Uncounseled Tribal Court Guilty Pleas in State and Federal Courts: Individual Rights versus Tribal Self-Governance

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Indian tribes in the United States are separate sovereigns with inherent self-governing authority. As a result, the Bill of Rights does not directly bind the tribes, and criminal defendants in tribal courts do not enjoy the protection of the Sixth Amendment right to counsel. In United States v. Ant, a defendant—without the legal assistance that a state or federal court would have provided—pled guilty to criminal charges in tribal court. Subsequently, the defendant faced federal charges arising out of the same events that led to the tribal prosecution. The Ninth Circuit in Ant barred the federal prosecutor from using the defendant's prior uncounseled tribal court guilty plea as evidence in the federal proceeding, explaining that doing so would violate the Sixth Amendment. This Note argues that Ant is no longer good law. First, Ant's legal foundation is weak, especially in light of subsequent developments in Sixth Amendment jurisprudence. Second, Ant is poor policy because excluding tribal court guilty pleas from state and federal proceedings undermines tribal self-governance. Even though governments must protect the rights of individual criminal defendants, supporting tribal authority will ultimately lead to decreased violence on Indian land and increased consistency with federal legislation.

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INTRODUCTION

On October 27, 1986, Keri Lynn Birdhat, an Indian woman, was found dead on the Northern Cheyenne Indian Reservation in Montana.¹ Seven weeks later, Northern Cheyenne tribal police arrested Francis Floyd Ant, Birdhat’s uncle, and he confessed to killing Birdhat.² Lacking jurisdiction to charge Ant with homicide,³ the tribe charged Ant with assault and battery.⁴ Ant entered a guilty plea at his tribal court arraignment and served a six-month prison sentence.⁵ He did not have the assistance of counsel during tribal court proceedings.⁶

The United States indicted Ant on January 7, 1987, charging Ant with voluntary manslaughter in connection with Birdhat’s death.⁷ Shortly thereafter, Ant filed a motion to suppress his tribal court guilty plea in federal court.⁸ Pointing to the Sixth Amendment, Ant argued that using his uncounseled tribal court guilty plea as evidence in federal court would deprive him of his constitutional right to counsel.⁹ In response, the district court first ruled that the tribal court proceedings that resulted in Ant’s guilty plea were valid.¹⁰ The court then explained that respect for the Northern Cheyenne

¹. United States v. Ant, 882 F.2d 1389, 1390, 1392 (9th Cir. 1989).
². Id. at 1390–91.
⁴. Ant, 882 F.2d at 1390.
⁵. Id. at 1390–91.
⁶. Id. at 1390.
⁸. Ant, 882 F.2d at 1391.
⁹. See id. Although the Ninth Circuit’s opinion did not describe Ant’s argument in detail, its discussion implied that Ant contended that admitting his uncounseled tribal court guilty plea in federal court would violate his constitutional right to counsel. See U.S. Const. amend. VI. Because Ant was indigent and faced imprisonment at the time of his guilty plea, the Sixth Amendment would have entitled Ant to appointed counsel had he appeared in state or federal court rather than tribal court. See Scott v. Illinois, 440 U.S. 367, 373–74 (1979).
¹⁰. Ant, 882 F.2d at 1392.
tribal judicial system required it to admit Ant's guilty plea as evidence. On this basis, the court denied Ant's motion.

Ant appealed his conviction to the U.S. Court of Appeals for the Ninth Circuit, which reversed the decision of the district court. The Ninth Circuit agreed with the district court with respect to the initial validity of Ant's tribal court guilty plea. Although the Sixth Amendment requires state and federal courts to provide attorneys for indigent criminal defendants facing imprisonment, neither Northern Cheyenne tribal law nor U.S. federal law required the tribal court to provide counsel to Ant. Thus, Ant's tribal court guilty plea, despite Ant's lack of legal representation, was consistent with tribal law, federal law, and the Constitution.

However, the Ninth Circuit departed from the district court's judgment regarding the use of Ant's tribal court guilty plea in federal court. According to the Ninth Circuit, Ant would have been entitled to counsel in the assault and battery proceeding if it had taken place in federal court rather than in tribal court. Therefore, notwithstanding the initial legitimacy of Ant's uncounseled tribal court guilty plea, admitting Ant's plea as evidence in a subsequent federal proceeding would have violated the Constitution.

For almost twenty-two years, no federal court seriously questioned the Ninth Circuit's decision in United States v. Ant. In July 2011, however, two circuit court decisions raised significant doubts about Ant's status as good law. This legal conflict, combined with evolving policy considerations, calls for reevaluation of the Ant rule.

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11. *Id.* at 1391.
12. *Id.*
13. *Id.* at 1392.
16. *Id.* at 1392.
17. *Id.* at 1396.
18. *Id.*
19. Between 1989 and 2011, only the Supreme Court of Montana seriously questioned the Ninth Circuit's ruling in *Ant*. See *State v. Spotted Eagle*, 71 P.3d 1239, 1244 (Mont. 2003) (holding that Montana courts may consider a defendant's valid uncounseled tribal court convictions for sentence enhancement). The Tenth Circuit posed a lesser challenge to *Ant* when it held that uncounseled guilty pleas made in tribal courts are admissible in subsequent federal proceedings for impeachment. *United States v. Denetclaw*, 96 F.3d 454, 457–58 (10th Cir. 1996). In contrast, both state and federal courts have relied on *Ant* or have discussed it favorably. *E.g.*, *United States v. Percy*, 250 F.3d 720, 725–26 (9th Cir. 2001) (questioning whether the Sixth Amendment binds federal officers during interviews of suspects subsequent to tribal arraignment in cases where tribal and federal charges intertwine); *United States v. Lawrence*, No. CRIM. 05-333(MJD/RLE), 2006 WL 752920, at *4 (D. Minn. 2006) (holding that a defendant's uncounseled tribal court guilty plea could not be used in opposition to the defendant's motion to suppress evidence in federal court); *State v. Watchman*, 809 P.2d 641, 646–47 (N.M. Ct. App. 1991) (ruling that a court may not use a defendant's uncounseled tribal court convictions as aggravating factors for sentencing).
20. *See infra* Part II.
This Note argues that federal and state courts should admit uncounseled tribal court guilty pleas as evidence of underlying conduct, even if the guilty pleas would have been unconstitutional had they been made in state or federal court. Part I provides background information about tribal sovereignty and the Sixth Amendment right to counsel. Part II explains the Ninth Circuit’s argument in Ant and asserts that two recent cases—United States v. Cavanaugh and United States v. Shavanaux—indicate the precariousness of Ant’s status as good law. Part III argues that Ant’s legal foundation is weak, especially in light of subsequent developments in Sixth Amendment jurisprudence. Finally, Part IV contends that Ant is poor policy because excluding tribal court guilty pleas from state and federal proceedings undermines tribal self-governance.

I. TRIBAL SELF-GOVERNANCE AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

This Part introduces the concept of tribal self-governance and describes the protection of individual rights that the Sixth Amendment right to counsel provides. Section I.A explains that Indian tribes in the United States are separate sovereigns with inherent powers of self-government. Although Congress has the power to limit, modify, or terminate tribal authority, the Bill of Rights does not directly bind the tribes. Instead, as Section I.B explains, most of the protections provided by the Bill of Rights apply to the tribes through the Indian Civil Rights Act of 1968 (“ICRA”). ICRA’s modified version of the Bill of Rights does not, however, provide tribal court defendants with the Sixth Amendment right to counsel.

