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Indian Country Criminal Justice, the Dual-Sovereignty Doctrine, and Best Practices for Curbing Multiple Prosecutions

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Indian Country Criminal Justice, the Dual-Sovereignty Doctrine, and Best Practices for Curbing Multiple Prosecutions

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by

Sarah Glenn Thompson

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ABSTRACT OF THE THESIS

Indian Country Criminal Justice, the
Dual-Sovereignty Doctrine, and Best Practices for
Curbing Multiple Prosecutions

by

Sarah Glenn Thompson
Master of Arts in American Indian Studies
University of California, Los Angeles, 2020
Professor Angela R. Riley, Chair

The dual-sovereignty doctrine is a significant carve-out to the Fifth Amendment's Double Jeopardy Clause, allowing individuals to be criminally prosecuted twice for the same alleged conduct, as long as those prosecutions are conducted by different sovereigns. There is much scholarship on the doctrine, most of it critical. The vast majority of this scholarship examines the doctrine's application in the state-federal context, devoting little attention to its role in the tribal-federal context. Nor is there substantial data on the doctrine's application in the tribal-federal context. This thesis takes an initial step in filling this knowledge gap. It analyzes how the dual-sovereignty doctrine interacts with the unique framework of criminal law in Indian country, illuminating tribal sovereignty concerns and issues of fairness for defendants that the doctrine creates or exacerbates in the tribal-federal context. It also lays the groundwork for further study

of the doctrine's application in the tribal-federal context, with an eye toward identifying when, why, and with what frequency dual tribal and federal prosecutions arise, as well as the best practices tribal justice systems may already be using that mitigate potential tribal sovereignty concerns and fairness issues.

The thesis of Sarah Glenn Thompson is approved.

Randall Akee

Carole E. Goldberg

Angela R. Riley, Committee Chair

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I. INTRODUCTION

The Fifth Amendment's Double Jeopardy Clause guarantees that no individual will be put in jeopardy twice for the same offense.[1] A significant carve-out exists to the protections afforded by the Double Jeopardy Clause under what is known as the dual-sovereignty, or separate sovereigns, doctrine. The dual-sovereignty doctrine holds that "two prosecutions . . . are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct."[2] The U.S. Supreme Court has held that the dual-sovereignty doctrine applies in the state-federal context (for example, to dual prosecutions by the federal government and a state government or by two state governments). It has also held that the doctrine applies in the tribal-federal context to dual prosecutions by the federal government and an Indian tribe.[3] But the way the doctrine applies—in terms of the types of cases in which it applies and with what frequency dual prosecutions arise—is markedly different in the tribal-federal context than in the state-federal context. This is because the relationships and allocation of criminal jurisdiction between Indian tribes and the federal government are significantly different than those between the states and the federal government.

While there is a substantial body of legal scholarship on the dual-sovereignty doctrine,[4] much of it critical, the vast majority of it examines the doctrine's application in the state-federal

[1] *See* U.S. CONST. amend. V.

[2] Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016).

[3] This thesis uses the terms Indian tribe and tribe to refer specifically to "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). As of early 2020, there are 574 such tribes that are federally recognized. *See* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462 (Jan. 30, 2020), *available at* https://www.federalregister.gov/documents/2020/01/30/2020-01707/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of. Of course, there are many other tribes that are not federally recognized. And many tribes prefer other terminology, such as Native or tribal nation. This thesis uses the term Indian tribe to refer to the legal category of federally recognized tribes, as defined by federal law, because it is to these tribes that much of the federal Indian law discussed herein specifically (and often exclusively) applies.

context, devoting little attention at all to its role in the tribal context.[5] Nor is there any significant data, qualitative or quantitative, on the doctrine's application in the tribal-federal context. Thus, a nuanced understanding of how the dual-sovereignty doctrine plays out in Indian country,[6] both theoretically and actually, remains elusive. This is despite the potential implications that it raises in the tribal-federal context for tribal sovereignty and fairness to defendants, the overwhelming majority of whom are Indian.[7]

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[4] *See, e.g.*, Adam J. Adler, Note, *Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem*, 124 YALE L.J. 448 (2014); Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769 (2009); Erin M. Cranman, Note, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT'L L. REV. 1641 (2000); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception"*, 41 UCLA L. REV. 649 (1994); Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS 72 (1996); David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U. L.Q. 765 (2003).

[5] One exception is Ross Naughton, *State Statutes Limiting the Dual Sovereignty Doctrine: Tools for Tribes to Reclaim Criminal Jurisdiction Stripped by Public Law 280?*, 55 UCLA L. REV. 489 (2007) [hereinafter Naughton, *States Statutes Limiting*]. Naughton analyzes the dual-sovereignty doctrine primarily in the tribal-state context, however, not the tribal-federal context.

[6] Indian country is defined by federal law as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Many of the other federal statutes discussed throughout this thesis apply specifically to Indian country, defined as such.

[7] This thesis uses the term Indian when referring to the legal category of persons defined by federal statute as:

> (A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner . . . of a trust or restricted interest in land;
> (B) any person meeting the definition of Indian under the Indian Reorganization Act . . . and the regulations promulgated thereunder; and
> (C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to [25 U.S.C. § 2206(d)(2)], any person described in subparagraph (A) or (B) [therein] or any person who owns a trust or restricted interest in a parcel of such land in that State.

25 U.S.C. § 2201(2). This term is not synonymous or necessarily interchangeable with other terms commonly used to denote a cultural or political affiliation or identity—such as American Indian, Native American, Native, and Indigenous—which many such individuals may themselves prefer. Where appropriate, this thesis uses some of these other terms.

The purpose of this thesis is to take the initial step in bringing the interests of Indian tribes and individuals to the fore in an analysis of the dual-sovereignty doctrine. It examines how the dual-sovereignty doctrine interacts with the current criminal jurisdiction framework in Indian country to begin to illuminate the scenarios in which the doctrine applies, the possible sequences of dual prosecution that can occur when it applies, and the implications these dual prosecutions have for tribal sovereignty and fairness to defendants. It also lays the groundwork for further study of the topic beyond the theoretical legal analysis in this thesis, which could shed more light on precisely when (i.e., in what jurisdictional and factual circumstances), why, and with what frequency dual tribal and federal prosecutions arise, as well as the best practices tribal court systems may already be using that mitigate the potential tribal sovereignty and fairness concerns raised by the dual-sovereignty doctrine.

To these ends, Part II describes the doctrinal landscape of the Indian country criminal justice system and the dual-sovereignty doctrine. It delineates the bounds of tribal criminal authority, and the history of federal incursions into tribal criminal authority that have limited it, increasingly tipping the balance of authority in the federal government's favor over time. It also provides the necessary contextual background on the Double Jeopardy Clause and the dual-sovereignty doctrine. It then moves into a discussion of the dual-sovereignty doctrine's application to Indian tribes and the way the doctrine currently shapes criminal enforcement in the tribal-federal context. Part II concludes by enumerating the four jurisdictional scenarios when the dual-sovereignty doctrine applies in the tribal-federal context, which are important to identify because they underlie and shape the concerns related to tribal sovereignty and fairness to defendants examined later in the thesis.

