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Policy Considerations and Implications in *United States v. Bryant*

Jessica Larsen

I. INTRODUCTION

In *United States v. Bryant*, the Supreme Court unanimously decided to both narrow the scope of the Sixth Amendment right to legal representation, and reinforce and strengthen tribal sovereignty and the legitimacy of the tribal court system.[1] The decision came at a time when the Court was only eight justices strong, and 4-4 splits along ideological lines left important issues in a sort of limbo: considered to have reached their final disposition, but without an opinion from the highest Court.[2] The issues presented in *Bryant* seemed likely to result in yet another split. The disposition of the case would either expand federal power over Native American tribes or diminish it, and the case was granted certiorari due to a circuit split.[3] What, then, drove the Court to decide unanimously in favor of the federal government?

One explanation may be the important policy considerations at play in this case. The issue at the heart of *Bryant* was whether uncounseled tribal court convictions could be used to support a conviction based on a federal recidivism statute without violating the Sixth Amendment.[4] However, greater issues were at stake. The federal statute in question allowed for offenders who were repeatedly convicted of domestic violence on Native American reservations to be charged with a federal crime.[5] This statute serves an important purpose because tribal courts are limited in their power to punish offenders on reservations and because domestic violence poses a disproportionately high risk to Native American women.[6]

Violence against Native American women is an issue that was both prevalent and overlooked by the justice system until very recently, and to some extent still is.[7] In passing the newest version of the Violence Against Women Act (VAWA), and with it the

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[1] 136 S. Ct. 1954 (2016).
[2] *See generally* Franchise Tax Bd. v. Hyatt, 538 U.S. 488 (2016); Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016); United States v. Texas, 136 S. Ct. 906 (2016); Adam Liptak, Larry Buchanan & Alicia Parlapiano, *How a Vacancy on the Supreme Court Affected Cases in the 2015–2016 Term*, N.Y. TIMES (June 27, 2016), http://www.nytimes.com/interactive/2016/02/14/us/politics/how-scalias-death-could-affect-major-supreme-court-cases-in-the-2016-term.html.
[3] *Bryant*, 136 S. Ct. at 1964.
[4] *Id.* at 1956.
[5] 18 U.S.C. § 117(a) (2012).
[6] *See General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL L. & POL'Y INST.: TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/jurisdiction.htm (last visited Mar. 5, 2018).
[7] *See Using the Declaration to End Violence Against Native Women*, INDIAN L. RESOURCE CTR., http://indianlaw.org/content/using-declaration-end-violence-against-native-women (last visited Mar. 5, 2018).

statute allowing for repeat offenders to be prosecuted federally, the federal government took long-overdue steps to correct the massive problem of violence against Native American women. It did so by allowing the federal government to impose longer sentences than tribal courts can for offenders who commit multiple acts of domestic violence against Native American women.[8]

The strength of the positions of both the petitioner and respondent in *Bryant* suggest that there had to have been considerations outside the precedential reasoning in the opinion that swayed the Court to not only decide in favor of the United States, but to do so unanimously. Taking into account the magnitude of the public policy issues at stake, it is logical to point to policy considerations as being substantially responsible for the Court's unanimous decision in *Bryant.* The Court in *Bryant* decided unanimously in favor of preserving protections granted to Native American women by VAWA not because the Constitution demanded it, but because the Court was aware of the policy implications of this case.

The obvious public policy consideration in *Bryant* is how to best protect Native American women from domestic violence. However, any case that has a significant impact on the relationship between federal courts and tribal courts also has an impact on the overall sovereignty of Native American tribes. From the majority and concurring opinions, it is clear that the Court was aware of both sets of policy concerns. The nature of this case was such that the Court had to choose between these concerns—either more sovereignty for the tribes or stronger protections for Native American women. In this instance, the Court chose stronger protections for Native American women at the expense of tribal sovereignty. This Note seeks to understand the Court's reasons for choosing one policy concern over the other and to explore how this decision could impact the Native American community.

a. Background—Tribal Courts

To understand the significance of the Court's decision in *Bryant*, it is important to understand the position of tribal courts in the American legal landscape. Native American tribes are legally considered "domestic dependent nations."[9] This unique legal classification means that tribes are "in some ways more autonomous than states and in other respects less so."[10] It is this status of semi-sovereignty that allowed for the formation of the tribal court system. The singular and contradictory sovereignty given to Native American tribes also forms the basis of much of Justice Thomas's concurrence in *Bryant*.[11]

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[8] *Compare General Guide to Criminal Jurisdiction in Indian Country*, *supra* note 6 ("The Indian Civil Rights Act . . . provides that tribal court cannot 'impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000 or both.'"), *with* 18 U.S.C. § 117(a) ("[A]n offense . . . shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.").

[9] Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1502 (2013).

[10] *Id.*

[11] *Bryant*, 136 S. Ct. at 1967 (Thomas, J., concurring).

Originally, tribes had complete jurisdiction over their territories. State law did not govern tribal lands, and tribes had jurisdiction over all people, Native and non-Native alike, who were physically on tribal lands—a relationship much like one between the United States and a foreign nation.[12] "Native people had methods of resolving disputes prior to the introduction of Anglo law to the North American continent," and prior to the formalization of tribal courts and tribal laws, these dispute-resolution methods were what governed all people on tribal lands for all matters.[13] This authority came from the idea that, as sovereign entities, tribes were "qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal government but rather by reason of their original tribal sovereignty."[14]

Over time, the Supreme Court began limiting the jurisdiction of tribal justice systems, finding that states had some jurisdiction over tribes, particularly with respect to criminal law and crimes involving non-Native people.[15] One of the earliest attempts by the federal government to exercise jurisdiction over Native American tribal lands involved a case where a member of the Lakota tribe, Crow Dog, killed another member of his tribe.[16] The Lakota had already punished Crow Dog according to their traditional methods, which involved him paying restitution to the victim's family.[17] The Supreme Court held that the treaty between the tribe and the federal government allowed the tribe to adjudicate the matter by its own methods.[18] Congress responded to this case by enacting the Major Crimes Act, "giving the federal courts the authority to prosecute Indians who commit certain major crimes on reservations," in an attempt to correct a perceived lawlessness in the Native American tribes.[19] This was just one action among many the federal government took following *Crow Dog* to reduce tribal sovereignty and gain jurisdiction over tribal lands.[20]

