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Elementary Unfairness: Federal Recidivism Statutes and the Gap in Indigent American Indian Defendants' Sixth Amendment Right to Counsel

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Elementary Unfairness: Federal Recidivism Statutes and the Gap in Indigent American Indian Defendants' Sixth Amendment Right to Counsel

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ELEMENTARY UNFAIRNESS: FEDERAL RECIDIVISM STATUTES AND THE GAP IN INDIGENT AMERICAN INDIAN DEFENDANTS' SIXTH AMENDMENT RIGHT TO COUNSEL

BY THAIS-LYN TRAYER[*]

Indigent American Indian defendants suffer from a gap in federal laws that denies them full Sixth Amendment right-to-counsel protections. Indian defendants are not automatically guaranteed representation by a lawyer in tribal court. Constitutional difficulties arise when these uncounseled convictions are later used to support prosecution of repeat offender crimes in federal court. Supporters of this practice, most recently upheld in United States v. Cavanaugh, *point to the status of tribal nations as inherently sovereign and beyond the reach of the Bill of Rights. This Comment argues that federal courts should nevertheless approach prosecution of recidivist crimes by Indian defendants as if the Sixth Amendment applies. Different treatment of Indian defendants in federal court is based on a misunderstanding of criminal law, whereby defendants are given fewer procedural protections when prior convictions are considered sentencing factors, rather than elements of crimes. To avoid these semantics, courts should return to the Supreme Court's original intent underlying the right to counsel: ensuring a conviction's reliability. This approach is more appropriate for considering judgments from sovereign Indian nations. Furthermore, it resolves inadequacies of the 2010 Tribal Law and Order Act's partial Sixth Amendment grant. By returning to*

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a reliability analysis, federal courts can ensure indigent American Indians are not the only U.S. citizens subject to federal criminal prosecutions supported by uncounseled convictions simply because they are too poor to afford counsel.

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INTRODUCTION

While driving with their three children in 2008, Roman Cavanaugh Jr. and his wife began a dispute that soon became physical.[1] Cavanaugh grabbed his wife's hair and pushed her face into the

1. United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

dashboard.[2] He attempted to choke her, stopped the car, pulled her from the vehicle, and repeatedly kicked her.[3] Cavanaugh then drove away.[4]

Four years later, a federal district court sentenced Cavanaugh to five years and six months in prison.[5] This conviction and sentencing was one of the first pursuant to 18 U.S.C. § 117,[6] a new federal offense created in the Violence Against Women and Department of Justice Reauthorization Act of 2005[7] ("VAWA III"). The crime, labeled "[d]omestic assault by an habitual offender," punishes individuals who commit domestic assault and who have at least two prior, similar convictions.[8] Cavanaugh had a history of three misdemeanor domestic abuse offenses,[9] including punching his eleven and twelve-year-old sons.[10] VAWA III thus achieved a victory. It punished a repeat offender with an increased sentence for continuing to commit acts of violence. Yet to reach this goal, the federal court overlooked a lack of procedural protections in Cavanaugh's prior convictions: Cavanaugh lacked counsel during his previous trials.[11] The court could do so because Cavanaugh is an enrolled member of the Spirit Lake Sioux Tribe.[12]

Indigent American Indian[13] defendants suffer from a gap in federal laws that denies them full Sixth Amendment right-to-counsel

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2. *Id.*
3. *Id.*; *Fort Totten Man Sentenced for Domestic Assault by a Habitual Offender*, U.S. ATT'Y'S OFFICE, DISTRICT OF N.D. (Sept. 17, 2012) [hereinafter *Fort Totten Man Sentenced*], http://www.justice.gov/usao/nd/news/2012/09-17-12-Cavanaugh,%20Jr%20Sentenced.html.
4. *Cavanaugh*, 643 F.3d at 594.
5. *Id.* at 595; *Fort Totten Man Sentenced*, *supra* note 3.
6. 18 U.S.C. § 117 (2012). One of the first convictions under this statute occurred in June 2012, three month before Cavanaugh's sentencing. *See Standing Rock Tribal Council Member Convicted by Federal Jury of Domestic Assault by Habitual Offender*, U.S. ATT'Y'S OFFICE, DIST. OF N.D. (June 6, 2012), http://www.justice.gov/usao/sd/pressreleases/2012/Pierre-2012-06-06-St.%20John.html (reporting a guilty verdict delivered in June 2012 as among the first convictions obtained under the statute, three months prior to Cavanaugh's sentencing).
7. Pub. L. No. 109-162, § 909, 119 Stat. 2960, 3084 (2006).
8. 18 U.S.C. § 117(a).
9. *Cavanaugh*, 643 F.3d at 594.
10. Dave Kolpack, *ND Man Sentenced in Pivotal Domestic Violence Case*, NECN.COM, (Sept. 17, 2012, 5:06 PM), http://www.necn.com/09/17/12/ND-man-sentenced-in-pivotal-domestic-vio/landing_nation.html?&apID=5ef87deb74284ebe88df614e2114f4d9.
11. *Cavanaugh*, 643 F.3d at 594.
12. *See id.* at 594, 596 (explaining that Indian Civil Rights Act, 25 U.S.C. § 1302(a)(6),(b),(c)(2), does not require tribal courts to appoint counsel to indigent defendants for crimes with sentences of less than one year).
13. The term "Indian" has developed as a political classification, as opposed to a racial classification. *See* Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974) (recognizing that Congress applies the term "Indian" to members of federally-recognized tribes, which does not include all individuals racially classified as Indians); *see also* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 60 (4th ed. 2012) (explaining that the *Morton* case finds constitutional support for treating

protections in certain federal criminal proceedings. Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[14] However, the Supreme Court has long held that the Constitution protects the rights of Indians as U.S. citizens vis-à-vis the federal government, not as enrolled members vis-à-vis tribal nations.[15] In other words, due to the limited reach of Bill of Rights protections, indigent Indian defendants are not entitled to court-appointed counsel in tribal courts.[16] This situation is unique because the Sixth Amendment dictates that all indigent defendants—both Indian and non-Indian—enjoy this right in federal and state courts.[17] As a result, constitutional difficulties arise when prior convictions from tribal courts, obtained without assistance of counsel, are used in federal court either to enhance sentencing or to prove an element of an offense.

This Comment argues that uncounseled tribal court convictions should not be used as predicate offenses under recidivist statutes in federal criminal proceedings. Part I describes this special problem, which lies at the intersection of criminal law and federal Indian law. It traces the history of the right to counsel in prosecution of recidivist crimes, as well as the ways in which Congress and the Supreme Court determine Indian rights and criminal jurisdiction over Indian crimes. Part I concludes by examining *United States v. Cavanaugh*,[18] which exemplifies the predominant rationales for permitting uncounseled tribal court convictions to enhance federal sentencing.

Part II argues that federal courts are wrong to permit this practice, which is only sustained by misapplying Sixth Amendment jurisprudence. This Part explains how the *Cavanaugh* court mistakenly shifted away from the Supreme Court's intent in establishing a right to counsel for indigent defendants: ensuring the

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American Indians different from other groups of people based on their political status).

14. U.S. CONST. amend. VI.

15. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (describing the Cherokee Nation's sovereignty as predating that of the Constitution and therefore not confined by the Fifth Amendment). Members of Indian tribes are referred to as "enrolled" members. *See Tribal Enrollment Process*, U.S. DEP'T OF INTERIOR, http://www.doi.gov/tribes/enrollment.cfm (last visited Oct. 8, 2013) (describing enrollment criteria as varying from tribe to tribe but frequently including "lineal descendency" and relationships to a tribal members).

16. *See* discussion *infra* Part I.B.b (explaining that the Bill of Rights was incorporated against the states but never applied to tribal nations).

17. *See* U.S. CONST. amend. VI (applying the right to counsel to "all criminal prosecutions").

18. 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

reliability of convictions. Part II asserts that a return to this reliability analysis is more appropriate for considering judgments from inherently sovereign Indian nations. Finally, this Comment contends that the Tribal Law and Order Act of 2010, which provides a partial right to counsel in some prosecutions, is inadequate to solve this unique constitutional problem. It concludes by arguing that American Indians should not be the only class of U.S. citizens who can be prosecuted in federal court based on a prior uncounseled conviction, simply on the basis of being too poor to afford a lawyer.[19]

I. BACKGROUND

One out of every three American Indian women is raped in her lifetime.[20] Furthermore, Indian women experience battery at a rate of 23.2 per 1,000, as compared with 8 per 1,000 among Caucasian women.[21] To address these disproportionately high rates of violence, VAWA III created a new federal crime, 18 U.S.C. § 117: "Domestic assault by an habitual offender."[22] The statute authorizes imprisonment for up to five years for anyone who commits domestic assault in Indian country[23] and has at least two prior convictions for "assault, sexual abuse, or serious violent felony against a spouse or intimate partner."[24] The prior convictions may be from state, federal,

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19. Tribal courts are one of the only judicial forums in the United States where a constitutional right to counsel may not exist. *See infra* Part II.C (explaining that although this constitutional right may not apply, some tribes voluntarily provide public defender services). Juveniles undergo criminal proceedings different from adults and are subject to different procedural protections. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (denying the right to a jury trial in juvenile adjudications). They nevertheless enjoy the right to counsel in those proceedings. *In re* Gault, 387 U.S. 1, 41 (1967). United States citizen-detainees in trials by military tribunals also enjoy this right. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) (plurality opinion) (holding that the citizen-detainee "unquestionably has the right to access to counsel"); *see also In re* Guantanamo Bay Detainee Continued Access to Counsel, 892 F. Supp. 2d 8, 28 (D.D.C. 2012) (confirming access to counsel for non-U.S. detainees held at the U.S. naval base in Guantanamo Bay). The right to counsel is disputed as a statutory right in immigration proceedings, but these defendants are not U.S. citizens. *See* Montes-Lopez v. Holder, 694 F.3d 1085, 1090–91 (9th Cir. 2012) (detailing the circuit split on whether prejudice should be an element of a right to counsel claim under the Immigration and Nationality Act).

20. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007), *available at* http://www.amnestyusa.org/women/maze/report.pdf.

21. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901(3), 119 Stat. 2960, 3077 (2006) (codified at 42 U.S.C. 3796gg-10 note (2012)) (reciting the Congressional findings).

22. *Id.* §§ 902, 909. 119 Stat. at 3078, 3084, (codified at 18 U.S.C. § 117 (2012)).

23. "Indian country" is a legal term that refers to Indian communities and reservation lands. 18 U.S.C. § 1151 (2012).

24. 18 U.S.C. § 117(a)(1).

or tribal court.[25] The penalty increases to a maximum of ten years if the assault results in substantial bodily injury.[26]

Until codification of 18 U.S.C. § 117, tribal communities lacked a way to hold repeat offenders accountable for multiple offenses.[27] However, authority to prosecute this new domestic violence crime actually resides with federal law enforcement. The Department of Justice recognizes a "federal trust responsibility" that extends to the safety of Indian women and children.[28] This relationship between the federal government and tribal nations, predicated on the sovereignty of the latter, has endured a complicated history with overlapping roles for tribal, state, and federal authorities in law enforcement.[29] Even though tribal governments govern many aspects of their own affairs, their sovereignty is subject to restrictions by Congress.[30] As a result, criminal jurisdiction in Indian country has been described as a "maze."[31] American Indians have become increasingly subject to federal criminal jurisdiction over the years[32] while enjoying fewer constitutional protections than other Americans in certain criminal proceedings.[33] In particular, they suffer from a major constitutional

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25. *Id.* § 117(a).
26. *Id.*
27. *See* Nat'l Task Force to End Sexual and Domestic Violence Against Women, *Safety for Indian Women, § 909 Domestic Assault by an Habitual Offender*, RESTORATION OF NATIVE SOVEREIGNTY & SAFETY FOR NATIVE WOMEN, Oct. 2010, at 26, 26 (praising the statute for sending a "global" message to offender populations that the federal government is invested in victim safety).
28. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901(6), 119 Stat. 2960, 3078 (2006) (codified at 42 U.S.C. 3796gg-10 note (2012)). "Federal trust responsibility" refers to the unique relationship between the U.S. government and Indian tribes, which is based on "the distinctive obligation of trust incumbent upon the [federal] Government in its dealings with these dependent and sometimes exploited people." Seminole Nation v. United States, 316 U.S 286, 296 (1942).
29. *See generally* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 34–61 (4th ed. 2004) (providing a historical background on the special relationship between the federal government and Indian tribes).
30. *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (explaining that Congress's law enforcement authority over Indian land arises from its constitutional treaty power and commerce power, a judicially-created Indian trusteeship theory, and federal statues).
31. *Id.* at 504–05 (remarking on the "chaotic allocation" of law enforcement authority between federal, state, and tribal courts).
32. *See infra* Part I.B.1.a (describing how successive federal laws have divested tribal nations of criminal jurisdiction over certain offenses committed in Indian country). Federal prosecution of crimes in Indian country has increased by 54% from 2009 to 2012. David Stout, *More U.S. Prosecution of Crimes in Indian Country Is Seen as Heartening*, MAIN JUST. (May 30, 2013, 2:48 PM), http://www.mainjustice.com/2013/05/30/more-u-s-prosecution-of-crimes-in-indian-country-is-seen-as-heartening/.
33. *See infra* Part I.B.1.b (setting forth federal circuit court views that American Indian defendants' prior, uncounseled convictions from tribal courts may be used to support enhanced penalties under repeat offender laws in federal court).

difficulty that arises under recidivist statutes: the challenge of how to punish a repeat offender for committing yet another crime when his criminal history consists of prior convictions where he was unrepresented by counsel.

A. *Constitutional Challenges to the Sixth Amendment Right to Counsel and Recidivist Crimes*

1. *The Sixth Amendment right to counsel*

The Sixth Amendment guarantees the right to an attorney in criminal prosecutions.[34] Over time, the Supreme Court's interpretation of the Amendment has expanded its meaning to include the right to be represented by a lawyer in state and federal court proceedings for prosecution of felonies and misdemeanors, regardless of the ability to afford legal representation.

