NOTE

DISPARATE DEFENSE IN TRIBAL COURTS: THE UNEQUAL RIGHT TO COUNSEL AS A BARRIER TO EXPANSION OF TRIBAL COURT CRIMINAL JURISDICTION

Samuel Macomber†

Introduction 275
I. Context: Criminal Jurisdiction in Indian Country .. 280
A. Past 281
B. Present 283
C. Future 286
II. Problem: Unequal Right to Counsel for Indians and Non-Indians 287
A. Right to Counsel and Due Process 287
B. Equal Protection 288
C. Fairness 292
III. Solutions: Balancing Tribal Autonomy and the Rights of the Accused 295
A. In Favor of the Defendant 295
B. In Favor of Tribal Autonomy 296
C. Compromise: Licensed Legal Technicians 299
Conclusion 302

INTRODUCTION

Michael Bryant, Jr. was a defendant in the Northern Cheyenne Tribal Court.[1] He pled guilty to committing domestic abuse in violation of the Northern Cheyenne Tribal Code and was sentenced to a term of imprisonment. Although he was indigent, Bryant was not appointed counsel.[2] Meanwhile, Frank Jaimez was a defendant in the Pascua Yaqui Tribe of Arizona Tribal Court.[3] A jury found Jaimez guilty of commit-

† J.D., Cornell Law School, 2020. I thank the Cornell Native American Law Students Association for friendship, community, and learning. I am also grateful to the staff of the *Cornell Law Review* for their diligent assistance.

1 United States v. Bryant, 136 S. Ct. 1954, 1963 (2016).

2 *Id.*

3 Pascua Yaqui Tribe v. Jaimez, No. CR-16-236, (Pascua Yaqui Ct. App. 2017); Pascua Yaqui Tribe, *First Non-Indian Jury Trial Conviction in Indian Country Prosecuted at Tucson, Arizona's Pascua Yaqui Tribal Court*, PR Newswire: Ci-

ting domestic violence, and he was sentenced to a term of imprisonment. Jaimez was indigent and was represented by a public defender.[4]

Bryant appeared without counsel while Jaimez received a court-appointed attorney. Why? Because Bryant is Indian, and Jaimez is not.[5] Indians do not have the same right to counsel in tribal court as non-Indians do.[6] Moreover, Bryant was prosecuted in tribal court because tribes have "inherent power" to "exercise criminal jurisdiction over all Indians."[7] But tribal courts do not have general criminal jurisdiction over non-Indians—Jaimez was only prosecuted by the Pascua Yaqui Tribe because U.S. Congress granted tribal courts limited criminal jurisdiction over non-Indians for certain crimes of domestic violence.[8] Thus, both a tribe's authority to prosecute and a defendant's subsequent right to counsel can vary depending on the defendant's Indian status.

This Note argues that modifying the right to counsel for Indians will help expand tribal court criminal jurisdiction over non-Indians. Fixing the discrepancy in representation between Bryant and Jaimez may increase U.S. Congress's faith in tribal courts and thus encourage Congress to extend tribal jurisdiction over more non-Indian offenders. This Note arises from a deeply held belief in both the rights of the accused as presumptively innocent and the rights of tribes as sovereign nations.

SION (May 23, 2017 1:27 PM), https://www.prnewswire.com/news-releases/first-non-indian-jury-trial-conviction-in-indian-country-prosecuted-at-tucson-arizonas-pascua-yaqui-tribal-court-300462521.html [https://perma.cc/YK2C-JRFX].

4 Pascua Yaqui Tribe v. Jaimez, No. CR-16-236, (Pascua Yaqui Ct. App. 2017).

5 This Note "uses the terms 'Native American Indian' and 'Indian' interchangeably to refer to indigenous tribal people who inhabit the present-day United States. While it is true the term 'Indian' was never accurate, it has become a term of art from historical use in Federal Indian law, history, and statutes." Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 318 n.1 (2013).

6 *Compare* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (requiring appointed counsel for indigent criminal defendants in federal and state courts if the defendant faces any term of imprisonment), *with* 25 U.S.C. § 1302(c) (2018) (requiring appointed counsel for indigent Indian criminal defendants in tribal court only if a defendant faces a term of imprisonment that exceeds one year).

7 25 U.S.C. § 1301(2); United States v. Lara, 541 U.S. 193, 210 (2004) (upholding the statute).

8 *See* 25 U.S.C. § 1304(c)(1), (2) ("A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories: (1) Domestic violence and dating violence . . . (2) Violations of protection orders."). The Pascua Yaqui Tribe implemented exacting requirements in order to adopt that limited jurisdiction. *See* 25 U.S.C. § 1304(a)(4).

This Note starts from the premise that tribal court jurisdictional expansion is a good idea, identifies the right to counsel as a barrier to expansion, and proposes a potential solution. The solution is intended to respect tribal sovereignty and provide tribal courts with tools to meet their communities' needs.[9]

Regarding criminal jurisdiction, not all criminal cases can be adjudicated by tribal courts. Tribal courts have inherent criminal jurisdiction over crimes committed by Indians on tribal land.[10] But if the defendant is non-Indian, then tribal courts do not have criminal jurisdiction unless U.S. Congress affirmatively grants it.[11] This means that most crimes committed by non-Indians on tribal land cannot be prosecuted by tribal authorities. Instead, those crimes must be prosecuted by the federal government or the state.[12] This "complex patchwork" of jurisdiction creates an "enforcement gap" where crimes committed on tribal land by non-Indians are drastically underenforced by both state and federal law enforcement agencies.[13] In response, Congress has affirmatively granted criminal jurisdiction over non-Indians to some tribal courts for certain crimes of domestic violence, dating violence, and violations of protection orders.[14] The limited jurisdiction expansion statute is known as "special domestic violence criminal jurisdiction."[15]

Further expansion of tribal court criminal jurisdiction would promote tribal sovereignty, inspire positive tribal reforms, and encourage collaboration between tribes and other

[9] This Note differs from previous scholarship in that it looks toward the future and combines the right to counsel with additional jurisdictional expansion. *Cf.* Creel, *supra* note 5, at 321 (focusing on the right to counsel); Margaret H. Zhang, Comment, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PENN. L. REV. 243, 245 (2015) (focusing on special domestic violence criminal jurisdiction).

[10] *See* 25 U.S.C. § 1301(2); United States v. Lara, 541 U.S. 193, 210 (2004) (upholding the statute).

[11] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (holding that tribes cannot exercise criminal jurisdiction over non-Indians without an express congressional delegation).

[12] United States v. Bryant, 136 S. Ct. 1954, 1960–61 (2016).

[13] *See id.* at 1959–60.

[14] *See supra* note 8.

[15] 25 U.S.C. § 1304(a)(6) ("The term 'special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.").

jurisdictions.[16] Tribal courts are rigorous and fair judicial bodies,[17] and jurisdictional expansion is a positive step toward tribal autonomy.[18] Expanding tribal court criminal jurisdiction requires U.S. Congress to grant tribal courts the power to prosecute non-Indians for a broader array of crimes, beyond domestic violence, dating violence, and violations of protection orders.[19]

But expanding jurisdiction has costs. This Note highlights one particular cost of expanding jurisdiction under special domestic violence criminal jurisdiction: unequal representation for Indian defendants compared to non-Indian defendants. The problem arises from balancing the rights of the tribe as a sovereign nation with the rights of the accused. From a Native perspective, tribes may feel that exercising their sovereignty should include the right to practice their own legal traditions,[20] to determine their own due process protections,[21] and to protect a defendant's individual rights without necessarily mirroring the U.S. Constitution.[22] However, from an Anglo-American

---

16 *See* NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 32–37 (2018) [hereinafter VAWA 2013'S REPORT], http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/32SF-APBV].

17 *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV 285, 287–88, 323–24 (1998) (arguing that tribal courts are not biased in favor of Indian parties, are equally rigorous compared to their state and federal peers, and that "weaknesses stem from lack of funding and not pervasive bias").