A. Tribal Self-Governance and Criminal Jurisdiction

In 1831 and 1832, Chief Justice John Marshall explained the relationship between the federal government, states, and Indian tribes in two opinions that form the foundation of modern tribal self-governance. In Cherokee Nation v. Georgia, Marshall described the Cherokee Nation “as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself.”21 In Marshall’s view, Indian tribes are not foreign states, but “domestic dependent nations” under the protection of the United States.22 As such, the Cherokee Nation lacked standing as a foreign state to invoke the Supreme Court’s original jurisdiction.23 The following year, in Worcester v. Georgia, Marshall described Indian nations as “distinct, independent political communities, retaining their original natural rights.”24 Because the Cherokee Nation was a separate and independent na-

21. 30 U.S. (5 Pet.) 1, 16 (1831).
23. Id. at 20.
24. 31 U.S. (6 Pet.) 515, 559 (1832). However, the Court subsequently “departed from Chief Justice Marshall’s view that the laws of [a State] can have no force within reservation
tion, the laws of Georgia had no power over tribal members occupying tribal land.25 According to Marshall, tribes have inherent self-governing power and exercise this authority under federal supervision with little state interference.26

Subsequently, the Supreme Court established that Indian tribes, as self-governing nations, have the power to create and enforce substantive law on intratribal matters. For example, tribes have the authority to legislate tribal membership,27 inheritance of land,28 and domestic relations.29 In addition, tribes have authority to enforce tribal law in tribal courts.30

However, tribal self-governance has limits. Although Indian tribes are distinct political entities, the federal government has the power to restrict tribal authority, even on tribal land.31 United States v. Kagama asserted that tribes are “not . . . possessed of the full attributes of sovereignty” but are subject to the acts of Congress.32 Similarly, Talton v. Mayes established that although the Fifth Amendment does not limit tribal sovereignty, Congress has the “dominant authority” to limit tribal exercise of self-governing authority.33 The Supreme Court recently confirmed Congress’s plenary power over the self-governance of tribes in United States v. Lara.34 In Lara, the Court acknowledged inherent tribal sovereignty35 but concluded that Congress possesses broad authority to modify tribal power.36

26. See id.
30. See Williams v. Lee, 358 U.S. 217, 223 (1959) (prohibiting Arizona’s exercise of jurisdictional authority over a civil suit brought by a non-Indian against an Indian where events leading to the suit occurred on tribal land).
31. See Worcester, 31 U.S. (6 Pet.) at 561. The Supreme Court imposed a significant limitation on tribal sovereignty during the decade prior to Cherokee Nation and Worcester when it ruled that Indian tribes lacked authority to grant land to anyone other than the government of the United States. Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).
32. 118 U.S. 375, 381 (1886).
33. 163 U.S. 376, 384 (1896); see also Montana v. United States, 450 U.S. 544, 564 (1981) (holding that tribes do not have inherent authority to regulate hunting and fishing by nonmembers on tribal land because such authority would constitute “tribal power beyond what is necessary to protect tribal self-government or to control internal relations”); Cherokee Nation v. Hitchcock, 187 U.S. 294, 307-08 (1902) (holding that Congress has the power to enact legislation for the “control and development of . . . tribal property”).
35. Lara, 541 U.S. at 199.
36. Id. at 200 (holding that Congress has the constitutional authority to modify criminal jurisdiction exercised by Indian tribes over nonmember Indians).
Partially due to Congress’s extensive power over tribal authority, criminal jurisdiction in Indian territory is complex and confusing. In general, Indian tribes have the authority to exercise criminal jurisdiction over all Indians for crimes committed within tribal territory. However, tribes may not exercise criminal jurisdiction over non-Indians unless Congress confers such jurisdictional authority on the tribe. At the same time, federal laws substantially intrude on tribal criminal jurisdiction. With the Indian Country Crimes Act, Congress conferred federal jurisdiction over crimes committed between Indians and non-Indians in Indian territory. The Major Crimes Act likewise gives the federal government jurisdiction over “major” crimes—such as murder and arson—when they are committed by an Indian in Indian country. In practice, the Major Crimes Act means that Indian tribes must rely on the federal government to prosecute tribal members who commit major criminal acts on tribal land. State law can also interact with tribal law. Public Law 280, passed in 1953, grants certain states the authority to exercise criminal jurisdiction in Indian country. Although Public Law 280 does not exclude tribes from


40. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (holding that the Suquamish Indian Provisional Court did not have jurisdiction over non-Indian residents of a Suquamish Indian reservation).


42. 18 U.S.C. § 1153 (2006). Congress passed the Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885), one year after the Supreme Court held that federal courts had no jurisdiction over murders committed by Indians against other Indians in Indian territory, see Crow Dog, 109 U.S. at 571-72. The Act originally gave the federal government exclusive jurisdiction over seven major crimes. Kevin K. Washburn, Federal Criminal Law and Tribal Self-Determination, 84 N.C. L. Rev. 779, 804 (2006). However, subsequent amendments have significantly increased the number of “major” crimes covered by the Act. See id. at 823-26.


exercising jurisdiction concurrently with the states,\textsuperscript{45} it still intrudes on tribal law enforcement authority over tribal members on tribal land.\textsuperscript{46}

B. The Sixth Amendment and the Indian Civil Rights Act

While Congress has enacted legislation to limit the criminal jurisdiction of tribes, it has also granted tribes a level of autonomy when it comes to defining the rights of criminal defendants in tribal court—particularly the rights of criminal defendants under the Sixth Amendment. The Sixth Amendment provides a criminal defendant with a host of procedural rights, including the right "to have the Assistance of Counsel for his defence."\textsuperscript{47} In \textit{Powell v. Alabama}, the Supreme Court first recognized an indigent criminal defendant's constitutional right to court-appointed counsel in a capital trial.\textsuperscript{48} The Court, incorporating the Sixth Amendment right to legal counsel against the states, held that a state that denied criminal defendants the right to counsel violated the Fourteenth Amendment's Due Process Clause.\textsuperscript{49} The Court reasoned that even an "intelligent and educated layman" lacks the knowledge and experience necessary to make himself heard in a legal tribunal.\textsuperscript{50}

\textit{Gideon v. Wainwright} extended the right to court-appointed counsel to indigent felony defendants in state courts.\textsuperscript{51} The Court then clarified the right to counsel in \textit{Argersinger v. Hamlin}, holding that courts may not sentence either misdemeanor or felony defendants to imprisonment without giving them an opportunity to have legal representation at trial.\textsuperscript{52} Finally, in

\begin{itemize}
\item \textsuperscript{45} See \textit{Walker v. Rushing}, 898 F.2d 672, 675 (8th Cir. 1990); \textit{Cohen's Handbook of Federal Indian Law}, supra note 44, at § 6.04[3][c].
\item \textsuperscript{46} One specific example of this intrusion occurs when a state court refuses to recognize a tribal court judgment. See, e.g., \textit{Teague v. Bad River Band of the Lake Superior Chippewa Indians}, 612 N.W.2d 709, 720 (Wis. 2000). For more information on the history and implications of Public Law 280, see Vanessa J. Jiménez & Soo C. Song, \textit{Concurrent Tribal and State Jurisdiction Under Public Law 280}, 47 AM. U. L. REV. 1627 (1998).
\item \textsuperscript{47} U.S. CONST. amend. VI.
\item \textsuperscript{48} 287 U.S. 45, 68, 71 (1932). Read narrowly, \textit{Powell}'s holding applies only to capital cases in which the defendant can neither retain counsel at his own expense nor adequately represent himself. \textit{Powell}, 287 U.S. at 71. In \textit{Johnson v. Zerbst}, the Court clarified that the right to counsel applies more broadly. 304 U.S. 458, 468 (1938) ("If the accused...is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.").\textsuperscript{abrogated on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981). After Powell and Zerbst established criminal defendants' right to counsel at trial, \textit{Massiah v. United States} extended the right to counsel to pretrial investigation. 377 U.S. 201, 206 (1964).
\item \textsuperscript{49} \textit{Powell}, 287 U.S. at 71.
\item \textsuperscript{50} \textit{Id.} at 68–69.
\item \textsuperscript{51} See 372 U.S. 335, 342–43 (1963).
\item \textsuperscript{52} 407 U.S. 25, 37 (1972).
Scott v. Illinois, the Court confirmed that the right to counsel turns on actual, rather than potential, imprisonment. That is, the Sixth Amendment does not require the state to provide an attorney to an indigent misdemeanor defendant who faces possible, but not mandatory, incarceration if convicted. However, if the state declines to provide legal counsel, the court may not sentence the defendant to a prison term.

Although criminal defendants facing imprisonment in federal and state courts enjoy the right to court-appointed legal counsel, criminal defendants in tribal courts do not enjoy the same right. In 1896, Talton v. Mayes held that the Fifth Amendment does not restrict tribal self-governance. The Supreme Court explained that the inherent self-governing powers of Indian tribes existed prior to the Constitution, so the Fifth Amendment does not limit these powers. The Court has subsequently extended the principle of Talton, declaring that tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." Thus, the Constitution alone does not provide tribal defendants with a right to legal counsel. The Talton principle, combined with complaints of civil rights violations in Indian country, ultimately led to the passage of the Indian Civil Rights Act ("ICRA") in 1968.