Part III moves into a more theoretical discussion of the dual-sovereignty doctrine's impact in the tribal-federal context. It illuminates three possible sequences of tribal and federal dual prosecutions that arise out of the four jurisdictional scenarios enumerated previously. It then analyzes the heightened risk of dual prosecutions that arises from the unique nature of Indian country criminal jurisdiction and how this heightened risk disparately impacts Indian defendants compared to non-Indian defendants. Next, it raises tribal sovereignty concerns and issues of fairness impacting defendants, separating this discussion into two sections based on the order in which the two prosecuting sovereigns act, first focusing on when a tribal prosecution precedes a federal one and then vice versa. Finally, it lays the groundwork for further study of this topic that would move beyond the theoretical legal analysis in this thesis—which is all that is currently possible, without more data—to a more grounded analysis of the dual-sovereignty doctrine's impact in the tribal-federal context.

Part IV advances a research agenda for just such a study of how the dual-sovereignty doctrine plays out on the ground in the tribal-federal context. It presents a sample survey study to be widely administered to tribal justice officials, including tribal prosecutors, tribal defense attorneys, and tribal court judges. The basis of the survey is the hypothesis that at least five factors are essential for curbing instances of dual prosecutions in the tribal-federal context and, in turn, mitigating the tribal sovereignty and fairness concerns that its application potentially presents in that context. Part IV further hypothesizes that many tribal courts already engage in practices that correspond to the factors discussed therein, thus mitigating at least to some extent the tribal sovereignty and fairness concerns raised by the dual-sovereignty doctrine in the tribal-federal context. Hopefully, a more comprehensive study identifying and examining best practices could lead to their wider adoption.

Part V concludes.

II. THE INDIAN COUNTRY CRIMINAL JUSTICE SYSTEM AND THE DUAL-SOVEREIGNTY DOCTRINE

A. The Indian Country Criminal Justice System: The Bounds of—and Federal Incursions Into—Tribal Criminal Authority

The Supreme Court's characterization of the relationship between the United States federal government and Indian tribes as "an anomalous one and [being] of a complex character" rings just as true today as it did almost 150 years ago when it was first made.[8] The Court made its observation, fittingly, in the context of contemplating the allocation of criminal law enforcement authority on Indian lands between the federal government and Indian tribes. Even today, the complexity of the federal-tribal relationship is nowhere more obvious than in the arena of criminal jurisdiction.

Since the term was coined several decades ago, criminal jurisdiction in Indian country has come to be characterized as a "jurisdictional maze," or a "complex labyrinth" of ill-coordinated rules that "practitioners and courts find virtually impossible to master,"[9] and to which scholars and community members alike have attributed the dire conditions on many Indian reservations.[10] In large part, the system's incoordination is a result of the "piecemeal"

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[8] United States v. Kagama, 118 U.S. 375, 381 (1886).

[9] Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 991 (1975) [hereinafter Clinton, *The Historical Perspective*].

[10] *See, e.g.*, Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1566, 1574 (2016) [hereinafter Riley, *Crime and Governance*] (noting that "[d]ecades of isolation and indifference—much of which has been facilitated, if not created, by federal law and policy—have led to astonishingly bleak conditions in regards to safety and security on Indian reservations across the United States," and asserting that the "criminal justice crisis that exists in Indian country today is a manifestation of a failure of law so extreme that it has actually caused reservation crime to flourish"). *See also* INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES, at v (2013) [hereinafter INDIAN LAW & ORDER COMM'N, ROADMAP], *available at* https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf ("American Indian . . . communities and lands are frequently less safe—and sometimes dramatically more dangerous—than most other places in our country. Ironically, the U.S. government, which has a trust responsibility for Indian Tribes, is fundamentally at fault for this public safety gap. Federal government policies have displaced and diminished the very institutions that are best positioned to provide trusted, accountable, accessible, and cost-effective justice in

approach through which it has been constructed,[11] as the U.S. Congress and Supreme Court have alternatingly announced jurisdictional rules—which are often subsequently applied and further interpreted, clarified, or developed by the Court—during various eras of federal Indian law and policy that have been, at times, utterly at odds with each other.[12] This haphazard amalgamation of jurisdictional rules compiled throughout—and reflective of—these policy eras, in which the federal government has vacillated between more and less assimilative approaches to Indian tribes and people,[13] has had the "bizarre result" of creating a disjointed, multilayered framework of criminal law enforcement in Indian country.[14] Within this framework, several sovereigns operate at various levels and in various capacities depending on a range of case-specific factors, including the offense alleged, the geographic location where the offense purportedly occurred, and whether or not the alleged perpetrator and the victim(s) are Indian.[15]

Today, the federal government and tribes co-administer the criminal justice system throughout much of Indian country.[16] This federal-tribal system is rooted in the U.S.

Tribal communities. . . . [As a result, t]he system is complex, expensive, and simply cannot provide the criminal justice services that Native communities expect and deserve.").

[11] Riley, *Crime and Governance*, *supra* note 10, at 1575.

[12] *See, e.g.*, Sarah Deer, *Native People and Violent Crime: Gendered Violence and Tribal Jurisdiction*, 15 DU BOIS REV. 89, 92 (2018) (explaining that the "jurisdictional framework for Indian country is one of the most confusing areas of American law because the policies of the federal government toward Indian tribes have been inconsistent over the course of the past two centuries").

[13] *See* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV 1754, 1776 (1997) [hereinafter Frickey, *Adjudication and Its Discontents*] (explaining that "the story of federal Indian law is one of vacillation between an approach rooted in respecting the uniqueness and worthiness of tribal institutions and one bent on assimilating tribes and their members into the larger society" and that these "[c]onflicting and confounding values" mean that, even today, "federal Indian law remains about as unruly as ever"). *See also* Clinton, *The Historical Perspective*, *supra* note 9, at 965–72 (detailing the federal government's vacillating approach over time to tribal sovereignty, generally, and to criminal law enforcement in Indian country, specifically).

[14] Riley, *Crime and Governance*, *supra* note 10, at 1575.

[15] *Id*.

Constitution, which gives Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes,"[17] and in legislation like the Trade and Intercourse Act of 1790, enacted by Congress in the wake of the nation's founding to solidify the federal government's "exclusive control over Indian affairs."[18] At their core, the 1790 Act and its later iterations were meant to facilitate uniform, efficient relations with Indian tribes as American settlements expanded westward, encroaching further into Indian lands—more efficient, at least, than would be the case if individual states were left to make and enforce their own Indian policies. The federal government hoped such legislation would reduce hostility between the states and tribes.[19] Early U.S. Supreme Court decisions upheld this principle of federal primacy in intergovernmental dealings with Indian tribes, denying states legal authority on Indian land and further solidifying the federal-tribal framework in Indian affairs.[20] From its inception, this

[16] The exception to this federal-tribal framework is Indian country that is subject to state jurisdiction under Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, and 28 U.S.C. § 1360). The full text of Public Law 280 is available at *Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360)*, TRIBAL LAW & POLICY INST., https://www.tribal-institute.org/lists/pl_280.htm (last visited May 8, 2020). Public Law 280 conferred Indian country criminal jurisdiction on some state governments. Today, "nearly a quarter of the reservation-based tribal population in the lower 48 states" is subject to state criminal jurisdiction pursuant to Public Law 280, to varying degrees depending on the particular reservation and the state(s) within which the reservation land lies. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 14 (2012) [hereinafter CHAMPAGNE & GOLDBERG, CAPTURED JUSTICE]. For a complete account of the reach of Public Law 280 today in terms of the tribes it affects and including a state-by-state breakdown of its applicability, see *id*. at 14–18. For a compendium of online resources related to Public Law 280's scope and impact, see generally *Public Law 280*, TRIBAL LAW & POLICY INST., http://www.tribal-institute.org/lists/pl280.htm (last visited May 8, 2020).

