux's convictions complied with ICRA's right to counsel provision . . . . Thus, use of Shavanaux's prior convictions in a prosecution under § 117(a) would not violate the Sixth Amendment, anew or otherwise."[137] In other words, a subsequent prosecution could not be found to violate the Sixth Amendment if the prosecuting jurisdiction was never been bound by the Constitution in the first place.[138]

The problem inherent in the Ninth Circuit's decision in *Bryant* is that it assumed, without examination of daily proceedings and functions, that tribal courts are incapable of administering due process of law without a right to counsel identical to that of the U.S. Constitution. The *Bryant* challenge to § 117(a) failed to recognize that because tribal courts did not spring forth from the U.S. Constitution, they do not have to be identical to state and federal courts. As a result of the Ninth Circuit's failure to recognize the

131. NIWRC Brief, *supra* note 27, at 3.
132. United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011).
133. United States v. Cavanaugh, 643 F.3d 592, 592 (8th Cir. 2011).
134. *Id.* at 604.
135. State v. Spotted Eagle, 71 P.3d 1239 (Mont. 2003).
136. *Id.* at 605.
137. *Shavanaux*, 647 F.3d at 998.
138. *Id.* at 997.

uniqueness and sovereignty of tribal courts, *Bryant's* challenge to the legitimacy of tribal verdicts emerges out of the tension between tribal due process and the Sixth Amendment. The Ninth Circuit's decision in *Bryant*—that assumes tribal courts differ from federal and state courts—implies tribal adjudication is incapable of protecting the procedural rights of tribal members.[139]

The allegations of *Bryant* are an attack on the ability of tribal courts to administer fairness and justice. While Congress has recognized the importance of tribal courts and self-governance, the Supreme Court has challenged the legitimacy of tribal courts as forums capable of fundamental fairness.[140] As demonstrated by Supreme Court jurisprudence, even in another case before the Court in the same term as *Bryant*, challenges to the legitimacy of tribal courts and their ability to administer fundamental fair proceedings are not new.[141] Indeed, "problems associated with institutional illegitimacy and jurisdictional complexities occur across the board in Indian country."[142] As Gloria Valencia-Weber further explains, "[t]he scope of a tribally operated court's responsibilities has provoked continuing attention from other jurisdictions, the media, and the public. The non-Indian world reacts, sometimes with alarm, when tribal governments assert rights that legally and economically affect nonmembers and the dominant society."[143] Opponents of tribal jurisdiction take a homogenizing view of tribal courts, claiming that they are illegitimate and illiberal.[144]

139. Fletcher, *supra* note 49, at 93–94 (quoting David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 346–47 (2001): "In the tribal court jurisdiction cases, the issue was not the specific denial of any fundamental right, but a general concern with difference—the kind of difference that might be expressed with the laws of any other country or, indeed, among states which, in our federal system, may apply their own mix of laws ranging from the common law of England to unique local ordinances. . . . The Court acknowledged the impact on the tribe's interests in maintaining reservation health and safety through the exercise of sovereignty over reservation activities but, unlike a traditional conflict of law analysis, gave no weight to the preference for the local law of the place of injury.").

140. Jesse Sixkiller, *Procedural Fairness: Ensuring Civil Jurisdiction After Plains Commerce Bank,* 26 ARIZ. J. INT'L & COMP. L. 779, 802–11 (explaining that the Supreme Court's holding in *United States v. Plains Commerce Bank,* 128 U.S. 2709 (1997), marked a "distrust in tribal courts [that] had permeated through the courts" that challenged tribal courts' legitimacy as fundamentally fair forums). *See generally* United States v. Bryant, 769 F.3d 671, 677 (9th Cir. 2014); Dollar General Corp. v. Mississippi Choctaw Band of Choctaw Indians, 746 F.3d 167 (2014), *cert. granted*, 135 S. Ct. 2833 (2015) (No. 13-1496).

141. *See generally Dollar General Corp.*, 746 F.3d 167; Fisher, *supra* note 46.

142. INDIAN LAW & ORDER COMM'N, *supra* note 7, at ix.

143. Valencia-Weber, *supra* note 50, at 233–34; *see also* Fletcher, *supra* note 49, at 62.

144. Fletcher, *supra* note 49, at 62 (arguing that while some tribal governments do have illiberal tendencies, "in most instances, modern tribal justice systems are successful at resolving these issues").

A. A Standard of Fundamental Fairness

Unconstrained by the U.S. Constitution, tribal courts are uniquely situated to look outside of the procedural due process constraints of the Sixth Amendment to ensure fundamental fairness. Though tribal courts are limited by the ICRA, they retain the sovereign discretion to balance customary law and tribal ways of thinking about due process with federal interpretations of the doctrine.[145] As exemplified by the examples of the Navajo and Hopi, *infra*, this process does not dichotomously force tribes to choose between custom and American due process.[146] Precisely because tribes are engaged in this negotiation, the standard accorded to tribal judgments should be granting comity to tribal court verdicts based on a determination of fundamental fairness. A fundamental fairness standard will help to avoid challenges to tribal jurisprudence such as that brought by Michael Bryant, while legitimizing tribal courts in the national legal landscape and respecting the discretion of tribal governments to transcend Anglo-American notions of due process. Justice Ginsburg gave a nod to fundamental fairness in the *Bryant* opinion: "Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently insure the reliability of tribal court convictions."[147]

Professor Rebecca Tsosie proposes that Supreme Court criminal litigation in the past three decades has begun to raise questions regarding the extent to which tribal sovereignty may be "exercised over persons protected by the laws and the Constitution of a superior sovereign[]."[148] Because tribes are both preconstitutional and extraconstitutional sovereigns, Tsosie argues that the unique status of tribes "seems perplexing, if not unsettling, to many people."[149] The enactment of the ICRA was an exercise of congressional plenary power, and set a floor of individual rights protections in tribal courts.[150]

Tribes have responded to the ICRA in their laws and courts differently. Some tribal courts look to the ICRA as a federal statute, and others have incorporated the statute into their own constitutions and law and order

145. Spruhan, *supra* note 47, at 119.
146. Pommersheim, *supra* note 8, at 105.
147. United States v. Bryant, 136 S. Ct. 1954, 1966 (2016).
148. Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 508 (1994).
149. *Id.* at 508; *see also* Garrow & Deer, *supra* note 58, at 9 ("Native American traditional laws look very different from the Anglo-American criminal justice system. As a result, those unfamiliar with tribal laws often make misjudgments about tribal justice systems. For example, when British settlers came in contact with the Cherokee, they believed the Cherokee had no laws because British notions about law were very different.").
150. Tsosie, *supra* note 148, at 509.

codes.[151] The combination of varying tribal responses to the ICRA and the sovereign prerogative that tribes retain to adjudicate violations of the ICRA has had a complex effect on tribal due process jurisprudence. Due process, in the Anglo-American sense, has not been universally replicated in tribal courts and therefore the protection of the rights of the accused is more appropriately framed by the broader standard of fundamental fairness.[152] Further still, some tribal courts do not operate in an adversarial model, but look to concepts of customary law and peacemaking to resolve disputes in a setting where due process under the ICRA is simply not relevant.[153]

Addressing the precise concern regarding the perplexing status of tribes that Professor Tsosie raises is Justice Thomas in his concurring opinion in *Bryant*.[154] In recent decades, through increased tribal control, courts in Indian country have evolved from tools of assimilation to mechanisms of tribal self-determination.[155] In the course of this process, tribal courts have grown in number and bodies of tribal jurisprudence have expanded, yet tribal courts have actively resisted imposition of federal law. Justice Thomas argues in his concurring opinion that the tribal sovereignty as it is expressed in the *Bryant* opinion is essentially contradictory, requiring Congressional intervention in the domestic violence realm, while actively refusing to implement federal law (the Sixth Amendment) in tribal court.[156] Increasingly, as perhaps most saliently evidenced by the Supreme Court's Indian law decisions that have articulated perspectives similar to those of Justice Thomas on the role of tribes in the federal judicial system, tribal sovereignty has come under fire. Developing implicitly and alarming, even despite the *Bryant* decision, is the perception

151. *See* Newton, *supra* note 70, at 343 ("Many tribes have incorporated the ICRA into the tribal constitution or the law and order code; others have not . . . [T]hus the issue can be discussed as a matter of tribal constitutional law or statutory law, of the ICRA alone, of both.").

152. *See id.* at 343–44 ("Tribal courts need not give the same definition to the 'majestic generalities' of the ICRA's equal protection or due process clauses . . . ."); *see also* Fletcher, *supra* note 49, at 68 (noting that tribes surveyed "[t]ook ICRA more seriously as a procedural guide to provide fundamental fairness to litigants, rather than as an invitation to adopt federal civil rights protections whole heartedly").

153. *See generally* Fletcher, *supra* note 49.

154. United States v. Bryant, 136 S. Ct. 1954, 1967 (2016) (Thomas, J., concurring) ("The fact that this case arose at all suggests how far afield our Sixth Amendment and Indian-law precedents have gone.").

155. Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 117–18 (2001) ("[T]ribal courts cannot be justified primarily through the use of custom and tradition. 'Customary' law presents too problematic a concept in most instances to constitute a practicable and coherent foundation for modern tribal courts.").

156. United States v. Bryant, 136 S. Ct. 1954, 1967–68 (2016) (Thomas, J., concurring).

that tribal sovereignty conflicts with fundamental fairness.[157] The narrative that tribal sovereignty works in opposition to fundamental fairness is perhaps most salient in the due process realm.

It is important to frame the conversation around fundamental fairness in tribal courts in a manner that accurately conveys the reality, recognized by the ICRA and affirmed by the Court in *Bryant*[158] that tribal courts are capable of protecting the civil rights of their members.[159] To that end, tribal court verdicts should be recognized through the international principle of comity. Comity is the principle by which a jurisdiction grants legal reciprocity to the executive, legislative, and judicial decisions of another sovereign nation. Because the United States generally accords comity to the judicial decisions of foreign nations, tribal court decisions, which are issued by distinct sovereigns, should be treated similarly.[160]

Multiple state and federal courts have held that it is possible for tribal court proceedings to be fundamentally fair, even absent professional counsel for the defense.[161] In *State v. Spotted Eagle*, cited by Justice Ginsburg in *United States v. Bryant*,[162] the Montana Supreme Court determined that a tribal court verdict was fundamentally fair as a matter of comity: "Spotted Eagle's tribal convictions are valid tribal convictions pursuant to Blackfeet law. In other words, the parties concede that those convictions were valid at their inception. Nothing of record indicates that the proceedings were fundamentally

157. *Id.* at 2 ("[T]he only reason why tribal courts had the power to convict Bryant in proceedings where he had no right to counsel is that such prosecutions are a function of a tribe's core sovereignty."). *See generally* Dollar General Corp. v. Mississippi Choctaw Band of Choctaw Indians, 746 F.3d 167 (2014), *cert. granted*, 135 S. Ct. 2833 (2015) (No. 13-1496).

158. United States v. Bryant, 136 S. Ct. 1954, 1966 (2016).

159. *See* Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, tit. 2, 82 Stat. 73, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–02); *see also* Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 324 (Kristen A. Carpenter et al. eds., 2012) (arguing that there is strong empirical evidence suggesting that the ICRA has provided the framework for tribal communities, through self-determination and governance, to meet the needs and values of their communities). *But cf.* Fletcher, *supra* note 49, at 75 (arguing that fundamental fairness in tribal courts may be guaranteed by the ICRA, but may also be guaranteed by unwritten tribal custom and traditional law, or tribal statutory or constitutional provisions, depending on the tribe and justice system).

160. *See* Dan St. John, Comment, *Recognizing Tribal Judgments in Federal Courts Through the Lens of Comity*, 89 DENV. U. L. REV. 523, 536 (2012).

161. POMMERSHEIM, *supra* note 8, at 55 ("[A]t least one circuit court has adopted the comity model. Several states, such as Alaska and South Dakota, have adopted a judicially created comity approach." (first citing Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); then citing John v. Baker, 982 P.2d 738, 762–63 (Alaska 1999); and then citing SDCL (South Dakota Codified Laws) § 1-1-25 (2006))).