The Indian Reorganization Act of 1934 allowed tribes "to set up their own justice codes and operate court systems enforcing tribal laws enacted by Indian tribes."[21] Tribal courts, therefore, exist under the authority of the Indian Reorganization Act of 1934, not Article III of the Constitution, which created federal and state courts.[22] Not all tribes chose to write their own code, and not all tribes chose to operate their own court

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[12] Florey, *supra* note 9, at 1502.
[13] B.J. JONES, CTR. ON CHILD ABUSE & NEGLECT, INDIAN COUNTRY CHILD TRAUMA CTR., ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 4 (2000), http://www.icctc.org/Tribal%20Courts.pdf.
[14] David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power": An Analysis of Case Law Affecting Tribal Sovereignty, 1886–1914*, 18 AM. INDIAN Q. 349, 349–50 (1994).
[15] Florey, *supra* note 9, at 1519.
[16] *Ex parte* Crow Dog, 109 U.S. 556, 556 (1883). The opinion refers to the tribe as "Sioux," however, "Sioux" is a name derived from the Chippewa word for "snake," and was given to the tribe after the neighboring Chippewa identified the tribe as such to explorers. The "Sioux" in fact consists of three tribes-the Lakota, Dakota, and Nakota. Crow Dog belonged to the Lakota tribe. *See* Maurice G. Smith, *Indian Tribal Names*, 5 AMERICAN SPEECH 114, 115–16 (1929).
[17] JONES, *supra* note 13, at 4.
[18] *Id.*
[19] *Id.* at 4 n.9.
[20] *See* Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 198 (2008).
[21] JONES, *supra* note 13, at 5.
[22] *Id.*

systems.[23] These tribes "operate by the Code of Indian Offenses found in the Code of Federal Regulations [(CFR)]" and resolve disputes in courts operated by the Bureau of Indian Affairs.[24] For the most part, tribal courts function procedurally similarly to federal and state courts.[25] Tribal courts "use sworn testimony, keep a record of court proceedings and use both a judge and jury system to decide cases."[26]

II. SUMMARIZING *BRYANT*

a. Facts

Michael Bryant Jr. is a member of the Northern Cheyenne tribe.[27] Between 1997 and 2007, he was convicted over 100 times in tribal courts, including five instances in which he pled guilty to domestic violence charges.[28] In 2011, Bryant was convicted of domestic violence against two women.[29] In one instance, Bryant repeatedly kicked and punched his then-girlfriend.[30] He admitted to the police after being arrested that this was the fifth or sixth time that he had assaulted his girlfriend.[31] Three months after this conviction, Bryant was convicted of domestic violence again, this time against his new girlfriend of two months.[32] He choked her until she lost consciousness and told police that over the course of their two-month relationship, he had assaulted her multiple times.[33]

Bryant was indicted on federal charges of domestic assault by a habitual offender.[34] The statute under which Bryant was indicted provides that offenders who have been convicted of domestic assault in the United States, including in tribal courts, on at least two separate occasions may be charged under the federal statute and sentenced to up to five years in prison upon their conviction for a third assault.[35] Bryant, represented by counsel, moved to dismiss on the basis that his prior, uncounseled convictions in tribal court could not be used to charge him under § 117(a) without violating the Sixth Amendment.[36] The district court denied Bryant's motion, and he pled guilty.[37] On appeal of the motion to dismiss, the Ninth Circuit reversed and directed the lower court to

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[23] *Id.*
[24] *Id.*
[25] *Id.* at 7.
[26] *Id.*
[27] *Bryant*, 136 S. Ct. at 1963.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* It should be noted that non-fatal strangulation is a significant predictor of future homicide or attempted homicide in abusive relationships. *See* Nancy Glass, Kathryn Laughon, Jacquelyn Campbell, Anna D. Wolf Chair, Carolyn Rebecca Block, Ginger Hanson, Phyllis W. Sharps & Ellen Taliaferro, Non-Fatal Strangulation is an Important Risk Factor for Homicide of Women (Oct. 1, 2009) (unpublished manuscript) (on file with the Journal of Emergency Medicine).
[34] *Bryant*, 136 S. Ct. at 1963.
[35] 18 U.S.C. § 117(a).
[36] *Bryant*, 136 S. Ct. at 1957.
[37] *Id.*

dismiss the indictment, finding that because Bryant's tribal court convictions would have been in violation of the Sixth Amendment had they been tried in state or federal courts, they could not be used for purposes of indicting Bryant under § 117(a).[38]

b. Circuit Split

The Supreme Court granted certiorari in *Bryant* because the decision of the Ninth Circuit created a circuit split between the Ninth, Eighth, and Tenth Circuits.[39] Both the Eighth and Tenth Circuits had previously held that "tribal-court convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117(a)."[40]

The Eighth Circuit had considered the issue in *United States v. Cavanaugh*.[41] The facts in *Cavanaugh* are very similar to the facts in *Bryant*. Cavanaugh was charged with domestic assault by a habitual offender under § 117(a) in federal court after being convicted of misdemeanor abuse in tribal court on three occasions without being represented by counsel.[42] Because Cavanaugh's tribal court convictions were uncounseled, the district court dismissed the indictment under § 117(a) as it was in violation of the Sixth Amendment right to counsel.[43] The federal government then appealed to the Eighth Circuit.[44] Unlike in *Bryant*, Cavanaugh argued that his tribal court convictions were invalid because he was not given court-appointed counsel.[45] The district court and the Eighth Circuit both found this argument to be meritless, noting that it had long been established in Indian law[46] that "the Constitution does not apply to restrict the actions of Indian tribes as separate, quasi-sovereign bodies."[47] The Eighth Circuit noted that under the Indian Civil Rights Act (ICRA), tribal courts are only required to appoint counsel for indigent defendants if the defendant faces a sentence of incarceration for more than one year.[48] Since Cavanaugh was only charged with misdemeanor offenses and "the Indian Civil Rights Act does not impose upon tribes a duty to provide counsel for indigent misdemeanor defendants," he did not have a right to appointed counsel in tribal court, and the Eighth Circuit held that his prior convictions were valid.[49]