18 *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1049–51 (2005); Samuel E. Ennis, Comment, *Reaffirming Indian Trial Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 556–57 (2009); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1573 (2016) (arguing that "expanded criminal jurisdiction and punishment authority have, perhaps paradoxically, enhanced the ability of tribes to develop and enforce policies, laws, and procedures that are consistent with tribal custom and tradition").

19 *See infra* subpart I.C.

20 *See* Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180 (1994).

21 Creel, *supra* note 5, at 321 ("[I]t is simply not acceptable to address the problem by announcing that Indian people deserve the same rights as a person coming before state or federal court. While such a stance might be a viable rallying point to ultimately fight for the right to indigent defense counsel in tribal courts, a sovereign tribe's right to define due process under the tribal internal system must also be acknowledged.").

22 *See* Angela Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 802–03 (2007).

perspective, certain protections such as the right to counsel are considered essential to the administration of justice.[23]

Regarding the right to counsel, an indigent Indian defendant in tribal court does not necessarily have the right to an appointed attorney, unlike in state or federal court.[24] An indigent criminal defendant receives a court appointed attorney in some jurisdictions but not others because the right to counsel is not identical across the three court systems in the United States—federal, state, and tribal. The federal court system requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is a possible outcome.[25] States can expand the right to counsel but cannot violate this federal floor.[26] Tribal courts, however, are not bound by the U.S. Constitution.[27] Instead, federal statutes set minimum requirements for appointment of counsel in tribal courts.[28] The current federal statute provides a right to counsel for Indian defendants in tribal court only if the tribe imposes a sentence of more than one year.[29] A tribe can expand the right to counsel at their discretion.[30] This regime reflects a system of competing interests—the Fifth, Sixth, and Fourteenth Amendment rights of the U.S. Constitution, federalism concerns of the states, and the sovereignty of Native Nations.

Unfortunately, there is a potential conflict between the current tribal court right to counsel and tribal court jurisdictional expansion. Today, two defendants could be in the same tribal court, accused of the same crime, but one defendant could receive appointed counsel while the other does not. The only difference is that the defendant with appointed counsel is non-Indian while the defendant without counsel is Indian. This inequality is a legally sanctioned compromise between the constitutional protections guaranteed to non-Indian defendants and respect for tribal sovereignty. The compromise is achieved

---

23 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

24 *See* 25 U.S.C. § 1302(c) (2018).

25 *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

26 Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 228 (2008).

27 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

28 *See* 25 U.S.C. § 1302(c).

29 *Id.*

30 *Id.*

by not requiring tribal courts to wholly comply with U.S. constitutional conceptions of representation.

The goal of this Note is to encourage Congress to increase tribal court criminal jurisdiction over non-Indians by addressing the conflict between the right to counsel and criminal jurisdiction. If Congress is convinced that tribal courts are fair, just, and will not practice a two-tiered system of representation, then Congress may be more likely to extend tribal court criminal jurisdiction over non-Indians. To do so, this Note argues that all indigent tribal court defendants who face imprisonment should be provided sufficient representation; however, sufficient representation does not necessarily require barred attorneys trained in the Anglo-American legal tradition. Instead, Congress should create and fund a Tribal Licensed Legal Technician program that offers training for tribal defense counsel.

A legal technician program would promote tribal sovereignty by licensing tribal members to advocate for both Indian and non-Indian defendants in their tribal courts.[31] Such a program would simultaneously protect the rights of the accused by providing them with qualified representation.[32] In other words, Tribal Licensed Legal Technicians would allow tribal courts to be fair to all defendants, regardless of their Indian status, without sacrificing tribal sovereignty and without the high cost of mirroring U.S. courts. Providing representation to both Indian and non-Indian defendants in tribal courts would eliminate one argument against the expansion of tribal court criminal jurisdiction over non-Indians.

I
CONTEXT: CRIMINAL JURISDICTION IN INDIAN COUNTRY

Criminal jurisdiction in Indian country is a "complex patchwork of federal, state, and tribal law."[33] For much of U.S. history, tribes exercised criminal jurisdiction only over Indians who committed crimes on tribal lands.[34] But that rule is evolving. Today, some tribes have criminal jurisdiction over non-Indians for certain crimes of domestic violence.[35] In the future,

---

31 *See* Creel, *supra* note 5, at 322 (arguing for extending the right to counsel to all tribal courts while still protecting tribal sovereignty).

32 *Id.* at 334–35.

33 United States v. Bryant, 136 S. Ct. 1954, 1959–60 (2016) (citing Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)).

34 *See infra* subpart I.A.

35 *See infra* subpart I.B.

tribes may have jurisdiction over non-Indians for multiple categories of crimes.[36]

A. Past

Congress has restricted tribal authority over crimes involving non-Indians since the creation of the United States.[37] Initially, tribes were denied general jurisdiction over non-Indians but retained jurisdiction over Indians. Then in 1885 Congress claimed federal jurisdiction over all serious crimes committed on tribal land, even for crimes involving exclusively Indians.[38] The U.S. Supreme Court formalized limitations on tribal court criminal jurisdiction over non-Indians in its 1978 decision, *Oliphant v. Suquamish Indian Tribe*.[39] *Oliphant* held that tribes could not exercise criminal jurisdiction over non-Indians without an express congressional delegation of authority.[40] *Oliphant*'s limitation on tribal court criminal jurisdiction left much of law enforcement in Indian country to federal or state agencies.[41] Ultimately, both federal and state law enforcement have failed.[42]

This failure is particularly acute for crimes of domestic violence. Nearly three out of five Native American women have been assaulted by their spouses or intimate partners.[43] Moreover, at least seventy percent of the violent abuses experienced by Native Americans are committed by non-Indians—a substantially higher rate of interracial violence than experienced by White or Black victims.[44] Senator John McCain, while advocating for legislation to support Native women, said that "compared to all other groups in the United States," Native American women "experience the highest rates of domestic violence."[45]

As the U.S. Supreme Court has noted, "the tide of domestic violence experienced by Native American women" is "difficult to

---

36 *See infra* subpart I.C.

37 Creel, *supra* note 5, at 334–35 (describing the Indian Trade and Intercourse Acts and the General Crimes Act from 1790 to the late 1800s).

38 *Id.* at 335–38 (describing the Major Crimes Act of 1885).

39 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (holding that tribes cannot exercise criminal jurisdiction over non-Indians without an express congressional delegation).

40 *Id.*

41 United States v. Bryant, 136 S. Ct. 1954, 1960–61 (2016).

42 *Id.*

43 *See* S. REP. NO. 112-153, at 7 (2012).

44 *See* LAWRENCE A. GREENFIELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 173386, AMERICAN INDIANS AND CRIME 6 (1999), http://www.bjs.gov/content/pub/pdf/aic.pdf [https://perma.cc/PTD5-Z9DG].

45 151 CONG. REC. 8983, 9061 (2005) (statement of Sen. McCain).

stem."[46] The problem persists because criminal jurisdiction is a "complex patchwork of federal, state, and tribal law."[47] This jurisdictional fragmentation leaves an "enforcement gap" where tribes cannot prosecute non-Indians who commit crimes against tribal members.[48] Although federal and state agencies are tasked with filling that gap, they repeatedly fail to step in.[49] In general, the federal government has systemically underprosecuted domestic violence crimes; federal reports show that prosecutors declined to pursue more than a third of the cases referred to them in Indian country.[50] Similarly, "[s]tates are unable or unwilling to fill the enforcement gap . . . . States have not devoted their limited criminal justice resources to crimes committed in Indian country."[51] This leaves tribes to try to protect their own without the jurisdictional power to do so. In the words of Sadie Young Bird, referencing crime on the Fort Berthold reservation: "Perpetrators think they can't be touched . . . . They're invincible."[52]

In the last thirty years, tribal court power has incrementally increased. *Duro v. Reina* in 1990 represented the nadir of tribal court power when it limited tribal court criminal

---

46 *Bryant*, 136 S. Ct. at 1960.