162. United States v. Bryant, 136 S. Ct. 1954, 1966 (2016).

unfair or that Spotted Eagle was in any way innocent of the tribal charges."[163] Because the Blackfeet court complied with both the ICRA and its own tribal law, the convictions were valid.[164] Convictions that comply with the law of a foreign sovereign are extended the grant of comity. Following, the U.S. court considering a foreign jurisdiction's verdict is tasked with determining whether the defendant's conviction was fundamentally fair, rather than requiring that foreign jurisdiction comply with the due process standard set forth by the U.S. Constitution.[165]

The U.S. Supreme Court established that comity should be accorded to international court verdicts based on a standard of fundamental fairness in in *United States v. Wilson*.[166] As sovereigns distinct from the United States, international courts are extended comity rather than the full faith and credit that the U.S. Congress applies to states.[167] Multiple state and federal jurisdictions have granted comity to tribal court judgments, according the judgments the same degree of deference as foreign courts. The Montana Supreme Court, in *State v. Spotted Eagle*,[168] stated: "This Court treats tribal court judgments with the same deference as those of foreign sovereigns as a matter of comity."[169] The Ninth Circuit, in *Wilson v. Marchington*,[170] held that comity "affords the best general analytical framework for recognizing tribal judgments" because it is the principle by which a nation upholds the judicial acts of another sovereign.[171] As preconstitutional sovereigns, tribal court verdicts should be awarded comity, provided that the verdict is fundamentally fair and compliant with tribal law and the ICRA.

163. State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003) ("To disregard a valid tribal court conviction would imply that Montana only recognizes the Blackfeet Tribe's right to self-government until it conflicts with Montana law. Moreover, it would suggest that Montana recognizes the legitimacy of the judgments of the tribal courts to the extent that the procedures mirror Montana procedure. Such a position would contradict the judicial policy of this state and indirectly undermine the sovereignty of the Blackfeet Tribe.").

164. St. John, *supra* note 160, at 530.

165. United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011) ("[I]n considering the due process implications of recognizing tribal convictions that federal courts have repeatedly recognized foreign convictions and accepted evidence obtained overseas by foreign law enforcement through means that deviate from our constitutional protections.").

166. United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir. 1977) (holding that although the defendant did not receive a jury trial in German court, the German court's verdict was awarded comity because the proceedings were fundamentally fair and thus did not violate the defendant's due process rights).

167. *See* St. John, *supra* note 160, at 538; *see also* U.S. CONST. art. IV, § 2, cl. 2.

168. 71 P.3d 1239, 1245 (Mont. 2003).

169. *Id.*

170. 127 F.3d 805, 810 (9th Cir. 1997).

171. *Id.*

Just as the role of the ICRA and incorporation of the statute into tribal law varies from tribal court to tribal court, the mechanisms guaranteeing fundamental fairness vary greatly. Professor Fletcher has observed that some tribes rely on custom and tradition and others look to federal and state due process to inform their procedure.[172] In addition, he offers evidence that tribes are able to guarantee fundamental fairness to tribal court litigants beyond the minimum standard of the ICRA by incorporating tribal statutory and common law principles.[173] The Cheyenne River Sioux Tribe, for instance, has held that the rights of the accused are statutorily protected by the ICRA, but bound by traditional Lakota constructions of respect. Thus, due process in Cheyenne River Sioux Courts is upheld based on Lakota custom.[174] In other tribal courts, the ICRA has been foundational in guaranteeing fundamental fairness, but has served as more of a stepping stone, in that the tribes have litigated beyond the ICRA to guarantee fairness.[175]

The ICRA's legislative history and Congress's provision of a right to counsel only at the defendant's expense collectively demonstrate that Congress recognizes that tribal judiciaries are capable of being fundamentally fair in ensuring due process.[176] Furthermore, "[t]he underlying assumption implicit in Congress's enactment of ICRA is that uncounseled proceedings in tribal courts will not deny fundamental fairness, since there is no reason to assume Congress would legislatively encourage judicial forums which would foster injustice."[177] More recently, the passage of VAWA and TLOA demonstrate Congress's respect for tribes' sovereign authority.[178] By creating opt-in jurisdiction in TLOA and VAWA, the federal government recognizes that tribes have the sovereign authority to determine how to best achieve fundamental fairness in their justice systems. This principle—that fundamental fairness can inhere outside of a

172. *See* Fletcher, *supra* note 49, at 75–76.
173. *Id.*
174. *See id.* at 84.
175. *Id.* at 87.
176. Washburn, *supra* note 108, at 408.
177. Vincent C. Milani, Note, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1289 (1994) (citation omitted) (arguing that congressional legislation supporting tribal governments and courts, as well as the federal government's self-determination policies, indicates the capabilities and importance of trial court forums).
178. INDIAN LAW & ORDER COMM'N, *supra* note 7, at 92 ("By seeking to strengthen Tribal justice systems, Federal and State leaders will not only enhance public safety on Tribal nations, but also save taxpayers' money throughout the United States.").

Sixth Amendment right to appointed counsel—has been recognized and upheld in tribal courts.[179]

Assistant Attorney General Paul Spruhan explained how the Navajo Nation, one of the largest tribal court systems in the country, has interpreted due process in its courts: "[T]he Navajo Nation has moved from a blanket adoption of federal concepts of due process, to a sophisticated and unique synthesis of federal concepts with Navajo principles. This unique approach ultimately transcends federal definitions of due process[.]"[180] The Navajo Nation courts have recognized defendants' rights to be heard at trial, but derives those rights from Navajo fundamental law rather than from the ICRA and federal law.[181] According comity to the due process judgments of the Navajo courts and recognizing the fundamental fairness guaranteed to the defendant in the Navajo court thus serve to legitimize Navajo justice and law.[182]

The Hopi Tribe guarantees defendants in its tribal courts the right to law-trained counsel at his or her own expense. Hopi law further requires that a defendant "knowingly [waive] his right to counsel" before proceeding either with the representation of a lay advocate or pro se.[183] The Hopi, through their jurisprudence, have developed a procedure and two-part test to determine if a knowing waiver of counsel is valid.[184] The test was upheld and the issue of effectiveness of counsel litigated as a matter of first impression in the trial of *Nathan J. Navasie v. The Hopi Tribe*.[185] With regard to the effectiveness of counsel, the court looked to federal and state case law to inform their decision, ultimately holding that the lay advocate the defendant received from the court was ineffective and failed to meet the right to counsel requirement.[186]

179. *See generally* Pommersheim, *supra* note 8.

180. Spruhan, *supra* note 47, at 119.

181. *See id.* at 124.

182. *Id.* at 127 ("As a positive assertion of unique cultural values, the Navajo Nation Supreme Court's current approach bolsters the Nation's jurisprudential sovereignty by transcending a mere literal application of outside interpretations of individuals rights.").

183. Hopi Indian Tribe, Ordinance 21 § 1.9.4, http://www.narf.org/nill/codes/hopicode/title1.html [https://perma.cc/2WPG-CWMH]; *see also* Hopi Code § 2.8.5, http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf [https://perma.cc/JAS8-P3Z8]. Both sections of the Law and Order Code, the 1998 Ordinance and the 2012 Law and Order Code, are cited to in the opinion.

184. Nathan J. Navasie v. The Hopi Tribe, 1999.NAHT.00000I0, as excerpted in Garrow & Deer, *supra* note 58, at 320–26.

185. *Id.*

186. *Id.* at 326 (holding that the lay advocate provided to the defendant did not meet the test laid out by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984)). The Hopi appellate court wrote:

> The . . . errors meet the *Strickland* test for ineffective counsel. . . . However, since this standard comes from a foreign jurisdiction, Hopi courts should consider

The court wrote: "Representation by lay counsel has distinct advantages for Hopi litigants, including affordability and cultural familiarity, that merit preservation. Nonetheless, lay counsel should not be permitted to practice without basic competency in law and procedure. The *Strickland* test . . . can be applied to both lay advocates and attorneys."[187]

As illustrated in *Nathan J. Navasie v. The Hopi Tribe*, the Hopi Tribe demonstrated through its own jurisprudence that its tribal courts are capable of providing due process rights to defendants. The examples of the Navajo, Hopi, and Cheyenne River Tribes above collectively demonstrate that tribal courts are capable of affording their litigants due process of the law even beyond the boundaries of congressional plenary power or the U.S. Constitution. Tribes have, in many cases, looked to federal and state due process jurisprudence as informative, where others have focused on tribal customs and traditions almost exclusively.

The U.S. Congress has repeatedly recognized its support of tribal self-determination and tribal courts. While the Court's opinion in *United States v. Bryant* recognized that tribal courts are forums capable of issuing reliable convictions, *Bryant* is far from the last challenge to tribal court legitimacy, and likely also not the last challenge to tribal due process. The examples of Navajo and Hopi jurisprudence demonstrate that tribal courts are capable of shaping procedural law to promote fundamental fairness through reliance on tribal custom and by looking to federal and state jurisprudence. In recognition of tribes' ability to provide fundamental fairness, the U.S. Supreme Court should continue to follow international principles of comity in determining the validity of tribal court convictions. While the ICRA ensures the reliability of tribal court convictions, tribes, like all sovereigns, must examine and address the protection of the rights of their accused. In the wake of *Bryant* and recent federal policy, tribal courts should seize upon the opportunity to reexamine fundamental fairness and procedural protections for defendants in their courts.

> whether it is suited to the Hopi community before adopting it. . . . . The *Strickland* test, in assessing the effectiveness of counsel by what is reasonable under the circumstances, allows competency to be evaluated in light of Hopi norms.

See also Creel, *supra* note 8, at 329 (noting that the presence of a "warm body" is not enough to meet the demands of the Sixth Amendment procedural due process right to counsel). The Hopi court looked to the *Strickland* analysis to inform its decision on the effectiveness of counsel for the defense, even as it decided the case based on interpretation of Hopi fundamental fairness rather than Sixth Amendment due process.

187. *Navasie*, 1999.NAHT.00000I0, as excerpted in Garrow & Deer, *supra* note 58, at 326.

III. WHY NOT AMEND THE INDIAN CIVIL RIGHTS ACT TO CREATE A SIXTH AMENDMENT EQUIVALENT RIGHT TO COUNSEL?

The holding in *United States v. Bryant* recognizes the Congressional intent behind the ICRA that tribal defendants could be protected by a right to retained counsel. Though writing before *Bryant*'s holding, opponents of 117(a) and the ICRA right to counsel argue that Congress fundamentally erred by creating the right to retained, rather than appointed, counsel.[188] Though the holding in *Bryant* affirms a federal solution to addressing domestic violence and recidivism in Indian country, the solution is a prosecutorial one and only a small step forward in addressing criminal justice reform and public safety disparities. An article published by *The Marshall Project* on the same day the *Bryant* decision was handed down addressed the lack of representation for defendants on the Pine Ridge Reservation, located in one of the poorest counties in the United States.[189] Judge Dominique Alan Fenton, a legal advocate who is now a youth and family judge in the Oglala Sioux courts, wrote: "In any justice system in this country, prosecutorial power can act as the gas pedal driving the surge for justice forward. But equally important . . . is the brake pedal—the high quality and unflinching public defenders who prevent the surge for justice from careening out of control[.]"[190]

Judge Fenton advocates for improved public defense on Pine Ridge.[191] Fenton argues that effective criminal justice reform in Indian country implores tribal courts to examine their public defense in response to prosecutorial reform. The first question that is logically asked in searching for sustainable solutions for the provision of indigent defense in Indian country is the federal question: whether to amend the Indian Civil Rights Act to extend a Sixth Amendment–equivalent right of counsel to all indigent defendants in tribal courts.[192] Congress's authority to enact the ICRA and impose statutory individual rights protections on tribes stems from its plenary power. The inherent sovereignty of tribal governments can be limited only through treaty or the

188. *See* Creel, *supra* note 8, at 351–52.
189. Fenton, *supra* note 46.
190. *Id.*
191. *Id.*
192. *See* Burnett, *supra* note 17, at 589–91 (explaining that the first draft of the ICRA, S. 961, essentially incorporated all of the Bills of Rights provisions. While some tribes did not object, others found the direct statutory importation of the Bill of Rights to be grossly offensive to the traditional custom and potentially threatening to the tribe's social cohesion).

exercise of congressional plenary power to regulate tribal affairs.[193] It was plenary power that Congress exercised in 1968 when the ICRA was signed into law. The first ICRA bill introduced in the U.S. Senate in 1965 attempted to enact a Sixth Amendment–equivalent right to counsel, but the bill was ultimately struck down because it failed to accommodate the unique needs and justice systems of tribes.[194] The Senate bill that would become the ICRA did not materialize until several years later, after revisions in response to input from tribes and the Department of the Interior about the appropriateness of certain enumerated individual rights protections in tribal courts.[195]

Congress has reexamined the requirement of appointed counsel on two occasions of late, most recently three years ago in the 2013 Reauthorization of VAWA, and has continuously declined to extend a right to indigent defense in tribal courts.[196] In addition to running contrary to Congress's repeated refusal to expand the right to counsel and the Supreme Court's recognition of the reliability of tribal convictions, amending the ICRA to create a right to appointed counsel in tribal courts would be devastating for three reasons. First, extending a right to appointed counsel would be a sweeping mandate and overbroad because not all tribal courts mirror adversarial state and federal systems. Second, there have not been sufficient federal resources to support the provision of appointed counsel in tribal courts, and it is unlikely that Congress will appropriate the necessary funding. And third, imposing such a right through amendment to the ICRA would run counter to recent federal Indian law and policy.