The right to counsel was first challenged in *Powell v. Alabama*[35] in 1932, where defendants facing the death penalty were not appointed a lawyer until the morning of their trial.[36] The Alabama Supreme Court found that this delay did not violate a state statute guaranteeing the right to counsel in capital cases.[37] The United States Supreme Court reversed this decision in favor of the defendants, citing the Due Process Clause of the Fourteenth Amendment.[38] While not yet implicating the Sixth Amendment, *Powell* laid the foundation for how the right to counsel is understood today. The Court reasoned that denial of the right to be heard through counsel equated to a denial of a fair hearing and was, therefore, a fundamental violation of due process of law.[39] According to the Court, even an intelligent layperson lacks the "skill and knowledge" to prepare her defense,[40] and for this reason "requires the guiding hand of counsel at every step in the proceedings."[41] The Court determined that the right to be heard through counsel,

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34. U.S. CONST. amend. VI.; *see also* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) (construing the Sixth Amendment to guarantee federal defendants the right to counsel unless it is intelligibly waived).

35. 287 U.S. 45 (1932).

36. *Id.* at 56.

37. *Id.* at 59–60.

38. *See id.* at 67–68, 73 (concluding that the right to counsel cannot be denied without violating fundamental principles of liberty and justice).

39. *Id.* at 68–69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

40. *Id.* at 69.

41. *Id.*

and thus the appointment of counsel, is an "immutable principle[] of justice."[42]

Six years later, the Court in *Johnson v. Zerbst*[43] drew from its reasoning in *Powell* to recognize the right to counsel in federal criminal proceedings under the Sixth Amendment.[44] The Court once more emphasized inequities between lawyers and laypersons in criminal proceedings.[45] Rather than relying on due process concerns in prosecution of a federal crime, the Court stated that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself."[46] In this way, *Johnson* built on *Powell* to establish the right to counsel as a constitutional mandate under the Sixth Amendment and, absent waiver by the defendant, a jurisdictional prerequisite to any deprivation of life and liberty.[47]

In 1942, the Supreme Court rejected the idea that *Johnson* extended the right to counsel to state court proceedings in *Betts v. Brady*.[48] Concerns of incorporating the Bill of Rights against the states continued until the 1963 landmark decision, *Gideon v. Wainwright*.[49] Twenty years after *Betts*, the Court rejected its earlier reasoning and returned to the principle of the right to counsel as "fundamental and essential to a fair trial."[50] The Court considered it an obvious truth that any person "too poor to hire a lawyer[] cannot be assured a fair trial unless counsel is provided for him."[51] It noted the need for a lawyer was best stated in *Powell*:

> If charged with crime, [a defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of

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42. *Id.* at 71. Nevertheless, *Powell*'s holding was limited to defendants in capital cases who suffered from "ignorance, feeble mindedness, illiteracy, or the like." *Id.*

43. 304 U.S. 458 (1938).

44. *Id.* at 463 (quoting *Powell*, 287 U.S. at 68–69).

45. *See id.* at 462–63 (recognizing "[t]hat which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious").

46. *Id.*

47. *Id.* at 467–68.

48. *See* 316 U.S. 455, 464–66, 471 (1942) (concluding that the Fourteenth Amendment does not obligate states to furnish counsel in all cases, and that the provision of counsel is a state's legislative policy choice), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

49. 372 U.S. 335 (1963). *See Conference on the 30th Anniversary of the United States Supreme Court's Decision in* Gideon v. Wainwright*:* Gideon *and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 25 (1993) [hereinafter Gideon *Conference*] (remarks of Abe Krash) (discussing federalism as a primary concern of the Supreme Court's consideration of whether to obligate states to appoint counsel).

50. *Gideon*, 372 U.S. at 342 (quoting *Betts*, 316 U.S. at 465).

51. *Id.* at 344.

> counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.[52]

With this quotation from *Powell*, the Court declared *Betts* "an anachronism"[53] and extended the Sixth Amendment right to counsel to indigent defendants in state court proceedings pursuant to the Due Process Clause of the Fourteenth Amendment.[54]

Although under *Gideon* only defendants facing felony charges were guaranteed representation,[55] the Court subsequently extended this protection to prosecution of misdemeanors in *Argersinger v. Hamlin*.[56] It reasoned that regardless of the severity of the offense, assistance of counsel "has relevance to any criminal trial, where an accused is deprived of his liberty."[57] After *Argersinger*, the Sixth Amendment is applicable to both felony and misdemeanor proceedings in federal and state courts.

Nevertheless, the Sixth Amendment right to counsel is still subject to limitation. For instance, in *Scott v. Illinois*,[58] the Supreme Court declined to extend the Sixth Amendment to prosecution of misdemeanors that do not result in imprisonment.[59] The Court explained that imprisonment is a different and more serious kind of penalty than others, such as monetary fines.[60] Therefore, the Court concluded that the Sixth and Fourteenth Amendments only obligate the appointment of counsel when an indigent defendant is sentenced to a term of imprisonment.[61] In so holding, the Court ignored the dissent's concerns about "problems of administration"; whether a defendant's criminal proceeding results in imprisonment is only apparent after the conviction has occurred.[62] Despite this concern,

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52. *Id.* at 345 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).
53. *Id.*
54. *Id.*
55. The holding of *Gideon* is limited to appointment of counsel in felony cases because Gideon was charged with a felony. *Id.* at 336–37; *see also* Loper v. Beto, 405 U.S. 473, 481 (1972) ("In [*Gideon*] the Court unanimously announced a clear and simple constitutional rule: In the absence of waiver, a felony conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer."); Yale Kamisar, Gideon v. Wainwright *a Quarter-Century Later*, 10 PACE L. REV. 343, 347 (1990) (explaining that states supported a narrow ruling in favor of limiting *Gideon* to felony cases).
56. 407 U.S. 25 (1972).
57. *Id.* at 32.
58. 440 U.S. 367 (1979).
59. *Id.* at 373–74.
60. *Id.* at 373.
61. *Id.* at 373–74.
62. *Id.* at 383 (Brennan, J., dissenting).

Scott remains the standard for when assistance of counsel is required in misdemeanor cases.

2. Recidivist statutes

Gideon was historic in establishing a fundamental right to counsel, but Gideon the man had been described as "a small-time gambler, a sometime hobo, and an 'ex-con.'"[63] He was originally sentenced to five years in prison due to four prior felony convictions that elevated his sentence.[64] Although his prior convictions were not at issue, Gideon faced a longer sentence as a result of his past criminal history.[65]

Individuals who have committed prior crimes often receive stricter penalties than first-time offenders.[66] Courts have long used an individual's criminal history to impose more severe sentences.[67] Considerations of recidivism are contained both in statutes and sentencing guidelines.[68] For example, a state law can define an offense and in a subsection require a mandatory minimum or a maximum sentence if the defendant has a prior conviction.[69] Most states also implement sentencing guidelines.[70] Guidelines prescribe a range of punishments but generally do not obligate judges to impose a penalty within this range.[71] They do necessitate that a judge at least

63. Kamisar, *supra* note 55, at 344.

64. *See* Gideon *Conference*, *supra* note 49, at 35 (remarks of Dean Bruce R. Jacob); *see also* ANTHONY LEWIS, GIDEON'S TRUMPET 103 (Vintage Books ed., 1989) (1964) (detailing Gideon's prior burglary felonies).

65. Gideon *Conference*, *supra* note 49, at 35 (remarks of Dean Bruce R. Jacob).

66. *See generally* Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332 (1965) (surveying the various procedures through which repeat offenders are prosecuted).

67. *See generally* Apprendi v. New Jersey, 530 U.S. 466, 501–18 (2000) (Thomas, J., concurring) (describing how courts have considered recidivism in sentencing since the founding of the country).

68. *See* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1149–50 (2010) (providing an overview of how recidivism factors into state and federal statutes, as well as state and federal sentencing guidelines).

69. *See* Joel W.L. Millar, Comment, Nichols v. United States, *The Right to Counsel, and Collateral Sentence Enhancement: In Search of a Rationale*, 144 U. PA. L. REV. 1189, 1191–92 & nn.15–21 (1996) (giving examples of various ways states incorporate recidivism into their laws: a Michigan law requires courts to increase the maximum sentence to one and a half times its original when the defendant is convicted of a previous felony; an Alabama law increases the severity of the felony conviction for every previous felony conviction; a Georgia law enacts the maximum sentence against a defendant convicted of a felony when he or she has been imprisoned for a previous felony conviction).

70. *See* 2 PETER J. HENNING ET AL., MASTERING CRIMINAL PROCEDURE: THE ADJUDICATORY STAGE 171 (2012) (categorizing different types of state sentencing guidelines, from purely voluntary to truly mandatory).

71. *Id.* (noting that even truly mandatory sentencing guidelines permit judges to deviate under "the most extraordinary of circumstances").

take into account prior convictions when formulating a sentence.[72] At the federal level, recidivism similarly factors into statutes creating federal crimes,[73] as well as federal sentencing guidelines.[74]

Proponents of recidivist statutes believe that increased penalties punish repeat offenders for their continuing bad behavior.[75] In addition to providing retribution, such punishment also serves as deterrence.[76] Greater punishment is necessary to deter future crimes because lesser penalties have not prevented their recurrence.[77] The Supreme Court has agreed that states have a valid interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."[78] For example, the Court has upheld a sentence of twenty-five years to life imprisonment for the theft of three golf clubs, valued at $399 each, because the offense was the defendant's third.[79] Eighth Amendment challenges to the proportionality of such sentences as constituting cruel and unusual punishment in comparison to the present offense are usually unsuccessful.[80]

The Supreme Court has also considered Fifth Amendment double jeopardy concerns in relation to recidivist penalties. The issue arises due to the tension between laws that require consideration of past crimes, and the double jeopardy clause, which provides, "nor shall any person be subject for the same offence to be twice put in

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72. *See id.* at 175 (explaining that judges must consider the criminal history of the defendant).

73. *See* Russell, *supra* note 68, at 1148 n.61 (listing federal statutes that include considerations of recidivism, such as federal crimes of illegal reentry, firearms possession, drug possession, three-strikes laws, and drug crimes at 8 U.S.C. § 1326, *id.* § 924(e), 21 U.S.C. § 851, and 18 U.S.C. § 3559, respectively).

74. *Id.* at 1144–45 (discussing how a defendant's prior convictions can increase both his criminal history points and adjusted offense level under the federal sentencing guidelines).

75. *See* Millar, *supra* note 69, at 1193 (hypothesizing that repeat offenders are considered more culpable than first-time offenders).

76. *See* Russell, *supra* note 68, at 1150–57 (explaining the goals of recidivist statutes as retribution, deterrence, incapacitation, and rehabilitation).

77. *See* Millar, *supra* note 69, at 1193 (noting that repeat offenders' increased propensity to commit crime threatens societal safety).

78. Rummel v. Estelle, 445 U.S. 263, 276 (1980).

79. Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (plurality opinion) (holding that the sentence did not violate the Eighth Amendment's prohibition on cruel and unusual punishment because it was "not grossly disproportionate" to the crime).

80. *See* JENNIFER E. WALSH, THREE STRIKES LAWS 83 (2007) (showing that of the five most pivotal Supreme Court cases on Eighth Amendment challenges to recidivist statutes, only two were found to violate the Eighth Amendment). *But see, e.g.*, Solem v. Helm, 463 U.S. 277, 303 (1983) (holding that life imprisonment without parole for a nonviolent repeat offender was an unconstitutionally disproportionate punishment under the Eighth Amendment).

jeopardy of life or limb."[81] The Court has ruled that recidivist punishments do not subject defendants to double punishment for the same offense.[82] A longer sentence under a recidivist statute is "not to be viewed as . . . [an] additional penalty for the earlier crimes," but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."[83]

The Supreme Court used this reasoning in *Almendarez-Torres v. United States*[84] in discussing the use of recidivism as a sentencing factor. Almendarez-Torres faced charges under a federal law making it a crime for a deported alien to return to the United States.[85] This underlying offense led to a maximum prison sentence of two years.[86] The statute furthermore authorized a maximum prison sentence of twenty years if the person had been deported for an aggravated felony conviction.[87] Almendarez-Torres argued that the portion of the statute dictating a higher penalty for the prior conviction was an element of the federal crime, entitling him to heightened procedural protections.[88] In rejecting his claim, the Court distinguished sentencing factors from elements of crimes.[89] Recidivism, it noted, is one of the most traditional bases for increasing a defendant's sentence.[90] A statute's incorporation of past criminal behavior does not create a separate offense within the same law.[91] The Court reaffirmed that "recidivism does not relate to the commission of the offense, *but goes to the punishment only*."[92]

A subsequent case has indirectly complicated the issue of what role prior convictions play in prosecution of present crimes, or what recidivist statutes actually punish. In *Apprendi v. New Jersey*,[93] the Supreme Court once more tackled the "seemingly simple question of

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81. U.S. CONST. amend. V.

82. *See, e.g.*, Witte v. United States, 515 U.S. 389, 406 (1995) (ruling that consideration of past criminal behavior does not impose punishment for the past conduct for double jeopardy purposes).

83. Gryger v. Burke, 334 U.S. 728, 732 (1948).

84. 523 U.S. 224 (1998).

85. *Id.* at 229 (referring to 8 U.S.C. § 1326 (1988).

86. *Id.*

87. *Id.*

88. *Id.* at 239. Almendarez-Torres' maintained that recidivism was an element of the offense that must be included in the government's indictment and proven beyond a reasonable doubt to a jury. *Id.*

89. *See id.* at 243 (describing recidivism as "the *sentencing factor* at issue here" (emphasis added)).

90. *Id.*

91. *See id.* at 226 ("We conclude that the [statutory subsection in question] is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime.").

92. *Id.* at 244 (internal quotation marks omitted).