47 *Id.* at 1959–60 (citing Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)). The impact of jurisdictional complexity extends beyond the legal world, including popular fiction such as *The Round House*, winner of the National Book Award. *See* LOUISE ERDRICH, THE ROUND HOUSE 142, 229 (2013) (using jurisdictional limitations as a central theme).

48 *Bryant*, 136 S. Ct. at 1960.

49 *Id.*

50 In 2017, U.S. Attorney's offices (USAOs) declined to prosecute thirty-seven percent of cases referred to them in Indian country, a figure that remained steady since 2011. The majority of declinations, nearly sixty percent, involved physical assault, sexual assault, sexual exploitation, or failure to register as a sex offender. *See* U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 3–4, 37 (2017), https://www.justice.gov/tribal/page/file/1113091/download?utm_medium=email&utm_source=govdelivery [perma.cc/W7Y6-7TXW]. Between 2005 and 2009, USAOs declined to prosecute fifty percent of the 9,000 Indian country matters resolved by their offices. Seventy-seven percent of the matters were violent crimes. USAOs declined to prosecute violent crimes at a higher rate (fifty-two percent) than nonviolent crimes (forty percent). *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS (2010), http://www.gao.gov/products/GAO-11-167R [https://perma.cc/VL33-KDYF].

51 *Bryant*, 136 S. Ct. at 1960. The statute granting state court jurisdiction on many reservations, known as Public Law 280, is a disaster. *See* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 698 (2006).

52 *See* Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/ [https://perma.cc/NWA7-UFM4].

jurisdiction to enrolled members of the prosecuting tribe.[53] But, only six months later, Congress amended the Indian Civil Rights Act (ICRA), recognizing the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[54] This language overruled the jurisdictional limitation from *Duro*. Next, in 2004, the U.S. Supreme Court upheld the *Duro* fix in *United States v. Lara*, cementing tribal court jurisdiction over nonmember Indians.[55] In 2010, the Tribal Law and Order Act (TLOA) increased tribal court sentencing power from one year punishments to three year punishments.[56] Most recently, in 2013, the Violence Against Women Act (VAWA) amended ICRA to grant jurisdictional powers over nonmembers in certain circumstances, known as special domestic violence criminal jurisdiction (SDVCJ).[57] SDVCJ is the first attempt to remedy *Oliphant*'s jurisdictional hole.

B. Present

Today, tribes have inherent jurisdiction over members, and some tribes exercise congressionally-granted jurisdiction over nonmembers for certain crimes of domestic violence.[58] VAWA's 2013 amendments to ICRA were designed to "bolster[ ] existing efforts to confront the ongoing epidemic of violence on tribal land by . . . recognizing limited concurrent tribal jurisdiction to investigate, prosecute, convict, and sentence non-Indian persons who assault Indian spouses . . . in Indian country."[59] Expansion of tribal court jurisdiction to include perpetrators of

53 *See* Duro v. Reina, 495 U.S. 676, 692–93 (1990).

54 *See* 25 U.S.C. § 1301(2) (2018). *Duro* was decided in May and Congress resolved the issue by November.

55 United States v. Lara, 541 U.S. 193, 210 (2004) (upholding the statute and holding that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians").

56 *See* 25 U.S.C. § 1302(b); *Tribal Law and Order Act*, U.S. DEP'T OF JUSTICE (JAN. 2, 2020), https://www.justice.gov/tribal/tribal-law-and-order-act [https://perma.cc/W52R-KLCB].

57 *See* 25 U.S.C. § 1304.

58 A crime must meet certain criteria to be eligible for Special Domestic Violence Criminal Jurisdiction. *See* 25 U.S.C. §§ 1302–1304. First, the victim must be Indian, and the crime must have occurred in the Indian country of the participating tribe. *See* § 1304(b)(4)(A), (c)(1)–(2). Second, the crime must be one of domestic violence, dating violence, or violation of a protection order. *See* § 1304(c). Third, a non-Indian defendant must have sufficient "ties to the Indian tribe." § 1304(b)(4)(B). Sufficient ties include residing on tribal land, employment in Indian country, or being the spouse or intimate partner of a member of the tribe. *Id.* Fourth, tribes must notify non-Indian defendants of their rights and privileges and make criminal laws publicly available. *See* § 1302(c)(4); § 1304(e)(3).

59 S. REP. NO. 112-153, at 8 (2012).

domestic violence closes a legal loophole which, if left open, "leaves victims tremendously vulnerable and contributes to the epidemic of violence against Native women."[60] By increasing the number of forums where perpetrators can be tried, tribal communities have more opportunities to condemn abusive conduct.[61]

Congress's plenary power to grant or divest attributes of sovereignty includes the power to expand tribal court jurisdiction.[62] But Congress did not extend SDVCJ to all tribal courts. Instead, Congress only granted SDVCJ to tribal courts that adopted the structure of federal courts. For example, one condition of SDVCJ is that tribes appoint appropriately qualified counsel to represent indigent non-Indian criminal defendants.[63] The tribe must "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution."[64] Further, the attorney must be "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."[65] While SDVCJ is laudable, it is only a first step toward comprehensive tribal authority over crimes on tribal land.

Many tribes desire broader criminal jurisdiction.[66] In 2019, over fifty tribes participated in the Intertribal Technical-Assistance Working Group (ITWG), a voluntary working group of tribal representatives who exchange information and advice on implementing SDVCJ.[67] These communal efforts toward jurisdictional extension create pride and autonomy for tribes and inspire future changes for the criminal legal system.[68] On

---

60 *Id.* at 9.

61 *Id.*

62 *See* United States v. Lara, 541 U.S. 193, 210 (2004) (noting that Congress may grant tribes the power to prosecute non-Indians); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 169 n.18 (1982) (Stevens J., dissenting) ("The United States retains plenary authority to divest the tribes of any attributes of sovereignty.").

63 *See* 25 U.S.C. § 1302(c) (2018).

64 *Id.* § 1302(c)(1).

65 *Id.* § 1302(c)(2).

66 *See* Tribal Law & Policy Inst., *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing*, TRIBAL CT. CLEARINGHOUSE [hereinafter *Implementation Chart*], http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf [https://perma.cc/E6UV-QBZ9] (last visited Oct. 1, 2020).

67 *See Intertribal Technical-Assistance Working Group (ITWG)*, NAT'L CONG. AM. INDIANS, http://www.ncai.org/tribal-vawa/get-started/itwg [https://perma.cc/F8UM-YQQ9] (last visited Oct. 1, 2020).

68 *Id.* (noting that the ITWG creates the opportunity to "anticipate threats to sovereignty; brainstorm responses; and build a united voice in protection of Tribal

the other hand, some tribes have made the affirmative choice to not obtain SDVCJ.[69] Reasons for not obtaining SDVCJ include the blatant racism of the Anglo-American court system—manifested both in outright discrimination[70] and in using race to delegitimize tribal self-government.[71] It is for these reasons, among others, that extension of jurisdiction is voluntary.[72]

It is important to note that increased jurisdiction does not necessarily mean increased incarceration—many Tribal Courts practice alternatives to incarceration, including Peacemaker Courts or sentences of banishment.[73]

Recently, courts and Congress have shown a trend of supporting enhanced tribal sovereignty. In 2017, a unanimous Sixth Circuit found that a tribal court had inherent criminal jurisdiction over a crime committed by an Indian against a non-Indian on land owned by the tribe but outside the reserva-

---

sovereignty and Tribal Citizens victimized by domestic and sexual violence . . . . The shared understanding of the pain and frustration of those VAWA 2013 provisions that reflect ignorance of Tribal Justice Systems was not only comforting, but empowering").

69 *See Implementation Chart*, *supra* note 66.