ICRA imposes the majority of the rights enumerated in the Bill of Rights on Indian tribes, while simultaneously recognizing inherent powers of tribal self-government. Section 1301 lays out definitions for the purposes of the Act and stresses that "powers of self-government" are inherent to federally recognized Indian tribes and include the authority to "exercise criminal jurisdiction over all Indians." Section 1302 places limited restrictions on tribal governments in order to protect the individual rights of tribal members. While developing § 1302, the Senate committee considered a bill that would have imposed the Bill of Rights in its entirety on tribal governments. However, the committee realized the potential imprudence of imposing the legal norms of the U.S. government on Indian tribes that

54. 163 U.S. 376, 384 (1896).
55. Talton, 163 U.S. at 348.
57. Tom v. Sutton, 533 F.2d 1101, 1103 (9th Cir. 1976); Settler v. Lameer, 507 F.2d 231, 241 (9th Cir. 1974).
60. Id. § 1302.
61. SUMMARY REPORT, supra note 58, at 8.
possessed a variety of unique cultural values and beliefs. With this in mind, Congress passed a more limited version of the bill.

Significantly, § 1302 does not fully impose the Sixth Amendment right to counsel on Indian tribes. Instead of being obliged to provide legal counsel to any criminal defendant in tribal court who faces actual imprisonment and cannot afford his own attorney, tribes must not deny a criminal defendant access to legal counsel whom the defendant has retained “at his own expense.” At the same time, ICRA limits the penalty that tribes may impose on a defendant to one year of imprisonment, a fine of $5,000, or both, for any single offense. In 2010, the Tribal Law and Order Act of 2010 ("TLOA") modified ICRA and granted tribes authority to sentence criminal defendants to three years of incarceration, fine them $15,000, or both, for any single offense. However, if a tribe sentences an individual to a prison term of more than one year, the tribe must provide that defendant with a right to counsel “at least equal to that guaranteed by the United States Constitution.” In other words, tribes must provide counsel to indigent defendants whom they incarcerate for more than one year.

The primary purpose of ICRA was to protect the individual rights of tribal members. The Senate committee expressed its strong concern for “deprivation of individual rights by tribal governments” and developed ICRA in order “to safeguard the rights of Indian citizens.” However, Congress did not intend to extend rights to individuals by destroying tribal sovereignty. Rather, Congress sought a compromise between protection of

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62. Id. at 9.
63. 25 U.S.C. § 1302; see also SUMMARY REPORT, supra note 58, at 25. Among other omissions and limitations, § 1302 omits the First Amendment’s prohibition against governmental establishment of religion and the Seventh Amendment’s right to a jury trial in civil cases, and it limits the Sixth Amendment’s right to counsel. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, supra note 44, § 14.04[2]. Finally, § 1303 provides the writ of habeas corpus to remedy alleged illegal incarceration by an Indian tribe. 25 U.S.C. § 1303. Under the Supreme Court’s ruling in Santa Clara Pueblo v. Martinez, habeas corpus is the exclusive federal remedy for alleged tribal violations of § 1302. 436 U.S. 49, 70 (1978) (explaining that Congress, balancing individual rights with tribal sovereignty, sought to provide only limited opportunities for federal review of tribal actions).
66. Id. § 1302(a)(7)(B).
67. Id. § 1302(c).
68. SUMMARY REPORT, supra note 58, at 24.
69. Id. at 5.
70. E.g., Arthur Lazarus, Jr., Title II of the 1968 Civil Rights Act: An Indian Bill of Rights, 45 N.D. L. REV. 337, 346 (1968-1969) ("Congress viewed extension of the Bill of Rights to Indian reservations as a tool for strengthening tribal institutions and organizations, not as a weapon for their destruction.").
individual rights and preservation of tribal self-governance. In *Santa Clara Pueblo v. Martinez*, a seminal case construing ICRA, the Supreme Court held that tribal courts—rather than federal courts—are the appropriate forums for adjudicating disputes over the rights created by ICRA. With this holding, the Supreme Court recognized ICRA's dual purpose of protecting individual rights from tribal interference and protecting tribal sovereignty from federal and state interference. In fact, by prioritizing the legitimation of tribal courts over the provision of a forum for grievances alleging deprivation of individual rights, the Court largely shifted the focus of ICRA from individual rights to tribal sovereignty.

From one perspective, ICRA can be understood as an important extension of civil rights to all U.S. citizens, regardless of their status as members of Indian tribes. From another perspective, however, ICRA can be understood as a harmful interference with tribal sovereignty. This conflict between individual rights and tribal sovereignty forms the backdrop for the Ninth Circuit's decision in *United States v. Ant*.

II. ANT, CAVANAUGH, AND SHAVANAUX

This Part examines the Ant court's decision to exclude evidence of a defendant's prior tribal court guilty plea in light of two subsequent circuit decisions: *United States v. Cavanaugh*, decided by the Eighth Circuit, and *United States v. Shavanaux*, decided by the Tenth Circuit. Section II.A describes the Ninth Circuit's reasoning in Ant. Although the Ant court found that the defendant's guilty plea was valid in tribal court, it held that a federal prosecutor could not introduce the guilty plea as evidence of a federal crime. The tribal plea did not meet the standards set by the Sixth Amendment and therefore could not be considered in a court where the Sixth Amendment applied. However, *Cavanaugh*, discussed in Section II.B, and *Shavanaux*, discussed in Section II.C, challenge this ruling. Finally, Section II.D argues that the validity of Ant must be reevaluated in light of Cavanaugh and Shavanaux.

71. See SUMMARY REPORT, supra note 58, at 24 ("Besides extending protection to the rights of individual Indians, it is also important that the legitimate interests of the Indian communities in a lawful and peaceable order be recognized.").


73. *Martinez*, 436 U.S. at 62 ("Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'" (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974))).

74. See id. at 64–66, 72; Vincent C. Milani, Note, The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 AM. CRIM. L. REV. 1279, 1293 (1994) ("As a result [of *Martinez*], it became very difficult, if not impossible, for a Native American aggrieved by an alleged ICRA violation to pursue a claim against the tribe ... ").
Uncounseled Tribal Court Guilty Pleas

A. United States v. Ant

In Ant, the Ninth Circuit concluded that a federal court may not admit a defendant’s uncounseled tribal court guilty plea as evidence of the actions underlying that guilty plea.\(^{75}\) Prior to his federal indictment, Ant had pled guilty to tribal charges of assault and battery in connection with the death of his niece.\(^{76}\) Subsequently, Ant faced federal manslaughter charges arising out of the same events, and the federal prosecutor sought to use Ant’s tribal court guilty plea as evidence in federal court.\(^{77}\) The district court denied Ant’s motion to suppress his guilty plea on Sixth Amendment grounds.\(^{78}\)

In reversing the order of the district court, the Ninth Circuit first found that Ant’s tribal court guilty plea was valid at its inception under both federal and tribal law.\(^{79}\) Under ICRA, Ant had no federal right to court-appointed counsel during tribal proceedings.\(^{80}\) Northern Cheyenne tribal law provided Ant with a right to legal counsel but only at his own expense.\(^{81}\) Because neither ICRA nor Northern Cheyenne law provides criminal defendants with court-appointed counsel, both the district court and the circuit court determined that Ant’s lack of counsel in tribal court violated neither federal nor tribal law.\(^{82}\) Thus, the Ninth Circuit ruled that Ant’s tribal court guilty plea was valid in tribal court.\(^{83}\)

In spite of the original validity of Ant’s tribal court guilty plea, the Ninth Circuit held that the federal prosecutor could not use Ant’s plea as evidence of the acts giving rise to the plea.\(^{84}\) The court began by asserting that Ant’s uncounseled tribal court guilty plea should be treated as if Ant had pled guilty in federal court, rather than in tribal court.\(^{85}\) Within this hypothetical framework, the court explained, Ant’s Sixth Amendment right to counsel attached at his arraignment in tribal court.\(^{86}\) In other words, if the tribal court had been a federal court, Ant’s lack of legal representation would have violated the Constitution. Because Ant’s plea would have been unconstitutional if it had been made in federal court, the court held that evidentiary use of Ant’s uncounseled tribal court guilty plea in federal court was unconstitutional.\(^{87}\)

\(^{75}\) United States v. Ant, 882 F.2d 1389, 1395, 1396 (9th Cir. 1989).
\(^{76}\) Id. at 1390–91.
\(^{77}\) Id.
\(^{78}\) Id. at 1391.
\(^{79}\) Id. at 1392.
\(^{81}\) Ant, 882 F.2d at 1391–92.
\(^{82}\) Id. at 1392.
\(^{83}\) Id.
\(^{84}\) Id. at 1395.
\(^{85}\) Id. at 1393.
\(^{86}\) Id. at 1393–94.
\(^{87}\) Id. at 1395–96 (holding that a constitutionally infirm guilty plea, even if made in compliance with tribal law and ICRA, is inadmissible in a federal prosecution).
Although the Ant court grounded its opinion in case law, a significant policy disagreement lurked beneath the Ninth Circuit’s legal argument. On one hand, the district court implied that federal courts should protect tribal self-governance, even at the expense of individual rights. The district court admitted Ant’s tribal court guilty plea based on its view that suppressing the plea would undermine the validity of tribal proceedings. On the other hand, the Ninth Circuit majority asserted an implicit preference for protecting individual rights over preserving tribal self-governance. The majority opinion concluded that protecting the individual defendant’s right to counsel required exclusion of Ant’s plea. By excluding the plea, according to the dissent, the majority communicated the idea that tribal proceedings are illegitimate. In this way, Ant highlights the tension between the rights of individual defendants and the preservation of tribal self-governance.