93. 530 U.S. 466 (2000).

what constitutes a 'crime.'"[94] Unlike the defendant in *Almendarez-Torres*, the defendant in *Apprendi* faced a higher sentence not due to his past criminal history, but due to possessing a specific mental state while committing the offense; that is, for having committed a hate crime.[95] The defendant fired a gun into the home of an African-American family and pled guilty to two second-degree offenses and one third-degree offense.[96] Each second-degree offense carried a maximum penalty of ten years imprisonment.[97] The prosecution sought to prove a biased purpose behind one of the second-degree offenses, which could have increased the penalty for that count alone to twenty years.[98] The question on appeal involved constitutionally-required procedural protections for the higher sentence.[99] The answer turned on whether the authorization of the increased jail term was an element of the defendant's crime, or a penalty enhancement.[100]

The Court in *Apprendi* held that due process requires heightened protections for any fact other than a conviction that increases the penalty for a crime beyond the statutorily prescribed maximum penalty.[101] For Apprendi, this meant the circumstances of his crime—other than the fact of a prior conviction—had to be proven beyond a reasonable doubt to a jury.[102] Prior convictions were exempted for two reasons. First, the Court emphasized that prior convictions are different from other factual circumstances surrounding a crime because of "the certainty that procedural safeguards attached to any 'fact' of prior conviction."[103] Second, the Court admitted, "it is arguable that *Almendarez-Torres* was incorrectly

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94. *Id.* at 499 (Thomas, J., concurring).

95. *See id.* at 468–69 (majority opinion) (describing the New Jersey "hate crime" law, which imposed an extended prison term upon a preponderance of the evidence that a defendant committed the crime with intent to intimidate based on "race, color, gender, handicap, religion, sexual orientation or ethnicity" (quoting N.J. STAT. ANN. § 2C:44-3(e))).

96. *Id.* at 469.

97. *Id.* at 469. The defendant had entered a plea agreement allowing the third sentence to run concurrently with the first two sentences. *Id.* at 469–70.

98. *Id.* at 469–70. The trial judge sentenced Apprendi to a twelve-year term for his second offense, *id.* at 471, meaning the hate crime law led to a sentence two years longer than the ten-year, statutorily prescribed maximum for that count. *Id.* at 469.

99. *Id.* at 475.

100. *See id.* at 492 (rejecting the State's argument that the finding of bias was merely a sentencing factor).

101. *Id.* at 490.

102. *Id.*

103. *Id.* at 488.

decided."[104] While not expressly overruling its earlier decision, the Court noted that the defendant in *Almendarez-Torres* admitted to the prior convictions, which mitigated due process concerns.[105] It continued to speculate that if the question of prior convictions under a recidivism statute was at issue, "a logical application of our reasoning today should apply."[106]

In his concurrence, Justice Thomas agreed that the Court incorrectly decided *Almendarez-Torres*.[107] His opinion went further than the majority in describing prior convictions as elements of crimes:

> [I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime . . . . The aggravating fact is an element of the aggravated crime.[108]

Although seemingly semantic, the distinction between elements and sentencing factors has significant consequences. While a sentencing factor increases a defendant's punishment, it is not subject to the constitutional protections of elements.[109] Elements, however, trigger protections such as the way in which defendants are charged,[110] the government's burden of proof,[111] and whether the fact-finder is the judge or the jury.[112]

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104. *Id.* at 489; *see also* Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("[A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

105. *See Apprendi*, 530 U.S. at 489–90 (noting that the Court need not revisit *Almendarez-Torres*, as Apprendi did not contest the validity of that case).

106. *Id.*; *see also* Erwin Chemerinsky, *Making Sense of* Apprendi *and its Progeny*, 37 MCGEORGE L. REV. 531, 543 (2006) (acknowledging unfulfilled predictions since *Apprendi* that the Supreme Court will overrule *Almendarez-Torres*).

107. *Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring) (noting that the Court's approach of using tradition to determine whether a particular fact should provide a basis for increasing a sentence "defines away the real issue").

108. *Id.* at 501.

109. *Id.* at 500.

110. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges. But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." (internal citations omitted)).

111. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986) (upholding a preponderance-of-the-evidence standard for sentencing factors, as opposed to the beyond-a-reasonable-doubt standard required to prove elements of a crimes). Scholars continue to challenge this standard post-*Apprendi*. *See, e.g.*, Chemerinsky, *supra* note 106, at 543 (describing recidivist crimes as imposing additional punishment for prior convictions, "even though th[e prior] crime has not been proven beyond a reasonable doubt"); Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973, 994 (2004) (protesting lower courts'

Post-*Apprendi*, there has been uncertainty regarding how to treat different types of prior convictions under recidivist statutes. Convictions from foreign jurisdictions are one example. Until 2005, federal circuit courts were split on whether to count foreign convictions as predicate offenses under an unlawful gun possession statute.[113] The Supreme Court eventually settled this question in *Small v. United States*,[114] where it presumed that the prohibition on possession of firearms by a person "convicted in any court" referred to domestic convictions.[115] This decision was partially motivated by concerns that convictions from different legal systems may punish crimes more severely than in the United States, or that the systems themselves are "inconsistent with an American understanding of fairness."[116]

Juvenile adjudications are another example of post-*Apprendi* confusion over prior convictions. The Supreme Court has held that the Constitution does not guarantee juveniles the right to a jury trial in juvenile criminal proceedings.[117] Due to this fundamental difference between adult and juvenile criminal proceedings, federal appellate courts are split on whether, post-*Apprendi*, prior delinquency adjudications should be considered predicate offenses under recidivism statutes.[118] *United States v. Tighe*[119] is the lone case prohibiting such use. The U.S. Court of Appeals for the Ninth Circuit in *Tighe* acknowledged *Apprendi*'s differing treatment of convictions compared to other factors that enhance sentences.[120]

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assumptions that *Almendarez-Torres* and *Apprendi* limit the government's burden of proof for prior convictions to a preponderance of the evidence).

112. *See, e.g.*, *Apprendi*, 530 U.S. at 490 (permitting prior convictions, in contrast to elements of crimes, to be proven to a judge rather than to a jury).

113. *Compare* United States v. Gayle, 342 F.3d 89, 95 (2d Cir. 2003) (interpreting "convicted in any court" in the Federal Gun Control Act to exclude foreign convictions), *with* United States v. Small, 333 F.3d 425, 427 n.2 (3d Cir. 2003) (upholding use of a Japanese conviction as a predicate offense under the same statute), *rev'd*, 544 U.S. 385 (2005), *and* United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989) (reading the plain language of "any court" to include foreign convictions). The circuit split was eventually settled in *Small*, 544 U.S. 385, in which the Court held the statute applied only to domestic convictions. *Id.* at 394.

114. 544 U.S. 385 (2005).

115. *Id.* at 387.

116. *See id.* at 389 (arguing that certain economic conduct punishable by imprisonment in other countries may not violate domestic, American laws).

117. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). The Court reasoned that "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." *Id.* at 551.

118. *See* Murphy, *supra* note 111, at 1012–17 (exploring the effects of the *Apprendi* decision on nonjury juvenile proceedings).

119. 266 F.3d 1187 (9th Cir. 2001).

120. *See id.* at 1192 (recognizing that prior convictions are excluded from "*Apprendi*'s general rule and, as sentencing factors, need not be afforded the same

Nevertheless, it declined to take into account the defendant's prior adjudication, which would have lengthened his sentence from a maximum of 188 months to 235 months.[121] By contrast, the U.S. Court of Appeals for the Eighth Circuit in *United States v. Smalley*[122] permitted use of a nonjury juvenile adjudication to increase a defendant's sentence from a maximum of ten years to a minimum of fifteen years.[123] The court noted other procedural protections available to juveniles, like the right to counsel, which made the adjudication sufficiently reliable to satisfy the requirements of *Apprendi*.[124]

3. Challenging the use of uncounseled prior convictions under recidivist statutes

The Supreme Court has also considered permissible uses of prior convictions in relation to the Sixth Amendment right to counsel. The issue first arose in 1967 in *Burgett v. Texas*,[125] where a state recidivist statute subjected anyone with three prior felonies to life imprisonment.[126] Burgett had three prior convictions from Tennessee and one from Texas.[127] The prosecution introduced into evidence a certified copy of one of these convictions, which suggested Burgett had not been represented by counsel.[128] The Court held that use of the prior uncounseled felony conviction under the recidivist statute violated the defendant's Sixth Amendment right.[129] Without much explanation, the Court found that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case."[130]

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procedural protections that attach to facts that are construed as elements of the charged crime").

121. *See id.* at 1194–95 (limiting *Apprendi* to "prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt").

122. 294 F.3d 1030 (8th Cir. 2002).

123. *See id.* at 1031 (affirming the district court's sentence).

124. *See id.* at 1033 (supporting its holding further by pointing to juvenile defendants' right to notice, right to confront and cross-examine witnesses, and privilege against self-incrimination).

125. 389 U.S. 109 (1967).

126. *Id.* at 111 n.3 (referring to TEX. PENAL CODE art. 63 (1952)).

127. *See id.* at 111 (listing petitioner's previous felony convictions, which included three forgery convictions in Tennessee and one burglary conviction in Texas).

128. *Id.* at 112.

129. *Id.* at 114–15 (explaining that "the accused in effect suffers anew from the deprivation of that Sixth Amendment right").

130. *Id.* at 115 (citation omitted).

Thirteen years later, the Supreme Court issued two seemingly contradictory opinions. First, in *Lewis v. United States*,[131] the Court considered use of an uncounseled felony conviction under a federal statute that prohibited possession of a firearm by a former felon.[132] Mindful of *Burgett*, the Court nevertheless held that the Sixth Amendment did not prohibit use of the defendant's prior felony conviction, though it was uncounseled and resulted in imprisonment.[133] The Court distinguished *Lewis* from past precedent by framing the federal gun law as imposing a "civil disability."[134] The statute was not focused on concerns about the reliability of the prior conviction, but on the "mere fact of conviction" in order to keep firearms from dangerous individuals.[135] The Court justified its decision as distinct from using a prior conviction to "support guilt or enhance punishment," which was the issue in *Burgett*.[136] While noting that some uses of uncounseled convictions were impermissible, the Court interpreted its past decisions as "never suggest[ing] that an uncounseled conviction is invalid for all purposes."[137]

Just two months later, the Court in *Baldasar v. Illinois*[138] arrived at the opposite conclusion. There, the defendant's previous offense meant that, under state law, his present misdemeanor offense could be tried as a felony, with a penalty of one to three years of imprisonment.[139] However, in a per curiam opinion, the Court held that the state could not use the defendant's prior, uncounseled misdemeanor conviction to convert his current misdemeanor into a felony.[140] In a concurring opinion, Justice Stewart interpreted use of the previous conviction as violating *Scott*.[141] Misdemeanor convictions that are obtained without the right to counsel and lead to

131. 445 U.S. 55 (1980).
132. *Id.* at 56 (referring to 18 U.S.C. app. § 1202(a) (1970)).
133. *See id.* at 66–67.
134. *Id.* at 67.
135. *Id.*; *see also* D. Brian King, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373, 1386 (1989) (finding the difference between *Lewis* and *Burgett* as the difference between the existence and the factual reliability of a previous conviction).
136. *Lewis*, 445 U.S. at 67 (quoting Burgett v. Texas, 389 U.S. 109, 115 (1967)). The Court furthermore refused to recognize any inconsistency with *Burgett*. *See id.* (distinguishing between *Burgett* and the current case, which it characterized as using "an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by criminal sanction").
137. *Id.* at 66–67.
138. 446 U.S. 222 (1980) (per curiam), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).
139. *Id.* at 223.
140. *Id.* at 224.
141. *Id.* at 224 (Stewart, J., concurring).

imprisonment violate the Sixth Amendment.[142] In a separate concurring opinion, Justice Marshall agreed that use of the prior conviction violated *Scott*, but maintained that *Scott* was wrongly decided.[143] His opinion also pointed out that the defendant's imprisonment was not just a result of the present offense, but a direct consequence of the prior uncounseled conviction.[144] While Justices Brennan and Stevens joined both concurrences,[145] not all of the Justices agreed. Comparing this case to *Lewis*, Justice Powell protested that "[t]he conflict between the two holdings could scarcely be more violent."[146] *Lewis* allowed the use of an uncounseled felony conviction as a predicate for a subsequent offense,[147] while *Baldasar* prohibited the same use of an uncounseled misdemeanor conviction.[148]

This conflict persisted until the Court explicitly overruled *Baldasar* in *Nichols v. United States*.[149] The defendant in *Nichols* had previously been convicted of a misdemeanor for driving under the influence, for which he paid a fine.[150] After pleading guilty to the federal offense of conspiracy to possess cocaine, a sentencing court assigned him an extra criminal history point for his DUI.[151] This point increased his criminal history category and sentencing range under the then-mandatory federal sentencing guidelines.[152] The Court upheld use of the uncounseled conviction to impose a greater penalty in the increased sentencing range.[153] It reasoned that "an uncounseled misdemeanor conviction, valid under *Scott* because no

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142. *See id.* (noting that the petitioner "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense").

143. *Id.* at 225 (Marshall, J., concurring) (stating continuing disagreement with the Court's decision in *Scott* for the reasons set forth in Justice Brennan's dissent). Justice Brennan's dissent in *Scott* argued that the right to counsel should apply where imprisonment is an authorized or potential penalty, even if the sentencing process results in a fine and no prison term. Scott v. Illinois, 440 U.S. 367, 376, 382–89 (1979) (Brennan, J., dissenting). To require otherwise would mean "a defendant will have no right to appointed counsel even when he has a constitutional right to a jury trial," which he considered "simply an intolerable result." *Id.* at 382.

144. *Baldasar*, 446 U.S. at 226 (Marshall, J., concurring) ("That petitioner has been deprived of his liberty 'as a result of [the first] criminal trial' could not be clearer." (alteration in original)).

145. *Id.* at 224.

146. *Id.* at 234 n.3 (Powell, J., dissenting).

147. Lewis v. United States, 445 U.S. 55, 65 (1980).

148. *Baldasar*, 446 U.S. at 224.

149. 511 U.S. 738, 748 (1994).

150. *Id.* at 740.

151. *Id.*

152. *Id.* (explaining that an "additional criminal history point" increased the petitioner's maximum sentence from 210 months to 235 months).