70 *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 40–41 (1913) (claiming that Pueblo Indians "are dependent upon the fostering care and protection of the Government, like reservation Indians in general . . . they are intellectually and morally inferior"); Scott v. Sanford, 60 U.S. 393, 404 (1857) (noting that Indian tribes were "under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy").

71 *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV 591, 599 (2009) (arguing that "the basic racist move at work in Indian law and policy is to racialize the tribe, defining tribes as racial groups in order to deny tribes the rights of governments").

72 *See* 25 U.S.C. § 1304(c) (2018) (noting that extension of SDVCJ is optional by saying that a tribe "may" exercise jurisdiction if it meets certain requirements).

73 *See* Grant Christensen, *Civil Rights Notes: American Indians and Banishment, Jury Trials, and the Doctrine of Lenity*, 27 WM. & MARY BILL RTS. J. 363, 373 (2018); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 3–4 (1999). As an example of effective legal banishment, the Native Village of Perryville banished a tribal member with a long history of alcohol-fueled violence against other villagers. The Alaska Superior Court upheld the banishment order. *See* Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 148–49 (2015); Associated Press, *Tribe's Right to Banish Resident Upheld*, SEATTLE TIMES (Nov. 24, 2003), https://archive.seattletimes.com/archive/?date=20031124&slug=banish24m [https://perma.cc/TC5U-TU9B]. *See also* Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. (July 2017), https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer [https://perma.cc/6BSF-DC58] (finding that "[i]ncreased incarceration has a marginal-to-zero impact on crime. In some cases, increased incarceration can even lead to an increase in crime").

tion.[74] In 2018, Native women were elected to Congress for the first time.[75] While these developments are positive, tribes should have more power over crimes committed on tribal land.

C. Future

The logical next step is for Congress to incrementally increase tribal court criminal jurisdiction over non-Indians by expanding the enumerated types of crimes that tribes can prosecute. Congress has many options to extend jurisdiction beyond current limitations.[76] Jurisdictional expansion could include other crimes of gender-based violence, including stalking, sexual assault by a stranger or acquaintance, and sex trafficking.[77] Beyond gender-based violence, Congress could expand jurisdiction to include all charges of assault and battery, all misdemeanor drug crimes, crimes against children, crimes that occur within the criminal justice system, or all misdemeanors, regardless of category of crime.[78]

But incremental jurisdictional expansion is costly for tribes.[79] Congress has required tribal courts to meet most U.S. constitutional requirements in order to exercise jurisdiction over non-Indians.[80] These exacting requirements are financially expensive, culturally disruptive, and have high opportunity costs. That is why "few tribes have employed this enhanced . . . authority."[81] To encourage more tribes to adopt SDVCJ, and other future expansions, Congress must reduce the cost of jurisdictional expansion.

---

74 *See* Kelsey v. Pope, 809 F.3d 849, 852 (6th Cir. 2016); Grant Christensen, *The Extraterritorial Reach of Tribal Court Criminal Jurisdiction*, 46 HASTINGS CONST. L.Q. 293, 299–301 (2019).

75 Eli Watkins, *First Native American Women Elected to Congress: Sharice Davids and Deb Haaland*, CNN: POLITICS (Nov. 7, 2018, 12:01 AM), https://www.cnn.com/2018/11/06/politics/sharice-davids-and-deb-haaland-native-american-women/index.html [https://perma.cc/FML7-EJKC].

76 *See supra* note 54.

77 *See* VAWA 2013'S REPORT, *supra* note 16, at 22.

78 *Id.* at 22–23.

79 *Id.* at 29 ("The primary reason tribes report for why SDVCJ has not been more broadly implemented is a focus on other priorities and a lack of resources.").

80 For example, ICRA bars self-incrimination, prevents double jeopardy, and ensures a speedy trial. *See* 25 U.S.C. § 1302(a) (2018).

81 United States v. Bryant, 136 S. Ct. 1954, 1960 (2016). As of June 2019, twenty-five tribes were implementing SDVCJ. *See Currently Implementing Tribes*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes [https://perma.cc/2F4Q-XPP2] (last visited Oct. 2, 2020).

II
PROBLEM: UNEQUAL RIGHT TO COUNSEL FOR INDIANS AND NON-INDIANS

ICRA creates two tiers of representation in tribal court, one for Indian defendants and one for non-Indian defendants. To protest an uncounseled conviction, most criminal defendants allege violations of the Sixth Amendment right to counsel, the Fifth Amendment Due Process clause, and the Fourteenth Amendment Equal Protection clause. None of these claims provide relief to Native defendants. But there remains an intuitive unfairness if one defendant gets counsel while another does not.

A. Right to Counsel and Due Process

The U.S. Constitution's Bill of Rights applies only to the federal government and does not apply to proceedings in tribal courts because tribes predate the Constitution.[82] The historical presumption in American law is to leave Indian tribes with the authority to resolve crimes committed between Indians.[83] Congress and the U.S. Supreme Court have affirmatively recognized the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[84] But in 1968, Congress enacted ICRA to protect Indian defendants from "injustices as a result of vacillating tribal court standards."[85] ICRA makes many, but not all, guarantees of the Bill of Rights applicable within tribal courts.[86] For example, ICRA bars self-incrimination, prevents double jeopardy, and ensures a speedy trial.[87]

Yet ICRA does not grant a Sixth Amendment right to appointed counsel for all indigent Indian defendants—it only guarantees assistance of counsel to defendants who can afford to pay for representation.[88] The U.S. Supreme Court has held that "the Sixth Amendment does not apply to tribal-court proceedings."[89] The Court added, "In tribal court . . . unlike in

---

82 *See* Talton v. Mayes, 163 U.S. 376, 384–85 (1896).

83 *See Ex parte* Crow Dog, 109 U.S. 556, 568–69 (1883).

84 25 U.S.C. § 1301(2); United States v. Lara, 541 U.S. 193, 210 (2004) (upholding the statute).

85 S. REP. NO. 90-841, at 11 (1967).

86 *See Bryant*, 136 S. Ct. at 1962. *Contra* Jordan Gross, *VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings—A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?*, 67 CASE WESTERN RES. L. REV. 379, 435 (2016) (discussing ICRA's right to counsel provisions being coextensive with the Sixth Amendment).

87 *See* 25 U.S.C. § 1302(a).

88 *Id.* § 1302(a)(6).

89 *Bryant*, 136 S. Ct. at 1958.

federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel."[90]

Similarly, ICRA does not create a viable due process claim if a tribe chooses not to appoint counsel for all indigent defendants.[91] In 2016, in *United States v. Bryant*, the Supreme Court held that the use of uncounseled tribal court convictions as predicate offenses for the federal crime of domestic assault in Indian country by a habitual offender "does not violate a defendant's right to due process."[92] The Court reasoned that "[p]roceedings in compliance with ICRA . . . sufficiently ensure the reliability of tribal-court convictions."[93] The U.S. Supreme Court has repeatedly affirmed the validity of tribal court convictions when Congress grants tribes the affirmative power to convict.[94]

The selective extension of U.S. constitutional protections to tribal court defendants exemplifies the balance that federal courts must strike between respecting tribal sovereignty and protecting the rights of criminal defendants. In *Santa Clara Pueblo v. Martinez*, the U.S. Supreme Court noted that when considering tribal sovereignty and the rights of the accused, "we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck."[95] In short, the logical extension of *Bryant* combined with the balancing consideration outlined in *Santa Clara Pueblo* eliminate the possibility of a due process challenge to disparate representation in tribal court.

B. Equal Protection

Before addressing the merits of an equal protection claim, a Native American defendant must first address threshold questions of whether U.S. doctrine applies and whether the defendant has standing. The guarantees of the U.S. Constitution do not apply to Native Nations unless expressly made ap-

---

90 *Id.* at 1962.

91 *See* Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 253, 260 & n.47 (2017) (discussing due process protections under VAWA 2013).

92 *Bryant*, 136 S. Ct. at 1966.

93 *Id.*

94 *See* Duro v. Reina, 495 U.S. 676, 708 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978).