[17] U.S. CONST. art. I, § 8.

[18] CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 18 (7th ed. 2015).

[19] *See id*. at 19 (explaining that the "ultimate goal of the [Trade and Intercourse Acts] was to preserve an orderly and economically efficient advance of the frontier of American settlement in Indian country without costly warfare").

[20] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573–88 (1823) (finding that the states, upon entering the union, ceded the territory within their limits that was occupied by Indians and the jurisdiction over that territory to the United States, and that the federal government has the exclusive authority to acquire title to those lands from Indian tribes); Worcester v. Georgia, 31 U.S. 515, 561 (1832) (finding that the "whole intercourse between the United States and [tribes] is, by [the U.S.] constitution and laws, vested in the [federal] government").

framework cast tribes as distinct political entities vis-à-vis the federal and state governments, serving as a buffer against state encroachment into tribal authority and thus providing a certain measure of protection for tribal separatism. With time, however, the federal government became increasingly committed to a policy of forced assimilation of Indian people into the broader American polity[21] and to enhancing its own control over Indian lands and people in the interim—in other words, using the chisel of federal authority to chip away at tribal governmental institutions.[22] It used the federal-tribal model of Indian affairs as a mechanism for enacting this usurpation, particularly in the context of criminal jurisdiction.

One of Congress's earliest incursions into tribal criminal jurisdiction was its enactment of the General Crimes Act (GCA) in 1817, which extends federal enclave laws to Indian country and provides for federal jurisdiction over cases involving violations of those laws.[23] Federal enclave laws are those that apply within the maritime and territorial jurisdiction of the federal government and include statutes criminalizing arson, assault, theft, manslaughter, murder, and various sexual offenses, among others.[24] Congress subsequently amended and expanded the GCA so that it extended the Assimilative Crimes Act[25] to Indian country, allowing the federal

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[21] *See infra* notes 32–34 and accompanying text (discussing the Dawes Act of 1887 and federal assimilation-by-allotment policy).

[22] *See, e.g.*, Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1071 (2010) [hereinafter Eid & Doyle, *Separate but Unequal*] (describing how "the extension of federal jurisdiction to Indian reservations was a key component of assimilation" policy and was implemented by introducing "federal institutions that divested local control and accountability from the justice system in Indian country").

[23] 18 U.S.C. § 1152.

[24] *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 678 [hereinafter U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL], *available at* https://www.justice.gov/jm/criminal-resource-manual-678-general-crimes-act-18-usc-1152.

[25] 18 U.S.C. § 13.

government to borrow state law when it has exclusive or concurrent criminal jurisdiction over a matter in Indian country but no federal statute applies.[26] However, expanded federal jurisdiction in Indian country under the GCA is subject to several exceptions, including: (1) when both the alleged perpetrator and victim are Indian; (2) when the perpetrator has already been punished under tribal law; and (3) where a treaty gives exclusive jurisdiction over the particular type of offense to a tribe.[27] Essentially, the GCA grants federal jurisdiction over non-major, interracial crimes—i.e., those in which either the perpetrator(s) is non-Indian and the victim(s) Indian or vice versa—and major crimes committed by a non-Indian perpetrator against an Indian victim in Indian country. States retain exclusive criminal jurisdiction over crimes committed by non-Indians against other non-Indians.[28]

Congress further expanded the reach of federal jurisdiction in Indian country with its enactment of the Major Crimes Act (MCA) in 1885, which provides for federal jurisdiction over certain felony offenses, such as murder and rape, committed by Indian perpetrators against Indian victims.[29] As Indian law scholars have previously illuminated, the MCA, "which has governed Indian country crime since 1885 and served as the foundation for other federal institution-building there, was intended to be temporary."[30] In fact, it was passed as an

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[26] *See id*. § 13(a) (declaring that an individual who commits "any act or omission" in Indian country that is not "punishable by any enactment of Congress" but which would be "punishable if committed or omitted within the jurisdiction of the State . . . in which [the Indian country] is situated . . . shall be guilty of a like offense and subject to a like punishment").

[27] *See* 18 U.S.C. § 1152.

[28] *See* United States v. McBratney, 104 U.S. 621 (1881). This rule is one of the carve-outs to the general principle announced by the U.S. Supreme Court in Worcester v. Georgia, 31 U.S. 515 (1832), that states do not have criminal jurisdiction in Indian country. Another major carve-out to this general principle is Public Law 280's conferral of Indian country criminal jurisdiction on some states. *See infra* notes 38–41 and accompanying text.

[29] 18 U.S.C. § 1153.

[30] Eid & Doyle, *Separate but Unequal*, *supra* note 22, at 1074.

appropriations rider and its limited legislative record "demonstrates that the general consensus in Congress was that, thanks to assimilation-by-allotment, the federal government would shortly be getting out of the Indian business," as it intended for there to be no such business left in which to involve itself.[31] Assimilation and allotment policy was codified by the General Allotment (Dawes) Act of 1887,[32] which President Theodore Roosevelt infamously described as "a mighty pulverizing engine to break up the tribal mass"[33] and ultimately diminished tribal land holdings by 90 million acres.[34] That Congress evidently intended the MCA to serve only as a temporary measure[35] until assimilation-by-allotment rendered tribal institutions and control over land obsolete and Indian individuals had been fully integrated into the broader American society—at which point, presumably, they would be subject primarily to state criminal law like non-Indians—does not diminish the role it has played in further cementing the federal-tribal framework in Indian affairs and, ultimately, tipping the balance of authority within this framework increasingly in the federal government's favor. Its role in this regard is all the more obvious in light of the MCA's longevity and expansion. Despite the fact that the federal government has long since abandoned assimilation policy and has committed itself instead to a

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[31] *Id*. at 1081.

[32] 25 U.S.C. §§ 331–58 (repealed 2000).

[33] President Theodore Roosevelt, First Annual Message (Dec. 3, 1901), *available at* https://millercenter.org/the-presidency/presidential-speeches/december-3-1901-first-annual-message.

[34] FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 130 (2009). Pommersheim notes that, as a result of the General Allotment Act, the "national Indian land estate diminished from 138 million acres in 1887 to 48 million acres in 1934" when the federal government abandoned the assimilation and allotment policies. *Id*. Of the 90 million acres lost, "approximately 26 million acres were transferred from the tribes to individual Indian allottees and then passed to individual non-Indians through sale, fraud, mortgage foreclosure, or tax sales." *Id*. The federal government obtained the remaining approximately 64 million acres through purchase. *Id*.

[35] *See* Eid & Doyle, *Separate but Unequal*, *supra* note 22, at 1095 (describing that the "MCA, and the institutions built and maintained to carry it out, envisioned that crime in Indian country would temporarily be policed, prosecuted, adjudicated, and punished by the federal government," as a "stopgap measure [that] would end once tribal lands were finally allotted away and criminal jurisdiction thereby transferred to the states").

policy of supporting tribal self-determination,[36] Congress "has largely abdicated to the federal bureaucracy it originally created to mete out justice in Indian country—occasionally adding to the list of MCA offenses, or clarifying bureaucratic roles and responsibilities for federal agencies, but never seriously questioning the continued existence of the machinery itself."[37]

This picture of a federal-tribal Indian country criminal justice system remained relatively undisturbed until Congress's enactment of Public Law 280[38] in 1953, which conferred Indian country criminal jurisdiction on certain state governments, known as mandatory Public Law 280 states, and created a pathway for additional states to elect to assume Indian country criminal jurisdiction. A handful subsequently did, coming to be known as optional Public Law 280 states.[39] Thus, while there are some areas of Indian country where criminal jurisdiction is substantially a state-tribal affair today, because of the limited scope of criminal jurisdiction assumed by a number of the optional Public Law 280 states, the subsequent retrocession (or return) by some states of their Public Law 280 jurisdiction back to the federal government over time,[40] and the recent creation of a pathway for the federal re-assumption of concurrent Indian

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[36] The hallmark legislation of the federal government's contemporary self-determination policy is the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423).