153. *Id.* at 748–49.

prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[154] The Court adopted the dissent's view from *Baldasar* that enhancement statutes "do not change the penalty imposed for the earlier conviction."[155] Rather, according to the Court, they penalize only the last offense committed by the defendant.[156] Under this rationale, the additional criminal history point did not result in any imprisonment for the defendant's prior misdemeanor.[157] Therefore, it did not violate the Sixth Amendment.[158]

Nichols seemed definitive until the Supreme Court decided *Alabama v. Shelton*.[159] In *Shelton*, the defendant was tried without assistance of counsel, convicted of a misdemeanor, and sentenced to thirty days in prison.[160] Per an Alabama statute, the circuit court suspended the sentence and placed the defendant on probation.[161] Though the defendant never went to jail, the Court considered the suspended sentence the equivalent of a prison term.[162] If the defendant violated his probation, the uncounseled conviction would directly result in imprisonment.[163] Although dependent on a triggering condition—violating probation—the court noted that the uncounseled misdemeanor could "end up in the actual deprivation of a person's liberty."[164] The potential imposition of incarceration therefore violated "the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration."[165]

B. *Prosecution of American Indian Defendants Under Federal Recidivism Statutes*

Debates persist about the effectiveness of legislation targeting recidivists. Some scholars note inconclusive results from studies on the relationship between punishment and increased occurrence of crime.[166] Others describe dramatically decreased crime rates

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154. *Id.* at 749.
155. *Id.* at 747.
156. *Id.* (quoting *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting)).
157. *Id.*
158. *Id.* at 748–49.
159. 535 U.S. 654 (2002).
160. *Id.* at 658.
161. *Id.* (citing ALA. CODE § 15-22-50 (1995)).
162. *See id.* at 662 ("Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense.").
163. *Id.*
164. *Id.* (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972)).
165. *Id.* at 667.
166. *See, e.g.*, NANCY RODRIGUEZ, PERSISTENT OFFENDER LAW: RACIAL DISPARITY,

following the passage of three-strike laws.[167] Recidivism rates are particularly high for American Indians, exceeding those of other populations in some states.[168] Research also suggests that most domestic violence against Indian women is committed by repeat offenders.[169] Holding domestic violence perpetrators accountable is particularly difficult due to a complex web of federal legislation and judicial decisions that control criminal jurisdiction in Indian country.[170] The interaction between these statutes and case law controls whether federal, state, or tribal authorities may prosecute certain types of crimes committed by Indians and non-Indians, as well as Indian rights vis-à-vis their own tribes.

1. Federal power in Indian country

Justice Sandra Day O'Connor has described Indian nations as the "third sovereign."[171] Their unique status stems from the fact that Indian nations exist independently from federal or state governments.[172] Early treaties and the Supreme Court acknowledged their inherent and independent sovereignty.[173] However, federal regulation has significantly interfered with this sovereignty in many ways, making tribal nations more closely resemble "domestic dependent nations."[174]

PATTERNED OFFENSES, AND UNINTENDED EFFECTS 2–4 (2003) (exploring the nexus between three strikes laws and theories of punishment).

167. *See* WALSH, *supra* note 80, at 134 (discussing a recent California study showing a 45% drop in crime following adoption of three strikes legislation). Walsh also notes the effects of increasing the cost of crime too much, which may lead to a corresponding increase in certain crimes. *Id.* at 140.

168. *See State Recidivism Studies*, SENT'G PROJECT (2010), http://sentencingproject.org/doc/publications/inc_StateRecidivismFinalPaginated.pdf (showing studies in Iowa and Wisconsin, where recidivism rates are highest among Indian populations).

169. *See* Margaret S. Groban & Leslie A. Hagen, *Domestic Violence Crimes in Indian Country*, U.S. ATTYS' BULL., July 2010, at 2, 6, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5804.pdf (encouraging federal prosecutors to target repeat offenders under 18 U.S.C. § 117).

170. *See infra* Part I.B.1 (setting forth the statutes and Supreme Court decisions defining federal power over criminal jurisdiction in Indian country).

171. Sandra Day O'Connor, Remark, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

172. *See id.* (distinguishing the sovereignty and judicial systems of Indian tribes from those of the Federal government and the States).

173. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), *abrogated by* Nevada v. Hicks, 535 U.S. 353 (2001) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . ."). *See generally* Canby, *supra* note 29, at 105–23 (surveying Indian treaty rights from the first treaty with the Delawares in 1787).

174. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (concluding that the Cherokee Nation cannot be considered a "foreign nation," and that its "relation[ship] to the United States resembles that of a ward to his guardian").

Federal authority over Indian affairs originates in the Constitution from two sources. First, the Supreme Court has pointed to the Executive Branch's treaty powers, and the fact that treaties are the main way the federal government has maintained relations with Indian nations.[175] The Constitution furthermore allows Congress to regulate commerce with the Indian tribes.[176] This so-called Indian Commerce Clause "provide[s] Congress with plenary power to legislate in the field of Indian affairs."[177] States have no authority in this area without an express grant of power from Congress.[178] Through the years, Congress has legislated many aspects of tribal sovereignty, including tribal nations' exercise of criminal jurisdiction, as well as personal rights enjoyed by Indian members vis-à-vis tribal governments.

a. Federal criminal jurisdiction in Indian country

Since the Nineteenth century, Congress has extended federal jurisdiction to crimes committed in Indian country through its plenary authority over Indian affairs. The General Crimes Act of 1817[179] applied federal criminal law to the Indian territories.[180] In 1825, the Assimilative Crimes Act[181] further provided that if a crime was not enumerated in federal legislation, the offender could still be prosecuted in federal court under state laws.[182] Together, these two

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175. *See* United States v. Lara, 541 U.S. 193, 200 (2004) (identifying the Indian Commerce Clause and the Treaty Clause as two sources of federal power over Indian tribes); *see also* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .").

176. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

177. *Lara*, 541 U.S. at 200.

178. Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45 CT. REV. 12, 13 (2009), *available at* http://aja.ncsc.dni.us/publications/courtrv/cr45-1-2/CR45-1-2Fletcher.pdf (naming the three main principles in federal Indian law as (1) Congress having exclusive power over Indian affairs; (2) states enjoying no such power without Congressional delegation; and (3) Indian tribes possessing inherent sovereignty that is nevertheless subject to limitation by Congress).

179. Act of March 3, 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (2012)).

180. *See id.* ("[T]he general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.").

181. Act of March 3, 1825, ch. 65, 4 Stat. 115 (codified as amended at 18 U.S.C. § 13).

182. *See id.* ("[A]ny act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.").

pieces of legislation continue to allow the federal government to prosecute all crimes in Indian country in federal court, with three exceptions: (1) when an Indian commits a crime against another Indian, (2) when an Indian has already been punished by tribal law, and (3) when the federal government grants jurisdiction to an Indian tribe.[183]

Based on these exceptions, the Supreme Court affirmed that the federal government did not properly exercise jurisdiction over a Brule Sioux Indian who shot and killed another Brule Sioux in *Ex parte Crow Dog*.[184] After Crow Dog's tribal council dealt with his offense under their traditional law, federal authorities subsequently arrested and tried him for murder under federal law.[185] Without jurisdiction under the General Crimes Act, the Court granted Crow Dog's habeas petition.[186] The decision sparked public outrage over what was perceived as an acquittal.[187] In response, Congress passed another law two years later: the Major Crimes Act.[188] This statute specified several offenses over which the federal government would assume exclusive jurisdiction, including murder.[189] It left enforcement of these serious crimes in the hands of the federal government.[190]

The federal government continues to enjoy jurisdiction over serious crimes, except where it has transferred this power to states under what is known as Public Law 280.[191] In the 1950s, Congress experimented with granting states the authority to prosecute crimes in Indian country.[192] Public Law 280 mandated this transfer among six states and extended the option to others, without the consent of

183. 18 U.S.C. § 1152.

184. 109 U.S. 556 (1883).

185. *See* David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary*, 47 GONZ. L. REV. 767, 770 (2012) (describing the facts of *Crow Dog*).

186. *See Crow Dog*, 109 U.S. at 572 (finding no congressional intent to depart from the government's general policy of allowing tribes to adjudicate crimes committed by Indians against each other).

187. Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 61 (2011) (noting the public perception of acquittal).

188. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153).

189. *Id.* § 1153(a). The other offenses are manslaughter, kidnapping, maiming, incest, various types of assaults, felony child abuse or neglect, arson, burglary, and robbery. *Id.*

190. *Id.*

191. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 4, 67 Stat. 588, 588–89 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2012)).

192. *See generally* Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1639–56 (1998) (providing a comprehensive background on Public Law 280).

Indian tribes.[193] Despite hopes that states might better handle law enforcement, and that law enforcement would be easier if tribes were subject to state laws, crime rates did not improve.[194] Public Law 280 is widely considered a failure.[195] Nonetheless, Public Law 280 jurisdiction still exists in several states, which assume prosecution of crimes committed by and against Indians, as opposed to the federal government.[196]

Congress expanded federal and state criminal jurisdiction while the Supreme Court simultaneously restricted the jurisdiction of tribal governments in several decisions. In *Oliphant v. Suquamish Indian Tribe*,[197] the Court held that tribes do not have inherent jurisdiction to try and punish non-Indians.[198] Later, in *Duro v. Reina*,[199] the Court even divested tribal governments of jurisdiction over Indians not enrolled in the same tribe.[200] In response, Congress amended the Indian Civil Rights Act of 1968[201] ("ICRA") to restore the ability of tribal governments to prosecute all Indians, regardless of tribal enrollment in what is known as the "Duro fix".[202] Recently, Congress also granted tribal courts jurisdiction over non-Indians in domestic violence cases, subject to certain conditions.[203] In other words, the

193. *See id.* at 1632–33 (Minnesota, Alaska, California, Nebraska, Wisconsin, Oregon); *see also* Patton, *supra* note 185, at 774 (describing that tribal consent was not necessary for states to assume jurisdiction from the federal government).

194. *See* Patton, *supra* note 185, at 774–75 (explaining how Public Law 280 acted as an unfunded mandate that did not improve law enforcement in Indian country).

195. *See* Jiménez & Song, *supra* note 192, at 1636 (noting that even Congress considers Public Law 280 a failure).

196. *See id.* at 1679–83 (discussing two cases in which courts have found concurrent tribal jurisdiction under Public Law 280 in California and New York).

197. 435 U.S. 191 (1978).

198. *Id.* at 195, 208–11 (reasoning that Indian tribes are within the geographic limits of the United States and thus are subordinate to the sovereignty of the United States). As a result, criminal jurisdiction over non-Indians can only be granted by an affirmative delegation of such power by Congress. *Id.* at 208.

199. 495 U.S. 676 (1990).

200. *See id.* at 679 (holding that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership").

201. Pub. L. No. 90-284, tits. II–VII, 82 Stat. 73 (codified in scattered sections of 18 and 25 U.S.C.).

202. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (codified at 25 U.S.C. § 1301(2)-(4) (2012)).

203. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–22 (to be codified at 25 U.S.C. § 1304). Tribal jurisdiction over domestic violence crimes by non-Indians is predicated on the provision of jury trials, and the right to counsel where any term of imprisonment is imposed. *Id.*, 127 Stat. at 122 (to be codified at 25 U.S.C. § 1304(d)(2)–(3)); *see also* Matthew L.M. Fletcher, *Tracing the Right to Counsel in the VAWA Reauthorization Act*, TURTLE TALK (Feb. 28, 2013), *available at* https://turtletalk.wordpress.com/2013/02/28/tracing-the-right-to-counsel-in-the-vawa-reauthorization-act/ (explaining that the 2013 Reauthorization Act incorporates protections from the Indian Civil Rights Act, 25 U.S.C. § 1302); Part I.B.b (detailing how the Tribal Law and Order Act of 2010

same principle behind the "defeasance" of Indian jurisdiction is valid today.[204] Tribal sovereignty is inherent but subject to restrictions by Congress that control the "metes and bounds of tribal sovereignty."[205]

In sum, the federal government retains jurisdiction over non-Indians who commit crimes in Indian country and over Indians who commit major crimes. In mandatory Public Law 280 jurisdictions, this authority instead resides with states. Indian tribes thus retain jurisdiction to prosecute non-major crimes committed by Indians and certain domestic violence crimes committed by non-Indians.

b. *Constitutional rights of American Indians and the gap in Sixth Amendment right to counsel*

Through this complex jurisdictional web, Congress's exercise of plenary authority in Indian affairs subjects Indian members to three different sovereigns' laws: federal, state, and tribal governments.[206] An overlap also exists when it comes to laws protecting individual Indian rights. Since 1924, the U.S. government has recognized Indians as American citizens who enjoy the same constitutional guarantees as any other U.S. citizen.[207] At the same time, the Supreme Court has held since 1896 that the Constitution does not apply to tribal nations.[208] This means that the Constitution does not obligate tribal governments to apply any Bill of Rights protections to their tribal members.[209] While the Fourteenth Amendment has selectively incorporated the Bill of Rights against the states,[210] the

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amended the Indian Civil Rights Act to include more defendants' rights). This grant of jurisdiction was highly controversial, impeding renewal of the Violence Against Women Act for fear that tribes were incapable of granting fair trials to non-Indians. *See* Timothy Egan, *Science and Sensibility*, N.Y. TIMES (Feb. 28, 2013, 9:00 PM), *available at* http://opinionator.blogs.nytimes.com/2013/02/28/science-and-sensibility (highlighting the antiquated view of Senator Charles Grassley, among other Republican Representatives).

204. United States v. Wheeler, 435 U.S. 313, 323 (1978).

205. United States v. Lara, 541 U.S. 193, 202 (2004).

206. *See supra* Part I.B.1 (discussing the interplay of federal, state, and tribal laws).

207. *See* The Indian Citizenship Act of 1924, Pub. L. No. 68-176, 43 Stat. 253, (granting Indians American citizenship while maintaining their tribal property rights) (codified as amended at 8 U.S.C. § 1401(b)).

208. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (ruling that the Fifth Amendment does not apply to the Cherokee Nation because the powers of the Cherokee government existed prior to the formation of the Constitution, and the "sole object" of the Fifth Amendment is to restrain the powers of the federal government); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (reaffirming the notion that constitutional provisions do not apply to tribal nations).