95 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).

plicable by the Constitution or an act of Congress.[96] As the U.S. Supreme Court has noted, equal protection under ICRA differs from the Fourteenth Amendment in that ICRA guarantees "'the equal protection of *its* [the tribe's] laws,' rather than of '*the* laws.'"[97]

To determine whether U.S. constitutional equal protection doctrines apply to tribes through ICRA, the prevailing standard among the U.S. circuit courts is to examine whether the strict application would significantly interfere with any important tribal values or significantly alter firmly embedded tribal customs.[98] Under this standard, a court must refrain from applying constitutional equal protection doctrines if doing so would amount to "forcing an alien culture on . . . [the] tribe."[99] However, where the practices of a tribe are "parallel" to those in American society, there is no problem of forcing an "alien culture" on a tribe and constitutional equal protection doctrines apply.[100]

If U.S. doctrine applies, constitutional standing requires that the "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct."[101] In the equal protection context, "discrimination itself . . . can cause serious noneconomic injuries" sufficient for standing.[102] However, personal injury, or injury-in-fact, demands more than an injury to a cognizable interest—it requires that the party seeking review be among the injured.[103] Further, when a party cannot demonstrate past injury, threatened future injuries must be "*certainly impending* to constitute injury in fact."[104]

---

96 *See* Groundhog v. Keeler, 442 F.2d 674, 681 (10th Cir. 1971); Elk v. Wilkins, 112 U.S. 94, 100 (1884).

97 *Santa Clara Pueblo,* 436 U.S. at 63 n.14. For a more nuanced review of the Equal Protection clause as applied to Native Americans, see David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 761 (1991).

98 *See, e.g.*, Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1046 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978); Howlett v. Salish & Kootenai Tribes of the Flathead Reservation, Montana, 529 F.2d 233, 238 (9th Cir. 1976); Wounded Head v. Tribal Council of Oglala Sioux Tribe of the Pine Ridge Reservation, 507 F.2d 1079, 1083 (8th Cir. 1975); White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973).

99 *White Eagle*, 478 F.2d at 1314.

100 *Howlett*, 529 F.2d at 238 (quoting *White Eagle*, 478 F.2d at 1314).

101 Allen v. Wright, 468 U.S. 737, 751 (1984).

102 Heckler v. Mathews, 465 U.S. 728, 739 (1984).

103 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (citing Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972) (requiring injury-in-fact)).

104 Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (denying standing due to opacity of future injury).

When Indian parties have standing, the U.S. Supreme Court has long held that classifications based on Indian status do not violate the Equal Protection clause.[105] Classifications based on Indian status must be "reasonable and rationally designed to further Indian self-government."[106] For example, in *Morton v. Mancari*, the U.S. Supreme Court held that polices at the Bureau of Indian Affairs (BIA) favoring employment of Indians passed "rational tie" scrutiny.[107] The Court reasoned that employment preferences make the BIA more responsive to the needs of its constituent groups, like requiring a Senator to be from the state where they reside.[108] "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[109]

Classifications expressly singling out Indian tribes do not receive strict scrutiny because they are based on "the quasi-sovereign status of [Indian tribes] under federal law," not based on invidious race-based distinctions.[110] Indians are not a suspect class because classifications of Indian tribes are "expressly provided for in the Constitution" and "supported by the ensuing history of the Federal Government's relations with Indians."[111]

If a party alleging an equal protection violation is not a suspect class, they must show discriminatory purpose and effect in order for their claim to receive strict scrutiny.[112] A party may prove discriminatory purpose by showing some combination of the following factors: impact, historical discrimination, specific sequence of events, procedural or substantive departure, and legislative history.[113] A party may prove discriminatory effect by showing a disparate impact on a particular group.[114] Further, the party must have more than a categorical grievance—they must show discrimination in their particu-

---

105 *See* United States v. Antelope, 430 U.S. 641, 644 (1977).
106 Morton v. Mancari, 417 U.S. 535, 555 (1974).
107 *Id.* at 554–55.
108 *Id.* at 554.
109 *Id.* at 555.
110 *Antelope*, 430 U.S. at 646 (quoting Fisher v. Dist. Court, 424 U.S. 382, 390 (1976).
111 *Id.* at 645.
112 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242–48 (1976) (requiring a showing of both discriminatory purpose and effect for a valid claim under the Equal Protection Clause).
113 *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).
114 *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that it is unconstitutional to administer a law that is fair on its face in an unequal manner).

lar case.[115] If a state action is sufficiently discriminatory to warrant strict scrutiny, the action must be "necessary to the accomplishment of some permissible state objective."[116] Determining whether a classification based on Indian status is "necessary" requires balancing tribal interests and individual justice.[117]

Even assuming that U.S. constitutional equal protection doctrines apply and that a defendant can show sufficient injury to have standing, unequal representation will likely pass rational tie scrutiny. Providing counsel for non-Indian defendants in tribal court and not providing counsel for Indian defendants is "reasonable and rationally designed to further Indian self-government."[118] The discrepancy is reasonable because of the high cost of requiring the full protections of U.S. constitutional right to counsel for all defendants in tribal court—such a requirement would price out many tribes from affordable legal representation.[119] ICRA's two-tiered system furthers Indian self-government by granting tribal court jurisdiction over non-Indians without the burden of matching the expensive right to counsel for every defendant. This "special treatment" is tied "rationally to the fulfillment of Congress' unique obligation toward Indians."[120]

Courts are also unlikely to raise the standard of review from rational tie to strict scrutiny. *Morton v. Mancari*, requiring only rational tie scrutiny for distinctions based on Indian status, remains good law.[121] Similarly, it would be difficult for an Indian defendant to circumvent the suspect class requirement for strict scrutiny—an Indian defendant would be hard pressed to show that ICRA's right to counsel standards were created with discriminatory purpose. Further, Congress can likely

---

115 *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 308–313 (1987) (holding that a general study regarding race and the death penalty was insufficient to support an inference that the decisionmakers in petitioner's case acted with discriminatory purpose).

116 Loving v. Virginia, 388 U.S. 1, 11 (1967) ("[T]he Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny.'" (citing Korematsu v. United States, 323 U.S. 214, 216 (1944))).

117 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–67 (1978).

118 Morton v. Mancari, 417 U.S. 535, 555 (1974).

119 *See* VAWA 2013'S REPORT, *supra* note 16, at 29.

120 *Mancari*, 417 U.S. at 555.

121 *See* Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. Rev. 958, 964 (2011); Frank Shockey, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari Contra Adarand Constructors, Inc., v. Pena, Rice v. Cayetano, *and Other Recent Cases*, 25 AM. INDIAN L. REV. 275, 297 (2001).

show that they would have made the same choices regardless of any alleged discrimination.[122]

Even if the courts did extend strict scrutiny to uncounseled Indian defendants, the courts may still deny relief. A tribe has a compelling state interest in the efficient administration of justice, and the decision to not appoint counsel is necessary to fulfill that interest in order to avoid overwhelming costs.[123] Further, the U.S. Supreme Court does not infringe on internal tribal issues between members.[124] The consequences of holding otherwise would undermine tribal sovereignty and devalue community knowledge.

In short, an equal protection claim will fail because of a waterfall of barriers: the difficulty of applying U.S. constitutional equal protection, the complications of establishing standing, the likelihood of passing rational tie scrutiny, and even the likelihood of passing strict scrutiny.

C. Fairness

While not a constitutional violation, disparate representation may appear inherently unfair from an Anglo-American perspective (and thus the perspective of most of Congress). As the U.S. Supreme Court has recognized, "[w]ithout [counsel], though he be not guilty, [the layman] faces the danger of conviction because he does not know how to establish his innocence."[125] Thus, an Indian defendant without counsel is seen as disadvantaged relative to a non-Indian defendant with counsel. This dual system of justice may delegitimize tribal court convictions.[126]

---

122 Footnote 21 of the *Arlington Heights* decision requires causation. Without the proponent of the discrimination showing causation in-fact, "there would be no justification for judicial interference with the challenged decision," as "the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

123 *See* VAWA 2013'S REPORT, *supra* note 16, at 29 (noting that the primary barrier to implementation of SDVCJ is lack of tribal resources); Jed S. Rakoff, *Why You Won't Get Your Day in Court*, N.Y. REV. BOOKS (Nov. 24, 2016), https://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court [https://perma.cc/6LA2-PQMV] (criticizing the cost of representation, generally).