B. United States v. Cavanaugh

In July 2011, the Eighth and Tenth Circuits issued opinions in Cavanaugh and Shavanaux, two cases that threaten Ant’s continued legitimacy. In Cavanaugh, the Eighth Circuit held that a federal court may consider uncounseled tribal court convictions when the charge against the defendant is based on prior offenses. The prosecution charged the defendant, Cavanaugh, with domestic assault by a habitual offender under 18 U.S.C. § 117. Section 117 requires at least two prior domestic assault convictions and explicitly provides that prior tribal court judgments may fulfill this requirement. The crime has a maximum penalty of ten years in prison. Assault by a nonhabitual offender, in contrast, carries less severe penalties. If the federal prosecutor had charged Cavanaugh under the nonhabitual-offender statute, Cavanaugh likely would have faced six months of

88. Id. at 1391.
89. Id. at 1396. However, the dissent claimed that the majority’s judgment would result in the unjustifiable expansion of ICRA’s individual rights protections. Id. at 1398 & n.2 (O’Scannlain, J., dissenting).
90. Id. at 1397 (“Whether the majority intends it or not, its opinion will be construed to mean that evidence from tribal court proceedings obtained in a way which clearly complies with ICRA and tribal law will be suppressed largely because we do not regard tribal courts to be as ‘civilized’ as state and federal courts.”). The majority disagreed with the dissent’s characterization of the majority opinion. Id. at 1396 (majority opinion).
93. Cavanaugh, 643 F.3d at 605.
94. Id. at 593; see 18 U.S.C. § 117 (2006).
95. 18 U.S.C. § 117(a).
96. Id.
97. Id. § 113(a)(4).
incarceration.\textsuperscript{98} In effect, therefore, \textit{Cavanaugh} dealt with the use of prior unrepresented tribal convictions for statutory sentence enhancement in federal court.\textsuperscript{99}

Just as the \textit{Ant} court began by confirming the legitimacy of Ant's prior tribal court guilty plea, the \textit{Cavanaugh} court began by asserting the validity of Cavanaugh's prior tribal court convictions. Under ICRA, Indian defendants in tribal court who face less than one year in prison have no constitutional or statutory right to court-appointed counsel unless tribal law affords them such a right.\textsuperscript{100} The laws of the Spirit Lake Tribe did not provide Cavanaugh with a right to court-appointed counsel, so the court found that Cavanaugh's prior convictions were "valid [from] their inception."\textsuperscript{101} The Eighth Circuit's determination of the initial validity of Cavanaugh's prior tribal court convictions was essentially the same as the Ninth Circuit's determination of initial validity in \textit{Ant}.\textsuperscript{102} Both courts found that prior tribal court convictions are valid, despite lack of counsel, when neither federal nor tribal law is violated.

However, \textit{Cavanaugh} retreated from \textit{Ant} by ruling that a federal court may consider a defendant's prior tribal court convictions, at least for the purpose of sentence enhancement. \textit{Cavanaugh} primarily relied on the Supreme Court's decision in \textit{Nichols v. United States}, which held that a defendant's prior unrepresented state conviction may increase the defendant's prison term for a subsequent offense without violating the Sixth Amendment.\textsuperscript{103} According to the \textit{Cavanaugh} court, \textit{Nichols} demanded the presence of an actual constitutional violation before barring the use of prior convictions in subsequent proceedings.\textsuperscript{104} Cavanaugh's unrepresented convictions—like those of the \textit{Nichols} defendant—were constitutionally valid at their inception. Because no constitutional violation occurred with respect to these underlying convictions, the \textit{Cavanaugh} court declined to preclude the use of these convictions in federal court.\textsuperscript{105}

\textsuperscript{98} See \textit{id}.

\textsuperscript{99} Using prior convictions for statutory sentence enhancement may be distinguished from using prior convictions for judicial sentence enhancement. In the latter case, prior convictions act as aggravating factors. \textit{E.g.}, United States v. Benally, 756 F.2d 773, 779 (10th Cir. 1985) (holding that state court judges may consider prior unrepresented tribal court convictions for judicial sentence enhancement).

\textsuperscript{100} United States v. Cavanaugh, 643 F.3d 592, 596 (8th Cir. 2011), cert. denied, 132 S. Ct. 1542 (2012).

\textsuperscript{101} \textit{Id.} at 594.

\textsuperscript{102} United States v. Ant, 882 F.2d 1389, 1392 (9th Cir. 1989).

\textsuperscript{103} 511 U.S. 738, 748-49 (1994).

\textsuperscript{104} See \textit{Cavanaugh}, 643 F.3d at 601 ("Post-\textit{Nichols}, then, 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.").

\textsuperscript{105} \textit{Id.} at 603-04.
C. United States v. Shavanaux

Shortly after the Eighth Circuit delivered its ruling in Cavanaugh, the Tenth Circuit delivered its opinion in a similar case, Shavanaux. Like Cavanaugh, Shavanaux involved the application of § 117 to a defendant with prior un counsel ed tribal court convictions. In addition, like Cavanaugh, Shavanaux held that a federal court may consider a defendant's prior un counsel ed tribal court convictions for the purpose of sentence enhancement.

Unlike Cavanaugh, however, Shavanaux strongly emphasized the sovereignty of Indian tribes in the United States. The court explained that tribes are unique political entities that the Bill of Rights may not directly constrain. That being the case, Shavanaux's deprivation of counsel in tribal court did not amount to a violation of the Sixth Amendment. Moreover, the initial constitutional validity of the defendant's tribal court convictions remained constant, even when a nontribal court used the convictions in a later proceeding: "Use of tribal convictions in a subsequent prosecution cannot violate 'anew' the Sixth Amendment, because the Sixth Amendment was never violated in the first instance."

After ruling that no Sixth Amendment violation had occurred, the Tenth Circuit found that considering uncounsel ed tribal convictions for federal sentence enhancement adheres to Fifth Amendment due process guarantees. Again, the court began by stressing the special status of Indian tribes, reasoning that tribal courts can be analogized to foreign courts because both Indian tribes and foreign states "are sovereigns to whom the Bill of Rights does not apply." Given this premise, the Tenth Circuit applied principles of international comity, which permit recognition of foreign judgments except where the foreign court did not provide procedural due process compatible with that provided by state and federal courts in the United States. Within this comity framework, the Tenth Circuit ruled that Shavanaux's prior tribal court convictions were consistent with due process because the tribal court adhered to the procedural provisions of ICRA. The court also asserted that federal courts have frequently recognized for-

107. Id. at 995–96.
108. Id. at 998.
109. Id. at 996–97.
110. Id. at 997.
111. Id.
112. Id. at 998 (citation omitted).
113. Id. at 1000.
114. Id. at 998.
115. Id. at 998–99. A court in the United States must also refuse to recognize a foreign judgment when the foreign court lacked jurisdiction over the defendant. Id. at 999.
116. Id. at 1000.
eign judgments and accepted foreign evidence in situations where foreign justice systems departed from the procedural protections that the Constitution guarantees. Similarly, a federal court may recognize tribal convictions, even when tribal court procedures do not comport precisely with the Constitution, without violating defendants' Fifth Amendment due process rights.