The Eighth Circuit then moved on to the question of whether the tribal court convictions, being valid, could be used to indict Cavanaugh under § 117(a). The court relied on the Supreme Court's ruling in *Nichols v. United States*, in which the Court held

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[38] *Id.*
[39] *Id.* at 1964.
[40] *Id.* (citing United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011)) (internal quotations omitted).
[41] 643 F.3d at 597.
[42] *Id.* at 593.
[43] *Id.*
[44] *Id.* at 594.
[45] *Id.* at 595.
[46] This Note uses the term "Indian law" to refer to the body of law pertaining to Native American tribes and reservations. Although the use of the term "Indian" is problematic in reference to Native American peoples, the term "Indian law" has long been used to refer to this area of law and is commonly found in court opinions and statutes.
[47] *Id.*
[48] *Id.* at 596.
[49] *Id.* at 595.

that uncounseled prior convictions that were valid because they had not resulted in incarceration could be used in a conviction for enhancement purposes.[50] The court reasoned that because Cavanaugh's prior convictions were not in violation of the Constitution, charging him under § 117(a) was also not in violation of the Constitution.[51]

The Tenth Circuit considered the issue in another case with a strikingly similar fact pattern: *United States v. Shavanaux*.[52] Shavanaux, like Bryant and Cavanaugh, was a member of a Native American tribe who was charged under § 117(a) after having been previously convicted on multiple occasions of domestic assault on a Native American reservation.[53] Shavanaux was also uncounseled when he was convicted in tribal court.[54] The Tenth Circuit noted, "because the Bill of Rights does not constrain Indian tribes, Shavanaux's prior uncounseled tribal convictions could not violate the Sixth Amendment," and, "thus, use of Shavanaux's prior convictions in a prosecution under § 117(a) would not violate the Sixth Amendment."[55]

Cavanaugh and *Shavanaux* were decided just twenty days apart by the Eighth and Tenth Circuits in 2011.[56] The Ninth Circuit's ruling in *Bryant* came three years later in September 2014 and created the circuit split.[57] The Ninth Circuit based its reversal of Bryant's conviction on a 1989 case it had decided, *United States v. Ant*.[58] In *Ant*, the Ninth Circuit reasoned that "if Ant's earlier guilty plea had been made in a court other than in a tribal court, it would not be admissible in the subsequent federal prosecution absent a knowing and intelligent waiver," and since the guilty plea would have violated the Sixth Amendment if it were made in state or federal court, "such a plea is inadmissible in a federal prosecution."[59] In *Bryant*, the Ninth Circuit took notice of the holding in *Nichols* that "an uncounseled misdemeanor conviction, valid . . . because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[60] However, the Ninth Circuit distinguished *Bryant* and *Ant* from *Nichols* by pointing out that "*Nichols* involved a prior conviction that did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment."[61] The Ninth Circuit acknowledged the creation of the circuit split with its decision in *Bryant*, but noted that *Ant* was binding precedent, and that *Cavanaugh* and *Shavanaux* could not be reconciled with *Ant*.[62]

[50] *Id.* at 599.
[51] *Id.* at 604–05.
[52] 647 F.3d 993 (10th Cir. 2011).
[53] *Id.* at 995.
[54] *Id.* at 996.
[55] *Id.* at 997–98.
[56] *See generally id.*; *Cavanaugh*, 643 F.3d 952.
[57] *See* United States v. Bryant, 769 F.3d 671 (9th Cir. 2014).
[58] *Id.* at 677 (citing United States v. Ant, 882 F.2d 1389 (9th Cir. 1989)).
[59] *Ant*, 882 F.2d at 1394–95.
[60] *Bryant*, 136 S. Ct. at 1963 (citing Nichols v. United States, 511 U.S. 738, 748–49 (1994)).
[61] *Bryant*, 769 F.3d at 677.
[62] *Id.* at 678.

c. Legal Backdrop

Justice Ginsburg, writing for the Court, began her discussion of the issues in *Bryant* by acknowledging that domestic violence is a serious problem for Native American women. The Court outlined some of the relevant statistics, showing that Native American women are one of the groups most vulnerable to intimate partner violence.[63] It went on to note that domestic abusers have an abnormally high rate of recidivism, with attacks often escalating until the domestic abuser commits murder.[64]

The Court also pointed out the difficulty in punishing domestic assaults perpetrated against Native American women due to the complexity of Indian law.[65] Tribal courts have jurisdiction over Native American defendants, as was the case in *Bryant*. However, as stated above, Congress has limited the sentencing ability of tribal courts. The Court noted that ICRA only allowed tribal courts to impose up to one year of incarceration, and more recent legislation allowed for tribal courts to sentence for up to three years if they adopt "additional procedural safeguards."[66] These procedural safeguards include providing the defendant assistance of counsel equal to what is required by the Sixth Amendment; providing indigent defendants with counsel at the expense of the tribal government; requiring the judge to have legal training and be licensed to practice law in the United States; publishing criminal laws, rules of evidence, and rules of criminal procedure of the tribal government; and maintaining a record of any criminal proceedings.[67] The Court emphasized that "few tribes have employed this enhanced sentencing authority," meaning that for most tribal courts, the reality is that the maximum sentence they can impose is one-year imprisonment.[68]

In addition to the complexity of the jurisdictional and sentencing issues, the Court went on to note that states have some limited capability of exercising jurisdiction over crimes committed by Native Americans on Native American land but that states rarely take advantage of this capability.[69] The result is that the federal government is left to pick up the slack left by state inaction and Congressional limitations on tribal sentencing and enforcement power. In most cases, Congress has not allowed for federal court jurisdiction over crimes committed by a Native American against another Native American.[70] The Major Crimes Act allowed federal jurisdiction over a finite number of offenses when the offender and victim are both Native American.[71] The Court made a point of noting that those crimes included are only the most serious, limited to "murder, manslaughter, and felony assault."[72] At the time, federal prosecution of felony assault required "serious bodily injury, meaning a substantial risk of death, extreme physical pain, protracted and