124 United States v. Kagama, 118 U.S. 375, 381–82 (1886) (noting that tribes are "separate people, with the power of regulating their internal and social relations").

125 Powell v. Alabama, 287 U.S. 45, 69 (1932).

126 *But see* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:*Indian Courts and the Future *Revisted*, 84 U. COLO. L. REV. 59, 63 (2013) (arguing that "ICRA is declining in importance as Indian tribes domesticate federal constitutional guarantees by adopting their own structures to guarantee fundamental fairness").

During debate over the original passage of ICRA in 1968, tribes argued against imposing the Sixth Amendment on tribal courts because providing counsel on reservations was impractical. Senator Sam Ervin, a leading voice behind ICRA, initially wanted tribes to comply with the Bill of Rights in its entirety.[127] But tribes objected with various justifications of self-determination, lawyer availability, and cost.[128] Senate hearings explained that there were no lawyers in Indian country.[129] If tribal courts could not find lawyers, but defendants needed counsel, then reservations would become lawless places.

A decade later in 1978, the Ninth Circuit asked if the right to counsel was implicit in ICRA.[130] It is the only time a federal court asked whether tribes have a Sixth Amendment right to counsel. The Ninth Circuit found that there were still no available attorneys and no bar to select from and thus did not require tribes to appoint counsel for indigent defendants.[131]

Today there is greater access to Native representation. Over the last fifty years, the number of Native attorneys has grown from fewer than twenty-five to over 2,500.[132] But Native

---

[127] Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1, 20, 24 (1993); *see also* Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-*Oliphant *World?*, 5 AM. INDIAN L.J. 597, 642 (2017) (expressing concern that subjecting tribes to the U.S. Constitution will "create the system that Senator Sam Ervin originally conceived of, where ICRA would provide a vehicle for further assimilation of tribes").

[128] *See* Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976) (describing the legislative hearings).

[129] The then Solicitor of the Department of the Interior, Frank J. Barry, stated:

> [W]e have specified that the assistance of counsel will be provided at the expense of the Indian defendant. There are several reasons for this. One is that there are no attorneys on the reservations, neither prosecuting attorneys nor defense attorneys, and there would be no bar over which the court has jurisdiction from which it could select attorneys and over which it would have authority to say to an attorney, "You must represent this litigant." Accordingly, until a situation obtains where lawyers would be available, we think that it should not be required that the Indian tribes provide defense counsel.

Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 89th Cong. 21 (1965) (statement of Frank J. Barry, Solicitor, Department of the Interior). Tribes also argued that they were not financially prepared to pay for counsel if the burden fell on them. *Id.* at 340–41.

[130] *See Tom*, 533 F.2d at 1104–06.

[131] *Id.* at 1104 ("The clear import of [ICRA] is that a criminal defendant may be represented by counsel but only at his own expense.").

[132] *See* Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285, 291 (1994); NAT'L NATIVE AM. BAR ASS'N, THE PURSUIT OF INCLUSION: AN IN-DEPTH EXPLORATION OF THE EXPERIENCES AND PERSPECTIVES OF NATIVE

representation in the bar remains proportionally low and additional arguments against extension of the right to counsel are cost and tribal self-determination. Regarding costs, all tribes that have extended SDVCJ under VAWA provide counsel to both Indian and non-Indian defendants.[133] Providing a lawyer is costly, but tribes that can have chosen to do so. Statistics from the first five years of SDVCJ implementation show that the tribal courts that chose to adopt SDVCJ effectively uphold the rights of defendants and are invested in rehabilitation.[134] Regarding tribal self-determination, some tribes simply do not want to adopt norms of the U.S. criminal legal system that fail to ensure the legitimacy of their own justice systems.[135]

ICRA and the U.S. Constitution do not guard against the disparate treatment of Indian defendants in tribal court; however, the unequal right to counsel seems facially unfair through the lens of an Anglo-American legal tradition. While a Native perspective of common law may show that discrepancies in formal representation do not make tribal legal systems unfair,[136] a practical legislative solution to the disparity in representation is likely necessary if tribes want Congress to grant expanded criminal jurisdiction.

AMERICAN ATTORNEYS IN THE LEGAL PROFESSION 10 (2015), https://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf [https://perma.cc/J97B-PHKQ].

[133] Some tribes hired a licensed attorney full time to serve as tribal public defender, while others contracted with outside attorneys to represent their defendants as needed. Fort Peck, Pascua Yaqui, Sisseton, EBCI, and Chitimacha have hired full-time tribal public defenders, while CTUIR, Tulalip, Muscogee, and Sac and Fox rely on contract arrangements with licensed attorneys. *See Contrasting the First 18 Implementing Tribes on Right to Counsel*, NAT'L CONG. OF AM. INDIANS [hereinafter *The First 18 Implementing Tribes*], http://www.ncai.org/tribal-vawa/resources/code-development/judicial-court-resources/defendants-rights/contrasting-the-first-18-implementing-tribes-on-right-to-counsel [https://perma.cc/VH3B-56QN] (last visited Oct. 2, 2020).

[134] *See* VAWA 2013'S REPORT, *supra* note 16, at 18.

[135] Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 714 (2006).

[136] *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 222 (arguing that "the white man's law denies respect to the vision of the American Indian, and thus stand as an intractable barrier to the white man's own Americanization").

III
SOLUTIONS: BALANCING TRIBAL AUTONOMY AND THE RIGHTS OF THE ACCUSED

Congress, as a largely non-Native body, has an obligation to advocate for tribal self-government. In the words of Felix Cohen:

> If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who never were Indians and never expect to be Indians fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth; we are fighting for . . . the integrity or salvation of our own souls.[137]

Criminal jurisdiction is an important manifestation of self-government.[138] To further extend tribal court jurisdiction over non-Indians, this Note argues that Congress should address the discrepancy in representation between Indians and non-Indians. While no legal claim exists to enforce the discrepancy in required legal representation, the perceived unfairness of a two-tiered system of justice is a barrier to jurisdictional empowerment of tribal courts.

A. In Favor of the Defendant

Some potential solutions protect the accused but should not be implemented because they completely eliminate tribal autonomy over their criminal legal system.[139] These solutions derive from the cynical stance that the only way Congress will extend jurisdiction to new crimes is if protections resemble the Sixth Amendment for all defendants.

Congress could require equal counsel for all defendants by explicitly extending Sixth Amendment protections to tribal courts. Congress could also implicitly do this, without explicitly extending the Amendment, by requiring state bar passage for tribal counsel. Although requiring counsel for all defendants in tribal court would eliminate the two-tiered system of justice, it would price out tribes from legal representation. For example, few tribal lawyers in Turtle Mountain courts have a

---

[137] Felix Cohen, *Indian Self Government, 1949*, *in* RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM 69, 74 (Alvin M. Josephy et al. eds., 2d ed. 1999), *cited with approval in* Christensen, *supra* note 73, at 363.

[138] *See supra* note 16.

[139] *See* Riley, *supra* note 22 (arguing that tribal conceptions of justice need not always comply with the U.S. Constitution and that individual rights may be protected by tribes in different ways or not protected at all).

J.D., and none of the three judges attended law school.[140] The tribe is unable to extend SDVCJ because it cannot afford barred counsel for non-Indian defendants and has chosen to allow only tribal members to be judges. If Sixth Amendment requirements were extended to tribes like Turtle Mountain, the Tribe would be unable to adjudicate disputes within its own community.