209. *See generally* Vincent C. Milani, Note, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1284–85 (1994) (debating whether Congress should impose the right to counsel on tribal governments).

210. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 499–

process of incorporation did not proceed in the same way for tribal nations.[211] It is for this reason that Indians, as U.S. citizens, enjoy the Sixth Amendment right to counsel in federal and state courts, but not in tribal courts.

Congress passed the Indian Civil Rights Act[212] in 1968 as a response to this civil rights loophole, but the law did not solve the right-to-counsel gap. Beginning in 1961, reports of civil rights abuses committed by tribal governments against their members triggered hearings by the Senate Subcommittee on Constitutional Rights.[213] Inadequacy of tribal courts was one theme of the hearings, with concern for "uneducated" judges who were not legally trained.[214] The Subcommittee was also alarmed at what it perceived as lack of independence between branches of tribal governments.[215] Representatives testified to concerns about tribal councils appointing judges, and also in some cases appeals from court decisions to the council itself.[216] As a result, Congress decided to limit tribal courts' sentencing authority to $500 and/or six months in jail.[217] More generally, Congress felt the need to prohibit "action by a tribal government that would be unconstitutional if undertaken by the Federal, State, or local governments."[218]

The goal of the ICRA was to create parity between the civil rights of Indians and non-Indian U.S. citizens.[219] The law extended some, but not all, of the Bill of Rights obligations to tribal governments.[220] Both

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505 (3d ed. 2006) (detailing the cases through which the Supreme Court concluded that certain Bill of Rights provisions became enforceable against the states through the Fourteenth Amendment's Due Process Clause).

211. *See* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1706–07 (2012) (comparing the reach of the Fourteenth Amendment to states with its effect on tribal governments). Because the sovereignty of the Indian tribes existed before the formation of the United States Constitution, the Fourteenth Amendment did not extend the Bill of Rights to the tribes. *Id.*

212. Pub. L. No. 90-284, tits. II-VII, 82 Stat. 73, 73–81 (1968) (codified as amended in scattered sections of 25 U.S.C.).

213. *See* Riley, *supra* note 211, at 1705. The Committee also received "disturbing" reports of civil rights violations by state and federal governments. *Id.*

214. Elizabeth Ann Kronk, *Tightening the Perceived "Loophole": Reexamining ICRA's Limitation on Tribal Court Punishment Authority*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 211, 223–25 (Kristen A. Carpenter et al. eds., 2012).

215. *See id.* at 219–21 (presenting congressional testimony on the intermingling of tribal legislative, executive, and judiciary branches).

216. *See id.* at 220 (quoting Representative Berry on the perceived arbitrary nature of tribal councils' powers).

217. *See id.* at 217–19 (positing a second theory that Congress likely also thought it was codifying, rather than limiting, tribal governments' existing sentencing authority).

218. Riley, *supra* note 211, at 1707.

219. *Id.*

220. *See id.* at 1707–08 (explaining the absence of a right to grand jury indictment, jury trial, and counsel).

tribal leaders and government officials expressed concerns about the inapplicability of select rights.[221] For example, an equivalent of the Establishment Clause was omitted out of respect for theocratic governance.[222] Out of concern for lack of resources, the ICRA did not include a parallel Sixth Amendment right to counsel for indigent defendants.[223] It is unclear whether tribes themselves were concerned about their inability to provide attorneys in criminal proceedings, or if the Bureau of Indian Affairs advocated against this inclusion, fearful that the expense would fall to the Bureau.[224] Nevertheless, the ICRA required that a defendant be afforded the right to an attorney "at his own expense."[225] Where a defendant could not afford counsel, the ICRA did not compel it.[226] Since 1968, tribal courts' sentencing authority has been raised to $5000 in fines and/or one year of imprisonment,[227] but the right to counsel was not amended until recently.

In 2010, Congress passed what amounts to a partial Sixth Amendment right to counsel for Indians. Other than a 1990 amendment to the ICRA, the Tribal Law and Order Act of 2010[228] ("TLOA") is the first major piece of legislation to address law enforcement in Indian country since the 1968 ICRA. The law acknowledges an epidemic of domestic and sexual violence against American Indian women and seeks to empower tribal governments to provide better public safety.[229] A major change is that the statute now allows tribal courts to prosecute felonies.[230] It increases tribal courts' sentencing authority to $15,000 and three years of imprisonment.[231]

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221. *See id.* at 1707 (noting Congress's attention to differences between Indian and Anglo governments).

222. *See id.* (suggesting tribal elders from the southwestern Pueblos were especially influential in omitting a parallel Establishment Clause).

223. *See id.* at 1707–08 (noting funding concerns related to the rights to grand jury, jury trial, and counsel).

224. *Compare id.* at 1707 (discussing only tribal governments' concerns about funding defense counsel), *with* Robert T. Anderson, *Criminal Jurisdiction, Tribal Courts and Public Defenders* 13 KAN. J.L. & PUB. POL'Y, no. 1, 2003-2004, at 139, 144–45 (stating that omission of a right to counsel was motivated by federal government concerns that it would have to eventually fund tribal public defenders).

225. 25 U.S.C. § 1302(6) (2012).

226. *Id.*

227. *See* Indian Alcohol and Substance Abuse Prevention Act of 1986, Pub. L. No. 99-570, tit. IV.C, § 4217, 100 Stat. 3207-137, 3207-146 (amending 25 U.S.C. § 1302(7)) (revising the statute to provide for imprisonment of no greater than "a term of one year and a fine of $5,000, or both").

228. Pub. L. No. 111-211, 124 Stat. 2261 (codified in scattered sections of 21 U.S.C., 25 U.S.C., and 28 U.S.C. (2012)).

229. *See id.* § 202, 124 Stat. 2262, *reprinted in* 25 U.S.C. 2801 note (stating the congressional findings).

230. 25 U.S.C. § 1302(b)).

231. *Id.*

In order to take advantage of this provision, tribal courts must also provide certain procedural safeguards, including "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution."[232] The statute furthermore obligates tribal governments "at the expense of the tribal government, [to] 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."[233] Although much of the language is unclear, defense counsel under this provision must be a licensed attorney, not a lay advocate as is the practice in many tribes.[234]

TLOA's partial Sixth Amendment right applies in prosecution of felonies and repeat offender crimes.[235] Tribal courts may continue to prosecute misdemeanors, and sentence one-year jail terms, without providing defense counsel.[236] Just how successful this partial Sixth Amendment right will prove remains to be seen. The U.S. Government Accountability Office reported in May 2012 that approximately 36% of federally recognized Indian tribes plan to take advantage of the new guidelines.[237] They have not done so thus far, citing funding concerns.[238] Administrative considerations have also been a barrier, such as revising internal procedural codes to comply with TLOA's various provisions.[239] On August 28, 2012, the Hopi tribe adopted a new criminal code, becoming the first tribe in a position to implement TLOA's increased sentencing authority.[240]

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232. *Id.* § 1302(c)(1).
233. *Id.* § 1302(c)(2).
234. *See* Patton, *supra* note 185, at 786 (characterizing the majority of defense work in Indian country as provided by Indian Legal Services or lay advocates).
235. 25 U.S.C. § 1302(b).
236. *Id.* § 1302.
237. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-658R TRIBAL LAW AND ORDER ACT 3 (2012), *available at* http://www.gao.gov/assets/600/591213.pdf.
238. *Id.* at 8 (presenting data that 96% of tribes most frequently identified limited funding as a challenge to implementing TLOA's increased sentencing authority).
239. *Id.* (indicating that 37% of tribes reported needing to revise their internal codes to comply with TLOA).
240. *See* Anne Minard, *A Leader Emerges: Hopi Tribe Adopts New Criminal Code According to Tribal Law and Order Act Standards*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 3, 2012), http://indiancountrytodaymedianetwork.com/2012/09/03/a-leader-emerges-hopi-tribe-adopts-new-criminal-code-according-to-tribal-law-and-order-act-standards-132160 (detailing the Hopi Tribal Council's decision and vote).

2. Uncounseled tribal court convictions as predicate offenses under recidivist statutes

United States v. Cavanaugh[241] illustrates the difficulties encountered when prior convictions obtained in tribal court are used as predicate offenses under recidivist statutes in federal court. Cavanaugh was a member of the Spirit Lake Sioux Tribe and indicted under 18 U.S.C. § 117.[242] At least two prior convictions for assault are a precondition of this federal crime,[243] and Cavanaugh had been previously convicted of three misdemeanor domestic abuse offenses in 2005 and 2008, for which he served prison sentences.[244] In those cases, he was advised of his right to counsel but not represented by a lawyer.[245] Despite noting that "Supreme Court authority in this area is unclear,"[246] the Eighth Circuit ultimately held that these prior convictions "may be used to prove the elements of § 117."[247]

The Eighth Circuit analyzed Cavanaugh's challenge to the use of his prior conviction through two frameworks. First, the court engaged in a lengthy discussion of the Sixth Amendment right to counsel.[248] It particularly emphasized that *Nichols* permitted an uncounseled misdemeanor conviction to enhance a defendant's punishment.[249] The *Nichols* court adopted the view that recidivism statutes punish only the present offense, and that any imprisonment for the present offense cannot be traced back to any prior convictions.[250] Therefore, according to the court, because the additional criminal history point assigned to the defendant in *Nichols* did not result in any imprisonment attributable to the prior misdemeanor, no Sixth Amendment violation had occurred.[251] By refusing to follow the chain of causation from the prior misdemeanor

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241. 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).
242. *Id.* at 594. The district court dismissed Cavanaugh's indictment, which the Eighth Circuit reversed. *Id.* at 593, 594. Cavanaugh eventually pled guilty. *Fort Totten Man Sentenced*, *supra* note 3.
243. 18 U.S.C. § 117 (2012) (applying to "[a]ny person who commits a domestic assault within the . . . territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian trial court proceedings").
244. *Cavanaugh*, 643 F.3d at 593–94.
245. *Id.* at 594.
246. *Id.* at 605.
247. *Id.* at 594.
248. *See id.* at 597–603 (describing Supreme Court precedent as inconclusive on the question of whether a valid tribal court conviction could be used to prove the elements of a § 117 violation).
249. *Id.* at 599–600.
250. *Id.*
251. *Id.* at 599.

convictions, no jail sentence occurred to violate *Scott*'s holding that an uncounseled misdemeanor may not lead to imprisonment.[252]

Using this reasoning, the court in *Cavanaugh* extrapolated from *Nichols* the broad proposition that a prior uncounseled conviction may be used as a determinative factor in sentencing as long as no constitutional violation has occurred. It explained, "[p]ost-*Nichols* . . . it is arguable that the fact of an actual constitutional violation is, perhaps, not only an important factor for determining when a prior conviction may be used for sentence enhancement purposes, but a required or controlling factor."[253] In arriving at this test, the court also distinguished *Nichols* from *Lewis*, describing *Lewis* as "another line of cases that address the use of prior convictions . . . to establish the actual elements of subsequent offenses."[254] The court did not elaborate on the difference between sentencing factors and elements but noted "where the subsequent use [of a conviction] is to prove the actual elements of a criminal offense, *Nichols* is of questionable applicability, given that Court's emphasis on the differences between sentencing and guilt determinations."[255]

After raising the above distinction, *Cavanaugh* shifted its analysis from Sixth Amendment law to federal Indian law. Armed with its generalization from *Nichols*—that a constitutionally-obtained prior conviction may enhance a sentence—it found that Cavanaugh qualified for prosecution under 18 U.S.C. § 117.[256] Although Cavanaugh's prior convictions were uncounseled, they occurred in tribal court, where the Constitution does not confer the right to court-appointed counsel.[257] Just as Nichols' imprisonment did not violate the Sixth Amendment, neither did Cavanaugh's prior convictions.[258] Due to the nature of federal Indian law, Cavanaugh's prior convictions were actually "outside the bounds of the United States Constitution."[259]

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252. *See supra* notes 58–62 and accompanying text (discussing the holding of *Scott v. Illinois*, 440 U.S. 367, 374 (1979), in the context of the development of the Sixth Amendment right to counsel).

253. *Cavanaugh*, 643 F.3d at 601.

254. *Id.* at 602.

255. *Id.* at 601.

256. *See id.* at 604–05 (noting that a court cannot necessarily preclude a conviction simply because it would have been invalid had it occurred in a state or federal court).

257. *Id.* at 601, 606.

258. *See id.* at 603–04 (according "substantial weight to the fact that Cavanaugh's" convictions did not violate the Constitution). *But see id.* at 603 (indicating that *Nichols* might not be dispositive of this case, because it did not involve a guilt phase determination).

259. *Id.* at 603 n.7. The court was also swayed by "Cavanaugh's counsel stat[ing] clearly at oral argument that Cavanaugh alleges no irregularities with his tribal-court

To further support this point, the majority referenced a state court decision, *State v. Spotted Eagle*.[260] The defendant in *Spotted Eagle* had been convicted and jailed four times for driving under the influence of alcohol.[261] Under a state recidivist statute, his present offense, a fifth DUI, was eligible to be prosecuted as a felony.[262] The court emphasized that principles of comity obligated it to recognize the validity of Spotted Eagle's previous convictions, which were properly obtained under Blackfeet law.[263] It declared that "[t]o 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."[264] According to this reasoning, using the prior convictions to increase Spotted Eagle's offense from a misdemeanor to a felony exhibited "deference to tribal sovereignty."[265]

The *Spotted Eagle* dissent viewed these sovereignty considerations from the opposite point of view. Judge Leaphart argued, "[i]n true oxymoronic fashion, our Court has said to Mr. Spotted Eagle, 'Out of deference to your Tribe, we accord you fewer protections than guaranteed to individual citizens by the Montana Constitution.'"[266] Despite Judge Leaphart's argument, his perspective remains the minority view. In another federal appellate decision, considerations of sovereignty even led to treatment of tribal convictions as the same as those obtained from foreign jurisdictions. In *United States v. Shavanaux*,[267] the U.S. Court of Appeals for the Tenth Circuit described the parallels between tribal and foreign nations: both are sovereigns to which the Bill of Rights does not apply.[268] Instead of relying on the Constitution for its analysis, the court instead referenced the *Restatement (Third) of Foreign Relations*.[269] It did not

proceedings other than the denial of counsel (which was not a violation of any tribal or federal law)." *Id.*

260. 71 P.3d 1239 (Mont. 2003).