A congressional mandate would be overly broad, "imposing inappropriately sweeping standards upon diverse tribal governments, institutions and cultures . . . ."[197] Such a congressional mandate would disregard tribal courts' abilities to be responsive to the needs of their members.[198] A sweeping Sixth Amendment–equivalent right to counsel in tribal courts would also disregard the principles of sovereignty by which tribes have implemented justice

193. *See* United States v. Kagama, 118 U.S. 375, 385 (1886) (establishing that Congress can pass legislation to limit the scope of tribal liberties pursuant to the trust relationship and dependent status of tribes).

194. *See* Burnett, *supra* note 17, at 589–90 (citing the testimony of the Pueblo tribes, which did not want to disrupt their traditional communities to conform with the sweeping standards of the ICRA, and the testimony of the Crow Tribe, which stated that its current governmental structure served the needs and the rights of the people).

195. *Id.* at 599 (providing for the right to retained counsel for indigent defendants in tribal courts).

196. *See* Brief of National Congress of American Indians, *supra* note 23, at 22–23.

197. State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003).

198. Milani, *supra* note 177, at 1300–01; *see also* United States v. Bryant, 136 S. Ct. 1954, 1959–60 (2016).

in their communities.[199] The U.S. Commission on Civil Rights has recognized that tribal courts are not replicas of state and federal courts; rather, they have created judicial systems unique to the needs of their communities.[200] Tribal courts' special strengths include their proximity to their members and their ability to bridge Anglo-American law and customary law.[201] These strengths would be undermined if Congress unilaterally altered Indian criminal procedure without regard to how individual tribal judiciaries have developed in the past forty-five years. Mandating a right to appointed counsel in all tribes would disrupt existing tribal justice systems, which have been recognized by multiple state courts, Circuit courts, and the U.S. Supreme Court as capable of issuing reliable convictions. Forcing all tribal courts to adopt a right to counsel equivalent to that of the Sixth Amendment would impede justice in developed tribal courts by imposing another disruptive federal requirement, just as the CFR Courts of the 1800s and IRA constitutions of the 1930s did.[202]

Furthermore, as demonstrated above by the examples of the Hopi Tribe and Navajo Nation, tribes have been protecting the rights of accused by looking to both state and federal jurisprudence and tribal traditions.[203] Tribes have retained and exercised the sovereign right to define fundamental fairness for defendants in their own courts. Imposing a sweeping mandate to appointed counsel to protect defendants' due process rights under the ICRA would disrupt the jurisprudential balance many courts have struck between tribal and state and federal law. Yet as demonstrated herein, the reality of Indian country courts of law is that they contain many of the trappings of federal courts. Professor Barbara Creel has argued for a tribal imperative to provide effective assistance of counsel for tribal defendants.[204] Professor Creel argues that the notion of

199. Creel, *supra* note 8, at 357 ("[T]ribes do not have to implement the adversary system in all matters. The sovereign prerogative allows tribes to induce justice and fairness through their own systems. Should tribes have another system, like a restorative justice system based upon native tribal tradition or custom or other principles, there would be no need to provide defense counsel." (footnote omitted)).

200. *See* O'Connor, *supra* note 51, at 3 ("[S]ome tribal judicial systems seek to achieve a restorative justice, placing emphasis on restitution rather than retribution . . . . The special strengths of the tribal courts [include]—their proximity to the people served, the closeness of the relations among the parties and the court, and their often greater flexibility and informality . . . ."). *See generally* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 53.

201. *See* O'Connor, *supra* note 51, at 3; *see also* DELORIA & LYTLE, *supra* note 59, at 136–37 (noting that the strengths of tribal justice systems include quick access to a fair forum, ability to bridge the gap between law and Indian culture, dedicated judiciary, and growing support from federal agencies, tribal leaders, and organizations).

202. *See generally* Creel, *supra* note 8.

203. *See supra* Part I.

204. *See* Creel, *supra* note 8, at 355–56.

fairness is implicit in traditional notions of justice and that tribes and Congress should prioritize requiring appointed counsel in tribal courts, because the right to counsel is a fundamental human right.[205] While fairness and justice in Indian country is an imperative of tribal governments themselves as well as the federal government in its partnership with and in trust to tribes, an amendment of the ICRA to require a Sixth Amendment–equivalent right to counsel fails to address the reality of the crisis of public defense in the United States. Tribal courts, not the federal government, now have the prerogative in the wake of *Bryant* to look beyond the Sixth Amendment to protect tribal defendants in ways appropriately tailored the tribe and its citizens.

The second reason an overhaul of the ICRA should not be implemented is that there are insufficient federal resources allocated to support the unilateral development of tribal court infrastructure. Creating a mandatory right of counsel in tribal courts would be immediately devastating for tribes without the resources to do so independently. The ICRA's provision on defense counsel was limited because of a concern with available resources. Although some tribes have significantly greater access to legal resources than they did in 1968 and the ability financially to retain appointed defense attorneys, that reality is not uniform across Indian country. Considering the implementation of the enhanced sentencing provisions of VAWA, Professor Fletcher has stated: "[M]y educated guess is that fewer than 100 [federally recognized tribes] will be able to afford to do it. . . . You have to have three full-time lawyers at all times—a judge, public defender and prosecutor. That's expensive."[206] While this Comment suggests a possible reform of the federal funding structure for tribal courts, the federal government has chronically underfunded tribal courts and its trust responsibilities to tribes generally. Accordingly, it is highly likely that an amendment to the ICRA creating a right to appointed counsel in all tribal courts would be implemented without adequate federal funding. The cost of appointed counsel would therefore fall on tribal courts, imposing a quite possibly insurmountable barrier to the administration of justice in tribal communities.[207]

Professor Creel argues that the Congressional imperative in addressing the right to counsel in Indian country implores the federal government to reconsider its role in tribal justice systems.[208] As illustrated in Part IV, *infra*, Congress

205. *Id.*

206. Lorelei Laird, *Indian Tribes Are Retaking Jurisdiction Over Domestic Violence on Their Own Land*, AM. B. ASSOC. J. (Apr. 1, 2015, 6:02 AM), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own/ [https://perma.cc/ED93-4B69].

207. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 53, at 79.

208. Creel, *supra* note 8, at 359–61.

and tribal courts work in tandem to improve public safety and criminal justice in Indian country. The role of Congress, however, is not to actively legislate in the arena of tribal court procedure, but to work in partnership with tribal leaders to fulfill the tribal trust responsibility. While it is important to increase federal tribal court funding, it is also unrealistic, given Congress's demonstrated aversion to taking on the responsibility for funding tribal public defense, to assume that Congress will fully fund tribal courts. Rather, as I propose in Part IV, the federal role in promoting public defense in Indian country should focus on improving existing federal funding streams and working in true partnership with tribes.

Thirdly, overhauling the current right to counsel under the ICRA would run counter to federal policies supporting tribal self-determination.[209] A Congressional amendment would run counter to the unanimous Supreme Court holding in *Bryant*, as well as the past forty-five years of broad Congressional recognition and legislation in support of tribal self-determination.[210] In recent years, federal self-determination policies have also led, in particular, to Congressional support of tribal courts. VAWA and TLOA, by allowing tribes to opt in to enhanced jurisdiction, recognize that tribal courts have the sovereign discretion to determine whether felony and non-Indian prosecutions are appropriate for the tribal court to adjudicate. While no sovereign can be absolved of the imperative to protect the rights of the accused, a Congressional mandate to do so undermines both tribal sovereignty and the obligation that tribes have to their citizens and defendants to ensure appropriate individual rights protections in courts. Amending the ICRA to impose greater federal restrictions on tribal courts would run contrary to the recent federal policies regarding criminal jurisdiction and self-determination in Indian country.

An overhaul of the ICRA's right to retained counsel could have the adverse effect of compounding the barriers to effective administration of justice on reservations. For these preceeding reasons, federal support for indigent defense in tribal court must be more nuanced. Instead of obligating tribal courts to directly mirror state and federal courts, support for public defense

209. *See* Attorney General Guidelines, 79 Fed. Reg. 73,905 (Dec. 12, 2014).

210. Washburn, *supra* note 108, at 407 ("Congress adopted the tribal self-determination policy . . . and has worked aggressively to insure that the policy is reflected in the laws of the United States. Congress has created or amended programs throughout the federal government to accommodate and embrace tribal self-determination, including the full range of so-called Indian programs at the Departments of the Interior and Health and Human Services.").

should be driven by tribal solutions for infrastructure development and remedies for the underlying causes of criminal activity in tribal communities.[211]

IV. TRIBAL COURTS IN FEDERAL PARTNERSHIP

The national crisis of public defense is largely one of capacity and underfunding.[212] This crisis is present, and arguably more acute, in tribal courts. The historical trust relationship has produced a complex partnership between tribal courts and the federal government. Thus, effective protection of the rights of the accused in tribal courts requires an effective partnership with the federal government, driven by tribal solutions. This Part proposes two ways that the federal government can support tribes in protecting the rights of the accused in their courts. Part IV.A proposes a reform to federal funding streams to create a more stable funding structure for tribes. Part IV.B focuses on ways that the federal public defenders' offices and tribal courts can work together to ensure a continuing recognition that many tribal court defendants are implicated by both the federal and tribal criminal justice systems.

A. Federal Funding Reformation

Though both preconstitional and extraconstitutional, criminal justice in Indian country is part of the U.S. criminal justice system. Tribes and the federal government share concurrent jurisdiction for much of Indian country criminal law. Concurrent jurisdiction, compounded with the trust obligation and historical role that the federal government has played in Indian country criminal justice, has resulted in an intricate tribal-federal relationship.[213] Even as tribal self-determination is broadly supported and recognized in the criminal justice context, tribes and the federal government will continue to work collaboratively in the future. Building a more productive relationship to address the causes of criminal jurisdiction in Indian country requires a closer examination of the federal support structures that work with tribal courts.

211. Anderson, *supra* note 62, at 139 (describing the Tribal Defense Clinic at the University of Washington: "The joint effort of the Tribes and the School of Law is a direct product of the Indian self-determination era and reflects the Tribes' decision to increase their . . . tribal court capacity [and] . . . part of the growing effort to deal with the underlying causes of criminal activity").

212. *See generally* Drinan, *supra* note 43; Moore, *supra* note 43; Elliot, *supra* note 42; INNOCENCE PROJECT, *supra* note 42.

213. INDIAN LAW & ORDER COMM'N, *supra* note 7, at 83.

The federal funding structure supporting tribal courts has been inadequate for decades.[214] In its 2015 report, the Indian Law and Order Commission (ILOC) took a firm position on strengthening Indian country justice: Tribal governments should be at the helm of developing tribal court systems.[215] By conducting listening sessions around Indian country, ILOC found that tribes have two critical justice needs: First, tribes require adequate federal financial support.[216] Second, tribal governments need "a more rational Federal administration structure for the management of criminal justice programs in Indian country."[217] This Part focuses on these two needs while examining the role of the Departments of the Interior and Justice in funding and supporting tribal court development.

Federal funding for tribal courts is vested in two federal agencies: the Department of the Interior (DOI) and the Department of Justice (DOJ).[218] In 2003, the U.S. Commission on Civil Rights recognized the "silent crisis" in underfunded public safety needs in Indian country.[219] The Commission found that "federal funding directed to Native Americans through programs at these agencies [six federal agencies, including the DOJ and DOI] has not been sufficient to address the basic and very urgent needs of indigenous peoples."[220] Amnesty International also cited inadequacies in administration at the federal level as a barrier to tribal governments' abilities to address systemic violence in their communities.[221]

214. *See generally id.*
215. *See id.* at 82.
216. *Id.*
217. *Id.*
218. *See* U.S. GOV'T ACCOUNTABILITY OFF., INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 30–36 (2011) (noting that both the Department of Interior and the Department of Justice are responsible for ensuring public safety in Indian country).
219. *See generally* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 53.
220. *Id.* at iii. The U.S. Commission on Civil Rights recommended that federal agencies be designated to fulfill the trust responsibilities to tribes, as well as identify and regularly assess unmet needs as authorized. The Commission's report asserted that because of the small numbers of the Native American population and the relative poverty of Native nations, underfunding in Indian Country is a "quiet crisis." *Id.*
221. *See* AMNESTY INT'L, *supra* note 34, at 8, 27–28 ("The US government has interfered with the ability of tribal justice systems to respond to crimes of sexual violence by underfunding tribal justice systems, prohibiting tribal courts from trying non-Indian suspects and limiting the custodial sentences which tribal courts can impose for any one offence. . . . [T]he capacity of tribal governments to uphold the rights of their citizens is constrained by the legal limitations on their jurisdiction imposed by federal law and, in many cases, by the fact that the funds for the services they deliver are controlled by federal agencies.").