Alternatively, Congress could require that tribal bar exams match the standards of state bar exams. Although that option appears to infringe less on the autonomy of the tribe, it has the same practical effect as extending the Sixth Amendment—making legal representation prohibitively expensive.

B. In Favor of Tribal Autonomy

Other potential solutions respect tribal interests but do not solve the problem of disparate representation because, in the eyes of Congress, they fail to provide sufficient additional protections for the accused. Some solutions in favor of tribal self-government are briefly described below, in order from most sweeping to most conservative.

First, Congress could renounce its plenary power over tribes. The U.S. Constitution does not explicitly delegate power to Congress to make decisions about tribal governance and internal affairs.[141] In the words of Professor Robert Clinton, "there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent."[142] Thus, "neither Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes."[143] Rejecting federal supremacy over tribes would drastically change Indian law, for defendants and beyond.

Second, Congress could promote Native methods of adjudication, so-called alternative dispute resolution, such as Navajo Peacemaker Courts.[144] As described by former Chief Justice Robert Yazzie of the Navajo Nation Supreme Court, Peacemaker Courts practice "horizontal" (or "circle") justice where "no per-

---

140 Telephone Interview with Turtle Mountain Tribal HQ (April 5, 2020).

141 Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115 (2002).

142 *Id.*

143 *Id.* at 116.

144 *See generally* James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 99–105 (1983) (describing Navajo Peacemaker Courts).

son is above another."[145] A horizontal system has the "end goal of restorative justice which uses equality and the full participation of disputants in a final decision."[146] A horizontal system is based on "egalitarian relationships where group solidarity takes the place of force or coercion," and "helping a victim is more important than determining fault."[147] This is in contrast to a system of "vertical" justice, like a U.S. state or federal court, which "relies upon hierarchies and power" and "looks back in time, to find out what happened and assess punishment for it."[148] In a vertical system, "a decision will lead to coercion or punishment [and] there are procedural controls to prevent unfair decisions and state power."[149] But in a horizontal system, "the focus of a decision is problem-solving and not punishment, [and] parties are free to discuss problems."[150] Defendants could have much to gain if Congress encouraged horizontal systems like Peacemaker Courts.[151]

Third, Congress could affirm that the current safety net of federal habeas is sufficient to protect tribal court defendants.[152] Currently, the writ of habeas corpus is the only remedy for violations of ICRA.[153] Habeas is available for an *incarcerated* petitioner; however, the Ninth and Second circuits are split regarding whether a federal court has subject matter jurisdiction over a *banished* petitioner.[154] In order to resolve this split, Congress could clarify that banishment is equivalent to incarceration and affirm that habeas is an appropriate remedy for both Indian and non-Indian defendants.

Fourth, Congress could learn about the accountability of tribal justice systems and decide that that disparate treatment

---

145 Yazzie, *supra* note 20.
146 *Id.*
147 *Id.* at 181, 185.
148 *Id.* at 177, 179.
149 *Id.* at 184.
150 *Id.*
151 *See* Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 61 (2007) (offering a "normative theory for guiding tribal court judges in the assertion and application of tribal customary law"); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 238 (1997) (arguing that Native Nations are losing their sovereignty because "they have lost or are losing their inherent ability to resolve the disputes that arise within them"); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 227 (1994) (arguing that tribal courts "can be the possible laboratories for new, beneficial concepts in law").
152 *See* 25 U.S.C. § 1303 (2018). *See also* Christensen, *supra* note 73, at 372–83 (discussing federal habeas and ICRA).
153 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
154 *See* Christensen, *supra* note 73, at 383.

is not functionally unfair.[155] Many tribes have both adopted U.S. constitutional protections and integrated Native justice practices to protect individual rights.[156] This is occurring in SDVCJ implementation, where every tribe that has extended jurisdiction has also provided counsel to both Indian and non-Indian parties, even though counsel is not required for Indians.[157] Going further, some scholars argue that tribal systems are fair despite little resemblance to Anglo-American courts.[158] In fact, mirroring the U.S. state and federal system may actually decrease fairness in tribal systems.[159] Congress could simply extend tribal court criminal jurisdiction over non-Indians without addressing the potential for disparate provision of defense counsel.

Although the appearance of disparate treatment is perhaps functionally equal, these solutions are out of touch with Congressional and U.S. Supreme Court perceptions of tribal court proceedings.[160] In the eyes of Congress, these solutions are unlikely to give tribal courts sufficient validity to justify an increase in tribal court criminal jurisdiction.

---

155 *See* Riley, *supra* note 18, at 1627 (describing how tribes may elect to integrate traditional practices at many stages of the criminal justice process).

156 *See* Fletcher, *supra* note 126, at 63 ("[M]any of the most successful tribal justice systems have borrowed from ICRA or developed their own indigenous structure to guarantee due process and equal protection.").

157 *See The First 18 Implementing Tribes*, *supra* note 133.

158 *See* Riley, *supra* note 22, at 835–39 (describing illiberalism in tribal courts).

159 *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC'Y REV. 1123, 1135 (1994) (arguing that individual rights protections may be incompatible with collective tribal rights).

160 *See* H.R. REP. NO. 112-480, at 58–59 (2012) (expressing House majority views that tribal courts will not provide adequate due process to non-Indians); S. REP. NO. 112-153, at 37–39, 55–56 (2012) (expressing Senate minority views against extension of tribal court jurisdiction over non-Indians); S. REP. NO. 90-841, at 11 (1967) (expressing concern for the "injustices as a result of vacillating tribal court standards"); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 273–74, 284 (2001) ("In a spate of cases beginning about the time Rehnquist became Chief Justice in 1986, the Court veered away from the foundations of Indian law. . . . In cases where seemingly disenfranchised non-Indians within a reservation sought to escape tribal control, the Rehnquist Court's protection of non-Indian interests has been far greater [than the Burger court]."); Molly Ball, *Why Would Anyone Oppose the Violence Against Women Act?*, ATLANTIC (Feb. 12, 2013), https://www.theatlantic.com/politics/archive/2013/02/why-would-anyone-oppose-the-violence-against-women-act/273103/ [https://perma.cc/3NLQ-H3CF] (noting that critics of SDVCJ, namely the congressional representatives who voted against the bill in 2013, "say the tribal courts are underresourced and have a history of failing to provide adequate legal protections to defendants").

C. Compromise: Licensed Legal Technicians

A compromise solution is federal funding for a Tribal Licensed Legal Technician program. A Tribal Licensed Legal Technician (TLLT) would be qualified to defend both Indians and non-Indians accused of crimes in tribal court. They would be similar to a nurse practitioner in medicine—a licensed professional who provides competent services at a reasonable cost.[161] Rigorous training and selective licensing effectively address the competing needs of tribal autonomy and the rights of the accused: the tribe is empowered because their local advocates are supported by professional development and given increased responsibility, and the defendant is protected by adequately qualified counsel. Direct support for tribal counsel prioritizes community knowledge and tribal court experience. Congress could offer to extend tribal court criminal jurisdiction if tribal attorneys go through this training—a quid pro quo that balances the autonomy of tribes and the rights of the accused.

The program can be established through law schools or as an independent program. If implemented through law schools, Congress could provide funding to create and sustain one-year licensing programs at institutions with robust Indian law and criminal law curricula. The state of Washington is already supporting a similar one-year program for licensed legal technicians in family court with similar justifications of cost and access to representation.[162] If implemented as an independent program, the training could be run as a partnership between tribes and federal defender offices, with the mission of supporting and licensing tribal counsel. Federal defender offices provide a balance of independence from the homogenizing influence of Washington D.C., formal legal qualifications, familiarity with U.S. standards of defense, and some understanding of Indian law because they often defend clients in Indian country. There is also power in collaborative experiences—federal defenders and TLLTs will have the opportunity to learn from each other.

This program will graduate advocates who are better qualified for work in tribal court than their law school trained peers. A TLLT would have a deep understanding of tribal custom,

---

161 Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 613 (2014).