261. *Id.* at 1241.

262. *See id.* ("[A] defendant who is convicted of a fourth or subsequent DUI is guilty of a felony rather than a misdemeanor." (citing MONT. CODE ANN. § 61-8-731 (2001))).

263. *Id.* at 1245.

264. *Id.*

265. *Id.* at 1246.

266. *Id.* at 1246 (Leaphart, J., dissenting); *see also id.* at 1246–47 (arguing that using an uncounseled DUI conviction to increase a later DUI to felony status violates the Montana Constitution).

267. 647 F.3d 993 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

268. *Id.* at 998.

269. *See id.* at 999 (insisting that "in the due process context, federal courts have analogized Indian tribes to foreign states in considering whether to recognize the civil judgments of tribal courts," which are determined under "principles of comity derived from foreign relations law").

consider the previous tribal court conviction to be a foreign judgment obtained by procedures incompatible with due process of law.[270] Thus, Shavanaux's conviction was not improperly used in federal court to support his subsequent conviction as a repeat offender.[271]

Tribal sovereignty has been invoked both for and against recognizing tribal convictions in federal court. Perhaps partially to avoid this debate, the Ninth Circuit reframed this issue not as one of sovereignty, but as one of constitutional requirements in federal criminal proceedings.[272] In its decision in *United States v. Ant*,[273] the Ninth Circuit became the only federal appellate court that has refused to use a prior conviction, obtained without assistance of counsel in tribal court, to support a subsequent conviction in federal court.[274] While investigating a homicide, the Bureau of Indian affairs and tribal police went to Ant's house and obtained his confession.[275] After entering a guilty plea in tribal court, Ant later faced a federal charge of manslaughter.[276] Because Ant was not represented by counsel when he entered the plea, the Ninth Circuit reversed the district court's refusal to suppress the plea.[277]

Against a dissent that emphasized the "dignity shown to foreign courts,"[278] the majority in *Ant* would not use the plea to support the defendant's guilt in the manslaughter proceedings. Simply put, the guilty plea "would have been in violation of the Sixth Amendment had it been made in federal court."[279] The court recognized that the ICRA did not require the court to provide counsel for Ant.[280] Still, it preferred to treat the case as if the Sixth Amendment applied.[281] The court did not view its decision as undermining principles of comity.[282] It reasoned that declining to consider the tribal court conviction in federal court did not invalidate the judgment for tribal nations'

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270. *Id.* at 1000.
271. *Id.*
272. *See* United States v. Ant, 882 F.2d 1389, 1396 (9th Cir. 1989) (evaluating the tribal court proceedings' conformity to the Constitution rather than the tribal conviction).
273. 882 F.2d 1389.
274. *Id.* at 1396.
275. *Id.* at 1390.
276. *Id.* at 1390–91.
277. *Id.* at 1396.
278. *Id.* at 1396 (O'Scannlain, J., dissenting).
279. *Id.* (majority opinion).
280. *See id.* at 1392, 1396 (accepting "the district court's finding as to the validity of the guilty plea under tribal law and the ICRA").
281. *Id.* at 1396.
282. *Id.*

purposes.[283] The court ultimately concluded, "we have simply evaluated whether that plea meets the requirements of the United States Constitution for use in a federal prosecution in federal court."[284]

II. FEDERAL COURTS SHOULD NOT USE UNCOUNSELED TRIBAL COURT CONVICTIONS TO SUPPORT PROSECUTION OF RECIDIVIST CRIMES

Prior tribal court convictions, when used in federal criminal proceedings, should be treated as if the Sixth Amendment applies. Where an indigent Indian defendant is convicted in tribal court in the absence of counsel, this conviction should not serve as a predicate offense in federal court. Using a prior conviction in this way ignores concerns about its reliability. To bypass such concerns, some courts refer to prior convictions as sentencing factors instead of elements of crimes—a rationale apparently justifying a lower standard of constitutional protection.[285] Alternatively, they eschew discussion of criminal law in favor of emphasizing that Indian nations are sovereign and not constrained by the Bill of Rights.[286] However, reliability concerns underlie any analysis of uncounseled convictions used in federal criminal proceedings, whether approached through Sixth Amendment or federal Indian law jurisprudence.

A. United States v. Cavanaugh *Ignores Concerns About the Reliability of Prior Convictions Obtained Without Assistance of Counsel*

The Sixth Amendment right to counsel has always rested on concerns of reliability. The idea of reliability stems from the circumstances of the Supreme Court's first decision involving the right to counsel, which cited the Fourteenth Amendment, as opposed to the Sixth Amendment.[287] The Supreme Court has quoted its decision in *Powell* in all of its subsequent major Sixth Amendment

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283. *Id.* (emphasizing that suppression of Ant's tribal court plea would not "disparage tribal proceedings").
284. *Id.*
285. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998) (describing recidivism as a typical sentencing factor).
286. *See, e.g.*, United States v. Shavanaux, 647 F.3d 993, 999 (10th Cir. 2011) (noting that the Bill of Rights does not apply to Indian tribes and instead adopting an analysis under the *Restatement (Third) of Foreign Relations*), *cert. denied* 132 S. Ct. 1742 (2012).
287. *See* Powell v. Alabama, 287 U.S. 45, 60 (1932) (confronting "whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution").

cases.[288] In *Powell*, the Court addressed whether the right to an attorney was of such a fundamental nature that it should be extended to the states under the Due Process Clause.[289] The Court found such assistance crucial,[290] and this language flowed through its opinions regarding the Sixth Amendment right to counsel for the next fifty years.[291]

Cases challenging the treatment of prior convictions under recidivist statutes explicitly refer to reliability concerns.[292] If counsel is necessary to a fair trial and general due process in criminal proceedings, and if counsel is not provided, the conviction is therefore not fairly obtained. It is "unreliable" in the sense that the defendant may have had a valid defense but was unable to articulate it.[293] This unreliability can taint even subsequent offenses, as Justice Marshall discussed in his concurrence in *Baldasar*: "An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense."[294] Until *Nichols* was decided in 1994, courts viewed an enhanced prison sentence based on a prior tainted conviction as causing the defendant to "suffer[] anew" from lack of counsel.[295]

The *Cavanaugh* decision mistakenly shifted its analysis away from reliability concerns. The Eighth Circuit's logic rested on the simple theory that the Supreme Court permits a court to impose an enhanced sentence on the basis of a legally-obtained prior conviction.[296] Thus, if Cavanaugh's prior tribal court conviction was obtained without a constitutional violation, then it properly served as a predicate offense under 18 U.S.C. § 117.[297] However, this rationale ignores the original intent behind the right to counsel.

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288. *See* Nichols v. United States, 511 U.S. 738, 754–55 (1994) (Blackmun, J., dissenting) (quoting *Powell*, 287 U.S. at 69); Scott v. Illinois, 440 U.S. 367, 370–71 (1979) (quoting *Powell*, 287 U.S. at 52); Argersinger v. Hamlin, 407 U.S. 25, 33–34 (1972) (quoting *Powell*, 287 U.S. at 69); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (quoting *Powell*, 287 U.S. at 68–69); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (quoting *Powell*, 287 U.S. at 68–69).

289. *Powell*, 287 U.S. at 68–69.

290. *See supra* notes 35–47 (describing the Court's reasoning in *Powell*).

291. *See supra* note 288.

292. *See* Lewis v. United States, 445 U.S. 55, 67 (1980) (characterizing *Burgett*, *Tucker*, and *Loper* as relying on concerns about the reliability of prior convictions).

293. *See Powell*, 287 U.S. at 69 (contending that without counsel, an innocent person "faces the danger of conviction because he does not know how to establish his innocence").

294. Baldasar v. Illinois, 446 U.S. 222, 227–28 (1980) (per curiam) (Marshall, J., concurring), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

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

296. *But see* United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011) ("In any event, the most we take [away] . . . is that Supreme Court authority in this area is unclear . . . ."), *cert. denied*, 132 S. Ct. 1542 (2012).

297. *Id.*

Cavanaugh's constitutionality argument relies on a mischaracterization of *Nichols*. The *Cavanaugh* court described the *Nichols* majority as having "rejected arguments that formed one of the foundations for *Gideon*—arguments based on concerns about prior convictions' reliability."[298] The *Cavanaugh* court reached this conclusion by determining that the *Nichols* majority did not reference reliability concerns.[299] The Eighth Circuit pointed to the fact that the *Nichols* majority opinion rejected the dissent's reliability rationale and that no other Justices in the majority joined Justice Souter's concurring discussion of reliability.[300] The Eighth Circuit therefore viewed as dispositive the test of whether the prior conviction was constitutionally infirm: "Our approach is, admittedly, categorical in nature rather than firmly rooted in the reliability concerns expressed in *Gideon*."[301]

The Court in *Nichols*, however, did not ignore concerns about the reliability of a defendant's prior conviction. The Court simply allowed prior uncounseled convictions to be used as sentencing factors as long as the uncounseled conviction had not resulted in imprisonment.[302] Reliance on the conviction was a valid concern in *Nichols* but was mitigated by two factors. First, the predicate conviction did not result in any deprivation of liberty.[303] This is the principle underlying *Scott* and *Argersinger*, which characterized imprisonment as different from other punishments, such as monetary fines.[304] Assistance of counsel is fundamentally important in cases involving the "severe" sanction of incarceration.[305] Conversely, reliability could be overlooked where no deprivation of liberty occurred.[306] The Court did not dispense with the reliability concerns articulated in *Scott*, but rather made a policy decision not to impose

298. *Id.* at 600.
299. *Id.*
300. *Id.*
301. *Id.* at 604.
302. Nichols v. United States, 511 U.S. 738, 748–49 (1994).
303. *Id.*
304. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373 (1979) ("[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."); *see also* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter." (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970))).
305. *Id.* at 372.
306. *See Nichols*, 511 U.S. at 748–49 (permitting this outcome as consistent with the Sixth and Fourteenth Amendments).

on states the cost of appointing counsel in cases where no deprivation of liberty resulted.[307]

The *Nichols* Court also found that reliability concerns were mitigated by the fact that the defendant was assigned extra criminal history points at his sentencing hearing.[308] The Court stated that "[r]eliance on such a [prior] conviction is . . . consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt."[309] Sentencing judges have traditionally enjoyed wide discretion to consider many different factors in calculating an appropriate sentence.[310] Courts can also take past criminal behavior into account irrespective of a final conviction.[311] The implication in *Nichols* was that it would not be a significant departure from the traditional sentencing process to allow a sentencing judge to increase a defendant's criminal history score using a prior conviction.[312] In this way, the *Nichols* Court accounted for reliability concerns but once more found them mitigated by relaxed standards in the sentencing context.

Since *Nichols*, the Supreme Court reaffirmed that this relaxed standard is inapplicable when questioning "whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access" to counsel.[313] In *Shelton*, the Court concluded that a suspended prison sentence could lead to a deprivation of liberty if the defendant violated his parole terms.[314] The only intermediate step between the uncounseled conviction and imprisonment was this potential triggering event. In *Nichols*, the intervening event between the defendant's uncounseled conviction and imprisonment was his commission of another offense.[315] While both cases contain parallels, the Court ruled in opposite ways. This inconsistency leads to the question of when a conviction should be treated as enhancing a sentence in the "less exacting" sentencing

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307. *See Scott*, 440 U.S. at 373 (noting that the extension of the right to counsel to all misdemeanor cases—even those that do not result in imprisonment—would impose "necessarily substantial" costs on states).
308. *Nichols*, 511 U.S. at 747.
309. *Id.*
310. *Id.* (citing Wisconsin v. Mitchell, 508 U.S. 476 (1993)).
311. *Id.*
312. *Id.* at 747–48 (observing that the defendant's sentence enhancement did not depend on whether he was actually convicted of the prior DUI offense, but could have been imposed upon showing past criminal "behavior").
313. Alabama v. Shelton, 535 U.S. 654, 665 (2002).
314. *Id.* at 662.
315. *See Nichols*, 511 U.S. at 740–41.

context.[316] That is, what is the difference between a sentencing factor and an element of a crime?

B. A Reliability Analysis Dictates that Prior Convictions Should Be Treated like Elements of Crimes

The *Cavanaugh* court referred interchangeably to prior convictions as sentencing factors and elements. It implied that prior tribal court convictions are sentencing factors, but the opinion is filled with inexact language. For example, the court drew a distinction between cases like *Nichols* and "another line of cases that address the use of prior convictions or prior civil adjudications to establish the actual elements of subsequent offenses."[317] It similarly acknowledged that when a prior conviction is used to "prove the elements of a criminal offense," *Nichols* is not controlling,[318] thereby indicating treatment of sentencing factors in the current case. At the same time, *Cavanaugh* ultimately held that prior tribal court convictions "may be used to prove the *elements* of § 117."[319]

The *Cavanaugh* court's varying use of language is similar to, and likely a result of, the Supreme Court's vacillation on how to describe prior convictions.[320] The Supreme Court originally prohibited judges from using uncounseled convictions as a way "to support guilt *or* enhance punishment."[321] In subsequent cases, such convictions have been treated in a variety of ways: as a factor that "transformed"[322] a misdemeanor into a felony, as a "mere fact"[323] upon which a federal offense is predicated, and as a factor leading to an enhanced punishment in sentencing proceedings.[324] The Court's varying usage reflects its indecision regarding whether a prior conviction is an indispensable element of the present offense, or a factor to be taken into account when imposing a greater sentence on the defendant for repeated illegal conduct.