Neither the DOI or DOJ have provided consistent base funding for tribal justice systems.[222] The lack of stability in the amount of tribal court funding, grant funding sources, and federal agencies allocating tribal court funds creates barriers of both availability and accessibility for tribal governments. To improve consistency, the DOI and DOJ should continue to heed the Government Accountability Office's (GAO) recommendation to prioritize information sharing and coordination of their respective resources.[223] By improving interagency coordination, the federal government will be able to assist tribes in addressing the criminal justice crisis more effectively.[224]

The DOI and DOJ should also heed the National Congress of American Indians' (NCAI) imperative to prioritize tribal input in coordinating to improve delivery of justice services.[225] Both the DOI and DOJ's funding streams to support tribal court development face the challenge of competing criminal justice priority areas.[226] Tribal courts require training, infrastructure, judgeship funding, prosecutorial funding, and general administrative court costs—needs that all compete with public defense for tribal court funding.[227] The federal government has recognized that there is no single greatest criminal justice priority need for all tribes.[228] It is therefore essential for federal agencies to continually consult and coordinate with tribal governments to support tribal justice system development.[229]

Improving federal agency coordination will enable each agency to work more effectively with tribes in their respective capacity. Within the federal

222. NAT'L CONG. OF AM. INDIANS, FISCAL YEAR 2016 INDIAN COUNTRY BUDGET REQUEST: PROMOTING SELF-DETERMINATION, MODERNIZING THE TRUST RELATIONSHIP 34 (2015), http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/fy2016 [https://perma.cc/Y28K-Q3L8] [hereinafter NCAI].

223. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 218, at 30–36 (observing that indigent defense competes with victims' services, building costs, and prosecutorial resources for tribes determining which federal funding sources to pursue).

224. *Id.* at 36 ("[E]ffective [interagency] collaboration is important to operating efficiently and effectively . . . .").

225. *See* Attorney General Guidelines, 79 Fed. Reg. 73,905 (Dec. 12, 2014).

226. *See* U.S. GOV'T ACCOUNTABILITY OFF., INDIGENT DEFENSE: DOJ COULD INCREASE AWARENESS OF ELIGIBLE FUNDING AND BETTER DETERMINE THE EXTENT TO WHICH FUNDS HELP SUPPORT THIS PURPOSE 17 (2012); NCAI, *supra* note 222, at 34–40.

227. NCAI, *supra* note 222, at 34–40.

228. Attorney General Guidelines, 79 Fed. Reg. at 73,905 ("The Department of Justice recognizes that each tribe's history and contemporary culture are unique, and that solutions that work for one tribe may not be suitable for others.").

229. "For the promise of these laws [the Tribal Law and Order Act and the Violence Against Women Act Reauthorization Act of 2013] to be fully realized, however, they must be fully implemented. Implementation cannot occur without sufficient resources for tribal justice systems and ongoing coordination and consultation between various federal agencies and tribal governments." NCAI, *supra* note 222, at 27–28.

government as a whole, the DOI "is the federal agency working most intimately with Native American individuals, governments, and organizations."[230] Within the DOI, the Bureau of Indian Affairs (BIA) has the primary responsibility of fulfilling the federal trust relationship by providing federal services—land, education, and social services—to tribes.[231] The BIA's Office of Justice Services is specifically responsible for "support[ing] tribes in their efforts to ensure public safety and administer justice within their reservations as well as to provide related services directly or through contracts, grants, or compacts to . . . federally recognized tribes . . . ."[232] The Office of Justice Services' Division of Tribal Justice Support for Courts "works with tribes to establish and maintain tribal judicial systems."[233] The BIA is also responsible for operating judicial services for the remaining CFR Courts that still serve tribes that do not have a tribal court.[234]

The Indian Tribal Justice Act of 1993 authorized the DOI to create a tribal court base funding formula assessing the caseload, staffing needs, location, and demographic characteristics of tribal courts.[235] According to the NCAI's 2016 budget request, "[t]he highest priority" with respect to the BIA's law enforcement funding is "to increase base funding for tribal courts and to fund the Indian Tribal Justice Act."[236] Yet the Indian Tribal Justice Act at present is not fully funded and is not responsive to the increasing needs of tribal courts, particularly as the number of tribes implementing TLOA and VAWA grows.[237]

230. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 53, at 16.
231. *See id.*
232. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 218, at 8.
233. *Id.* at 9.
234. *Id.* at 9 n.16.
235. *See* Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, § 102, 107 Stat. 2004, 2006–07 (codified as amended at 25 U.S.C. § 3612 (1994)).
236. NCAI, *supra* note 222, at 35.

> Originally enacted in 1993, the Indian Tribal Justice Act authorized an additional $50 million per year for each of seven years for tribal court base funding. In today's dollars this would be $82 million per year. Despite numerous congressional reauthorizations of the Act over the past couple of decades—most recently in TLOA—funds have not been appropriated to implement the Act. In Fiscal Year 2012, the base funding appropriated was just $23 million, which is insufficient to meet either the needs of tribal courts or the federal trust responsibility. VAWA 2013 has the potential to add even more costs to the operating needs of tribal courts. The promise of this much-needed base funding must be fulfilled.

Id.

237. *See id.; see also* NAT'L CONG. OF AM. INDIANS, IMPLEMENTATION CHART: VAWA ENHANCED JURISDICTION AND TLOA ENHANCED SENTENCING (Oct. 5, 2015), http://tloa.ncai.org/documentlibrary/2015/10/Copy%20of%20July%2024%20Implementation%20chart%20%20VAWA%20enhanced%20jurisdiction%20and%20TLOA%20enhanced%20sentencing_revised2.pdf [https://perma.cc/G6B8-B7MW].

One way the Office of Tribal Justice Support is working with tribes to support their justice systems is by conducting tribal court assessments.[238] At the tribe's request, a nonfederal entity contracted by the Office of Tribal Justice Support conducts the tribal court assessment in order to evaluate tribal judicial needs and provide tribes with recommendations for improving their operational activities.[239] The assessment may also be accompanied by a one-time grant to invest in tribal court infrastructure and training needs.[240] These assessments are problematic as they only involve one-time funding for selected tribal courts that are selected for the assessments, which is insufficient to sustain and develop tribal justice systems as a whole.

While the DOI manages the funding for tribal police and criminal justice in Indian country, and is thus immersed in closing the public safety gap, the DOJ is the entity better suited for addressing the needs of tribal courts because of its expertise in justice administration. The DOJ plays a significant role in supporting the public safety and justice needs of tribes.[241] Nationally, the DOJ is responsible for "ensuring the fair and impartial administration of justice for all Americans[] [and] works to provide support for all participants in the justice system."[242] Within the DOJ, the Office of Justice Programs coordinates "funding, training, and technical assistance to federally recognized tribes to enhance the capacity of tribal courts, among other tribal justice programs."[243] The DOJ offers funding for tribal justice and public safety through the Coordinated Tribal Assistance Solicitation (CTAS).[244] The DOJ created CTAS in response to concerns by tribal leaders that federal funding lacked flexibility to address their public safety needs.[245] While the DOI received $23 million for tribal courts in

238. *See* BUREAU OF INDIAN AFFAIRS, TRIBAL COURT ASSESSMENTS: TO FURTHER THE DEVELOPMENT, OPERATION, AND ENHANCEMENT OF TRIBAL JUSTICE SYSTEMS, http://www.bia.gov/cs/groups/xojs/documents/document/idc1-030470.pdf [https://perma.cc/K7UN-XQSG].

239. *See id.*

240. *See id.*

241. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 53, at 66 ("The DOJ, by virtue of its law enforcement responsibility on trust lands and reservations, has a significant role in . . . supporting tribal justice systems.").

242. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 226, at 8.

243. *See* Tribal Justice & Safety, *Grants*, U.S. DEP'T OF JUSTICE (Nov. 30, 2015) http://www.justice.gov/tribal/grants [https://perma.cc/GL7Y-NGN9] (last updated Nov. 30, 2015); INDIAN LAW & ORDER COMM'N, *supra* note 7, at 83–84. The Coordinated Tribal Assistance Solicitation (CTAS) was launched in fiscal year 2010 as a major effort towards consolidation of funding streams. The streamlined approach of CTAS involves cross-program cooperation that makes it possible for tribes to use a single application for nine different competitive grant programs.

244. INDIAN LAW & ORDER COMM'N, *supra* note 7, at 85.

245. *See* Tribal Justice & Safety, *supra* note 243.

fiscal year 2012, the DOJ was allocated $134 million to create the Office of Justice Programs, the office tasked with administering CTAS.[246]

CTAS allows tribes to submit a single funding application for most of the DOJ's grant funding programs, which are referred to as purpose areas.[247] The purpose areas supported by CTAS include: Public Safety and Community Policing; Comprehensive Tribal Justice Systems Strategic Planning; Justice Systems and Alcohol and Substance Abuse; Corrections and Correctional Alternatives; Violence Against Women Tribal Governments Program; Children's Justice Act Partnerships for Indian Communities; Comprehensive Tribal Victim Assistance Program; Juvenile Healing to Wellness Courts; and Tribal Youth Program.[248] While CTAS was intended to centralize funding in response to the needs of tribes, the NCAI and ILOC have been critical of the competitive grant-funding structure CTAS created.[249]

In discussing indigent defense funding, Professor Creel argues that parity in prosecutorial and defense resources is essential for tribes that seek to implement indigent defense systems.[250] While the tribal court survey authorized by TLOA will help shed light on how tribes are obtaining and utilizing different funding streams, the current CTAS purpose areas are not suited to providing funding for indigent defense. In part, the purpose areas are ill-suited to indigent tribal defense funding because the legislation through which federal funds are appropriated to the DOJ for Indian country is not defense oriented.[251] These purpose areas are also ill-suited because the DOJ's indigent defense funding opportunities are generally not transparent or easily accessible to tribes seeking to fund public defense.[252]

One potential opportunity for achieving parity would be to create a separate purpose area for indigent defense funding. The NCAI cites two major concerns with CTAS that are relevant to the potential success of a separate

246. *Id.*

247. U.S. DEP'T OF JUSTICE, COORDINATED TRIBAL ASSISTANCE SOLICITATION: FISCAL YEAR 2016 COMPETITIVE GRANT ANNOUNCEMENT 3 (2015), https://www.justice.gov/tribal/file/794101/download [https://perma.cc/Z3NB-928D].

248. *Id.*

249. NCAI, *supra* note 222, at 36; INDIAN LAW & ORDER COMM'N, *supra* note 7, at 83 (concluding that despite developing programs specifically for tribal applicants that tribes have utilized to improve their justice systems, victim support services, and criminal codes, "DOJ's funding approach leaves much to be desired. Short-term, competitive grants for specific activities are not a good match for Indian country's needs").

250. Creel, *supra* note 8, at 359–60.

251. *See* U.S. DEP'T OF JUSTICE, *supra* note 247, at 3 (citing the appropriation authority for each purpose area).

252. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 226 (noting that the DOJ can increase awareness of funding streams available for public defense).

indigent defense purpose area.[253] First, CTAS forces tribes to compete for grant funding in priority areas determined by the DOJ.[254] This system leads to an increased focus on grant writing and favors tribes that are able to access grant writers and those whose needs best fit these previously determined purpose areas.[255] But even if tribal input directs the creation of an indigent defense priority area, the addition of another priority area could nonetheless increase the competitiveness of CTAS by further segmenting the DOJ's appropriations. Second, the CTAS grants are short term, and tribes cannot depend on tribal court funding beyond the current grant period.[256] Any indigent defense funding distributed by the DOJ would encounter this same issue, and tribal courts dependent on the DOJ for indigent defense funding may face sustainability issues.