162 *Id.*; *Limited License Legal Technicians*, WASH. ST. B. ASS'N (Mar. 17, 2020), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians [https://perma.cc/HGV6-VSQH].

culture, and justice, due to their training as tribal attorneys. A TLLT would also have a formal understanding of the adversarial Anglo-American legal system due to their legal technician licensing. For example, a TLLT will be better positioned to utilize rehabilitative opportunities for their client than a state public defender trained to advocate against punitive punishment.[163] Additionally, a natural extension of technician training is increased federal funding for Native law students, with a path from TLLT licensing to a full J.D. degree if the TLLT desires.

Importantly, a tribe providing a TLLT to a criminal defendant, either Indian or non-Indian, is explicitly in compliance with ICRA and the U.S. Constitution. A TLLT, after passing the licensing exam, would be "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."[164] "Any" jurisdiction includes a federal licensing program, not only state bars.[165] Further, the defendant would be provided with "effective assistance of counsel at least equal to that guaranteed by the United States Constitution."[166] The U.S. Constitution has no requirement that defense counsel graduate from law school or pass a state bar exam.[167] The

---

163 *See* Yazzie, *supra* note 20, at 180, 185 (describing a system of justice that works toward the "end goal of restorative justice," and where "helping a victim is more important than determining fault").

164 *See* 25 U.S.C. § 1302(c) (2018).

165 The word "any" refers to "one or some of a thing or number of things, *no matter how much or many*." NEW OXFORD AMERICAN DICTIONARY (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010) (emphasis added). Further, Congress amended VAWA in 2013 to fix *Oliphant*'s limitations on tribal court criminal jurisdiction—to remedy a jurisdictional hole—just as Congress passed ICRA § 1301(2) to override the jurisdictional limitations that the U.S. Supreme Court imposed in 2004 in *Duro v. Reina*. *See* 495 U.S. 676, 688 (1990). The increase in criminal jurisdiction that Congress affirmatively granted to implementing tribes comes with the power to grant licenses to attorneys as long as certain minimum qualifications are met. *See* 25 U.S.C. §§ 1302–1304 (cataloguing the minimum requirements for adequate counsel).

166 25 U.S.C. § 1302(c)(1). The American Bar Association (ABA) amended their Constitution in 2014 to recognize tribal bar members as full ABA members, placing tribal bar associations on equal footing with state bar associations. *See* AM. BAR ASS'N, CONSTITUTION AND BYLAWS 2019–2020, at 3 https://www.americanbar.org./content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2016-2017.pdf [https://perma.cc/VZR4-T6FH] (article 3, § 1).

167 For example, four states—California, Virginia, Vermont, and Washington—allow aspiring lawyers to take the bar without having a J.D. *See* Zachary Crockett, *How to Be a Lawyer Without Going to Law School*, PRICEONOMICS (Jan. 6, 2017), https://priceonomics.com/how-to-be-a-lawyer-without-going-to-law-school/ [https://perma.cc/RJ7Q-VUUT]. *See also* CAL. STATE BAR, TITLE 4. ADMISSIONS AND

obligation to provide "effective assistance of counsel," as required by ICRA and the Sixth Amendment, concerns defense counsel's performance, not qualification.[168]

TLLT training is a pragmatic compromise. Tribes want more jurisdiction while retaining tribal identity, but Congress will be unwilling to broaden tribal jurisdiction without some form of assimilation into the U.S. criminal legal system. In the interest of supporting tribal sovereignty and the rights of the accused, Congress should pay for defense counsel training and licensing to eliminate the unequal right to counsel in tribal court because it's fair and right, even if it is not required by the Constitution.[169] The program could be framed as a remedy for continued harm and as reparations for a past wrong.[170]

Congressional arguments against a TLLT program might address the validity of tribal courts. Congress and the Supreme Court have long been concerned that tribal courts are unfair.[171] Federal stakeholders may be further concerned by the quality of tribal bar exams. These concerns can be alleviated by the quality of the training program.[172] Legitimacy can be verified through rigor, with the licensing exam finalizing the exchange of training for increased jurisdictional power.

Defendants' arguments against a TLLT program may contend that a TLLT is less qualified than a barred attorney. While it is true that a TLLT would have fewer years of legal education than a lawyer with a J.D., time in school does not necessarily correlate to competency or zealousness of representation. A one-year program, focused exclusively on criminal defense in

---

EDUCATIONAL STANDARDS 8–9, http://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf [https://perma.cc/JP8Z-65VU] (rule 4.29, "Law Office Study Code"). Additionally, two states—New Hampshire and Wisconsin—grant "diploma privilege" where law students can join the bar without taking an exam. N.H. SUP. CT. R. 42(XII)(a), https://www.courts.state.nh.us/rules/scr/scr-42.htm [https://perma.cc/JQ5P-VLCZ]; WIS. SUP. CT. R. 40.03, https://www.wicourts.gov/sc/rules/chap40.pdf [https://perma.cc/GT8X-8P4B].

168 *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

169 *See* Creel, *supra* note 5, at 358 ("Tribes operating an Anglo-American adversary system should insist on training opportunities and funding for court personnel as essential to a just system.").

170 *Contra* Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 6–7 (arguing that reparations are unnecessary when the harm has expired).

171 *See supra* note 160.

172 In a reciprocal effort by states, federal Indian law should be a required section on state bar exams. Using state bar exams to increase legal awareness and competency for new attorneys is not exclusive to federal Indian law, it is offered as a remedy for ignorance of state constitutional law as well. *See* JEFFERY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 193 (2018).

tribal courts, may graduate advocates with more specific and relevant skills than a generalist J.D. curriculum.[173] Further, TLLTs comply with ICRA and would be subject to the same ex post evaluation of effective assistance as traditional defense lawyers.[174]

Tribal arguments against a TLLT program could include the potential for dilution of tribal values and that expanding jurisdiction may be bad for sovereignty. There is a legitimate risk that tribal values may be diluted by a training oriented toward U.S. Constitutional protections; however, that risk can be mitigated by the structure of the program. To avoid the homogenizing environment of D.C., the training should take place at law schools or on reservations. To avoid an excessively prosecutorial agenda, the training should be led by academics or a cooperation of tribal attorneys and federal defenders, not the Department of Justice. Finally, tribes can certainly imagine a world where expanding criminal jurisdiction over non-Indians is bad for sovereignty—that is why jurisdictional expansion would be voluntary, collaborative, and financially subsidized by the federal government.[175]

The stakeholders in this realm may appear to have conflicting agendas. Tribes may desire capital "S" Sovereignty while Congress and the Supreme Court may fear tribal court power. But their goals are the same: justice, fairness, and reduction of violence. If sovereignty is absolute, then progress will be difficult and harm will persist. If there is no trust in tribal courts, then progress will be difficult and harm will persist. The situation requires pragmatic compromise.

CONCLUSION

This Note has advocated for expanding tribal court criminal jurisdiction and offered a solution to potential resistance against jurisdictional expansion. While much resistance to jurisdictional expansion focuses on the rights of non-Indian defendants, this Note focuses on the right to counsel for Indian defendants. This Note argues that tribal courts can be fair to

---

173 All fifty states allow law students to practice before passing a bar exam. *See Student Practice Rules - Clinical Research Guide*, GEO. L. LIBR. (Apr. 6, 2020, 4:12 PM), https://guides.ll.georgetown.edu/StudentPractice [https://perma.cc/H942-ZUCS].

174 *See supra* notes 164, 168.

175 *See* Creel, *supra* note 5, at 359 ("The first responsibility of federal leadership is to engage in tribal consultation on the issue. . . . The nation-to-nation relationship requires consultation between the sovereign prerogative and the nation.").

all defendants, regardless of Indian status and without sacrificing tribal sovereignty, by providing sufficient defense representation. Sufficient representation can be practically implemented if Congress provides funding for the training and licensing of Tribal Licensed Legal Technicians.