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316. "Less exacting" than what is required to prove guilt. *Id.* at 747.
317. United States v. Cavanaugh, 643 F.3d 592, 602 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).
318. *Id.* at 595, 601.
319. *Id.* at 594 (emphasis added).
320. *See generally* Andrew J. Fuchs, Note, *The Effect of* Apprendi v. New Jersey *on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1402–13 (2001) (tracing the Supreme Court's historical treatment of sentencing factors and elements).
321. Burgett v. Texas, 389 U.S. 109, 115 (1967) (emphasis added).
322. Baldasar v. Illinois, 446 U.S. 222, 227 (1980) (Marshall, J., concurring) (per curiam), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).
323. Lewis v. United States, 445 U.S. 55, 67 (1980).
324. *Nichols*, 511 U.S. at 746–47.

The decision in *Apprendi* sheds some light on this issue and suggests that Cavanaugh's prior convictions are elements of 18 U.S.C. § 117. In his concurrence, Justice Thomas surveyed cases since the founding of the United States to conclude that in the earliest days, no distinction existed between elements of crimes and sentencing enhancement factors.[325] All of these cases support the idea that crimes simply consist of "any fact to which punishment attaches."[326] Indeed, the idea of sentencing enhancement factors did not exist until 1986.[327] History therefore "establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment."[328] Once the elements are determined, courts need only apply the constitutional right at issue.[329]

The four conditions necessary to commit a crime under 18 U.S.C. § 117 are: (1) a present offense of domestic assault; (2) committed within the maritime and territorial jurisdiction of the United States or Indian country; (3) by someone with at least two final convictions on separate prior occasions in federal, state, or Indian tribal court proceedings; (4) when that prior offense was one of assault, sexual abuse, or a serious violent felony against a spouse or intimate partner.[330] If a crime "includes every fact that is by law a basis for imposing or increasing punishment,"[331] then the prior convictions referenced in § 117 are an integral part of the crime. Although addressing a different aspect of the Sixth Amendment, the concurrence's reasoning in *Apprendi*—that an aggravating fact is an element of a crime—has dual application to the Sixth Amendment right to counsel.[332] Crimes consist of "any fact to which punishment attaches,"[333] and punishment is only achieved under § 117 by the existence of prior convictions.[334]

The *Apprendi* concurrence explicitly supports treatment of prior convictions as elements. This conclusion is also supported as a

325. Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring).
326. *Id.* at 515.
327. *See id.* at 485 (majority opinion) (acknowledging that the term "sentencing factor" was first used in McMillan v. Pennsylvania, 477 U.S. 79 (1986)).
328. *Id.* at 501 (Thomas, J., concurring).
329. *Id; see also supra* notes 109–112 and accompanying text (discussing the different constitutional protections applied to proving elements of crimes, as opposed to sentencing factors).
330. 18 U.S.C. § 117 (2012).
331. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).
332. *Id.* at 501.
333. *Id.* at 515.
334. *But see* United States v. Cheek, 415 F.3d 349, 353 (4th Cir. 2005) (arguing that recidivism involves "the *status* of a defendant as a repeat offender," not the current offenses being tried).

logical extension of the *Apprendi* majority opinion, which is undergirded by concerns of reliability, or the same justification of the right to counsel. Federal appellate courts' treatment of juvenile adjudications is especially illustrative of this concept. In *Tighe*, the Ninth Circuit noted that the *Apprendi* majority required all types of enhancement factors—except for prior convictions—to be proven beyond a reasonable doubt to a jury in the same manner as elements.[335] The rationale for the prior conviction exception "was premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections."[336] Courts are relieved from treating prior convictions as elements, because in theory this proceeding was already "subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions."[337]

Tighe thus declined to use juvenile adjudications to increase the defendant's jail sentence under a federal recidivist statute for the reason that the juvenile court did not provide adequate procedural protections.[338] Other federal appellate courts have arrived at the opposite conclusion, but only after engaging in the same reliability analysis.[339] The Eighth Circuit in particular wrote that use of juvenile adjudications under recidivist statutes turns "on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption."[340] The court noted that juveniles enjoy the right to counsel, a safeguard that sufficiently ensures the reliability requirements of *Apprendi*.[341]

Apprendi and its progeny support the idea that prior convictions should be treated as elements with their attendant constitutional protections. The *Apprendi* majority discussed that if the question of prior convictions under a recidivism statute were at issue, "a logical

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335. United States v. Tighe, 266 F.3d 1187, 1192 (9th Cir. 2001).
336. *Id.* at 1194.
337. *Id.* at 1193 (asserting that this triumvirate includes "fair notice, reasonable doubt, and the right to a jury trial").
338. *Id.* at 1194–95.
339. *See* United States v. Wright, 594 F.3d 259, 263–64 (4th Cir. 2010) (pointing to juveniles' "rights to appropriate notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination [in addition to] proof beyond a reasonable doubt" as sufficient procedural protections in the absence of the right to a jury trial (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 533 (1971) (plurality opinion))); United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007) (finding "no indication" the defendant did not enjoy "appropriate due process in his juvenile adjudication"); United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003) (same).
340. United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002).
341. *Id.*

application of our reasoning today should apply."[342] This logical application means that courts should only rely upon prior convictions complying with principles of due process. For this reason, prior juvenile adjudications are sometimes thought of as guaranteeing sufficient reliability.[343] Tribal court convictions, which are also obtained through procedures different from adult criminal proceedings in state and federal court, should be considered the same way. In fact, their special status as independently sovereign nations further supports application of a reliability analysis to these convictions.

C. Inherent Tribal Sovereignty Further Supports Application of a Reliability Analysis to the Use of Uncounseled Tribal Court Convictions in Federal Court

Courts employ different language when writing about the treatment of prior convictions obtained in tribal court. Some refer to the "use" of convictions to enhance sentences,[344] meaning to impose longer jail terms for indigent Indian defendants. Alternatively, other courts refer to the "recogni[tion]" of tribal court judgments.[345] As one state court has written, concerns of comity require "giv[ing] full effect to the valid judgments of a foreign jurisdiction according to that sovereign's laws."[346] These courts discourage applying the standard of the court in which recognition is sought, which was the Ninth Circuit's approach.[347] Thus, the question of whether to treat tribal court convictions as predicate offenses for repeat offender crimes necessarily involves discussions of sovereignty.

In cases like *Cavanaugh*, courts have upheld the use of uncounseled tribal court convictions by emphasizing that the Bill of Rights does not apply to sovereign tribal nations.[348] The Tenth Circuit even likened tribal court convictions to judgments from foreign

342. Apprendi v. New Jersey, 530 U.S. 466, 489 (2000).
343. *See supra* notes 122, 124 and accompanying text.
344. *See* United States v. Cavanaugh, 643 F.3d 592, 593 (8th Cir. 2011) (presenting the issue of the case as whether the Constitution precludes use of tribal court convictions under a recidivist statute), *cert. denied*, 132 S. Ct. 1542 (2012).
345. *See* State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003) (arguing that use of tribal convictions as predicate offenses equates to recognition of the validity of another sovereign's judgment).
346. United States v. Shavanaux, 647 F.3d 993, 999 (10th Cir. 2011) (quoting *Spotted Eagle*, 71 P.3d at 1245).
347. *Id.*
348. *See Cavanaugh*, 643 F.3d at 595 (emphasizing that Indian tribes, "as separate, quasi-sovereign bodies," are not restricted by the Constitution in the same way federal and state governments are); *see also supra* notes 260–271 and accompanying text (discussing cases in which courts emphasized tribal sovereignty concerns).

countries.[349] By this logic, if the Sixth Amendment and its reliability concerns are not applicable, then tribal court convictions obtained without the assistance of counsel cannot violate the Sixth Amendment. The more that federal and state courts emphasize that the Constitution does not apply to tribal courts, the more justified they appear in ignoring concerns about the reliability of convictions obtained from tribal courts.

Emphasizing the "otherness" of tribal nations actually supports the opposite conclusion; Indian nations' sovereignty may lead courts away from recognizing the validity of convictions obtained in non-American courts. When considering foreign convictions as predicate offenses under recidivist statutes, state and federal district courts have used a "fundamental fairness" test.[350] Though the standard is somewhat inexact, courts generally look to the procedures employed by foreign jurisdictions.[351] If these procedures meet "American standards of fundamental fairness," the conviction is considered valid as a predicate offense.[352] The Tenth Circuit has even referenced the *Restatement (Third) of Foreign Relations* when considering treatment of prior convictions from tribal courts in particular.[353] The *Restatement* lists two grounds for refusing to recognize the judgment of a foreign court, one of which includes a fairness concern that "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law."[354]

Regardless of the label, all of these tests evaluate the due process afforded in the earlier proceeding. Perhaps due to inexact standards,

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349. *Shavanaux*, 647 F.3d at 998–99.

350. *See* United States v. Moskovits, 784 F. Supp. 183, 185 (E.D. Pa. 1991) (invalidating a conviction from Mexico as a predicate offense under a drug possession statute).

351. *See* Martha Kimes, Note, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503, 514–18 (1997) (analyzing the procedural unfairness of using foreign convictions obtained in violation of U.S. constitutional guarantees).

352. *See* State v. Williams, 663 A.2d 1378, 1387 (N.J. Super. Ct. Law Div. 1995) (referencing the fundamental fairness test in *Moskovits* when evaluating the fairness of a prior Canadian conviction (citing *Moskovits*, 784 F. Supp. at 191–92)).

353. *See Shavanaux*, 647 F.3d at 999 (stating that the Ninth and Tenth Circuits have used the *Restatement (Third) of Foreign Relations* to determine whether to recognize tribal judgments under principles of comity (citing Burrell v. Armijo, 456 F.3d 1159, 1167 (10th Cir. 2006); MacArther v. San Juan County, 309 F.3d 1216, 1225 (10th Cir. 2002); Wilson v. Marchington, 127 F.3d 805, 810–11 (9th Cir. 1997))).

354. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(1)(a) (1987). The second ground for refusing to recognize the judgment of a foreign court is when "the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421." *Id.* § 482(1)(b).

this body of law has resulted in different outcomes. Failure to provide a jury trial has not been found fundamentally unfair, with use of the foreign conviction permissible in federal court.[355] Courts have decided both ways with regard to uncounseled convictions. A valid waiver of counsel in the foreign jurisdiction has satisfied due process concerns.[356] On the other hand, a court has invalidated a foreign conviction where no option of assistance of counsel was given to the defendant.[357]

Application of a fundamental fairness or due process test to Indian nations might mean some tribal court convictions could not be used in federal court. This approach is complicated in two respects but shows how treating tribal convictions as foreign judgments once more raises Sixth Amendment reliability concerns. First, tribal justice systems vary.[358] Tribal courts are only one form of dispute resolution, operating differently across tribes.[359] Some tribes rely on courts administered by the U.S. Department of the Interior, and others join resources to create intertribal courts for shared use.[360] There are 566 federally recognized tribes in the United States,[361] and it is unclear how many tribal courts exist.[362] A 2005 Bureau of Justice Statistics report documented 175 tribes operating courts on their reservations, forty-six of which have voluntarily established public defender

355. *See, e.g.*, United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir. 1977) (per curiam) ("When one is convicted in this country in violation of a federal constitutional right to a jury trial, vindication of the constitutional right may warrant exclusion of evidence of the conviction. But there is no such justification for excluding a conviction obtained without a jury in a foreign country.").

356. *See Williams*, 663 A.2d at 1390 (noting that the defendant had been represented during three-quarters of his trial before voluntarily dismissing counsel).

357. *See* United States v. Moskovits, 784 F. Supp. 183, 191 (E.D. Pa. 1991) ("The requirement which the Supreme Court of our country has found to be a central dimension of American criminal procedure is the presence of counsel at all significant stages of the criminal proceeding.").

358. *See* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002 19–20 (2005), *available at* http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf (discussing the diversity of tribal justice systems in Indian Country).

359. *See id.* at 19 (describing indigenous forums, also known as council of elders or peacemaking circles, as another type of dispute resolution mechanism).

360. *See id.* at 20 (describing courts administered by the U.S. Department of Interior for minor offenses, and inter-tribal court systems where economically and administratively feasible).

361. *Frequently Asked Questions*, U.S. BUREAU OF INDIAN AFF., http://www.bia.gov/FAQs/index.htm (last updated Aug. 2, 2013).

362. *See* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts and the Future *Revisited*, 84 U. COLO. L. REV. 59, 60, 71 (2013) (estimating 300 tribal courts currently in existence but admitting that nobody knows the exact number).

services.[363] If the right to counsel is a concern when recognizing foreign convictions in federal court, judging tribal court convictions according to the same fairness test would invalidate a significant number of them.[364]

The comparison between foreign nations and tribal nations fails in one significant respect: whereas Indian nations are sovereign, the federal government retains the power to limit the reach of their jurisdiction.[365] Congress furthermore exercises control over tribal governments through the ICRA, which obligates tribal courts to afford certain rights to defendants during criminal proceedings.[366] One federal appellate court has held that as long as a tribal court conviction does not violate the ICRA, it automatically complies with due process protections.[367] Another scholar has argued that because of the ICRA, due process protections are "virtually identical" in tribal and state courts.[368] From this perspective, treating tribal court convictions different from state court convictions—like foreign convictions, for example—is tantamount to treating them as less trustworthy than state court convictions.[369]

Other scholars compare not only procedure, but also values, when examining just what guarantees fundamental fairness in tribal courts.[370] According to this view, equating tribal court convictions with state court convictions for the purpose of incorporating them into a Western sentencing scheme does not honor tribal sovereignty.[371] Because the tribal court has already adjudicated the

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363. *See* PERRY, *supra* note 358, at 20, 37–42 (listing the number of tribes providing public defender services in each state).

364. *See, e.g.*, United States v. Moskovits, 784 F. Supp. 183, 191 (E.D. Pa. 1991) (refusing to recognize a Mexican conviction obtained without counsel for sentencing enhancement purposes).

365. *See* United States v. Lara, 541 U.S. 193, 202 (2004) (declaring that Congress controls the "metes and bounds of tribal sovereignty").

366. *See* 25 U.S.C. § 1302 (2012) (obligating tribal nations to provide U.S. constitutional protections such as, *inter alia*, prohibiting a defendant from being compelled to be a witness in his or her own trial); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 424–25 (2004) (listing constitutional protections incorporated into the Indian Civil Rights Act from the Fourth, Fifth, and Eighth Amendments).