Both ILOC and the NCAI have recommended, as an alternative to CTAS, that DOJ appropriations should be distributed as base funding with tribal consultation.[257] The Expert Working Group on Native American Traditional Practices issued a similar recommendation: "Tribes should be allowed to apply for funds that do not fit into currently defined purpose areas on grant applications."[258] This model, similar to that currently being executed by the BIA, would be more reflective of the unique needs of tribes. Additionally, this approach follows ILOC's official recommendation: "Congress should end all grant-based and competitive Indian country criminal justice funding in DOJ and instead pool these monies to establish a permanent, recurring base funding system for Tribal law enforcement and justice services."[259] ILOC suggested that a transition to base funding should involve tribal consultation to develop a base

253. NCAI, *supra* note 222, at 36.

254. *Id.*

255. *Id.* ("[T]ribes that have the financial and human resources to employ experienced grant writers end up receiving funding, while the under-resourced tribes may be left without.").

256. "Experts noted that the use of grants creates problems for sustaining successful programs in future years when grant funding is not guaranteed or available. They stressed that the Federal government must commit to supporting these programs continuously. A participant asserted that funding for Tribal courts is treated as discretionary when it should be recognized as a treaty obligation." MAHA JWEIED, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF INTERIOR, EXPERT WORKING GROUP REPORT: NATIVE AMERICAN TRADITIONAL JUSTICE PRACTICES 11 (2014), http://www.justice.gov/sites/default/files/atj/legacy/2014/10/09/expert-working-group-report--native-american-traditional-justice-practices.pdf [https://perma.cc/R7XD-JUGT].

257. NCAI, *supra* note 222, at 36.

258. JWEIED, *supra* note 256, at 17. The Expert Working Group, a joint initiative of the Department of Justice and the Department of the Interior, suggested that "in furtherance of the Tribal Law and Order Act's mandate that both Departments work with tribal court systems to develop a plan to address alternatives to incarceration." *Id.* at i.

259. INDIAN LAW & ORDER COMM'N, *supra* note 7, at 89.

funding formula that guarantees a minimum base funding to all federally recognized tribes.[260] The shift to a base funding model would thus follow the recommendation of multiple independent advisory groups that have received extensive input from tribal communities.

Lastly, the DOJ is the federal agency tasked with developing the effective administration of justice in the United States. In addition to recommending the elimination of the CTAS structure, ILOC also recommends that the Office of Justice Services in the BIA be eliminated, and that all of its criminal justice programs be consolidated into a single component in the DOJ.[261] ILOC also recommends the consolidation of BIA and DOJ tribal court funding as a cost-savings measure, the benefit of which should be appropriated to increase base funding for tribes.[262]

By deferring to the respective expertise of the two federal agencies and centralizing tribal court funding in the DOJ, the two federal agencies and federal resources can be streamlined to eliminate bureaucratic waste. Though the BIA is involved in training and technical-assistance support, as well as conducting tribal court assessments, concerns expressed by tribes and the NCAI indicate that the DOJ is best suited for supporting tribal courts through a base funding model. Tribes and the NCAI also expressed concern with the current DOJ grant structure whereby tribes must compete against one another for funding under predetermined umbrellas. Although these purpose areas were intended to be broad enough to meet the needs of tribes, the purpose areas are competitive, too narrowly defined, and are not conducive to sustainable indigent defense funding.[263]

B. Federal Public Defender Office Tribal Liaisons

As an Indian accused of committing an offense in Indian country in *United States v. Bryant*, Michael Bryant was subject to both federal and criminal court jurisdiction.[264] The charges against Bryant are, like most offenses in Indian country, far from easily sorted into clear categories of federal or concurrent tribal jurisdiction. This jurisdictional scheme has created loopholes and is repeatedly reexamined by the Supreme Court. Its complexity is a major concern

260. *Id.*
261. *Id.* at 87–89.
262. *Id.*
263. *Id.* at 83–85.
264. United States v. Bryant, 136 S. Ct. 1954, 1963 (2016).

of federal Indian policy, leading to the broadly recognized principle that tribal prosecutors and the USAO are in partnership.

For the past twenty years, the United States Attorney's Office has employed Special U.S. Assistant Attorneys (SAUSAs) to work in partnership with tribal Assistant prosecutors in order to boost federal prosecution in Indian country.[265] SAUSAs are prosecutors with knowledge of the tribal communities in their region and are hired in part to build consistency in federal Indian country prosecutions.[266] According to ILOC, the DOJ made the use of SAUSAs in Indian country a priority in 2009, and the model has subsequently proved to be "a positive and worthwhile development in making Indian country safer."[267]

SAUSAs provide continuity between tribal and federal courts to ensure effective administration of justice and are a crucial means of eliminating the public safety gap that exists in Indian country. ILOC recommends that tribal governments and U.S. Attorneys actively work to deputize tribal prosecutors, so that they can practice as both U.S. Attorneys in federal court and as tribal prosecutors, further building the capacity of the SAUSA model. ILOC also recommends that the Federal Public Defenders offices in judicial districts serving Indian country develop a similar initiative.[268]

Professor Barbara Creel initially proposed the designation of tribal Special Assistant Federal Public Defenders (FPD), modeled after the success of the SAUSAs.[269] ILOC endorsed Creel's proposal as an official recommendation to strengthen tribal justice systems.[270] A tribal liaison in the FPD's office is envisioned as facilitating "close working-level cooperation between Tribal and

265. INDIAN LAW & ORDER COMM'N, *supra* note 7, at 72. The TLOA codified these positions: "The United States Attorney for each district that includes Indian country shall appoint not less than 1 assistant United States Attorney to serve as tribal liaison for the district." 25 U.S.C. § 2810(a) (2012).

266. INDIAN LAW & ORDER COMM'N, *supra* note 7, at 72.

267. *Id.* The Indian Law and Order Commission's report found that the Indian country Special Assistant U.S. Assistant Attorney (SAUSA) program was especially successful with federally deputized tribal prosecutors. The deputized SAUSAs are able to prosecute cases under tribal law when federal prosecution is not an option. Additionally:

> Federally deputized Tribal prosecutors are especially well-positioned to ensure that police service calls in the field are quickly and thoroughly reviewed; investigations proceed based on admissible evidence; criminal charges are evaluated and filed based on admissible evidence; criminal charges are evaluated and filed based on which jurisdiction (Federal, State, and/or Tribal) is involved; and justice is pursued through the appropriate judicial system in a way that respects victims and defendants' rights while appropriately allocating scarce resources.

Id. at 72–73.

268. *Id.* at xvi.

269. *See* Creel, *supra* note 8, at 360.

270. *Id.* at 77.

Federal public defenders," and would support continuity in an individual's defense whether before a tribal or a federal court.[271] ILOC also noted that the need for such positions will proliferate with the growth of TLOA and VAWA implementation. As a Special Assistant Federal Public Defender would mirror the Special U.S. Assistant Attorneys program, the creation of this position would not only improve tribal-federal coordination of defense but would also be a step toward achieving parity for prosecutorial and defense resources.

A Special Assistant Federal Public Defender position should be driven by information sharing, with an eye toward not only effective representation, but also recidivism prevention through systematic support. This position would also serve to compliment tribal public defenders by offering training and technical assistance without direct federal intervention by federal public defenders unfamiliar with tribal courts. Additionally, creating Special Assistant Federal Public Defenders would be a step toward achieving parity between federal defense and prosecutorial resources in Indian country.

V. TRIBAL COURT PUBLIC DEFENSE PRAXIS[272]

The final Part of this Comment analyzes the systems tribes are utilizing to represent the rights of the accused in tribal courts by looking at existing models and comparing the benefits and shortcomings of each. The framework of Part V is intended to echo the framework developed by the Tribal Law and Policy Institute (TLPI) in the Tribal Legal Code and Policy Development Series that TLPI developed to serve tribal governments in "creating comprehensive, community-based, victim-centered response to crime."[273] The TLPI's Tribal Legal Code Resources are developed with the philosophy that tribal laws and policy should reflect the values and traditional justice system of the tribe.[274] This Comment advocates that Native communities have the knowledge and expertise to implement solutions that reflect the culture of their communities.[275]

271. *Id.*
272. *See generally* Newton, *supra* note 70.
273. TRIBAL LAW & POLICY INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAW IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION iii (2015), http://www.tribal-institute.org/download/codes/TLOA_VAWA_3-9-15.pdf [https://perma.cc/85VN-MS3V] ("This series is developed with a philosophy that tribal laws and policy should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how federal and state laws apply. Each resource is designed to help tribal governments customize law and policies that fit community values, principles, and capacities.").
274. *Id.*
275. *Id.*

In recognizing the unique circumstances of individual tribes, the tribal systems of defense representation described below are only intended to serve as examples, not as model systems.[276] Tribes exercising enhanced jurisdiction under VAWA or enhanced sentencing under TLOA must provide a right of counsel equivalent to that of the U.S. Constitution, and may therefore be more limited in which systems they are able to utilize.

Not every tribal court requires a system for indigent defense, as some tribal courts have not adopted adversarial systems.[277] While many tribal courts retain the trappings of Anglo-American justice, indigenous justices systems are greatly varied, and may be forums for alternative dispute resolution beyond the scope of adversarial justice.[278] The Section applies to tribal courts implementing an adversarial system and argues that tribes should consider both how to define a standard to protect the rights of defendants in their courts and how to, in practice, implement those protections. The TLPI identifies the three most common systems tribes utilize to represent the rights of the accused in tribal courts as a public defender's office, a contract system, and a pro bono or required service system.[279] There are many possible variations of these three systems, and they can be adapted to fit a tribe's culture and criminal code. Part V.A specifically addresses the widespread use of tribally trained advocates to represent tribal defendants. Part V.B addresses the public defender model, the most-used model for state and federal indigent defense. Part V.C addresses the pro bono model, which is likely infeasible for many smaller tribes, but may be useful in concert with intertribal bar associations. Part V.D discusses contract attorney systems, which may be used alone or in conjunction with one of the other models for indigent defendants. Part V.E discusses the possibility of applying Legal Services Corporation funds to support a public defender in tribal court, as well as leveraging the institutional knowledge of the twenty-five Indian Legal Services Programs. Lastly, Part V.F discusses the approach

276. *Id.* at 4 ("This resource guide is not a model code. Your tribal community is the best judge of what language will work best for your people . . . . [N]ot every tribal government has the same needs or resources. Most importantly, the sample language in this ['Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction'] guide is not necessarily consistent with every tribe's culture, traditional practices, or current criminal code design.").

277. JWEIED, *supra* note 256, at ii (noting that traditional justice in indigenous communities is based on "restoring harmony and peace to the community—while still including elements of offender accountability").

278. *See generally* Joh, *supra* note 155.

279. *Id.* at 74. Each of these three models, provided that they employ licensed attorneys, may be utilized by a tribe exercising enhanced jurisdiction under VAWA or enhanced sentencing under TLOA, or may be adapted to employ a combination of licensed attorneys and tribally trained advocates for tribes that have not chosen to opt in. *Id.* at 74–76.

taken by the University of Washington School of Law, where law students are trained and licensed in local tribal courts to represent tribal clients through the Tribal Court Public Defense Clinic.

A. Tribally Trained Advocates

In 2000, an American Indian Law Center survey examined the role of tribal justice system staff, finding that 75.6 percent of tribal courts surveyed employ advocates[280] who are trained in tribal law but not licensed by a state bar association.[281] The historically low number of Native attorneys available to practice tribal law has likely influenced the widespread use of tribally trained advocates, as Solicitor Frank Berry testified before the Senate Judiciary Committee.[282] Many tribal court advocates are community members who are licensed by their tribe's bar association.[283] As community members, advocates may be a source of tribal and institutional knowledge, and they provide a sense of permanency in the tribal justice system, avoiding high turnover rates associated with the use of nonmember attorneys.[284] Particularly in a tribal court that relies heavily on customary law, tribal court advocates may be effective litigators and the most appropriate attorneys.[285] Advocates operate in a similar capacity

280. Tribally trained advocates are also commonly referred to as "lay advocates." This Comment uses the term "tribally trained advocate" to recognize that these individuals, though neither law school trained nor admitted to a state or federal bar, are versed in the laws and culture of the tribe. Often advocates are community members and deeply knowledgeable of tribal law and culture. *See* DELORIA & LYTLE, *supra* note 59, at 149.

281. AM. INDIAN LAW CTR., *supra* note 113, at 30*; see also* RICHLAND & DEER, *supra* note 109, at 462–63 ("Unlike state governments, many tribal governments have established rules that allow specially trained advocates, who are not processional lawyers, to be licensed to practice in tribal courts."); U.S. COMM'N ON CIVIL RIGHTS, AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 13 (2d ed. 1980) ("Many tribes, however, provide some form of free help, often 'lay advocates' or people who are not State-licensed lawyers but who have been trained to help those charged with a crime.").