[63] *Bryant*, 136 S. Ct. at 1959.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1960.
[67] 25 U.S.C. § 1302(c) (2010).
[68] *Bryant*, 136 S. Ct. at 1960.
[69] *Id.*
[70] *Id.*; *see also Ex parte Crow Dog*, 109 U.S. at 571–72.
[71] *Bryant*, 136 S. Ct. at 1961.
[72] *Id.* (citing Major Crimes Act, 18 U.S.C. § 1153) (internal quotations omitted).

obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[73] The Court correctly recognized that the result of the above factors is that "serial domestic violence offenders, prior to the enactment of § 117(a), faced at most one year's imprisonment per offense—a sentence insufficient to deter repeated and escalating abuse."[74] This insufficiency was what spurred Congress to enact § 117(a).[75]

After outlining the stakes by describing the problem in the Native American community of domestic assault and the difficulties associated with reducing it, the Court went on to discuss the issue central to this case: whether explicit inclusion of tribal court convictions in § 117(a) could be reconciled with the Sixth Amendment.[76] The Court reasoned that Native American tribes are generally not subject to Constitutional provisions that limit state or federal authority. However, ICRA did impose some protections for tribal court defendants that are similar to, but not the same as, the Bill of Rights and Fourteenth Amendment.[77]

One of the protections that ICRA granted to defendants is the right for indigent defendants to be represented by counsel at the expense of the tribal government if the tribal court imposes a sentence of incarceration for more than one year.[78] Thus, the question central to *Bryant* and the circuit split is whether convictions obtained in compliance with ICRA can be used to charge a defendant under § 117(a). In *Burgett v. Texas*, the Court held that a conviction obtained in violation of the Sixth Amendment could not be used to convict a defendant under a recidivist statute similar to § 117(a).[79] To allow such a conviction based on wrongfully uncounseled prior convictions, even if the defendant is counseled for the charges based on the recidivist statute, would be a further violation of the defendant's Sixth Amendment rights.[80] In the words of the Court, it "would cause the accused in effect to suffer anew from the prior deprivation of his Sixth Amendment right."[81]

The Court went on to say that *Nichols* placed a limitation on *Burgett*.[82] According to the Court, *Nichols* limits *Burgett* because it held that an uncounseled misdemeanor, valid because the prior conviction resulted in only a fine and no jail time, could be used in a subsequent conviction to enhance punishment.[83]

d. Reasoning and Holding

Bryant did not attempt to dispute that his prior uncounseled convictions were valid.[84] Bryant's argument for affirming the reversal of his conviction was that had his

[73] *Id*. (internal quotations and citations omitted).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 1962.
[78] *Id*.
[79] *Id.* (citing Burgett v. Texas, 389 U.S. 109, 115 (1967)).
[80] *Id.*
[81] *Id.* (citing *Burgett*, 389 U.S. at 115).
[82] *Id.* at 1963.
[83] *Id.*
[84] *Id*. at 1963–64.

tribal court convictions been handed down by a state or federal court, they would have been invalid and could not have been used to charge him under § 117(a).[85]

The Court cited *Nichols* as the basis for its reasoning in this case.[86] Part of the Court's reasoning for its holding in *Nichols* was that recidivist or enhancement statutes do not punish an offender again for crimes previously committed, but only punish for the most recent crime with which the defendant is charged.[87] For this reason, a conviction's validity carries over to subsequent proceedings.[88]

Because Bryant was not sentenced to more than one year in his prior convictions and because he was granted counsel in his federal court case, the Court found that he was not denied his Sixth Amendment rights at any point. The Court reasoned that to find otherwise would cause tribal court convictions to be valid for the sentence imposed, but invalid for enhancing a later sentence or bringing charges under a recidivist statute.[89] Such a contradiction would be undesirable.

The Court reconciled this decision with *Burgett* by holding that *Burgett* only disallowed the use of an uncounseled conviction in later criminal proceedings if the uncounseled convictions were in violation of the Sixth Amendment.[90] Since the Court already held that Bryant's Sixth Amendment rights were never violated in his tribal-court convictions by virtue of the fact that he had no Sixth Amendment right to counsel in tribal court, the Court found no conflict with *Burgett*.[91]

In closing, the Court held that because Bryant's tribal-court convictions were in accordance with the requirements placed on tribal courts by ICRA, they were valid when entered and are valid for purposes of indictment under § 117(a).[92] The Court reversed the Ninth Circuit and remanded this case.[93]

e. Concurrence

Justice Thomas wrote a concurring opinion, stating that the Court's opinion was correct based on precedent.[94] He continued, however, by noting that the case itself was an example of "how far afield our Sixth Amendment and Indian-law precedents have gone."[95] Justice Thomas first argued that the Court's opinion in *Burgett* created greater protections than the Sixth Amendment calls for, since all that the Sixth Amendment requires is for a defendant to be granted counsel in the proceeding at hand, not for a defendant to have had counsel in all prior convictions on which the current charges are premised.[96]

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[85] *Id.* at 1964–65.
[86] *Id.* at 1965.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 1966.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 1967 (Thomas, J., concurring).
[95] *Id.*
[96] *Id.*

Justice Thomas then addressed Indian law. He wrote that the case was based on two conflicting premises: (1) that Bryant did not have a Sixth Amendment right to counsel in tribal court because Native American tribes have sovereignty, but (2) that the recidivism statute with which Bryant was charged exists only because Congress has a great deal of power over what happens on Native American reservations.[97] In response, Justice Thomas stated, "even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its 'plenary power' over Indian tribes."[98]

Justice Thomas then went on to question the very origins of Congress's plenary power over Native American tribes. Congress's power over Native American tribes stems in part from *United States v. Kagama*. Justice Thomas quoted the justification for this power provided by the Court in *Kagama* as justification for giving Congress said power: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . . It must exist in that government, because it has never existed anywhere else."[99] Justice Thomas was very skeptical of this precedent as a basis for Congressional power over Native American tribes and was skeptical of the idea of Congressional plenary power over Native American tribes in general.[100] He also questioned the federal government's treatment of all Native American tribes as a monolith, with each having the same claim to sovereignty as every other tribe.[101]

III. ANALYZING *BRYANT*

The Court's opinion in *Bryant* presents two rationales for its holding that uncounseled tribal court convictions can be used in subsequent federal court indictments under recidivist statutes such as § 117(a). There is the legal rationale, in which the Court reconciles the holdings in *Burgett* and *Nichols* to find that the two can be read in concert to reach the Court's holding. Then there is the public policy rationale, in which the Court makes a case for how important it is for tribal court convictions to be valid for use in an indictment or conviction under § 117(a).