D. Reevaluating Ant in Light of Cavanaugh and Shavanaux

Although both Cavanaugh and Shavanaux reached the same essential conclusion regarding federal recognition of tribal proceedings, they differed with respect to their treatment of Ant. On one hand, Cavanaugh distinguished Ant rather than explicitly calling Ant into question. This was possible because the two cases addressed subtly distinct issues: In Ant, the prosecution sought to use the defendant's prior unounselled tribal court guilty plea as evidence of the actions underlying the guilty plea. In contrast, the prosecution in Cavanaugh sought to use the defendant's prior unounselled tribal court convictions to prove the fact of conviction, not the underlying conduct leading to the conviction. Significantly, however, the Cavanaugh court did not claim consistency with Ant based on these differences. Instead, the court cited Ant as an example of the unsettled nature of the law.

On the other hand, Shavanaux expressed its disagreement with the Ant decision, even though the two cases dealt with slightly different issues. Shavanaux asserted that Ant erred by finding constitutional infirmity in the defendant's unounselled tribal court guilty plea; as such, the Shavanaux court stated that it was "at odds with the Ninth Circuit" in its opinion. Furthermore, Shavanaux explicitly grounded its opinion in an understanding of Indian tribes as separate sovereigns with the authority to create, enforce, and adjudicate criminal laws. In contrast, Ant made little mention of tribal sovereignty except to argue that suppressing tribal guilty pleas did not discredit tribal court proceedings. Thus, Shavanaux challenged Ant's legal conclusion as well as the policy rationale driving that conclusion.

At their most basic levels, both Cavanaugh and Shavanaux are inconsistent with Ant, although only Shavanaux explicitly disagreed with the

117. Id. at 1000-01.
118. Id. at 1001.
119. See supra Section II.A.
121. Id. at 604-05 ("[R]easonable decision-makers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not apply.").
122. Shavanaux, 647 F.3d at 997.
123. Id. at 997, 999.
124. United States v. Ant, 882 F.2d 1389, 1396 (9th Cir. 1989).
Ninth Circuit's decision. Both Cavanaugh and Shavanaux ruled that uncounseled tribal court convictions, if initially constitutional, cannot be deemed "constitutionally infirm" for use in a later proceeding. In contrast, from the Ninth Circuit's point of view, uncounseled tribal court guilty pleas can violate the Constitution anew if used in subsequent proceedings where the Sixth Amendment applies.

Both Cavanaugh and Shavanaux filed petitions for writs of certiorari with the Supreme Court on the basis of a split among the circuit courts with respect to federal recognition of tribal proceedings.125 Although the Supreme Court denied these petitions,126 the inconsistency with respect to the constitutionality of tribal court judgments—and their subsequent use in federal court—suggests that the policy iterated in Ant deserves reevaluation.

III. LEGAL REASONS WHY ANT IS WRONG

This Part examines the legal foundation of Ant and argues that the Ninth Circuit should overrule its decision if and when it is given the opportunity to do so. Section III.A suggests that the legal reasoning behind Ant was unsound on the day it was decided. Section III.B contends that subsequent developments in the law further call Ant's continuing legitimacy into question. Lastly, Section III.C argues that principles of international comity counsel in favor of state and federal recognition of tribal court proceedings.

A. Wrong the Day It Was Decided

The Ninth Circuit based its judgment in Ant on a faulty premise. After the court found that Ant's guilty plea was initially valid, the court ignored the fact that Ant entered his plea in a tribal court. Instead, the Ant court claimed an obligation to analyze Ant's guilty plea in a hypothetical nontribal setting: "[I]t is . . . necessary to examine the constitutional validity of Ant's earlier tribal court guilty plea, independent of issues involving tribal law or the ICRA, as if the plea had been made in federal court."127 This move was essential to the court's ultimate decision; without it, the court would have had a difficult time claiming that subsequent use of a constitutionally valid guilty plea could violate the Constitution. Despite the significance of this framing of the issue, the court declined to adequately support its decision not to examine the constitutionality of Ant's plea in its true tribal-court setting.128

127. Ant, 882 F.2d at 1393 (emphasis added).
128. While the Ninth Circuit chose to examine Ant's plea as if it had been made in a federal court, the Eighth Circuit took the opposite view by explicitly declining to treat prior
The Ninth Circuit primarily—and unjustifiably—relied on *Burgett v. Texas* for its decision to examine Ant’s plea as if it had not occurred in a tribal court. In *Burgett*, the Supreme Court held that a Texas court could not use a defendant’s prior uncounseled Tennessee convictions to enhance the defendant’s sentence, because the Tennessee convictions violated the defendant’s Sixth Amendment right to counsel. *Burgett* explained that the Tennessee convictions were constitutionally infirm under *Gideon*, which obligates state courts to provide the Sixth Amendment right to counsel to criminal defendants. In short, *Burgett* turned on the initial unconstitutionality of the Tennessee convictions. In Ant’s case, however, no law obligated the Northern Cheyenne tribal court to provide legal counsel to criminal defendants. Unlike *Burgett*, Ant did not involve any underlying constitutional violation. Thus, although *Burgett* supported the Ninth Circuit’s claim that constitutionally infirm pleas must not be admitted in subsequent proceedings, *Burgett* offered no support for the Ninth Circuit’s decision to examine Ant’s tribal plea in a hypothetical federal-court context.

If the Ninth Circuit had instead examined Ant’s guilty plea as a product of a valid tribal-court proceeding, it could not have justified the exclusion of the plea from federal court. When analyzing Ant’s guilty plea in its true tribal-court context, the Ninth Circuit found that the guilty plea in no way violated the Constitution. The court then explained that the admissibility of a prior guilty plea in a later proceeding turns on the constitutional validity of the plea: “An earlier guilty plea . . . [is] admissible in a subsequent federal prosecution, even if the proceedings are in different jurisdictions, if the earlier guilty plea was made under conditions consistent with the United States Constitution.” Following this logic, Ant’s guilty plea should have been admissible in federal court. Without framing Ant’s guilty plea in a hypothetical federal-court context, the Ninth Circuit would have been hard-pressed to avoid this outcome.

Although the Ninth Circuit’s flawed reliance on *Burgett* suggests that Ant was wrong the day it was decided, the Ninth Circuit did not completely lack a rationale for its conclusion. First, it is conceivable that *Baldasar v. Illinois* supported the court’s decision to exclude Ant’s guilty plea. In *Baldasar*, the Supreme Court held that courts could not use uncounseled

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130. *Ant*, 882 F.2d. at 1393 (citing *Burgett* v. Texas, 389 U.S. 109, 115 (1967)).
133. See *Ant*, 882 F.2d at 1392 & n.3.
134. *Id.* at 1392.
misdemeanor convictions to convert a defendant's subsequent misdemeanor into a felony with a prison term.\textsuperscript{136} Although Justice Marshall's concurring opinion in \textit{Baldasar} did not question whether the defendant's prior un counselled conviction was valid at its inception, Marshall contended that it was "invalid for the purpose of depriving petitioner of his liberty."\textsuperscript{137} The Ninth Circuit cited \textit{Baldasar} and implied that using an un counselled misdemeanor plea for sentence enhancement was similar to using an un counselled tribal court guilty plea as evidence.\textsuperscript{138} Following this argument, \textit{Baldasar} supported exclusion of Ant's tribal court plea.

However, \textit{Baldasar}’s support for \textit{Ant} falls short. For one thing, \textit{Baldasar} is not necessarily controlling. Using a prior state conviction for federal sentence enhancement is not the same as using a prior tribal guilty plea to establish the elements of a federal crime. Although a valid analogy probably exists between \textit{Baldasar} and \textit{Ant}, the Ninth Circuit declined to flesh out such an analogy. Instead of basing its decision on the \textit{Baldasar} rule, the Ninth Circuit held that Ant’s plea was not admissible evidence because the "tribal proceedings ... were [not] in conformity with the Constitutional requirements for federal prosecutions in federal court."\textsuperscript{139} Furthermore, \textit{Baldasar} is no longer good law. Even if \textit{Baldasar} offered a persuasive reason to exclude Ant’s tribal court plea at the time of his trial, the Supreme Court has since overruled \textit{Baldasar},\textsuperscript{140} thereby undermining the court’s ruling in \textit{Ant}.