282. RICHLAND & DEER, *supra* note 109, at 136; *see also* Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976).

283. DELORIA & LYTLE, *supra* note 59, at 149 ("The Indian advocate is usually a tribal member who has command of the tribal language, is familiar with tribal customs and traditions, and has been licensed by the tribe to function in his or her advocacy position.").

284. Garrow & Deer, *supra* note 58, at 320 (noting that when advocates are "very familiar with tribal customs and modern tribal law" a tribally-trained advocate can be "as effective, if not more effective, than an attorney in tribal court").

285. Seth J. Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISC. 88, 100–01 (2013) ("In a tribal court setting informed by tribal customary law, lay advocates may be more effective litigators than a law school graduate who is well grounded in Anglo-American criminal justice theory. The Navajo Nation's statutory code, for instance, appears very American, but it uses a parallel set of customary principles—the Navajo Common Law—to guide decisions interpreting and enforcing that code.").

to state bar-licensed attorneys in many communities, maintaining caseloads and appearing in tribal courts.[286]

The requirement of defense counsel under VAWA and TLOA was drafted vaguely. The amendment to the ICRA requires that indigent defendants prosecuted in tribal court under either of the laws must be provided with a "law trained" attorney.[287] A challenge that the Pascua Yaqui Tribe experienced with its tribal court advocates as part of a VAWA pilot program could potentially have ramifications for other tribes implementing VAWA and TLOA.[288] The Pascua Yaqui Tribe has a public defender's office that has been staffed by both attorneys and advocates since the office first opened.[289] The Pascua Yaqui tribal court defense advocate is an individual from the community who has been trained to represent tribal clients and is licensed to practice in the tribal courts; however, in the wake of the tribe's implementation of VAWA and TLOA, the tribe now requires attorneys to be law trained and licensed in state and federal court in order to represent clients accused of felony-level and SDVCJ offenses.[290] As a result, Pascua Yaqui's implementation of VAWA and TLOA has substantially reduced their tribal court advocate's caseload.[291]

If the requirement for law-trained counsel under VAWA and TLOA continues to be interpreted as mandating appointment of a state-licensed

286. *Id.* at 100 ("[L]ay advocates have certainly filled a practical need in Indian country where 'law-trained' defense attorneys may be in short supply."). The Sault St. Marie Tribe of Chippewa Indians demonstrates one example. Sault Ste. Marie Tribe of Chippewa Indians, Code § 87: Admissions to Practice (1998). The Sault St. Marie Tribe of Chippewa Indians allows both attorneys, defined as licensed members of state bar associations, and lay advocates, defined as "a person who is a non-lawyer and who has been qualified by the Court to serve as an Advocate on behalf of a party." *Id.* at § 87.102. The admission procedure for lay advocates to practice in the tribal court requires law-related education or training, as well as an understanding of tribal traditions, customs, and jurisdiction. *Id.* at § 87.110; *see also* NAVAJO NATION BAR ASSOCIATION BYLAWS § III(B)(3) (requiring that all non-law-trained persons be tribal members of an Indian tribe).

287. 25 U.S.C. §1302(c)(2) ("[A]t the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.").

288. TRIBAL LAW & POLICY INST., *supra* note 273, at 58–69. Of the three initial VAWA pilot tribes (Confederated Tribes of the Umatilla Indian Reservation, Tulalip Tribes, and Pascua Yaqui), it appears that all have state-licensed attorneys defending indigent clients. Although the question whether a defendant must be trained by an ABA-accredited law school and licensed to practice in state or federal courts has not been litigated, it appears that tribes have approached the requirement cautiously.

289. Telephone Interview with Melissa Acosta, Chief Pub. Def. Pascua Yaqui Tribe (Dec. 8, 2015) [hereinafter Acosta Interview].

290. *Id.*

291. *Id.*

attorney, as it likely will, tribal justice systems could face unexpected challenges. Reducing the roles of tribal advocates, who have long been a part of tribal justice systems, could potentially alter the tribal court procedures as attorneys who are unfamiliar with the tribe's traditions may place less emphasis on custom. Additionally, restricting advocates could displace community members. In praise of advocates, Vine Deloria Jr. and Clifford M. Lytle wrote: "Quite often the advocate will be allowed to practice because he or she has a good reputation in the community, knows the people and their problems well."[292] The advocate at Pascua Yaqui is a community member, as tribal court advocates typically are, and was an integral part of the justice system at Pascua Yaqui long before any of the attorneys currently serving in the public defender's office.[293] While attorney sustainability is a challenge, tribal member advocates are a consistent presence in many tribal communities.[294] For a tribe that relies primarily on tribally trained advocates, replacing advocates with attorneys could render the court foreign to its own community.[295] Recognizing the importance of continuing to employ their advocate, the Pascua Yaqui public defender's office responded to potential challenges by shifting the advocate's role. In addition to arguing cases in drug court and a limited class of other offenses, the Pascua Yaqui advocate has begun to take on more social service responsibilities.[296]

Overall, the tribally-trained-advocate model is widely utilized in tribal courts and provides defendants with counsel trained in the customs and traditions of the tribal community. While a potential drawback of the model is that the role of tribal advocates might come under increased scrutiny as tribes implement TLOA and VAWA, employment of advocates can potentially support more holistic defense. A holistic defense model is client-focused, interdisciplinary, and community-based.[297] The holistic defense model is gaining traction nationwide, though resource constraints continue to be a barrier. As the role of advocates in tribal courts begins to shift, tribal courts should consider the ways that right to counsel in their courtrooms can both impact and be informed by holistic defense.

292. DELORIA & LYTLE, *supra* note 59, at 149.
293. Acosta Interview, *supra* note 289.
294. AM. INDIAN LAW CTR., *supra* note 113, at 30.
295. *See generally* DELORIA & LYTLE, *supra* note 59, at 15 (arguing that law-trained attorneys who are not from tribal communities know little of the traditions and customs of the tribes, including the motivations for individual tribe members' actions and the importance of "preserving community well-being instead of winning").
296. Acosta Interview, *supra* note 289.
297. *See generally* Cynthia G. Lee et. al., *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215 (2015).

B. Public Defenders[298]

The Pascua Yaqui Tribe utilizes an in-house public defender's office. The public defender's office was created in 1994 and provides defense representation to defendants whom the court finds indigent pursuant to tribal code.[299] The Pascua Yaqui public defender's office currently is currently comprised of four attorneys and one tribally trained advocate.[300] The office oversees between 100 and 120 active cases, including diversion and drug court cases.[301] Additionally, a contract attorney system supplements the caseload of the office as needed and when conflicts of interest arise.[302] Contract attorneys are private attorneys who practice in the nearby Tucson metropolitan area and are paid on a case-by-case basis to represent indigent defendants.[303]

The Pascua Yaqui Tribe has been at the forefront of developing VAWA enhanced jurisdiction and has thus been recognized as a leader in Indian country.[304] The tribe's public defender's office emphasizes the importance of family and community in working with tribal clients with appropriate defense, rather than working with clients in isolation. Because of their central location on the reservation and because the office is fully staffed, individuals are able to drop in as needed to inquire about court formalities or legal questions generally.[305] Though unable to provide legal counsel outside of a court order of indigence, the office's open-door policy allows community members to access the office as needed.[306]

298. Steinberg & Feige, *supra* note 43, at 123 ("A traditional defender office is lawyer-driven and case-centric.").
299. Interview with the Pascua Yaqui Pub. Defs. Office and Attorney General's Office (Nov. 20, 2015) [hereinafter Pascua Yaqui PD Interview]; *see also* 3 PASCUA YAQUI TRIBAL CODE § 2-2-310 (2013).
300. Pascua Yaqui PD Interview, *supra* note 299. The Pascua Yaqui public defender's office has been directed by an attorney since its inception.
301. Acosta Interview, *supra* note 289.
302. Pascua Yaqui PD Interview, *supra* note 299.
303. *Id.*
304. *Id.* Pascua Yaqui was the first tribe to conduct a non-Indian jury trial under VAWA's Special Domestic Violence Criminal Jurisdiction (SDVCJ). As a leader for Indian country, Pascua Yaqui has encountered and anticipated challenges in VAWA implementation and is in the process of developing code provisions and intergovernmental agreements with an intertribal frame of reference so that their work may be adopted by other tribes implementing the SDVCJ. S*ee* Sari Horwitz, *Arizona Tribe Set to Prosecute First Non-Indian Under a New Law*, WASH. POST (Apr. 18, 2014), https://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html [https://perma.cc/R8RV-XJSL].
305. Pascua Yaqui PD Interview, *supra* note 299.
306. Acosta Interview, *supra* note 289.

The Pascua Yaqui public defender's office attributes its success in large part to the tribe's proximity to Tucson, Arizona, because there is both a law school and an attorney pool in the metropolitan area from which the tribe can hire.[307] Additionally, the tribe's public defenders are able to live in and commute from the Tucson area, which helps the office retain its attorneys.[308] Greater attorney retention, in turn, leads to greater stability in the public defender's office in the long term. In contrast, in extremely rural tribal communities, public defenders are isolated or commute long distances each way, which further exacerbates the challenge of hiring a public defender from outside the community.

Perhaps the greatest challenge to establishing a public defender's office is the cost of implementing and maintaining it. A public defender's office in the community requires not only attorney salaries but also infrastructure costs, including research costs, office space, and other costs indirectly related to client services. Pascua Yaqui is fortunate in that its tribal court, unlike those of many other tribes, is not solely dependent on the federal government for funding.[309] For tribes that are more dependent on the federal government for tribal court funding, the DOJ's short-term CTAS grants may cover initial start-up costs, but when grants are not renewed, the office may become inoperable.[310] Tribes creating in-house public defenders offices can bolster sustainability by diversifying funding sources, but should consider the long-term costs of implementing such a system.

A fully staffed public defender's office run by law-trained attorneys has widely been adopted to provide counsel to indigent defendants in tribal courts. This is the approach initially followed by the VAWA pilot project tribes; however, it is not the only way for tribes to provide legal services to their members. The public defender model is expensive to run and may be the most difficult model to implement for extremely rural tribes. The greatest benefits of such a model include having a centrally located office and being accessible and adaptable to the needs of the specific tribal community.

307. *Id.*
308. Pascua Yaqui PD Interview, *supra* note 299.
309. *Id.* The Tribe's internal revenue streams have enabled the Tribe to fully fund a public defender's office since its initial decision to do so in 1994.
310. JWEIED, *supra* note 256, at 11.

C. Pro Bono Model

The Navajo Nation has a pro bono requirement for all attorneys licensed to practice in the Navajo courts.[311] All licensed legal counsel must be in good standing with the Navajo Nation Bar Association (NNBA), and all members of the NNBA are subject to pro bono appointments.[312] All defendants in Navajo courts have a right to representation, and legal counsel may be appointed by a judge from the NNBA's pool of pro bono attorneys.[313]

The pro bono defense model takes some of the heavy financial burden of providing public defenders off of tribal governments, while still employing attorneys who are versed in tribal law. The model requires that the tribe maintain a bar association with an active membership.[314] Pro bono public defense also has the benefit of requiring members of the tribal bar association to stay up to date with changes in the tribal code, as members could be called upon to represent clients at any point in time. Citing the testimony of the director of the Navajo Nation Office of the Public Defender, Professor Barbara Creel introduces potential, perhaps overwhelming, pitfalls of the effectiveness of this model: "No matter how competent an attorney may be in his or her field, there is no guarantee of transferable skills to provide competent assistance in a criminal proceeding."[315]

The pro bono model is likely a more feasible option for a larger tribe that has more tribal bar association–licensed attorneys.[316] Additionally, while the pro bono model partially relieves the tribal government's financial burden, the model does not relieve the burden entirely. The Navajo Nation has a public defender's office, but to supplement the public defenders' caseloads, the Navajo Nation requires that all attorneys licensed in the tribe's courts take clients on a

311. Creel, *supra* note 8, at 357.

312. NAVAJO NATION CODE ANN. tit. 7, § 606(A) (2009); NAVAJO PRO BONO RULES, r. 2 (NAVAJO NATION COUNCIL 1996), http://www.navajocourts.org/Rules/probono.htm [https://perma.cc/UFG2-QKPK]. The Navajo Nation Bar Association is made up of about 470 members, including both attorneys licensed by state bar associations and court advocates. *General Announcements*, JUD. BRANCH NAVAJO NATION, http://www.navajocourts.org [https://perma.cc/BS26-G4UJ] (last visited Apr. 8, 2016).