The Court devotes more space in the opinion to the legal side of its reasoning than to the public policy angle. In fact, for the most part, the problems associated with domestic assault against Native American women and enforcing laws against it are laid out as facts in one section of the opinion and are never connected to the Court's rationale for its decision.[102] At first glance, it may seem that public policy considerations played little or even no part in the Court's decision in *Bryant.*

However, a closer look at the legal rationale behind the Court's holding reveals that while there is a sound doctrinal and precedential basis for the Court's decision, the legal

[97] *Id.*
[98] *Id.*
[99] *Id.* (quoting United States v. Kagama, 118 U.S. 375, 384–85 (1886)).
[100] *Id.* at 1969.
[101] *Id.* at 1968.
[102] *See id.* at 1965–66.

issues in play, particularly the intersection of the Court's decisions in *Burgett* and *Nichols*, are not as black and white as the opinion and the Court's unanimity may suggest. Further, in considering that this ruling by the Court expanded federal power over Native American tribes, it seems even more surprising that all eight sitting justices agreed on the outcome, since expansion of federal power is generally a hotly contested issue between liberal and conservative justices.[103]

In looking closely at the facts and the law in *Bryant*, it becomes apparent that there were holes in the government's argument and valid points made by Bryant that, had the Court been receptive to them, could have stood as a basis for an equally valid opinion with an opposite holding in this case. The Court distinguished *Bryant* from *Burgett* and analogized it to *Nichols* in order to make the case that, like in *Nichols*, the use of the uncounseled prior conviction was valid for Bryant's subsequent indictment.[104] However, the analogy to *Nichols* was addressed in the Ninth Circuit's opinion in Bryant's appeal from his conviction in district court, and the Ninth Circuit found the analogy lacking. The Ninth Circuit wrote, "*Nichols* involved a prior conviction that did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment."[105] The Ninth Circuit held that for a tribal court conviction to be used in subsequent proceedings, the tribal court would have to "guarantee[] a right to counsel that is, at minimum, coextensive with the Sixth Amendment right."[106]

If the stipulation that a tribal court should offer a right to counsel equivalent to the Sixth Amendment sounds familiar, that is because it is the same as the burden the federal government currently places on Native American tribes in order for tribal courts to be able to impose sentences of incarceration for longer than one year.[107] Because the federal government already requires tribal courts to provide defendants with a right to counsel that is coextensive with the Sixth Amendment to gain increased sentencing power, it is not unreasonable to impose a lesser requirement (since for increased sentencing power the right to counsel is only one requirement among five) for tribal court rulings to have increased weight in subsequent federal convictions.

The Court dismissed Bryant's argument that tribal courts may be less reliable than state or federal courts as a reason that the Court should not allow uncounseled tribal court convictions to stand as a basis for his conviction under a recidivist statute.[108] It stated that "there is no reason to suppose that tribal court proceedings are less reliable when a sentence of one year's imprisonment is imposed than when the punishment is merely a

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[103] In this instance, "liberal" and "conservative" refer to judicially, not ideologically, liberal and conservative justices. In relevant part, judicially "liberal" (sometimes described as "activist") justices tend to favor expansion of federal power, whereas judicially "conservative" justices tend to favor limiting federal power in favor of more power being given to the states. *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1197–99 (discussing different operational definitions for "conservative" judges).

[104] *Bryant*, 136 S. Ct. at 1965.

[105] *Bryant*, 769 F.3d at 677.

[106] *Id.*

[107] *See* 25 U.S.C § 1302.

[108] *Bryant*, 136 S. Ct. at 1966.

fine."[109] This statement is completely at odds with § 1302, which strongly implies that tribal courts are less reliable than state or federal courts by imposing heightened procedural requirements on tribal courts in order for them to be able to impose prison sentences of longer than one year or fines greater than $5,000.[110]

The Court went so far as to state that "we see no cause to distinguish for § 117(a) purposes between valid but uncounseled convictions resulting in a fine and valid but uncounseled convictions resulting in imprisonment not exceeding one year."[111] This statement is even more at odds with the idea that tribal courts are reliable enough to impose sentences of one year or less, but not reliable enough to impose sentences of up to three years. If anything, a more sensible distinction would be between any sentence of incarceration and any fine, rather than the arbitrary line between one year and three years of incarceration. To an individual facing any of the above penalties, the former distinction would certainly make far more sense than the latter.

IV. UNDERSTANDING THE ISSUES

All this is not to say that the Court reached the wrong conclusion in *Bryant*. On the contrary, the decision in *Bryant* was a potential matter of life or death for thousands of Native American women. Before the case was decided, the Lakota People's Law Project noted that the stakes were enormous for the Native American community: "If the Supreme Court rules in favor of Bryant, then tribal court convictions would not be able to count towards habitual offender status, making it much easier for abusers to get away with their crimes in Native communities."[112]

The seriousness of the endemic problem of domestic violence against Native American women cannot be overstated. The Supreme Court acknowledged the severity of the problem in its ruling in *Bryant*.[113] However, two paragraphs simply cannot paint a complete picture of how dire the situation truly is for many Native American women.