[37] Eid & Doyle, *Separate but Unequal*, *supra* note 22, at 1093. *See also* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 784 (2006) [hereinafter Washburn, *Federal Criminal Law*] (noting that the MCA, "even though it seems to represent an anachronistic legal regime from a bygone era, . . . undermines tribal self-governance today more than ever").

[38] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, and 28 U.S.C. § 1360). *See also supra* note 16 (discussing the scope of state Indian country criminal jurisdiction pursuant to Public Law 280).

[39] Today, eleven states exercise criminal jurisdiction in Indian country pursuant to Public Law 280, including the original five mandatory states (California, Nebraska, Wisconsin, Minnesota, and Oregon); Alaska, which was made a mandatory Public Law 280 state upon its admission into the union; and five optional Public Law 280 states (Nevada, Florida, Idaho, Washington, and Montana). *See* CHAMPAGNE & GOLDBERG, CAPTURED JUSTICE, *supra* note 16, at 15–18 (detailing the scope of the Public Law 280 Indian country criminal justice each of these states exercises).

country criminal jurisdiction over reservation land in mandatory Public Law 280 states,[41] the federal-tribal framework in Indian country criminal jurisdiction remains widespread. For this reason, the discussion and analysis in this thesis focus primarily on the application of the dual-sovereignty doctrine in the federal-tribal context.[42]

Not only has the federal-tribal framework remained a standard in Indian affairs, but the federal government has continued in recent decades to tip the balance of power within that framework increasingly in its own favor, even in an era of federal Indian policy purportedly committed to tribal self-determination.[43] One mechanism for tipping the balance of power is statutes that have extended western ideals to tribal justice systems, molding them by mandate to more closely resemble American courts. In 1968, Congress passed the Indian Civil Rights Act[44]

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[40] For example, various tribes in Minnesota, Nebraska, Oregon, Montana, Nevada, and Washington have been subject to full or partial retrocession, resulting in the return of all or some of the jurisdiction conferred on the state by Public Law 280 back to the federal government. *See id*.

[41] *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, §221, 124 Stat. 2261, 2271–72 (2010). A tribe must make a request to the U.S. Department of Justice's Office of Tribal Justice for the federal reassumption of criminal jurisdiction over its reservation land. *See Frequently Asked Questions About Public Law 83-280*, U.S. DEP'T OF JUSTICE (May 1, 2015), https://www.justice.gov/usao-mn/Public-Law%2083-280. Such a request need not have the state's consent to be considered and approved. *See id*. The White Earth Nation and Mille Lacs Band of Ojibwe, both in Minnesota, were two of the first tribes to successfully petition the Office of Tribal Justice for federal reassumption. *See, e.g.*, Dan Gunderson, *White Earth to Get Federal Crime-Fighting Help*, MPR NEWS (Mar. 15, 2013), https://www.mprnews.org/story/2013/03/15/white-earth-to-get-federal-crime-fighting-help; *Mille Lacs Band Hails Return of Federal Jurisdiction on Reservation*, INDIANZ (Jan. 12, 2016), https://www.indianz.com/News/2016/01/12/mille-lacs-band-hails-return-o.asp.

[42] Furthermore, dozens of states have their own statutes or constitutional provisions limiting the dual-sovereignty doctrine or abrogating it altogether. In these states, it is possible for a tribal prosecution to actually preclude a subsequent state prosecution for the same offense, diminishing the scope of circumstances in which dual tribal and state prosecutions may arise within the tribal-state criminal jurisdiction framework created by Public Law 280. *See, e.g.*, Naughton, *States Statutes Limiting*, *supra* note 5, at 494–502 (2007) (describing one case, *Booth v. State*, in which a prosecution by the State of Alaska was prohibited after a tribal prosecution arising from the same incident, based on Alaska law abrogating the dual-sovereignty doctrine). For a state-by-state analysis of state laws limiting dual prosecution, see generally ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS 87–289 (2001) [hereinafter KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS].

[43] Scholars have noted this inconsistency, which is that the federal policy of Indian self-determination has facilitated expanded tribal authority and self-governance in almost every facet of reservation life, except for in the area of criminal law. *See e.g.*, Washburn, *Federal Criminal Law*, *supra* note 37, at 819–30.

[44] Pub. L. No. 90–284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. § 1302).

(ICRA), extending "select, tailored provisions of the Bill of Rights—including equal protection, due process, free speech and religious exercise, criminal procedure, and property rights—to tribal governments."[45] ICRA also imposed severe sentencing restrictions on tribes for the first time, capping tribal sentences at six months of incarceration and a $500 fine for any single offense, even the most egregious ones such as murder or rape.[46] Congress amended the statute in 1986 to relax these sentencing restrictions ever so slightly, permitting tribes to impose maximum sentences of up to one year imprisonment and a $5,000 fine.[47] Congress has since amended it again to further relax sentencing restrictions on tribal governments.[48] Nevertheless, tribal sovereign authority to build justice systems that significantly depart from the American carceral model and determine criminal law enforcement responses that resonate with a tribe's values and truly foster safety for those in the reservation community remain significantly curtailed by ICRA even today, especially for tribes that prefer alternatives to incarceration.

Kevin Washburn, Indian law scholar and Assistant Secretary of Indian Affairs for the U.S. Department of the Interior during the Obama administration, has written extensively about how criminal law is one of the most important institutions through which communities define themselves and federal incursions into tribal criminal authority have significantly hamstrung Indian tribes' ability to freely exercise this crucial component of self-determination.[49] Criminal

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[45] THE INDIAN CIVIL RIGHTS ACT AT FORTY xi (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012).

[46] *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (1968).

[47] *See* 25 U.S.C. § 1302(7)(B).

[48] *Id*. § 1302(7)(C)–(D). *See also infra* notes 59–62 and accompanying text (detailing recent federal legislation amending the ICRA to permit enhanced tribal sentencing of up to three years of imprisonment and a fine of $15,000 for any single criminal offense).

[49] *See* Washburn, *Federal Criminal Law*, *supra* note 37, at 784, 832, 834–36.

laws serve an expressive function by declaring community values.[50] They serve an instrumental function by eliciting the conformity of community members' conduct with those values through the creation of an expectation of compliance and the possibility of enforcement in the event of failure to comply.[51] Criminal laws are, at their essence, a manifestation of a society's values.[52] A criminal justice system's success, therefore, in no small part relies on community members truly resonating with those values, as announced in the form of criminal laws and deployed through those laws' enforcement. In other words, there must be community buy-in for the system to be effective. Externally imposed laws are much less likely to elicit such buy-in, especially when they are imposed unilaterally, stripping the community of its agency, or when they do not align substantively with community conceptions of justice.[53] Undoubtedly, ICRA—unilaterally imposed on tribal governments by the federal government and almost surely out of touch substantively with many, if not most, tribal communities' conceptions of justice in myriad ways—stands as a significant curtailment of tribal autonomy and a general exception to the federal government's policy today of tribal self-determination.