313. NAVAJO NATION CODE ANN. tit. 7, § 606(A) (2009) ("Legal counsel shall be allowed to appear in any proceedings before the Courts of the Navajo Nation provided that the legal counsel is a member in active status and in good standing of the Navajo Nation Bar Association. Every defendant in a criminal case shall have the right to representation by legal counsel and in the event he has no such representation, he may proceed without legal counsel or a legal counsel may be appointed by the Judge.").

314. *See* Creel, *supra* note 8, at 357.

315. *Id.* at 357–58.

316. *Id.*

pro bono basis as appointed by the NNBA. A pro bono model may be best suited to complement another model for indigent defense, such as a contract attorney system or a public defender's office, because there may be issues of conflict of interest or pro bono availability.

Though the pro bono model requires a large bar association membership, it may be possible to replicate this model on a larger scale by instituting a pro bono requirement for members of the bar associations of intertribal appellate courts. Intertribal courts are appellate forums created by a grant of jurisdiction from participating tribes, usually within a specific region.[317] An intertribal court forum is similar to the United Nations in that it is open to all tribes in the region that choose to participate, and participation marks acceptance of forum decisions as binding.[318] Utilizing existing intertribal courts that have their own intertribal bar associations could spread the pro bono model more widely. For example, the bar association of an intertribal court could create a pro bono requirement for all attorneys admitted to practice in the intertribal court of appeals.

Creating a pro bono requirement for an intertribal court bar to provide counsel as appointed by tribal court judges would create a larger pool of attorneys familiar with the laws of the regional tribal courts to represent indigent defendants. It could create an opportunity for tribes that do not have bar associations or that have few member attorneys in their bar associations to employ the pro bono model to provide counsel to indigent defendants. It may also be possible to utilize an intertribal bar association in the contract attorney model. Individual private defense attorneys desiring to practice in tribal court could join a "contract pool" when admitted to the intertribal bar. From this list of contract pool attorneys, individual tribal judges could appoint counsel to indigent defendants.

By providing an impartial forum for appellate review of tribal court decisions, intertribal courts also make it possible for member tribes to leverage the legal knowledge and expertise of other tribal court judges.[319] In addition to

317. *See* Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309, 309 (1994).

318. *Id.*; *see also* AM. INDIAN LAW CTR., *supra* note 113. The Survey of Tribal Justice Systems and Courts of Indian Offenses found that 36.5 percent of tribes that responded to the survey participated in an intertribal appellate court. In addition to the Southwest Intertribal Court of Appeals, other intertribal appellate courts include: the Northwest Intertribal Court System, Nevada Intertribal Court of Appeals, Montana/Wyoming Judges Association, Northern Plains Intertribal Courts of Appeals, Minnesota Chippewa Tribe Appeals Court, and Wisconsin Tribal Judges Association. *Id.* The services intertribal courts provide include not only judicial panels to hear appeals, but also training and technical and research assistance). *Id.*

319. *See* Zuni, *supra* note 317, at 311 ("The participation of both member court and non-member court judges in the [Standing Advisory Committee (SAC) of the Southwest Intertribal Court of

providing the attorney base for an intertribal pro bono or contract system, intertribal bar associations could serve as a learning community for tribal public defenders, offering continuing education and training opportunities. In response to the GAO's finding that a "lack of funding hinders tribes' abilities to provide personnel with training opportunities to obtain new or enhance existing skills," intertribal bar associations have the ability to leverage and more broadly utilize federal training and technical-assistance funding.[320]

There are several concerns raised by a pro bono model utilizing intertribal courts, both of which should be addressed before implementation. First, in contrast to the attorneys admitted to the Navajo Nation bar, for example, the intertribal bar association membership might be comprised largely of appellate attorneys who are not as knowledgeable of the justice systems of the member tribes. Thus, attorneys may be ill-equipped to provide effective counsel in individual tribal courts. Additionally, these attorneys may be strangers to the courts themselves, unfamiliar not only with individual tribal codes but also tribal courts' customs. The hesitation expressed by Professor Creel regarding the drawback of the tribal pro bono model—that "[n]o matter how competent an attorney may be in his or her field, there is no guarantee of transferable skills to provide competent assistance in a criminal proceeding"—could be exacerbated by an intertribal bar association.[321] Not only would the pro bono model call upon bar admittees of all different legal fields to represent criminal defendants, it could also appoint attorneys who are only familiar with one tribe's laws.

While utilizing intertribal bar associations for a pro bono defense system may be feasible for some intertribal forums, the above concerns must be addressed before implementing such a system. The effectiveness and feasibility of such a solution is the exclusive purview of the member tribes of the intertribal court. Although the pro bono model is not widely used by individual tribes in Indian country at present, it taps into an existing pool of state-licensed attorneys and tribally trained advocates who are knowledgeable in the particular laws and customs of their tribe.

Appeals] allows for member courts to draw upon the expertise of other tribal court judges, and allows for intertribal communication and participation in the operation of a court which is intertribal by design. . . . At present, the inclusive format of the SAC has fostered intertribal communication on issues of importance to tribal courts and has assisted the court in its growth.").

320. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 218, at 23 (noting that an intertribal bar association can use training and technical assistance funds for all member tribes and thus have a greater reach than merely being allocated to one tribe).

321. Creel, *supra* note 8, at 357–58.

D. Contract Attorney System

A contract system involves a tribe contracting with private defense attorneys to accept tribal court appointments to represent indigent clients.[322] Attorneys in the contract pool are paid on a case-by-case basis, so a contract attorney system may be more affordable for smaller tribes, as attorneys' fees are dependent upon the attorney's caseload.[323] Contract attorneys may adequately serve tribes that do not require a full-time defense attorney, or may work in coordination with a tribal public defender's office when conflicts of interest preclude representation by the public defender. Additionally, if a tribe has just one or two full-time public defenders, they will likely need to contract out for additional counsel if a conflict of interest arises, particularly if the public defender's office needs to represent multiple indigent clients for offenses arising from the same interaction or events. Contract attorneys can still provide a greater pool of attorneys to draw from for appointment to indigent defendants, so that the same few public defenders are not the only attorneys appearing in criminal court.

Tribes are not the only court systems using contract attorneys. State and federal courts began utilizing contract attorneys in the wake of the *Gideon* decision[324] and its progeny, when states found themselves with an increasing need for defense attorneys.[325] While many states created public defender's offices in which attorneys are directly employed by the state, others elected to contract out to individual lawyers, nonprofit organizations, and legal partnerships to represent indigent defendants.

Hiring contract attorneys can cut the large-scale costs of hiring public defenders in-house, especially when they are employed through a legal partnership, such as a Legal Services Corporation–funded organization, described below, because a partnership can tap into multiple funding sources and leverage existing resources. Contract attorneys may also be a useful solution for rural or smaller tribes that struggle to recruit and retain attorneys owing to the tribes' prohibitive distances from towns or cities.[326] Because contract attorneys do not

322. TRIBAL LAW & POLICY INST., *supra* note 273, at 75.
323. *Id.*
324. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to counsel in criminal cases extends to indigent defendants in state courts).
325. Moore, *supra* note 43, at 84. Additionally, states had to make decisions about eligibility, funding, and staffing. *Id.* at 83–84.
326. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 218, at 22 ("Tribal justice officials also stated that their tribal courts face various challenges in recruiting and retaining qualified judicial personnel including: (1) inability to pay competitive salaries, (2) housing shortages on the

represent defendants in tribal courts on a full-time basis, contract attorneys could live in a neighboring town or city and maintain caseloads in both tribal and nontribal courts. It may also be possible, if a court so chooses, to teleconference contract attorneys into court. Teleconferencing may not be conducive to many tribal justice systems, however, because it does not give the opportunity to interact with their clients face-to-face, as it is important for effective assistance of counsel.[327]

The use of contract attorneys by state and federal courts has been criticized in part because contract attorneys lack a centralized office to provide a platform for client advocacy.[328] This concern is especially exacerbated when the attorneys are employed on an individual basis rather than as part of a nonprofit or legal partnership.[329] In an interview, the Pascua Yaqui public defenders described the importance of being centrally located in the community and having an open-door policy.[330] Citing the transportation challenges of many tribal members, the public defenders emphasized the importance of being flexible so that clients can drop by and speak with their appointed counsel. Timing and geographical constraints might prevent contract attorneys, who are often primarily employed in another capacity, from providing the degree of flexibility that may be necessary to meet the needs of their clients. Contract attorneys also might not have the opportunity to become acquainted with the tribal community or culture beyond its criminal code or courtroom doors.

The Pascua Yaqui Tribe, in addition to having a full-time public defender's office, is an example of a tribe contracting out to private counsel when conflicts of interest that prevent the public defenders from providing representation arise.[331] The Pascua Yaqui public defender's office cites its proximity to the Tucson metropolitan area as a reason for its retention and success with contract attorneys, many of whom have been representing tribal clients for several years.[332]

While not an ideal solution for every tribe, a contract attorney system can help reduce costs and improve retention and consistency of defense attorneys

reservation, and (3) rural and remote geographic location of the reservation, among other things. For example, a tribal justice official from one of the South Dakota tribes we visited noted that the tribe is often forced to go outside its member population to hire judges and attorneys. . . . [The Government Accountability Office surveyed twelve tribes in generating this report.]").

327. Acosta Interview, *supra* note 289.
328. Moore, *supra* note 43, at 103.
329. *Id.*
330. Pascua Yaqui PD Interview, *supra* note 299.
331. *Id.*
332. *Id.*

representing indigent defendants in tribal courts.[333] The contract attorney model can be used in tandem with all of the models described in this Comment. Described in greater detail in the section that follows is a specific contract attorney model in which tribes can partner with organizations receiving Legal Services Corporation funding to represent indigent defendants in tribal courts.

E. LSC Funding

One emerging way for tribal courts to utilize a contract attorney system is through partnership with the Legal Services Corporation (LSC). The LSC traditionally provides civil legal services funding to low-income Americans, acting as a grantee to legal aid programs across the country.[334] There are currently twenty-five Indian Legal Services Offices supported by LSC funding.[335] The LSC Act statutorily prohibits the use of LSC funds to provide legal assistance in criminal law matters, except those related to accusations of "misdemeanor or lesser offense[s] . . . tried in Indian tribal court."[336]

TLOA amended the LSC Act to allow the use of LSC funds for tribal court representation of criminal defendants who are otherwise eligible.[337] Following the passage of the VAWA Reauthorization three years later, the LSC recognized that federal legislation might increase demands on tribal courts to provide indigent defendants with appointed counsel at the expense of tribal governments.[338] The final federal rule authorized legal assistance for any eligible

333. *Id.* The list of contract attorneys that the Pascua Yaqui Tribe maintains has remained fairly consistent over time, so despite the fact that the contract attorneys are only assigned cases on an as-needed basis, the contract attorneys are familiar with the tribal court's practices. *Id.*

334. *How Legal Aid Works*, LEGAL SERVS. CORP., http://www.lsc.gov [https://perma.cc/63ZK-VXNT] (last visited Apr. 8, 2016).

335. JWEIED, *supra* note 256, at 10. The twenty-five Indian Legal Services Programs collectively form the National Association of Indian Legal Services. DELORIA & LYTLE, *supra* note 59, at 152. When Indian Legal Services were first created in the 1960s, their attorneys played important roles in developing tribal court systems and community education programs. *Id.* Of particular note is DNA Peoples' Legal Services, serving the Navajo Nation since 1967. DNA is an acronym that stands for Dinébe'iiná Náhiilna be Agha'diit'ahii, meaning "Attorneys That Contribute to the Economic Revitalization of the People." *Id.*

336. Legal Services Corporation Restrictions on Legal Assistance With Respect to Criminal Proceedings, 45 C.F.R. § 1613 (2014), http://www.lsc.gov/sites/default/files/LSC/pdfs/Part%201613%20Revised%20NPRM%20%28RL%2010-21-2013%29.pdf [https://perma.cc/XP9A-9UQZ] (citing Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, § 10(b), 91 Stat. 1619, 1621–22 (1977)).

337. 45 C.F.R. § 1613.5.