A 1999 Department of Justice (DOJ) report found that "rates of violent victimization were higher for Native women than for all other groups in the United States."[114] This was true despite a DOJ finding that 70% of sexual assaults against Native American women are never reported.[115]

Most violence against Native American women is committed by non-Native Americans.[116] Native American women suffered intimate partner rape at a 15.9% rate, while 75% of Native American women who are victims of homicide are killed by someone they know, with that person being a family member one-third of the time.[117]

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[109] *Id.*
[110] *See* 25 U.S.C § 1302.
[111] *Bryant*, 136 S. Ct. at 1965.
[112] Eliza Racine, *Supreme Court Case May Endanger Native Women*, LAKOTA PEOPLE'S L. PROJECT (May 5, 2016), https://www.lakotalaw.org/news/2016-05-06/supreme-court-case-may-endanger-native-women.
[113] *Bryant*, 136 S. Ct. at 1959.
[114] Roe Bubar & Pamela Jumper Thurman, *Violence Against Native Women*, 31 SOC. JUST. 70, 70 (2004).
[115] *Id.* at 71.
[116] *Id.* at 72 ("[A]mong Native Americans, 75% of the offenders in intimate (victimization involving current and former spouses, boyfriends, and girlfriends) violence cases were of a different race . . . .").
[117] *Id.*

Understanding the roots of violence against Native American women is key in understanding why the federal government has a responsibility to take a role in protecting Native American women and why the Supreme Court in *Bryant* affirmed that responsibility

The colonization of Native American tribes by the United States had disastrous results on Native American peoples and cultures. One of the most severe ill effects of colonization was the destruction of traditional family life and community support systems.[118] Some Native American tribes that had matriarchal structures or that afforded women more rights than white society did at the time of colonization were forced to conform to stricter patriarchal gender roles, which resulted in greater oppression of Native American women.[119] When women in a society are more oppressed, violence against them, particularly sexual and domestic violence, becomes more pronounced, because these forms of violence are used as an assertion of power over women[120].

Additionally, colonization devastated Native American communities economically. Bubar and Thurman note that "violence against women is an issue for all classes," but "poverty remains a stressor that likely increases the likelihood of violence. Native Americans with incomes of less than $10,000 per year have experienced the highest rate of violent victimization."[121] These conditions may result in "internalized oppression and the normalization of violence" in Native American communities.[122]

As referenced above, ineffective enforcement is another significant feature contributing to violence against Native American women. The Court noted in *Bryant* that "the complex patchwork of federal, state, and tribal law governing Indian country has made it difficult to stem the tide of domestic violence experienced by Native American women."[123] A lack of enforcement and punishment is almost certainly part of the reason that Native American women suffer violence at such shockingly high rates, and likely contributes to the normalization of violence against women in Native American communities.

It is not surprising that the Court would feel compelled to take action to ensure greater protections for Native American women in light of the federal government's role in the colonization of Native American peoples, which likely contributed in large part to the rates of violence experienced by Native American women. Considering the mess of enforcement issues also at play, it is even less surprising that the Court would unanimously decide in a way that serves to simplify the enforcement scheme for domestic violence against Native American women.

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[118] *Id.* at 73.
[119] *Id.* at 74–75.
[120] *See* Aisha K. Gill and Hannah Mason-Bish, *Addressing violence against women as a form of hate crime: limitations and possibilities*, 105 FEMINIST REVIEW 1, 2 (2013).
[121] *Id.* at 75.
[122] FUTURES WITHOUT VIOLENCE, THE FACTS ON VIOLENCE AGAINST AMERICAN INDIAN/ALASKAN NATIVE WOMEN (2017), https://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf.
[123] *Bryant*, 136 S. Ct. at 1959–60.

V. THE COURT'S COOPERATION

A further explanation behind the Court's ruling may come from the unified front presented by Congress and President Obama at the time of *Bryant*. When the other two branches of government are in clear agreement about what the law should look like for a particular issue, it is highly unlikely that the Court will rule against them both. This would take the Court into the territory of making the law—a risk the Court generally does not like to take, and certainly would not take without protest from judicially conservative justices.[124] In the case of *Bryant*, Congress and the President were in agreement that violence against Native American women was an issue that needed to be addressed and that greater enforcement was an appropriate way of addressing it.

Congress clearly signaled its support for this approach to the issue in passing § 117(a). The statute is specifically designed to protect victims of domestic assault in "Indian country" and explicitly includes convictions in tribal court as prerequisites for conviction under the new habitual offender statute.[125] In the Court's opinion in *Bryant*, it quotes Senator John McCain's remarks on the Senate floor about the seriousness of domestic violence against Native American women.[126]

President Obama also unequivocally supported strengthening protections for Native American women by closing gaps in the law. In a statement released by the White House after President Obama signed the Violence Against Women Reauthorization Act of 2013, the White House quoted the President as saying that "tribal governments have an inherent right to protect their people, and all women deserve the right to live free from fear. And that is what today is all about."[127] Although the President did not express his support for § 117(a) specifically, he made it clear that he prioritized giving tribal governments the necessary power to protect women from domestic violence. In hearing and deciding *Bryant* within the same presidential term, the Court certainly knew where the President and the executive branch stood on this issue.

VI. POSSIBLE IMPLICATIONS

Native American groups and activists were strongly in favor of the Court's ruling in *Bryant*.[128] It closed a gap in Indian law that left Native American women, arguably the most vulnerable population in the United States, in more danger of domestic violence by making the consequences for their abusers relatively light. However, Justice Thomas made an excellent and thought-provoking point in his concurrence about the absurdity inherent in the Court's decision in *Bryant* and in much of Indian law. The contradiction

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[124] Young, *supra* note 103, at 1197 (identifying a belief in judicial restraint as a hallmark of judicial conservatism).
[125] 18 U.S.C. § 117(a).
[126] *Bryant*, 136 S. Ct. at 1959 (citing 151 CONG. REC. 9061 (2005) (remarks of Sen. McCain)).
[127] Jodi Gillette & Charlie Galbraith, *President Signs 2013 VAWA—Empowering Tribes to Protect Native Women*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Mar. 7, 2013, 7:07 PM), https://www.whitehouse.gov/blog/2013/03/07/president-signs-2013-vawa-empowering-tribes-protect-native-women.
[128] *See* Racine, *supra* note 112.

between the concepts of tribal sovereignty and federal power over Native American tribes was the only reason this case came about.[129]

Scholars from legal and social science disciplines have examined the contradiction between tribal sovereignty and the federal government's plenary power over tribes and have found the two truths hard to reconcile. Wilkins writes, "[t]here is also considerable disagreement among scholars on whether plenary power is a necessary congressional power which protects tribes, or whether it is an abhorrent and undemocratic concept because it entails the congressional exercise of wide political authority over tribes."[130]

In this particular case, what is good for the physical safety of Native American women may not necessarily be good for Native American tribes on the whole, if their desire is to expand their sovereignty and lessen the federal government's control over their affairs. The decision in *Bryant* was meant to make Native American women safer, but the mechanism for doing so was to give the federal government even more power to prosecute crimes committed on Native American land.