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[50] *Id*. at 835.

[51] *Id*.

[52] *Id*.

[53] *See* CHAMPAGNE & GOLDBERG, CAPTURED JUSTICE, *supra* note 16, at 34 (discussing research that examines the "connection between the perceived legitimacy of [justice-related governmental] institutions and both public compliance with law and public cooperation with the justice system"). This body of research supports the assertion that, "if the system is viewed as more legitimate, its rules and decisions are more likely to be accepted." *Id*. at 34–35. Champagne and Goldberg note that "the entitlement of the federal . . . system[] to govern criminal justice on reservations has long been challenged in Indian country on grounds of lack of consent," since "Native nations did not participate in the establishment of the United States Constitution, with its provisions regarding federal power and the administration of justice." *Id*. at 35. Thus, where reservation community members view the federal government's presence on their reservation as uninvited or unwelcome, they are more likely to view the federal government as unentitled to perform governmental functions and services on their reservation and, therefore, the federal criminal justice system as illegitimate. Such sentiment is likely to negatively impact compliance with the law and cooperation with the system.

Furthermore, the federal government has continued to tip the balance of power within the federal-tribal criminal law framework in its own favor through the judicial divestiture of much of tribes' inherent criminal jurisdiction. In 1978 in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that Indian tribes do not have criminal jurisdiction over non-Indians.[54] It subsequently extended the *Oliphant* rule twelve years later in *Duro v. Reina*, holding that tribes do not even have jurisdiction over non-member Indians.[55] But Congress quickly overturned *Duro* the following year by enacting legislation known as the *Duro*-fix, a statutory amendment to ICRA recognizing and reinstating Indian tribes' authority to exercise criminal jurisdiction over non-member Indians within their territory.[56]

Thus, in the aftermath of *Oliphant* and the *Duro*-fix, federal law largely limited tribal criminal authority to internal matters. Tribes have criminal jurisdiction over crimes committed in Indian country by Indian perpetrators, but as described above, this jurisdiction is not always exclusive. The federal government has granted itself concurrent jurisdiction over major crimes committed by Indians in Indian country. Furthermore, tribes were completely without criminal jurisdiction over crimes committed on their lands by non-Indians. The federal government, as described above, had exclusive jurisdiction over these crimes pursuant to the GCA—until just recently.

Recent federal legislation has recognized enhanced tribal criminal authority in a couple of small, but nonetheless significant, ways. Congress passed the Tribal Law and Order Act[57]

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[54] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[55] Duro v. Reina, 495 U.S. 676 (1990), *overturned by* 25 U.S.C. § 1301.

[56] *See* Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301) (recognizing as among the "powers of self-government" of Indian tribes the "inherent power . . . to exercise criminal jurisdiction over *all* Indians" (emphasis added)).

(TLOA) in 2010, seeking to "address crime in tribal communities and . . . decreas[e] violence against American Indian and Alaska native women" by "encourag[ing] the hiring of more law enforcement officers for Indian lands and provid[ing] additional tools to address critical public safety needs," for example, by "enhanc[ing] tribes' authority to prosecute and punish criminals."[58] Recognizing that "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country,"[59] but that their effectiveness is undermined if they are limited by federal law to imposing only "misdemeanor-level sentences even for the most serious crimes,"[60] TLOA amended ICRA to permit tribes to impose maximum sentences of three years imprisonment and a fine of $15,000 for any single criminal offense and to stack penalties for multiple offenses in a single proceeding up to a maximum of nine years imprisonment.[61] Tribes choosing to exercise enhanced sentencing authority under TLOA must, in exchange, provide defendants with certain protections enumerated in the statute which track protections for criminal defendants based in the federal Constitution.[62] To date, only a small number of tribes have implemented enhanced sentencing authority under TLOA, likely primarily due to a lack of resources to carry out the implementation process and continue to fund the services and positions

[57] Pub. L. No. 111-211, 124 Stat. 2261 (2010).

[58] *Tribal Law and Order Act*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/tribal/tribal-law-and-order-act (last updated Jan. 2, 2020).

[59] Pub. L. No. 111-211, § 202(a)(2)(B), 124 Stat. 2261, 2262 (2010).

[60] U.S. DEP'T OF JUSTICE, TRIBAL LAW AND ORDER ACT REPORT ON ENHANCED TRIBAL-COURT SENTENCING AUTHORITY 1, *available at* https://www.justice.gov/tribal/file/796981/download (last visited May 8, 2020).

[61] Pub. L. No. 111-211, § 234, 124 Stat. 2261, 2262, 2279–82 (2010).

[62] *See* 25 U.S.C. § 1302(c) (requiring tribes that exercise enhanced sentencing authority pursuant to TLOA to ensure defendants have the effective assistance of counsel; provide indigent defendants with a defense attorney licensed to practice law in any jurisdiction of the United States; require that judges presiding over criminal cases are legally trained and licensed to practice law in any jurisdiction of the United States; make available its criminal laws, rules of evidence, and rules of criminal procedure; and maintain a record of the proceeding).

that are necessary in order to ensure provision of the federally-created rights of defendants as under TLOA.[63]

Provisions applicable to tribes in the 2013 reauthorization of the Violence Against Women Act (VAWA)[64] went a step further in expanding tribal criminal authority, restoring the federal government's recognition of a modicum of tribes' inherent criminal jurisdiction over non-Indians in certain instances of dating and domestic violence committed against Indians, as well as some criminal violations of protection orders, occurring in the Indian country of a participating tribe.[65] Tribal criminal jurisdiction over non-Indians exercised pursuant to VAWA

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[63] *See Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/tribal-vawa/vawa-implementation-chart-UPDATED-November2018.pdf (last updated Nov. 2, 2018) (listing sixteen tribes that had implemented TLOA enhanced sentencing as of late 2018).

The apparent hollowness of the federal government's gesture in creating a legislative pathway for Indian tribes to assume enhanced sentencing authority, but requiring tribes to meet various requirements in order to exercise that authority without providing the resources—especially financial—for them to do so is not surprising, given the federal government's well-established record of failing to fulfill its trust responsibility to provide tribes with certain services and funding. *See generally* U.S. COMM'N ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 12–13 (2018) ("Treaties between the United States and various tribal nations initially established the federal government's commitment to provide for Native Americans. As part of entering into treaties, the federal government acquired Native American lands and agreed to provide Native Americans with certain services such as the preservation of law and order, education, housing, and health care."). Today, "Native American programs and services continue to be underfunded at the federal level." *Id*. at 18. This reality is acutely felt in many tribal communities where the "failure to provide sufficient federal funding undermines the ability of tribal governments to provide criminal justice and public safety for their citizens." *Id*. at 31.

But the shortfall in federal funding for justice related services is not the only reason tribes might choose not to opt into TLOA enhanced sentencing. Some tribes view federal involvement in, and particularly the federal government's self-purported legislative power over, their affairs as illegitimate. A tribe might therefore decline to opt into federally created programs because it does not want to recognize and legitimize federal authority in this way. Additionally, tribes simply might not have the desire to impose sentences involving long terms of incarceration, especially if they believe alternative approaches to incarceration are more effective.

[64] 25 U.S.C. § 1304 (codifying the provisions applicable to tribes).