Second, it is possible that the Ninth Circuit’s decision was supported by Ant’s ignorance of the full range of consequences that could stem from his tribal court guilty plea. In dicta, the \textit{Ant} court suggested that exclusion of Ant’s plea was warranted because “Ant was not advised that the tribal court proceedings could be used against him in a subsequent felony prosecution in federal district court.”\textsuperscript{141} At least one federal court has excluded a defendant’s prior state court guilty plea when the defendant did not know that his state court plea could be used against him in federal court.\textsuperscript{142} By analogy, it

\textsuperscript{136} Id. at 224.
\textsuperscript{137} See id. at 226 (Marshall, J., concurring). Three concurring opinions support the holding expressed—but not explained—in the per curiam majority opinion. Id. at 224 (majority opinion); id. at 224 (Stewart, J., concurring); id. at 226–29 (Marshall, J., concurring); id. at 229–30 (Blackmun, J., concurring).
\textsuperscript{138} Ant, 882 F.2d at 1394.
\textsuperscript{139} Id. at 1396.
\textsuperscript{140} Nichols v. United States, 511 U.S. 738, 748 (1994).
\textsuperscript{141} Ant, 882 F.2d at 1393.
\textsuperscript{142} United States v. Edwards, 669 F. Supp. 168, 171 (S.D. Ohio 1987); see also United States v. Howze, 668 F.2d 322, 323 (7th Cir. 1982) (explaining that a federal court may consider the validity of a state court guilty plea when the defendant alleges a constitutional defect, especially “when a defendant may have had no idea of the extreme nature of the collateral consequences of his plea”). Although \textit{Howze} suggests that the \textit{Ant} court could have investigated the initial validity of Ant’s tribal court guilty plea on the basis of Ant’s lack of knowledge of the consequences, the \textit{Ant} court chose not to do so. Instead, the court confirmed the constitutionality of Ant’s guilty plea at its inception. See Ant, 882 F.2d at 1392.
is plausible to argue that a federal court must exclude a defendant’s prior tribal court guilty plea if the defendant was never advised of the plea’s possible federal court consequences.

But this argument does not stand up to scrutiny, as multiple circuits have held that trial courts need not inform defendants of all potential consequences of pleading guilty. The Seventh Circuit rejected this argument, citing the independence of state and federal judicial systems: “The state and federal systems are separate and distinct, and the defendant need only be informed of the direct consequences he may face within the particular system.” Under Long’s reasoning, Ant’s alleged ignorance of the federal consequences of his tribal guilty plea should not bar the admission of the plea in federal court. Perhaps most significantly, the holding of Ant does not turn on Ant’s possible ignorance of the consequences of his guilty plea but instead rests on Ant’s lack of counsel in tribal court.

B. Wrong in Light of Subsequent Legal Developments

Just as Ant’s reasoning was wrong the day it was decided, subsequent Sixth Amendment jurisprudence confirms the precariousness of its status as good law. The most significant case to arise after Ant is Nichols. In Nichols, the defendant argued that using a prior uncounseled conviction to increase his current prison term violated the Constitution. The Supreme Court disagreed. According to the Court, sentence enhancement based on prior convictions penalizes only the offense at issue in the current proceeding; it does not punish the prior offenses. As such, lack of counsel at a prior proceeding does not taint a subsequent proceeding unless the prior lack of counsel violated the Constitution. Applying the reasoning of Nichols to Ant suggests that the initial validity of Ant’s tribal court guilty plea should have been enough to admit the guilty plea into evidence in federal court.

Nichols also explicitly overruled Baldasar. As discussed previously, just as Baldasar precluded the use of a valid uncounseled conviction in a

143. E.g., King v. Dutton, 17 F.3d 151, 153 (6th Cir. 1994) (“[T]he trial court is under no constitutional obligation to inform the defendant of all the possible collateral consequences of the [guilty] plea.”); United States v. Bouthot, 878 F.2d 1506, 1511 (1st Cir. 1989) (“A state judge, even if she is aware of the federal implications of a state conviction, is not constitutionally required to warn a defendant about his federal exposure before accepting his guilty plea.”), abrogated on other grounds by Perry v. New Hampshire, 132 S. Ct. 716 (2012).
144. 852 F.2d 975, 976 (7th Cir. 1988).
145. Long, 852 F.2d at 979.
147. Id. at 748–49.
148. Id. at 747.
149. See id. at 748–49.
subsequent proceeding, *Ant* precluded the use of a valid uncounseled guilty plea in a subsequent proceeding. As such, the *Bal dasar* rule—prohibiting use of uncounseled convictions to convert a misdemeanor into a felony, regardless of the validity of the uncounseled convictions—provided support for *Ant*'s argument for exclusion. In contrast, *Nichols*'s overruling of *Bal dasar* weakened *Ant* and suggested that uncounseled guilty pleas should be admissible in subsequent proceedings as long as such guilty pleas are constitutionally valid at their inception. Under *Nichols*, the Ninth Circuit should have admitted *Ant*'s constitutionally valid guilty plea as evidence in *Ant*'s subsequent federal prosecution. Thus, post-*Nichols*, *Ant* is no longer good law.

Finally, both *Cavanaugh* and *Shavanaux* call *Ant* into question. As discussed previously, neither *Cavanaugh* nor *Shavanaux* directly contradicts *Ant*, because the two recent cases do not address the exact question at issue in *Ant*. *Cavanaugh* and *Shavanaux* involve the use of prior tribal court convictions for federal sentence enhancement, while *Ant* involves the use of a prior tribal court guilty plea as evidence to establish a federal crime. However, as the Tenth Circuit pointed out, both *Cavanaugh* and *Shavanaux* oppose *Ant* with respect to the constitutionality of uncounseled tribal proceedings. To the extent that *Cavanaugh* and *Shavanaux* hold that valid tribal proceedings may be used in subsequent federal proceedings without violating the Constitution, they support the argument for *Ant*'s legal infirmity.

### C. Comity: Deferring to Tribal Court Judgments

While *Nichols*, *Cavanaugh*, and *Shavanaux* each undermine *Ant*'s treatment of tribal court judgments, the doctrine of comity provides a solution. Comity is a doctrine of foreign relations law. Under principles of comity, courts in the United States should treat a foreign judgment as prima facie evidence of the actions giving rise to the judgment, as long as the foreign judgment "appears to have been rendered by a competent court" whose "proceedings are according to the course of a civilized jurisprudence." In other words, courts should defer to foreign judgments unless they find that the foreign court was biased or used procedures inconsistent with due process.

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151. See *Cavanaugh*, 643 F.3d at 599.


153. Hilton v. Guyot, 159 U.S. 113, 205–06 (1895). *Hilton* describes comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Id.* at 164.

Comity does not require that the foreign court issuing the judgment adhered to the same procedural standards that bind state and federal courts in the United States.\(^5\) In *Houle v. United States*, for example, the Fifth Circuit admitted prior uncounseled Canadian convictions for federal sentencing, even though the defendant’s prior Canadian convictions would have violated the Sixth Amendment had they been made in a state or federal court in the United States.\(^5\) The court emphasized that the Sixth Amendment does not bind Canadian courts, so the Canadian court’s noncompliance with the Sixth Amendment did not invalidate the defendant’s Canadian convictions.\(^5\)

Similarly, in *United States v. Small*, the Third Circuit admitted the defendant’s Japanese convictions to fulfill the elements of a federal charge.\(^5\) The court found that the Japanese convictions complied with U.S. concepts of fundamental fairness,\(^5\) even though the Japanese investigation and subsequent judicial proceedings did not adhere precisely to the Bill of Rights.\(^5\) As *Houle* and *Small* indicate, courts in the United States commonly defer to judgments of foreign courts, even when the foreign proceedings do not follow the strict requirements of state and federal proceedings in the United States.\(^5\)

Within the framework of comity, tribal courts can be thought of as foreign courts. This is because Indian tribes are similar to foreign nations to the extent that they are quasi-sovereign entities that govern themselves without the constraints of the Bill of Rights.\(^5\) In *State v. Spotted Eagle*, the Montana Supreme Court applied the doctrine of comity to determine whether a state court properly used the defendant’s prior uncounseled tribal court convictions to enhance the defendant’s state charge from a misdemeanor to a felony.\(^5\) First, the court found that the Sixth Amendment did not bind the Blackfeet Tribe, just as it does not bind a foreign nation.\(^5\) Second, treating the tribal court as a foreign court, the court determined that the tribal judgment was also valid for use in Montana courts, despite the tribal court’s nonconformance with the Bill of Rights: “Comity requires that a court give full effect to the valid judgments of a foreign jurisdiction according to that

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155. *See* Hilton, 159 U.S. at 204–05.
156. 493 F.2d 915, 916 n.2 (5th Cir. 1974) (per curiam).
157. *Houle*, 493 F.2d at 916.
159. *Small*, 333 F.3d at 428.
161. *See*, e.g., *United States v. Kole*, 164 F.3d 164, 175 (3d Cir. 1998) (holding that the absence of a jury in a Philippine proceeding leading to defendant’s conviction did not invalidate the Philippine conviction for the purpose of federal sentence enhancement); *United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir. 1977) (holding that the defendant’s German conviction, obtained without a jury trial, was admissible to impeach the defendant’s credibility).
163. 71 P.3d 1239, 1244–45 (Mont. 2003).
164. *Spotted Eagle*, 71 P.3d at 1243–44.
sovereign’s laws, not the Sixth Amendment standard that applies to proceedings in Montana.”\textsuperscript{165} Finally, the court explained that declining to admit valid tribal court convictions would compromise tribal sovereignty and undermine the legitimacy of tribal judicial proceedings.\textsuperscript{166} This nod to tribal sovereignty suggests that the court’s view of tribes as self-governing nations was a significant force underlying its opinion.