338. *Id.* In response, the Legal Services Corporation (LSC) undertook a rulemaking in January 2013 to revise the misdemeanors and lessor offenses restrictions on LSC funding for representation of tribal clients in criminal matters, amending the conditions by which LSC-funded organizations

individual charged with a criminal offense in an Indian tribal court, with the caveat that acceptance of an appointment must not impair the LSC funding recipient's primary responsibility to provide civil legal assistance.[339]

LSC funding has supported representation for individuals in Indian country on civil and limited criminal matters for several decades. Many LSC-funded organizations, specifically the Indian Legal Services Programs, have existing relationships with tribes, as well as institutional knowledge and experience in tribal courts.[340] These programs have a history of supporting tribal clients in both state and federal justice systems, as well as supporting indigenous and traditional justice.[341] According to the NCAI, "in many instances, these Indian Legal Services programs have been 'on the ground' for decades, an integral part of the legal structure of the reservation communities they serve, and guided by boards or advisory groups of local tribal citizens and others."[342]

Indian Legal Services programs' history and presence in tribal communities has expanded the traditional capacity of legal services to include "domestic violence, pro se assistance, family member prisoner visitation, re-entry and expunctions for certain criminal charges . . . ."[343] While TLOA amended the LSC Act and, together with VAWA, formed the impetus for revision of LSC regulations, the regulations do not limit LSC representation to tribes implementing or exploring VAWA or TLOA. Therefore, Indian Legal Services

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can accept appointments by tribal courts. The rulemaking proposed to align LSC regulations with TLOA's amendment of the LSC Act. The text of the rule reads:

> Criminal Representation in Indian tribal courts provides:
>
> (i) Legal assistance may be provided with Corporation funds to a person charged with a criminal offense in an Indian tribal court who is otherwise eligible.
> (ii) Legal assistance may be provided in a criminal proceeding in an Indian tribal court pursuant to a court appointment only if the appointment is made under a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction, and is authorized by the recipient after a determination that acceptance of the appointment would not impair the recipient's primary responsibility to provide legal assistance to eligible clients in civil matters.

Id.

339. *Id.*
340. JWEIED, *supra* note 256, at 10.
341. *Id.*
342. NCAI, *supra* note 222, at 38.
343. *Id.* The National Congress of American Indians (NCAI) has suggested that, if Congress declines to adopt a 7 percent tribal set-aside across the Office of Justice Programs, Congress should fund the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, at $3 million to provide funding for civil and criminal legal assistance, as well as training and technical assistance. The Indian Tribal Justice Technical and Legal Assistance Act of 2000 authorizes the DOJ "to award grants to non-profit entities such as the 25 Indian Legal Services programs connected with the Legal Services Corporation (LSC) to provide civil and criminal legal assistance to both tribal governments and their justice systems and to individual indigent tribal citizens." *Id.*

Programs can potentially provide criminal defense for indigent defendants seeking assistance of counsel in tribal courts across the country.

While Indian Legal Services Programs are supported by LSC funds and bound by LSC regulations, they are independent organizations and therefore able to determine priorities based on the needs articulated by their tribal clients and available funding streams.[344] Unfortunately, legal services organizations are themselves chronically underfunded; therefore, the provision of criminal defense in tribal courts, especially under VAWA and TLOA, may extend beyond the organizations' capacities.[345] One possible solution is for tribes to contract with a legal services program to share the cost of an attorney, which would decrease the funding strain on both the tribe and the organization. This approach has been taken by the Hopi Tribe, which contracted with DNA People's Legal Services to operate the Hopi Public Defender Office.[346] Additionally, such a solution may be more sustainable because it diversifies funding sources, as opposed to relying on one source of funding, especially when the existence of the defense attorney position, like other tribal court positions, can depend solely on renewal of the grant from year to year.[347]

Partnership with the LSC and existing Indian Legal Services Programs is another avenue for tribes to provide public defense for the accused in their courts. Although chronic underfunding of the LSC is a major barrier, tapping into legal services organizations with decades of experience working with low-income individuals in Native American communities may be a promising option for smaller tribes to provide counsel for indigent defendants in their courts.

344. *See generally* JWEIED, *supra* note 256, at 10.

345. *See generally* REBEKAH DILLER & EMILY SAVNER, BRENNAN CTR. FOR JUSTICE, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR (2009), http://www.brennancenter.org/sites/default/files/legacy/Justice/LSCRestrictionsWhitePaper.pdf [https://perma.cc/T5AL-UQ8L]; *see also* NCAI, *supra* note 222, at 38 ("[I]n FY 2014, the Indian Legal Services programs were awarded a total of just over $1.25 million in awards [from the DOJ through the Tribal Civil and Criminal Legal Assistance, Training and Technical Assistance (TCCLA), a DOJ grant program separate from the CTAS] to provide civil and criminal legal assistance to thousands of Native American clients, including juveniles, who meet federal poverty guidelines."); *id.* (demonstrating that Indian Legal Services Programs may be eligible for other specific funding streams).

346. *See, e.g.*, DNA People's Legal Servs., *Staff Attorney—Hopi Public Defender Office,* POOKIE.IO (May 27, 2015), http://www.pookie.io/jobs-for-staff-attorney-hopi-public-defender-office,keams-canyon-az,-84be6f00a9871cb5 [https://perma.cc/9UM7-2L2T].

347. JWEIED, *supra* note 256, at 10.

F. Law School Clinics

The Tribal Court Public Defense Clinic at the University of Washington School of Law provides defense services to low-income defendants through a unique partnership with the Tulalip Tribes.[348] The clinic is supervised by two faculty codirectors in partnership with two staff attorneys.[349] Since its inception in 2002, the clinic has expanded to provide criminal representation to defendants in the Tulalip, Quinault, Skokomish, Port Gamble S'Klallam, and Squaxin Island tribal courts, as well as representation in child welfare proceedings in the Muckleshoot tribal court.[350]

The students in the clinic spend their first quarter in the classroom learning advocacy skills and tribal law.[351] In the second quarter, students in the clinic apply to and are admitted to the Tulalip Tribal Bar, becoming spokespersons licensed to practice in Tulalip court. Although the Tulalip Tribal Code appoints law-trained attorneys for all indigent defendants charged with a felony offense, the clients that the clinic spokespersons serve are those who would likely otherwise be pro se defendants.[352] Then, from January to June, the students are assigned cases and represent clients in hearings under the supervision of the clinical director.[353]

The Tulalip Tribes court was one of the initial pilot project tribes to implement VAWA enhanced jurisdiction, beginning in February 2014.[354] The law students in the clinic may not meet the requirement for defense counsel under VAWA or TLOA—that is, although the students are admitted to the Tulalip Tribal Bar, they have not yet completed their legal training.[355] Tulalip's tribal code provides that "counsel" includes both tribally trained spokespersons and attorneys, provided that the spokespersons are members of the Tulalip

348. Anderson, *supra* note 67, at 146.
349. UNIV. OF WASH. SCHOOL OF LAW, CLINICAL LAW PROGRAM: ANNUAL REPORT TO THE LAW SCHOOL COMMUNITY 2013–2014, at 23–24 (2015), https://www.law.washington.edu/clinics/AnnualReports/CLPAnnualReport.pdf [https://perma.cc/92TA-9BMR].
350. *Id.* at 22.
351. Anderson, *supra* note 67, at 146.
352. *Id.*
353. *Id.*
354. NCAI, *supra* note 222.
355. TRIBAL LAW & POLICY INST., *supra* note 273, at 74 ("The court must ensure that the attorney provides, at a minimum, effective assistance of counsel equal to that of the U.S. Constitution."). In restricting the SDVCJ caseloads to state-licensed attorneys, it can be inferred that law students, still in the course of their legal training, are not yet in compliance with the standard for effective assistance of counsel under TLOA and VAWA. This issue had not been litigated, but does present a potential future legal challenge. *Id.* at 61.

Tribal Bar.[356] While the clinic has continued to operate in the Tulalip tribal court since the implementation of VAWA in 2014.[357]

There are several benefits to replicating a law school clinic, such as the University of Washington's, to advocate on behalf of indigent defendants in tribal courts. In creating the Tribal Court Public Defense Clinic, former clinic director Robert T. Anderson stated: "While the Clinic Director and student practitioners fill an important need in the Tribes' justice system, they are careful to avoid the temptation to simply replicate the non-Indian criminal defense model."[358] The partnership with Tulalip was created with the hope of developing a model for public defense in tribal courts focused on the underlying causes of criminal activity, which is not generally characteristic of state public defender's offices.[359] The clinic, as a legal-learning program driven by collaboration with Tulalip attorneys and court staff, has an opportunity to approach the provision of criminal defense in an innovative manner. Additionally, the Tribal Court Public Defense Clinic provides defendants who would otherwise not be able to afford an attorney or spokesperson with representation. The clinic also exposes students interested in pursuing a career in criminal law to tribal courts and law, an experience the students may miss by practicing exclusively in the state or federal criminal justice systems.

There are, however, several challenges to replicating a clinical model: geography, law school resources and training, and sustainability. First, clinics are limited by geography. The University of Washington School of Law is ideally located in that the tribes it serves are fairly close to the law school, and students are able to meet with clients and appear in tribal court while still maintaining regular course loads.[360] This model would not be ideal for more rural tribes, where law students could spend an entire day driving to reservations on the other side of the state. Second, a clinic requires an investment from the law school and active attorney supervision, by either clinical faculty or attorneys working

356. TULALIP TRIBAL CODE § 2.05.030(8) (2016) ("Right to Counsel. Any person appearing as a party in Tribal Court shall have the right to counsel at his or her own expense. 'Counsel' includes attorneys and spokespersons. Such counsel shall be of the parties' own choosing and need not be an attorney or admitted to practice before the bar of any state, but must be members of the Tulalip Tribal Bar. Indigent persons charged with a felony crime shall be appointed an attorney at the Tribes' expense at all critical stages of a criminal proceeding, up to and through trial.").

357. NCAI, *supra* note 222.

358. Anderson, *supra* note 67, at 146.

359. *Id.* at 139.

360. *See* UNIV. OF WASH. SCHOOL OF LAW, *supra* note 349, at 22 https://www.law.washington.edu/clinics/AnnualReports/CLPAnnualReport.pdf [https://perma.cc/92TA-9BMR].

for the tribe.[361] Student spokespersons cannot replace experienced attorneys and advocates. Furthermore, law students are trained to approach criminal procedure through a constitutional lens and the temptation to replicate a right to counsel as it is understood under the U.S. Constitution may present a significant challenge for tribal court and clinical staff. Third, and relatedly, a clinic is not a permanent solution. Echoing former clinic director Robert Anderson, a tribal defense clinic cannot simply replace a non-Indian criminal defense model. Clinics transform in response to the needs of law schools, the availability of funding, and faculty turnover. Therefore, a clinic like the University of Washington's should serve with an eye towards sustainability, and the aim to work itself out of a job. While a tribal defense clinic will not work for every tribe or law school, there is great potential for law schools and tribal courts, in partnership, to build upon the model developed by the University of Washington and the Tulalip Tribes.

CONCLUSION

When Congress passed the Indian Civil Rights Act in 1968, it created a statutory right to retained counsel for defendants in tribal courts. In the forty-five years following the ICRA's passage, tribal courts have developed their own fundamental fairness and due process jurisprudence. In *United States v. Bryant*, the U.S. Supreme Court legitimized tribal courts as forums capable of protecting the rights of the accused absent a Sixth Amendment right to appointed counsel. In a unanimous opinion, the Court recognized the public safety crisis in Indian country leading to the enactment of the federal recidivist statute at issue, Section 117(a). The Court found that preconstitutional tribal sovereigns are restricted by the ICRA, but not limited by the Bill of Rights, and thus that reliability of tribal convictions is determined by compliance with the ICRA.

A discussion of the provision of counsel for indigent defendants in tribal courts is one that is necessarily more nuanced. *Bryant* is situated in the context of a national public defense crisis, wherein public defenders offices and state and federal courts across the United States are consistently failing to provide effective assistance of counsel. Protection of the due process rights of the accused in tribal courts should be measured not by replication of state and federal public defense systems, but rather by analysis under international principles of comity to determine if a verdict was fundamentally fair. As sovereign governments,

361. *See id.* (noting that clinical staff support not only the Tribal Public Defense Clinic, but other clinical offerings at the University of Washington School of Law).

and in accordance with the historical congressional plenary framework, tribes have the inherent authority to define due process in their own courts, provided they comply with the ICRA, which must be respected by the federal government.

It is essential to frame the conversation about public defense in tribal court around fundamental fairness and in recognition of tribal sovereignty. There are opportunities in the current tribal landscape for the federal government to partner with tribal courts to streamline the federal funding structure and to develop Federal Public Defender tribal liaisons modeled after the Special Assistant U.S. Attorneys deputized in tribal courts. Finally, there are a great variety of models available for tribal courts to look to in developing a system for the provision of public defense in their courts. In discussions about effective assistance of counsel, tribes should continue to drive the conversation and build upon their unique jurisprudence to define due process in a manner that is consistent with tribal law and custom.