[65] *Id*. § 1304(b)–(c). The statute defines dating violence as "violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship." *Id*. § 1304(a)(1). Domestic violence is defined as "violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs." *Id*. § 1304(a)(2). Protection orders covered by the statute are those which "prohibit[] or

is known as "special domestic violence criminal jurisdiction" (SDVCJ).[66] Like enhanced tribal sentencing authority under TLOA, SDVCJ under VAWA is entirely elective. Tribes that elect to exercise SDVCJ must provide additional guarantees for defendants, above and beyond even those required of tribes implementing TLOA enhanced sentencing.[67] Few tribes so far have elected to exercise SDVCJ, again likely primarily due to a lack of resources to carry out the implementation process and continue to provide the federally-mandated rights of defendants.[68]

B. Double Jeopardy and the Dual-Sovereignty Doctrine

1. Double Jeopardy

The Fifth Amendment's Double Jeopardy Clause guarantees that no individual will be put in jeopardy twice for the same offense.[69] This right of defendants, of course, applies to

provide[] protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person." *Id*. § 1304(c)(2)(B)(i).

[66] *Id*. § 1304(a)(6).

[67] *See id*. § 1304(d) (incorporating all rights of defendants mandated by TLOA, 25 U.S.C. § 1302(c), in any SDVCJ case in which the sentence sought involves any term of imprisonment, as well as mandating rights: (1) to a trial by an impartial jury reflecting a cross-section of the community, and (2) "all other[s] whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise" SDVCJ).

[68] As of March 2018, when the National Congress of American Indians (NCAI) released its five-year report on VAWA SDVCJ, only eighteen tribes were exercising SDVCJ. *See* NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 42–60 (2018) [hereinafter NAT'L CONG. OF AM. INDIANS, VAWA SDVCJ FIVE-YEAR REPORT], *available at* http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf. The five-year report states that the "primary reason tribes report for why SDVCJ has not been more broadly implemented is a focus on other priorities and a lack of resources . . . to support implementation." *Id*. at 29.

[69] U.S. CONST. amend. V. (providing in part that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb"). *See also* JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 39 (1969) (explaining that, "[o]nce the double jeopardy clause had become an accepted part of American constitutions, the phrase 'life or limb' began to receive an interpretation broad enough to apply the protection to any criminal penalty so that the threat of death or mutilation was removed as a necessary element of the doctrine").

federal prosecutions, but it has also been extended to state prosecutions through the Fourteenth Amendment[70] and to tribal prosecutions through the Indian Civil Rights Act.[71]

The double jeopardy prohibition is twofold, protecting individuals from successive prosecutions and from multiple punishments for a single offense.[72] Together, these principles promote the integrity of the criminal justice system and the fair treatment of defendants. At the systemic level, when prosecutors only get one crack at convicting a defendant for a particular offense, judicial economy commands efficient marshalling of prosecutorial resources and protects the finality of judgments. At the individual case level, a defendant is ensured that they will only be subjected to the criminal defense process and its taxing psychological, social, and economic impacts once for any given offense and that, if convicted, they will only be punished once.

The U.S. Supreme Court has on numerous occasions recognized this "deeply ingrained" principle that defendants should not be subjected to the "embarrassment, expense and ordeal" of multiple prosecutions or compelled "to live in a continuing state of anxiety and insecurity" because of the threat of multiple prosecutions.[73] The principle's paramount importance is evident, for example, from the fact that it has been a fundamental concern of the Court over the years as it has grappled with how to define what exactly constitutes a single offense in the context of the double jeopardy inquiry.

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[70] *See* Benton v. Maryland, 395 U.S. 784, 787 (1969) (holding that "the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the [incorporation doctrine of the] Fourteenth Amendment").

[71] *See* 25 U.S.C. § 1302(a)(3) (mandating that "[n]o Indian tribe in exercising powers of self-government shall . . . subject any person for the same offense to be twice put in jeopardy").

[72] *See, e.g.*, United States v. Dixon, 509 U.S. 688, 696 (1993) (finding that the bar against double jeopardy "applies both to successive punishments and to successive prosecutions for the same criminal offense").

[73] Green v. United States, 355 U.S. 184, 187 (1957).

In *Blockburger v. United States*,[74] the Court first adopted what has since come to be known as the same elements test for determining what constitutes the same offense. Under the same elements test, when a single act or transaction violates more than one statutory provision, those violations are separate offenses only if *each* provision requires proof of a fact that the other does not.[75] Decades later, the Court supplemented the *Blockburger* same elements test with the *Grady*[76] same conduct test, additionally prohibiting successive prosecutions when an element of an offense charged in a second prosecution required proof of conduct constituting an offense for which the defendant was prosecuted the first time around.[77] But the *Grady* same conduct test proved short-lived and was overruled only a few years later because of its unworkability.[78] Courts had difficulty construing and applying *Grady*,[79] which meant that a "conclusive determination" of a second prosecution's constitutional permissibility under the Double Jeopardy Clause "often could not be made until well into a second trial—thereby frustrating one of the [Clause's] main objectives": its procedural component that aims "to avoid the inconvenience and harassment of a second trial."[80] Although not a perfect solution and certainly with workability

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[74] 284 U.S. 299 (1932).

[75] *Id*. at 304 ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").

[76] Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

[77] *See Grady*, 495 U.S. at 510 (holding that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted").

[78] *See Dixon*, 509 U.S. at 712 ("accept[ing] the Government's invitation to overrule *Grady*").

[79] *See Dixon*, 509 U.S. at 711 n.16 (citing various cases demonstrating that "*Grady*, 'even if carefully analyzed and painstakingly administered, is not easy to apply'" (quoting *Ladner v. Smith*, 941 F.2d 356, 364 (5th Cir. 1991))).

[80] Brief of Amicus Curiae Howard University School of Law Thurgood Marshall Civil Rights Center in Support of Neither Party at 7, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646).

issues of its own,[81] the *Blockburger* same elements test is easier to apply at the charging stage because it entails an examination of the two offenses at issue on their face, through a comparison of their statutory elements. It is thus theoretically more effective at safeguarding the procedural component of the double jeopardy prohibition than the *Grady* test was. Although the *Blockburger* test is typically rendered obsolete in the context of inter-sovereign dual prosecutions because of the dual-sovereignty doctrine,[82] the Court's preference for it over the *Grady* test and its eventual disavowal of the *Grady* test altogether underscore the Court's recognition of the importance of the procedural component of the Double Jeopardy Clause and highlight that the Clause does not stand solely for the prohibition of multiple punishments for a single offense. Nevertheless, it is the principle that defendants should not be subject to multiple prosecutions for a single offense that is most seriously jeopardized by application of the dual-sovereignty doctrine in the context of concurrent tribal and federal criminal jurisdiction in Indian country.[83]

2. The Dual-Sovereignty Doctrine

The dual-sovereignty doctrine is an important and by now well-established limitation on the protections against multiple prosecutions and multiple punishments for the same offense guaranteed by the Double Jeopardy Clause. The doctrine holds that "two prosecutions . . . are not

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[81] *See* KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 57 (discussing how some states have constitutionally or statutorily implemented the *Blockburger* test for determining the permissibility of inter-sovereign dual prosecutions, as well as intra-sovereign successive ones, but that these states' tendency to interpret very narrowly the definitions of various offenses as defined by statute means that such dual or successive prosecutions are rarely actually prohibited by the test, giving prosecutors wide latitude to proceed with dual and successive prosecutions). Kurland argues that, "[i]f the goal of a state in enacting a statute that limits successive prosecutions is to protect an individual from the burdens associated with multiple prosecutions for essentially the same conduct, application of the *Blockburger* test arguably does little to advance that." *Id*.