Following the state court’s decision in \textit{Spotted Eagle}, the Tenth Circuit in \textit{Shavanaux} applied principles of comity in its analysis of federal recognition of tribal court judgments. \textit{Shavanaux} held that tribal judgments that are valid under ICRA are per se compliant with constitutional due process.\textsuperscript{167} Explaining this holding, \textit{Shavanaux} stressed that tribal courts need not have judicial procedures identical to those of the United States in order to meet the due process requirement under the doctrine of comity.\textsuperscript{168}

Although both \textit{Spotted Eagle} and \textit{Shavanaux} dealt with the use of prior tribal court convictions for sentence enhancement,\textsuperscript{169} the comity framework applies equally to the use of prior tribal court guilty pleas as evidence of the actions giving rise to the convictions. This is because the underlying issue—validity of tribal court judgments in a nontribal court—is the same. Although the \textit{Ant} majority implied that comity principles were inappropriate in analyzing evidentiary use of tribal court judgments, it based this conclusion on the fact that courts had previously applied federal-tribal comity to only a narrow set of circumstances.\textsuperscript{170} Now that \textit{Spotted Eagle} and \textit{Shavanaux} have broadened the concept of federal-tribal comity, \textit{Ant}'s rationale has lost most of its force. Moreover, both the district court opinion\textsuperscript{171} and the dissenting opinion in \textit{Ant}\textsuperscript{172} applied principles of comity and reached results consistent with \textit{Spotted Eagle}. Both Judge Battin of the District of Montana and Judge O'Scannlain of the Ninth Circuit disagreed with the \textit{Ant} majority and found that federal courts should admit evidence of prior uncounseled

\begin{itemize}
\item \textsuperscript{165} \textit{Id.} at 1245.
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011), \textit{cert. denied}, 132 S. Ct. 1742 (2012).
\item \textsuperscript{168} \textit{Id.} at 1000–01; \textit{see also} Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) (“Comity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. . . . Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems.”).
\item \textsuperscript{169} \textit{Shavanaux}, 647 F.3d at 995–96; \textit{Spotted Eagle}, 71 P.3d at 1240.
\item \textsuperscript{170} United States v. Ant, 882 F.2d 1389, 1396 (9th Cir. 1989) (“[T]he principle of federal-tribal comity has heretofore been used primarily to prevent direct attacks on tribal proceedings in federal courts, and to require exhaustion of tribal remedies before going to federal court.”).
\item \textsuperscript{171} \textit{Id.} at 1390 (noting that the district court “ruled that suppressing the [defendant’s tribal court guilty] plea would violate principles of comity”).
\item \textsuperscript{172} \textit{Id.} at 1396 (O'Scannlain, J., dissenting) (invoking comity by arguing that tribal court “proceedings are entitled to the dignity shown to foreign courts”).
\end{itemize}
tribal court guilty pleas for the purpose of proving conduct underlying the pleas.  

IV. POLICY REASONS WHY ANT IS WRONG

Ant is not only wrong as a matter of law—it is wrong as a matter of policy. This Part addresses the policy debate underlying the legal question of whether judges can admit defendants’ prior uncounseled tribal court guilty pleas as evidence in state and federal courts. One side of the debate argues that protecting the rights of criminal defendants mandates exclusion of prior uncounseled tribal court guilty pleas and convictions in state and federal courts, while the other side maintains that tribal self-governance requires admission of uncounseled tribal pleas and convictions.

This Part contends that arguments in favor of admission should prevail over those in favor of exclusion. Section IV.A argues that increased tribal self-governance will lead to increasingly effective law enforcement, thereby reducing crime and violence in Indian country. Section IV.B examines the Tribal Law and Order Act of 2010 as evidence of a federal policy that prioritizes tribal self-governance. Finally, Section IV.C posits that the legislature—and not the judiciary—must remedy any shortcomings of the limited right to counsel enjoyed by tribal court defendants.

A. Tribal Control over Crime in Indian Country

As a policy matter, state and federal courts should admit tribal court guilty pleas as evidence of federal crimes because doing so will decrease violence that occurs on tribal land. Indian tribes face an epidemic of violent crime on Indian land. The rate of violent crime for American Indians is significantly greater than that for other U.S. racial and ethnic groups and is more than two times the national average. In fact, President Barack Obama has called the high crime rates in Indian country “unconscionable.”

To counter this disturbing trend of violence, Indian tribes must play a significant role in creating and implementing criminal law on tribal land.

173. Id.


176. See Washburn, supra note 42, at 832. Tribes have also communicated their desire to develop tribal justice systems free from stifling federal oversight. See, e.g., Enforcement of the Indian Civil Rights Act: Hearing Held in Phoenix, Ariz. Before the U.S. Comm’n on Civil Rights 9–10 (1988) (statement of Tom Tso, C.J., Navajo Nation) (“It would be unrealistic for you to expect our far younger [Navajo] legal system to gain maturity without ... struggle.
Any criminal justice system must have the support of the community it seeks to regulate in order to be effective.177 Because a criminal justice system must reflect community norms and values to gain community acceptance, increased tribal involvement in tribal criminal justice will lead to more effective law enforcement and decreased crime and violence.178

Admission of uncounseled tribal court guilty pleas in state and federal courts furthers the goals of tribal law enforcement. State and federal recognition of uncounseled tribal court convictions reinforces tribal authority to prosecute and punish Indians who commit crimes on Indian land.179 As legitimacy increases, tribal justice systems can more effectively combat violence on Indian land. More broadly, by recognizing tribal judgments, state and federal courts validate tribal law, tribal values, and the tribal community itself. The continuing strength of the tribal conviction in state or federal court stands for the continuing strength of the tribal community, especially the strength of its criminal justice institutions.

B. Tribal Self-Governance and the Tribal Law and Order Act of 2010

In addition to facilitating positive change on the ground, admitting tribal court guilty pleas in state and federal courts will achieve consistency with a federal policy of tribal self-governance that has undergone significant change since Ant. On July 29, 2010, President Obama signed the Tribal Law and Order Act of 2010 ("TLOA") into law.180 TLOA, Congress’s response to increasing crime and violence in Indian country,181 implicitly supports federal and state use of prior tribal court guilty pleas. By increasing tribal control over law enforcement in Indian country and declining to expand federal involvement with tribal court procedures, TLOA indicates a federal preference for tribal self-governance.

With the passage of TLOA, Congress acknowledged that federal interference with criminal justice in Indian country has undermined tribal self-governance. In its report recommending the passage of TLOA, the Senate emphasized that federal law often displaces tribal law enforcement authority, “forc[ing] tribal communities to rely on federal officials to inves-
tigate and prosecute all reservation crimes committed by non-Indians against Indian victims and most serious crimes committed by Indians." In particular, the Senate Report expressed concern that federal investigators, with exclusive authority to prosecute certain major crimes in Indian territory, frequently decline to prosecute without explaining their decision to the tribe. The Senate Report also highlighted the jurisdictional complexity that federal law has created with regard to Indian country law enforcement and the resulting inefficiency and ineffectiveness of law enforcement on tribal land. By significantly reducing tribal control over crime and punishment on tribal land, federal law has left tribes without the tools they need to protect their members and to enforce their unique tribal values through criminal law.