This raises the question: is there a solution that could both protect Native American women from domestic and other forms of violence against them, while avoiding erosion of tribal sovereignty? Some of the major issues with enforcement stem from a lack of resources on tribal lands. The U.S. Commission on Civil Rights found:

> [P]olicing, justice, and corrections [] are substandard in Indian country as compared with the rest of the nation. Native Americans are twice as likely as any other racial/ethnic group to be the victims of crimes. Yet per capita spending on law enforcement in Native American communities is roughly 60% of the national average. Correctional facilities in Indian Country are more overcrowded than even the most crowded state and federal prisons.[131]

Additionally, "Native Americans are incarcerated at a rate 38% higher than the national per capita rate."[132]

Looking at these facts together, it seems unlikely that either more sovereignty for Native American tribes or more federal government enforcement will be able to solve the issue of domestic violence against Native American women. On one hand, Native American reservations do not have the resources to implement effective enforcement and protection for Native American women under the current system.[133] In one roundtable discussion, Native American women expressed feelings of having little power in tribal decision-making systems.[134] They felt that tribal law enforcement and judges were uneducated about domestic violence and sometimes engaged in victim-blaming.[135] Research suggests that the inability of many tribal governments to address crime

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[129] *Bryant*, 136 S. Ct. at 1967 (Thomas, J., concurring).
[130] Wilkins, *supra* note 14, at 349.
[131] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 56 (2004).
[132] *Id*.
[133] *Id*.
[134] *See* Bubar & Thurman, *supra* note 114, at 79.
[135] *Id*.

"significantly harms American Indian and Alaska Native women in particular."[136] If tribal sovereignty were simply expanded, tribal law enforcement would likely be unable to cope with the increased responsibility. This could have the effect of worsening the problem for Native American women.

On the other hand, increasing federal government power to enforce the law on Native American reservations may also have negative, unintended consequences for Native American women. Native Americans are incarcerated at a rate higher than the national rate per capita, which may be one reason for Native American women to distrust federal law enforcement, preventing them from reporting crimes to federal law enforcement.[137] Hypothetically, if Native American women think that federal law enforcement is prejudiced against Native Americans, they may not trust the system to care about them enough to actually help them, and they may not trust the system enough to deal with their abusers fairly. Particularly in domestic violence situations, where the victim may feel some attachment to their abuser, this loyalty may prevent Native American women from seeking help from the federal government. Additionally, some of the same complaints Native American women have about judges engaging in victim-blaming and being poorly educated on issues of domestic violence have been lodged against both state and federal judges.[138]

However, the history of colonization is a larger factor contributing to Native American women's distrust of the federal government and another reason that expanding federal power on tribal reservations may not have the desired effect. White colonizers used government agencies, including the Bureau of Indian Affairs, the Indian Health Service, and the Department of Children and Family Services, to oppress Native American people.[139] For instance, the Indian Health Service unnecessarily sterilized Native American women through coercion in the 1970s.[140] Additionally, the Bureau of Indian Affairs took Native American children from their homes and placed them in boarding schools meant to "assimilate them" into white culture by eliminating all traces of their Native American culture, often through abuse.[141]

Abused Native American women often fear that the state will take their children away.[142] This fear stems from multiple sources. The first is the historical context outlined above—Native American children were taken away from their families in the past as part of an effort to stamp out Native American tribes by robbing their children of their racial and cultural identity.[143] The problem is not confined to history. To this day, Native American children are removed from their homes more frequently per capita than

[136] FUTURES WITHOUT VIOLENCE, *supra* note 122.
[137] McCarthy, *supra* note 130, at 56.
[138] *See* James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1156 (1995).
[139] Bubar & Thurman, supra note 114114, at 76.
[140] *Id*.; *see generally* Barbara Gurr, *Mothering in the Borderlands: Policing Native American Women's Reproductive Healthcare*, 37 INT'L J. SOC. FAM. 69, 73 (2011).
[141] *See* McCarthy, *supra* note 130, at 127.
[142] Bubar & Thurman, *supra* note 114, at 76.
[143] *See* McCarthy, *supra* note 130, at 127.

children of all other races.[144] Harmful stereotypes about Native Americans and particularly Native American women may contribute to this phenomenon. Dominant white culture often stereotypes Native American women as lazy, dirty, unintelligent, and prone to vices like drinking and gambling.[145] Further, it views these women as (1) having many children while (2) being less capable of motherly sentiment than white women and thus more likely to neglect their children.[146]

Finally, mothers who are victims of domestic abuse often have their children taken away and, in some cases, have their parental rights terminated for allowing their children to be exposed to domestic abuse, even if the children were never abused by the mother's violent partner.[147] Historical abuse and oppression of Native Americans by the federal government, coupled with states' propensity to take children away from victims of domestic abuse, would make it very difficult for Native American women to turn to the federal government for protection from domestic violence if that became their only avenue.

Although the Court in *Bryant* attempted to address the issue of domestic violence against Native American women through increasing federal power over Native American tribes, the best way to effectively handle this issue may be to look to Native American women themselves to determine their ideal solution. At one roundtable, Native American women said that they felt like an afterthought to discussions and policy meetings in Washington D.C. and within academia on this issue.[148] However, Native American women have valuable ideas on how they can be better protected by the tribes and the government.

Although Justice Thomas used the diversity of Native American tribes to support this argument that not all tribes should have uniform sovereignty in his concurrence, most Native Americans would agree with him that treating tribes as a monolith for the sake of solving the issue of violence against Native American women simply will not work; domestic violence law scholar Nancy K.D. Lemon noted that "the diversity of tribes and the community milieu in which native women live today are a challenge for devising programs."[149] However, contrary to Justice Thomas's implication that the solution to tribal differences is to accord some tribes less sovereignty than others, the consensus in Native American communities is that the best approach to the problem is to give each tribe enough sovereignty to determine what will work best within their culture to end abuse.[150]

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[144] CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, DEP'T OF HEALTH & HUMAN SERVS., RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 3 (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf (showing that Native American children are disproportionately represented in the foster care system based on the percentage they make up of the general population).