[82] Under the dual-sovereignty doctrine, two prosecutions are *not* considered to be for the same offense—thus removing them from the ambit of the Double Jeopardy Clause's protections—if brought by different sovereigns, even if the laws of each sovereign that are at issue are identical to each other or one is a lesser included offense of the other. *See generally infra* Part II.B.2.

[83] *See generally infra* Part III.

for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws."[84] Most recently reexamined and upheld by the U.S. Supreme Court in 2019,[85] the doctrine's historical development is a reflection of the Court's navigation of inter-sovereign relations over time—especially inter-sovereign relations in the context of federalism, as it has considered constitutional edicts for navigating the nature of the federal-state relationship in situations where those two sovereigns share concurrent criminal jurisdiction.

The Court's earliest discussion of the dual-sovereignty doctrine appears in dicta in the 1847 case *Fox v. Ohio*.[86] In *Fox*, the Court faced the question of whether federal constitutional provisions giving the federal government the right to "coin money, regulate [its] value," and "provide for the punishment of counterfeiting" that money precluded a state from passing its own law making it a punishable offense to circulate counterfeit money.[87] Justice Daniels, writing for the majority, concluded that federal constitutional law did not proscribe the Ohio state law at issue, since the two laws in fact concerned separate, albeit similar offenses.[88] The Court's determination that the federal and state laws at issue covered different offenses removed the case from the realm of the Double Jeopardy Clause altogether. Nevertheless, Justice Daniels briefly addressed the hypothetical situation in which federal and state law should be found to govern the

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[84] Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016).

[85] *See* Gamble v. United States, 139 S. Ct. 1960 (2019).

[86] 46 U.S. 410 (1847).

[87] *Id.* at 433.

[88] *See id*. (noting that the state and federal offenses were different in "character[]"—the latter being one "directly against the government, by which individuals may be affected," and the former being a "private wrong, by which the government may be remotely, if it will in any degree, [] reached").

same offense. He believed the possibility of dual prosecutions in such instances would be rare, tempered by the benevolence and prosecutorial restraint of the later acting government and thus reserved only for the most exceptional cases.[89] Ultimately, though, he believed that the bar against double jeopardy did not limit either government's prerogative to enforce its own criminal laws, irrespective of the actions of the other government concerning the same incident.[90] But the nascent dual-sovereignty principle suggested by Justice Daniels in *Fox* was not one accepted unanimously by the members of the Court. Justice McLean reserved strong words for the concept in his dissent, arguing that to permit multiple sovereigns to punish an individual under essentially equivalent criminal laws would be "repugnant," and that it would constitute a "great defect in our system," a violation of the "common principles of humanity," and a "mockery of justice."[91]

Five years later in *Moore v. Illinois*,[92] faced with precisely the type of situation Justice Daniels in *Fox* had thought would be so rare, the Court formally adopted the dual-sovereignty doctrine as a limitation on the protections afforded by the Double Jeopardy Clause. The defendant in *Moore* had been convicted under a law of the State of Illinois that criminalized harboring fugitive enslaved persons, which was also a federal offense under the Fugitive Slave Act of 1850.[93] In addressing whether the defendant could be culpable under federal law, as well,

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[89] *See id*. at 435 ("It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.").

[90] *See id.* (noting that concurrent federal and state jurisdiction over the same offense "would by no means justify the conclusion" that the defendant "would not properly be subjected to the consequences [each] authorit[y] might ordain").

[91] *Id.* at 439–40 (McLean, J., dissenting).

[92] 55 U.S. (14 How.) 13 (1852).

and thus potentially subjected to both state and federal punishment for offenses under state and federal law that were, for all intents and purposes, equivalent, the Court further expounded upon the importance of a law's derivation (i.e., from which sovereign it originates) for determining whether the offense it governs falls within the ambit of the Fifth Amendment. In doing so, the Court clarified that an offense is "the transgression of a law."[94] Because the "same act may be [a] transgression of the laws of both" the state and federal governments, the Court held that an individual may "by one act . . . commit[] two offences, for each of which he is justly punishable," as "either [sovereign] or both may (if they see fit) punish such an offender."[95]

Since *Moore*, cases have continued to emerge that are subject to the concurrent criminal jurisdiction of two or more sovereigns, typically the federal government and a state government, presenting the Court with opportunities in which it has reconsidered, reaffirmed, and further developed the dual-sovereignty doctrine, solidifying its place in American jurisprudence. The seminal prohibition era case *United States v. Lanza*[96] in 1922 presented the Court with the dual-sovereignty issue squarely for the first time when it was asked to decide whether the dual prosecution of a defendant by the federal government and the State of Washington for violations of equivalent prohibition laws in each jurisdiction was permissible. It held that when "two sovereignties" are involved, each "deriving power from different sources, [and] capable of dealing with the same subject matter within the same territory," both sovereigns "may, without

[93] Pub. L. 31-60, 9 Stat. 462 (1850).

[94] *Moore*, 55 U.S. at 19.

[95] *Id*. at 20. Again, Justice McLean dissented. *See id*. at 21–22 (McLean, J., dissenting) ("It is contrary to the nature and genius of our government, to punish an individual twice for the same offence. . . . It is no satisfactory answer to this, to say that the States and Federal Government constitute different sovereignties, and, consequently, may each punish offenders under its own laws.").

[96] 260 U.S. 377 (1922).

interference by the other, enact laws to secure prohibition," and a single act in violation of both laws is considered "an offense against the peace and dignity of both and may be punished by each."[97]

The Court reaffirmed the dual-sovereignty doctrine on a handful of occasions between *Lanza* and the next seminal Supreme Court cases dealing with it,[98] *Bartkus v. Illinois*[99] and *Abbate v. United States*,[100] decided on the same day in 1959. The petitioner in *Abbate* specifically requested that the Court overturn *Lanza*.[101] But the Court's determination that there was "[n]o . . . persuasive reason [to] depart from its firmly established principle" was perhaps hardly a surprise, given that the facts of *Abbate* presented a scenario much like many of its predecessor dual-sovereignty cases and with which the Court was by then quite familiar: that of a state prosecution (wherein the defendant entered a guilty plea) followed by a federal prosecution (garnering a guilty jury verdict).[102] Without new or different information for the Court to weigh, *Abbate* proved a straightforward application of the dual-sovereignty doctrine, with the majority engaging in minimal analysis of the doctrine itself or the vitality of the rationales undergirding it.[103]

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[97] *Id.* at 382.

[98] *See, e.g.*, Hebert v. Louisiana, 272 U.S. 312, 314 (1926) (holding that, when a person engages in conduct "doubly denounced" by two different sovereigns, that person "commits two distinct offenses, one against [each sovereign], and may be subjected to prosecution and punishment" by each).

[99] 359 U.S. 121 (1959).

[100] 359 U.S. 187 (1959).

[101] *Abbate*, 359 U.S. at 195.

[102] *See id*.