367. *See* United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011) ("We hold that tribal convictions obtained in compliance with ICRA are necessarily compatible with due process of law."), *cert. denied*, 132 S. Ct. 1742 (2012).

368. *See* Washburn, *supra* note 366, at 426 (insisting that some tribal courts are "replicas" of state courts).

369. *See id.* at 428 (asserting that tribal courts are arguably more trustworthy than, for example, South Dakota state trial courts).

370. *See id.* at 421 (analogizing concerns about the diversity of processes and values in foreign courts to tribal courts).

371. *See* Creel, *supra* note 187, at 84 (contending that treatment of tribal court convictions like state court convictions is "based on western notions of justice").

dispute according to its own customs and laws, using such convictions to enhance federal sentences only promotes federal power.[372] This tension created by federal law superseding tribal authority can also be seen by some tribes rejecting exclusively Western notions of fundamental fairness.[373] Shortly after passage of the ICRA, several tribes incorporated relevant American case law in their opinions on claims under the new legislation.[374] Gradually, tribes like the Navajo Nation have moved away from the ICRA as a source of fundamental fairness in Indian law, instead finding due process foundations in their traditional customs and values.[375] According to this trend, tribal court compliance with the ICRA only highlights the quasi-sovereign status of Indian nations, not their inherent sovereignty as nations with their own values predating "American standards of fundamental fairness."[376]

Emphasizing the sovereign status of tribal nations does not necessarily lead to the conclusion that tribal court convictions should serve as predicate offenses for federal recidivist crimes. If tribal nations are viewed as sovereign and the Bill of Rights inapplicable to their court proceedings, then tribal court judgments are more akin to judgments of foreign courts. Therefore, a fairness or due process test is more appropriate when considering how to treat such convictions. It remains unclear whether tribal court convictions, with their own procedures and values, might withstand this test. Nevertheless, both Sixth Amendment jurisprudence and that on the recognition of foreign judgments support application of a reliability analysis.

D. The Tribal Law and Order Act's Partial Sixth Amendment Right Does Not Fill the Gap in Indigent Indian Defendants' Right to Counsel

The Eighth Circuit acknowledged that Cavanaugh's prior tribal court convictions occurred before passage of the Tribal Law and Order Act, which now provides for a partial Sixth Amendment right

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372. *See id.* at 85 (characterizing the relationship between the federal government and tribal nations as a "history of denigration of tribal sentencing authority").

373. *See id.* (tracing disregard for tribal sentencing authority back to *Ex parte* Crow Dog, 109 U.S. 556 (1883), which the author describes as an early example of Supreme Court disrespect for tribal court punishments consistent with tribal values).

374. *See* Fletcher, *supra* note 362, at 77–79 (providing excerpts from tribal court opinions that have incorporated federal law to interpret the ICRA).

375. *See id.* at 86–87 (deeming the ICRA "all but irrelevant" in Navajo case law because it merely acted as a "steppingstone" to developing independent notions of fundamental fairness). *See generally* 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) (claiming that the Navajo Nation has "transcend[ed] federal definitions of due process").

376. State v. Williams, 663 A.2d 1378, 1387 (N.J. Super. Ct. Law Div. 1995).

to counsel.[377] While this legislation obligates tribal governments to appoint defense counsel at their own expense in certain situations, the challenge of how to treat uncounseled convictions from tribal courts in federal proceedings cannot simply be legislated away. A close reading of the law shows several obstacles that will prevent TLOA from truly closing the gap in indigent Indian defendants' right to counsel.

TLOA's new sentencing authority allows tribal courts to impose punishments of up to three years of imprisonment and a concurrent maximum fine of $15,000.[378] These sentences are authorized in two situations. First, when a defendant commits an offense comparable to a felony under federal or state law.[379] The increased punishment is also permitted for defendants who have been "previously convicted of the same or a comparable offense by any jurisdiction in the United States."[380] Thus, if an Indian defendant is facing prosecution in tribal court as a repeat offender, he can now face up to a three-year jail term.

In order to take advantage of this increased sentencing authority, TLOA mandates that tribes provide five "rights of defendants."[381] Two of these rights relate to the provision of defense counsel. First, the law requires "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution."[382] The meaning of this provision remains unclear, but the statute could refer to a standard of reasonably effective assistance as described in *Strickland v. Washington*.[383] Further ambiguities also arise in language that ensures assistance of counsel for indigent defendants:

> [T]he Indian tribe shall . . . at 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.[384]

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377. *See* United States v. Cavanaugh, 643 F.3d 592, 596 n.2 (8th Cir. 2011) (noting the requirement under TLOA, 25 U.S.C. § 1302(c)(1) (2012), to appoint counsel when a tribal court imposes a sentence longer than one year), *cert. denied*, 132 S. Ct. 1542 (2012).
378. 25 U.S.C. § 1302(b).
379. *Id.* § 1302(b)(2).
380. *Id.* § 1302(b)(1).
381. *Id.* § 1302(c)(1)–(5).
382. *Id.* § 1302(c)(1).
383. *See* 466 U.S. 668 (1984). To prevail, a challenge to the effectiveness of counsel "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.
384. TLOA, 25 U.S.C. § 1302(c)(2).

The statute specifically refers to assistance of counsel by an attorney.[385] Still, it is unclear what kind of licensing standards might be considered sufficient under this provision. A defense attorney might belong only to a tribal bar, which a federal court could consider an inadequate professional licensing standard.[386]

Three other conditions also accompany TLOA's increased sentencing authority. In addition to providing defense counsel for indigent defendants, tribes must observe certain professional requirements for judges.[387] The presiding judge must be licensed to practice law and have "sufficient legal training to preside over criminal proceedings."[388] Lastly, tribes must make their criminal laws and rules of evidence and procedure "publicly available,"[389] as well as "maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding."[390] Not only does requiring the availability of defense counsel potentially impose a financial burden on tribes, but concerns have also been raised about requiring that judges be lawyers.[391] In the Navajo Nation, for example, only two out of twenty judges possess a law degree and are admitted to the state bar.[392]

These ambiguities are significant for future prosecution of recidivist crimes like § 117. A defendant could be convicted of a felony in tribal court, in which case TLOA requires the provision of defense counsel at the expense of the tribal government.[393] In this situation, TLOA would have achieved what the ICRA never did. However, the inexact language in the statute also opens such convictions to multiple statutory challenges. In fact, tribes have been cautioned to carefully proceed in implementation of TLOA's sentencing authority for this reason. One expert warned that a large number of verdicts may be thrown out if judges or defense counsel seem to have deficient credentials or experience, "essentially ending

385. *Id.*
386. *See* Patton, *supra* note 185, at 786 (speculating that TLOA provides "little guidance" in regard to the licensing standards referenced in the law).
387. TLOA, 25 U.S.C. § 1302(c)(3).
388. *Id.* § 1302(c)(3)(A).
389. *Id.* § 1302(c)(4); *see also* Patton, *supra* note 185, at 789 (warning that adoption of formal rules of procedure and evidence may force members to rely on lawyers with specialized skills in order to navigate the legal system).
390. *Id.* § 1302(c)(5).
391. *See* Patton, *supra* note 185, at 788 (highlighting the probability of recusal in small tribal communities, which would further decrease the pool of available legal-trained judges).
392. *Id.* at 787 (clarifying that these two judges are the chief justice and one district court judge).
393. TLOA, 25 U.S.C. § 1302(c)(2).

the new law."[394] In this way, TLOA may have created its own barriers to achieving criminal convictions with the assistance of defense counsel.

In the alternative, TLOA may have no effect on how uncounseled convictions from tribal courts are treated in subsequent federal proceedings. A defendant can still be prosecuted for a misdemeanor in tribal court without the right to defense counsel.[395] Post-TLOA, defendants like Cavanaugh may still have their uncounseled misdemeanor convictions serve as the basis for new charges in federal court.[396] Furthermore, approximately one-third of federally recognized tribes do not plan to take advantage of TLOA's increased sentencing authority.[397] These tribes simply do not have enough money to meet TLOA's preconditions for implementing the new sentencing guidelines.[398] TLOA's partial right to counsel thus has limited effect if misdemeanor convictions are pursued in place of felony convictions.

Rather than solving the challenges posed by uncounseled tribal court convictions in *Cavanaugh*, TLOA may have done the opposite. The statute actually sanctions use of an uncounseled tribal court conviction to increase punishment in a subsequent criminal proceeding in *tribal court*.[399] Using TLOA as a vehicle, Congress has extended to tribal courts the challenges of prosecuting recidivist crimes where defendants are not represented by defense counsel in earlier proceedings. Put another way, the same legislation that imposes the right to counsel on tribal governments under some circumstances also ignores concerns about the reliability of prior convictions in other cases. Regardless of subjective views on whether tribal justice systems should or do mimic state or federal courts, TLOA shows that congressional manipulation of Indian jurisdiction and individual rights does not necessarily ensure fairness in criminal proceedings.

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394. Carol Berry, *Federal Laws Discriminate; Tribal Justice May Improve*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 18, 2011), http://indiancountrytodaymedia network.com/article/federal-laws-discriminate%3B-tribal-justice-may-improve-18198.

395. *See* TLOA, 25 U.S.C. § 1302(c) (providing protections only for offenses carrying a potential sentence of one year or greater).

396. *See* United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011) (holding that uncounseled tribal court convictions may be used to prove the elements of a repeat offender, domestic violence statute), *cert. denied*, 132 S. Ct. 1542 (2012).

397. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 237, at 3 (surveying tribes on whether they plan to exercise TLOA's sentencing authority).

398. *See id.* at 7–8 (reporting that 96% of tribes most frequently cited lack of funding as the main obstacle to implementing TLOA's increased sentencing authority).

399. *See* TLOA, § 1302(b)(1) (extending increased sentencing authority to tribal court prosecutions of defendants who "ha[ve] been previously convicted of the same or a comparable offense by any jurisdiction in the United States").

CONCLUSION

Gideon's Trumpet, written by a Supreme Court correspondent for the New York Times, served as the basis for a 1980 movie of the same name, starring Henry Fonda as Clarence Gideon and Lane Smith as his defense attorney.[400] On the 30th anniversary of the *Gideon* decision, author Anthony Lewis recounted watching the movie being made.[401] He remembered the filming of Gideon's first trial, where he did not have a defense attorney:

> The prosecutor asked the taxi driver, "Did Mr. Gideon say anything when he got in the cab?" The taxi driver said: "Yes, he said, 'Don't tell anybody you picked me up.'" The prosecutor said, "Thank you very much. That's all." And the judge said, "Mr. Gideon, would you care to cross-examine"? Well, as you know, he had no questions.[402]

The film juxtaposed this first trial with Gideon's second trial, where an attorney represented him. During the filming of the second trial, Lewis watched as the taxi driver once again took the stand and repeated the same story:

> [The defense attorney] said, "Had he ever said that to you before?" And the taxi driver said: "Oh, yes. He said that to me every time I picked him up." "Why?" The taxi driver said: "I think it was some kind of woman trouble." And Lane Smith, making this part up, walked over to the jury with a broad wink and said, "Well, we all know about that." And the director said, "Cut." And I turned to the person next to me and I said, "My God, it really makes a difference to have a lawyer, doesn't it?"[403]

Since the Supreme Court first considered the issue, it has found that counsel plays a crucial role in all phases of criminal proceedings, for all types of offenses. Yet, indigent American Indians sometimes face longer prison sentences in criminal proceedings in federal court based on prior convictions where they did not enjoy the right to counsel. They are the only class of U.S. citizens faced with this dilemma under statutes that punish repeat offenders with increased penalties. This inequity was originally created by an incomplete extension of the Bill of Rights to tribal governments, which still persists today. At its core, though, the problem of different treatment for American Indians in federal court is a misunderstanding of

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400. GIDEON'S TRUMPET (Hallmark Hall of Fame Productions 1980); *see also* Gideon *Conference*, *supra* note 49, at 17 (remarking that at the time he wrote *Gideon's Trumpet*, Anthony Lewis, the author, was "naïve about the promise of equal justice" and assumed that "political system would vindicate the rights established in *Gideon*").

401. Gideon *Conference*, *supra* note 49, at 17 (remarks of Anthony Lewis).

402. *Id.* at 17.

403. *Id.*

criminal law. The existing uncertainty regarding what constitutes a sentencing factor as opposed to an element of a crime has created different standards of constitutional protections depending on which label is chosen. If a conviction is a sentencing factor, it does not require assistance of counsel. If the conviction is an element, assistance is mandated.

In order to avoid these semantics, federal courts should focus on the Supreme Court's original intent underlying the right to counsel. When considering prior convictions in prosecution of repeat offender crimes, courts should look to whether the convictions are sufficiently reliable. The basis for this approach can be found in *Apprendi v. New Jersey* and its progeny, particularly in the way courts have treated juvenile adjudications. A reliability analysis is further supported by Indian nations' inherent sovereignty. As federal courts insist that judgments from tribal courts are the equivalent to those from sovereign nations, this approach provides the strongest basis for invalidating them. Emphasizing Indian tribes as foreign would actually support non-recognition of their judgments out of concern for un-American standards of due process. Ironically, this approach means that viewing tribal courts as foreign jurisdictions is more effective than legislation like the Tribal Law and Order Act in creating parity between the rights of Indians and non-Indians.

Domestic violence by repeat offenders remains a problem of enormous proportions across Indian country. As one victims' rights advocate pointed out, "We have serial rapists on the reservation . . . because they know they can get away with it."[404] The aim of this Comment has not been to minimize the important potential of repeat offender laws to combat this epidemic of violence. Rather, it has sought to explore a unique constitutional challenge presented by years of federal control over tribal nations' criminal jurisdiction. For the same reasons that Anthony Lewis observed twenty years ago, it holds true on *Gideon*'s fiftieth anniversary that a lawyer's assistance is still an essential part of the criminal justice system for all U.S. citizens. For some indigent Indian defendants, it remains to be seen whether the gap in federal laws that denies them the right to counsel is narrowing, or if another fifty years is needed.

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404. Egan, *supra* note 203 (quoting Charon Asetoyer, Native rights health advocate).