[145] Thomas W. Volscho, *Sterilization Racism and Pan-Ethnic Disparities of the Past Decade: The Continued Encroachment on Reproductive Rights*, 25 WICAZO SA REV. 17, 19 (2010).

[146] *Id.*

[147] Nancy K.D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence*, 9 FUTURE CHILD. 67, 71 (1999).

[148] *Id.* at 77.

[149] *Id.* at 76.

[150] Hart & Lowther, *supra* note 20, at 216; Bubar & Thurman, *supra* note 114, at 79; FUTURES WITHOUT VIOLENCE, *supra* note 122.

Researchers in this area have approached Native American women for their suggestions and have come away with many examples of culturally sensitive programs that Native American women have formulated through their own tribal culture. Some of these include "strategies that address intergenerational trauma and decolonization efforts that empower and move the community in a meaningful way to address violence in Native communities";[151] interventions that do not involve the traditional justice system and instead emphasize restorative and reparative justice;[152] and the introduction of tribal codes that are "grounded in the traditional willingness of tribes to respect women in complementary roles which promote tribal well-being."[153]

Many Native Americans believe that violence against women is not a part of their tribes' traditional values, and a return to those values, "such as those which stress family and clan honor, should help to alleviate problems associated with the physical and psychological abuse of female tribal members."[154] While eschewing traditional criminal justice methods may not eliminate all domestic violence against Native American women, some argue that doing so would allow tribes to balance the "distinct, important interests" of "sovereignty and security of the victim's person."[155]

Each of the above strategies suggested by Native American women can be tailored to a tribe's specific cultural background and practices to achieve maximum effectiveness in that culture. Native American women, the people closest to the problem of domestic violence in Native American communities, feel that a one-size-fits-all strategy of either more tribal sovereignty or more federal government enforcement will not help them in the ways that they and their communities most need, particularly considering the aforementioned problems with each system. Allowing the women most affected by this problem to work together to construct their own novel methods and systems for protecting themselves from domestic violence may be more likely to yield results that are more beneficial to women not only as victims of domestic violence, but as members of tribes with histories of oppression.

VII. CONCLUSION

The Court showed its willingness to respond to the dire public policy concerns in its decision in *Bryant*, chiefly the widespread problem of domestic violence against Native American women and how best to protect them in a system of complex tribal and federal laws. The precedent on whether uncounseled tribal court convictions can be used in subsequent federal proceedings under a federal recidivist statute had resulted in a circuit split on the issue of whether it was a violation of the Sixth Amendment to charge a defendant under a federal recidivism statute when the underlying convictions were uncounseled convictions in tribal courts. The Court unanimously decided that

[151] Bubar & Thurman, *supra* note 114, at 83.
[152] FUTURES WITHOUT VIOLENCE, *supra* note 122.
[153] Hart & Lowther, *supra* note 20, at 216.
[154] *Id.*
[155] *Id.* at 215.

uncounseled tribal court convictions could be used to convict Bryant and others under federal habitual offender statutes like § 117(a).

It is clear from the opinion that the Court was aware of the seriousness of the issue of domestic violence against Native American women. It is also clear that the Court was aware that the legislative and executive branches were of one mind on this issue, based on public statements by President Obama and Congress's passage of the statute in question in the first instance. The alignment of the other two branches of government may have played a part in the Court's unanimity in this case.

Although the Court's decision in *Bryant* was celebrated by Native American and domestic violence advocates alike, there is still plenty of room for the Court and the government to improve its response to the problem of domestic violence against Native American women. Justice Thomas's concurrence pointed out the conflict in Indian law between tribal sovereignty and the federal government's plenary power over Native American tribes. He also noted that not all tribes are alike, and they should not be treated as such.

Justice Thomas's thoughts in his concurrence are very similar to the thoughts expressed by Native American women in the aforementioned roundtable discussion on this subject. They would likely agree that tribal sovereignty and federal plenary power are concepts at odds with each other and make strange bedfellows as the basis for § 117(a) and Indian law in general. They would also agree that attempting to solve the issue of domestic violence against Native American women by applying the same solution to all tribes is not an effective plan.

Native American women, in some ways, are stuck between a history of abuse coming from both members of their own tribes and the federal government. When faced with the choice at the heart of *Bryant*—whether to trust the justice system in place in the tribes or the government with more power to protect Native American women from domestic abuse—some Native American would choose neither. Rather, they would choose to work within their communities to create community-based solutions individualized to suit the needs and cultures of their tribes, relying on their own experiences of what works and what does not to make themselves and other women safer. The Court's reliance on public policy concerns about domestic violence against Native American women in deciding *Bryant* was appropriate. However, like the issues in *Bryant*, the solution to violence against Native American women is more complicated than it appears on the surface.

The Court was limited in *Bryant* to a decision between increased or decreased federal jurisdiction over tribal lands. This was due to the adversarial nature of the United States justice system. Even though the Court acknowledged the severity of the problem of violence against Native American women, and Justice Thomas in his concurrence drew attention to the paradox of tribal sovereignty, the Court had to choose between a decision that would either protect women while undermining tribal sovereignty, or bolster tribal sovereignty at the risk of leaving Native American women vulnerable.

Because of their sovereignty, Native American tribes are in a unique position to craft their justice systems to be more restorative than adversarial. Historically, the federal government has pushed back against Native American tribes taking an approach to

criminal justice that differs too much from the federal system.[156] However, if tribes are given some latitude to experiment, it may be possible to create innovative solutions to the epidemic of domestic violence in Native America. For example, tribes could experiment with systems for law enforcement and dispute resolution that are unique to their tribal culture and created with the collaboration of women who are at risk of domestic violence in those communities. Such solutions would not only protect women, but do so while respecting tribal culture and sovereignty.

[156] *Compare Ex parte Crow Dog*, 109 U.S. at 571–72, *with* 25 U.S.C. § 1302.