In response to these problems of federal interference, Congress designed TLOA to enhance tribal self-governance. TLOA explicitly acknowledges that "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country" and states that the purposes of TLOA include "empower[ing] tribal governments with the authority . . . necessary to safely and effectively provide public safety in Indian country." Before signing the bill into law, President Obama highlighted the additional law enforcement power that TLOA gives to Indian tribes: "[I]t gives tribes greater authority to prosecute and punish criminals themselves. . . . And it strengthens tribal courts and police departments . . . ." Moreover, TLOA aims to increase coordination between federal, state, local, and tribal governments, as opposed to encouraging unilateral federal investigation and law enforcement.

182. Id. at 3.
183. Id. at 12.
184. Id. at 3–4; see Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs, 110th Cong. 65–67 (2007) (statement of Thomas B. Heffelfinger, Partner, Best and Flanagan, LLP) (discussing the "jurisdiction confusion" that undermines the efficacy and legitimacy of Indian country law enforcement).
185. See Washburn, supra note 42, at 836–42 (arguing that the federal Major Crimes Act "assaults the notion of tribal self-determination").
187. Id. § 202(b)(3). In addition, the U.S. Department of Justice has emphasized the importance of tribal sovereignty to TLOA. See U.S. DEPT. OF JUSTICE & U.S. DEP’T OF THE INTERIOR WITH WORK GRP. ON CORRECTIONS, TRIBAL LAW AND ORDER ACT: LONG TERM PLAN TO BUILD AND ENHANCE TRIBAL JUSTICE SYSTEMS 7 (2011) ("A foundational principle in the development of tribal justice systems, and therefore in any consideration of changing those systems, is tribal sovereignty.").
188. TLOA Presidential Remarks, supra note 175.
authority and encouraging tribal governments to work with local, state, and federal governments, TLOA recognizes Indian tribes as self-governing nations with an interest in controlling Indian country crime on their own terms.

One of the most significant provisions of TLOA, § 234, recognizes tribal sovereignty by increasing tribal sentencing authority.²⁸⁰ Previously, ICRA limited the term of imprisonment that a tribal court could impose on a criminal defendant to one year.²⁹¹ Section 234 amends ICRA by providing that tribes may sentence a defendant to a term of up to three years.²⁹² In the Senate’s view, tribes need this increased sentencing authority in order to control increasing levels of violent crime on Indian land.²⁹³ Granting this sentencing authority to tribes—rather than extending federal or state jurisdiction to cover the violent crimes that Indian tribes face—signals the federal government’s commitment to strengthening tribal institutions. Arguably, state and federal courts undermine this commitment when they refuse to acknowledge tribal court guilty pleas as evidence.

At the same time that TLOA increases tribal sentencing authority, the law deliberately declines to extend full Sixth Amendment protections to tribal defendants. Significantly, tribes must provide criminal defendants facing a term of imprisonment of more than one year with “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution”—namely, the Sixth Amendment.²⁹⁴ This right to counsel includes the right of indigent defendants to obtain legal representation “at the expense of the tribal government.”²⁹⁵ Although TLOA’s expansion of tribal defendants’ right to counsel suggests Congress’s concern for protecting rights of individual criminal defendants, it also indicates Congress’s continued intention not to require full Sixth Amendment protections in most cases. TLOA provides only certain tribal defendants with full Sixth Amendment protections, thereby prioritizing tribal control over the right to counsel in tribal courts. This recognition of tribal authority suggests that Congress did not intend to preclude evidentiary use of tribal court guilty pleas in state and federal courts.

C. What About the Rights of Tribal Defendants?

Although the case for admitting uncounseled guilty pleas in state and federal courts is strong, one important objection remains: What about the rights of tribal defendants? Advocates for exclusion contend that state and federal law

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²⁹² Tribal Law and Order Act §§ 234(a)(3), 202(b).
²⁹⁴ Tribal Law and Order Act §§ 234(a)(3), 202(c)(1).
²⁹⁵ Id. §§ 234(a)(3), 202(c)(2).
federal governments have a duty to protect individual rights that overrides their duty to facilitate tribal self-governance. In his dissenting opinion in Spotted Eagle, Justice Leaphart pointed out the need to protect individual rights, while disparaging the majority’s emphasis on tribal sovereignty: “In true oxymoronic fashion, our Court has said to [the defendant], ‘Out of deference to your Tribe, we accord you fewer protections than guaranteed to individual citizens by the Montana Constitution.’”196 Similarly, two federal public defenders have argued that counting prior tribal court convictions toward federal sentences is “fundamentally unfair to Native American defendants,”197 because many tribal justice systems deny defendants the representation that would be guaranteed to them in state or federal court.198

Other commentators suggest that tribes must provide all defendants facing criminal prosecution in tribal courts with protections equivalent to the Sixth Amendment’s right to counsel.199 Full Sixth Amendment protections for all tribal court defendants would increase fairness and accuracy in tribal court proceedings.200 In addition, it would ensure that defendants do not lose the right to legal counsel due to their status as members of Indian tribes and their residence on an Indian reservation.201

Despite the merits of this argument, however, the law does not require tribal courts to provide full Sixth Amendment rights to tribal defendants. Congress has the authority to require tribes to provide full Sixth

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198. Id. at 216.
199. Advocates of full Sixth Amendment protections for tribal defendants “recognize and respect the importance of tribal sovereignty” but contend that tribes that elect to utilize incarceration must grant full Sixth Amendment protections to all. E.g., Tribal Law and Order Act of 2009: Hearing on H.R. 1924 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 80 (2009) [hereinafter Hearing on H.R. 1924] (statement of Tova Indritz, Chair, Native American Justice Committee of the National Association of Criminal Defense Lawyers); see also id. at 130 (statement of Barbara L. Creel, Assistant Professor of Law, University of New Mexico School of Law). Congress has the authority to require tribes to provide full Sixth Amendment rights in tribal courts.
200. See id. at 81 (statement of Tova Indritz).
201. See Letter from Tova Indritz, Chair, Native Am. Justice Comm. of the Nat’l Ass’n of Criminal Def. Lawyers, to Daniel Akaka, Chairman, S. Comm. on Indian Affairs, and John Barrasso, Vice Chairman, S. Comm. on Indian Affairs (Nov. 9, 2011), available at http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=22955&libID. The Supreme Court has ruled that “Indian” is a political status and not a racial classification. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). However, an individual’s race is almost always an essential factor for tribal membership. L. Scott Gould, Mixing Bodies and Beliefs: The Predicament of Tribes, 101 COLUM. L. REV. 702, 719–20 (2001). Thus, because tribal courts only have criminal jurisdiction over members of Indian tribes, race plays an indirect but important role in determining an individual’s ability to receive legal counsel. But see United States v. Shavanaux, 647 F.3d 993, 1001–02 (10th Cir. 2011) (holding that use of prior uncounseled tribal convictions does not violate the Equal Protection Clause), cert. denied, 132 S. Ct. 1742 (2012).
Amendment rights in tribal courts, but Congress has thus far declined to do so. Under existing law, courts should not modify the scope of Sixth Amendment protections that ICRA provides. Instead, advocates of extending full Sixth Amendment protections to all defendants in tribal courts must direct their arguments to Congress.

CONCLUSION

Given the current state of the law, federal and state courts should show respect for tribal justice systems by recognizing prior uncounseled tribal court guilty pleas for evidentiary purposes. The Ninth Circuit's decision in established a judicial rule of excluding evidence of uncounseled tribal court guilty pleas. However, the recent circuit decisions in and are inconsistent with and suggest that other courts should hesitate to follow 's lead.

Upon reevaluation, is deeply flawed. First, its legal reasoning is unsound, especially in light of the Supreme Court's subsequent decision in . International comity, as illustrated by and , provides a viable alternative to 's framework for analyzing tribal court judgments and suggests that judges should admit tribal court guilty pleas as evidence in state and federal proceedings. Second, is bad policy. Even though governments must protect the rights of individual criminal defendants, supporting tribal authority by recognizing tribal court judgments will ultimately lead to decreased violence on Indian land and increased consistency with federal legislation. Admittedly, recognizing tribal court guilty pleas in state and federal courts would fall far short of resolving the complex relationship among tribes, states, and the federal government. However, such recognition would constitute an important step toward mutual admiration and respect.


203. One important practical reason that Congress has declined to require tribal courts to provide full Sixth Amendment rights may be the lack of funding for tribal public defenders. Hearing on H.R. 1924, supra note 199, at 82 (statement of Tova Indritz).