[103] The majority's opinion, however, did not go unchallenged. Despite what was perhaps at that point a routine fact scenario, the Court was again divided in a narrow 5-4 decision. Justices Brennan and Black each penned dissenting opinions vehemently opposing the Court's continued application of the doctrine. *See id*. at 196–204. In particular, Justice Brennan emphasized the two-fold purpose of the Fifth Amendment bar against double jeopardy, and the

The Court went a step further in *Bartkus*, extending the dual-sovereignty doctrine to a newly presented type of factual scenario: that in which the first prosecution in a dual prosecution had resulted in the defendant's acquittal and the second prosecution had resulted in the defendant's conviction. The *Bartkus* court applied the dual-sovereignty principle in holding that it was acceptable for the defendant, who was acquitted of a federal charge for the robbery of a federally insured savings and loan association, to then be convicted on subsequent charges brought by the State of Illinois under a state robbery statute.[104]

Since *Bartkus* and *Abbate*, the federal courts have reaffirmed the dual-sovereignty doctrine on numerous occasions, for example, in cases involving dual prosecutions by different states,[105] by the courts of foreign nations and the federal government,[106] and by Indian tribes and the federal government, as explored *infra* Part II.C.

C. The Dual-Sovereignty Doctrine and Indian Tribes

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manner in which he believed the dual-sovereignty doctrine undermined a key component of the double jeopardy protection, stating:

> The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts. . . . Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. . . . Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.

Id. at 198–200 (Brennan, J., dissenting). Justice Brennan's point would be echoed some years later by Justice Ginsburg in her concurrence in *Puerto Rico v. Sanchez Valle*. 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (writing to flag the issue that the "double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct" but "[c]urrent 'separate sovereigns' doctrine hardly serves that objective").

Justice Black noted that the *Lanza* court had largely "rel[ied] on dicta in a number of past cases" when it formally announced the dual-sovereignty doctrine for the first time and that the "legal logic used to prove on [offense] to be two [was] too subtle for [him] to grasp." *Abbate*, 359 U.S. at 202 (Black, J., dissenting). Allowing two sovereigns "to do together what . . . neither can do separately," Justice Black believed, is "an affront to human dignity." *Id*. at 203.

[104] *See* Bartkus v. Illinois, 359 U.S. 121 (1959).

[105] *See, e.g.*, Heath v. Alabama, 474 U.S. 82 (1985) (permitting dual prosecutions by the states of Georgia and Alabama of a lesser included offense and greater encompassing offense stemming from the same homicide).

[106] *See, e.g.*, United States v. Richardson, 580 F.2d 946 (9th Cir. 1978) (permitting a U.S. federal criminal prosecution following a Guatemalan prosecution for the same conduct), *cert. denied*, 439 U.S. 1068 (1979).

1. Historical and Contemporary Applications in Case Law

The dual-sovereignty doctrine plays an integral role in criminal law enforcement in Indian country today. This reality is somewhat surprising, however, in light of the doctrine's early development in cases that have almost always involved defendants subject to the concurrent criminal jurisdiction of the federal government and a state or of two states.[107] The cases that form the heart of the Court's dual-sovereignty analysis over the decades are often completely devoid of tribal interests or perspectives. And it is not evident from any of the early cases in the dual-sovereignty doctrine canon that the Supreme Court considered tribal interests or perspectives, in dicta or even tangentially, when it initially formally announced the doctrine or subsequently over the years as it further considered and refined the doctrine. In fact, the dual-sovereignty doctrine was an entrenched principle of federal court jurisprudence for decades before the Court was squarely presented with the question of whether it should apply to Indian tribes in 1978 in the case *United States v. Wheeler*.[108]

In *Wheeler*, the defendant, an enrolled member of the Navajo Nation, had already been prosecuted by the Navajo Nation for a lesser included offense (LIO), to which he pled guilty, a full year before being indicted on federal charges under the Major Crimes Act[109] (MCA) for a greater encompassing offense arising from the same incident.[110] Whether the defendant's subsequent federal prosecution violated double jeopardy thus turned on the answer to the question of whether an Indian tribe, in this case the Navajo Nation, is a separate sovereign from

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[107] *See generally supra* Part II.B.2.

[108] 435 U.S. 313 (1978).

[109] 18 U.S.C. § 1153.

[110] *See Wheeler*, 435 U.S. 313, 314–16 (1978).

the federal government. More specifically, the Court asked whether the Navajo Nation's authority to prosecute and punish offenders like Wheeler was "a part of *inherent* tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress."[111] The Court reasoned that, because "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status," and the power to punish tribal member offenders like Wheeler for crimes like the one to which Wheeler had pled guilty in the Navajo Nation's court had never been withdrawn, it remained an inherent power of the tribe.[112] When the tribe exercised that power, "it [did] so as part of its retained sovereignty and not as an arm of the Federal Government."[113] Thus, "[s]ince tribal and federal prosecutions are brought by separate sovereigns," the dual-sovereignty doctrine applies, meaning dual tribal and federal prosecutions for what would otherwise be considered the same offense do not violate double jeopardy.[114]

Since *Wheeler*, the Court has further solidified the dual-sovereignty doctrine's applicability to tribes, going a step further than it did in *Wheeler* and holding in the case *United States v. Lara*[115] that a tribe "act[s] in its capacity of a separate sovereign" even when it exercises criminal jurisdiction pursuant to a Congressional decision to, in effect, re-recognize a portion of inherent tribal jurisdiction.[116] In *Lara*, the defendant was charged by the Spirit Lake Tribe with

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[111] *Id*. at 322 (emphasis added).

[112] *Id*. at 323.

[113] *Id*. at 328.

[114] *Id*. at 329–30.

[115] 541 U.S. 193 (2004).

[116] *Id*. at 210.

the crime of violence to a policeman after he struck a federal officer arresting him for violating a tribal order excluding him from the Spirit Lake reservation.[117] The tribe had jurisdiction over the defendant, an Indian but not an enrolled member of the prosecuting tribe, pursuant to the *Duro*-fix,[118] which "relax[ed] restrictions" previously announced by the Court "on the bounds of . . . inherent tribal authority."[119] The defendant pled guilty in tribal court and then was subsequently charged by the federal government with assaulting a federal officer.[120] The defendant argued that the Double Jeopardy Clause precluded his dual prosecution since "[k]ey elements of his federal crime mirror[ed] elements of the tribal crime."[121] These circumstances presented the Court with the question of whether the source of a tribe's prosecutorial authority is federal when it stems from federal legislation relaxing prior restrictions by the federal government on inherent tribal authority.[122] The Court answered this question in the negative, noting that when "Congress enacted new legislation specifically authorizing a tribe to prosecute Indian members of a different tribe," it had "not purport[ed] to delegate the Federal Government's own *federal* power," but rather it had "enlarge[d] the *tribes'* own powers of self-government to include the inherent power of Indian tribes . . . to exercise criminal jurisdiction over *all* Indians, including nonmembers."[123] The Court held that the dual-sovereignty doctrine applied because the source of

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[117] *Id*. at 193.

[118] *See* Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301) (recognizing as among the "powers of self-government" of Indian tribes the "inherent power . . . to exercise criminal jurisdiction over *all* Indians" (emphasis added)).

[119] *Lara*, 541 U.S. at 207.

[120] *Id*. at 193.

[121] *Id*. at 197.

[122] *See id*. at 195.

[123] *Id*. at 197–98 (internal quotations and citations omitted).

both the tribal and federal governments' prosecutions was each sovereign's own inherent authority, and therefore the dual prosecutions were permissible.[124]

In line with *Lara*, the Court has also tacitly signaled its approval of a circuit court decision holding that a tribe retains its separate sovereign status where it "was the subject of an Act of Congress terminating federal supervision over the property and members of the tribe, and whose powers were later legislatively restored"—i.e., where the tribe was once subject to federal termination but later had its status as a federally recognized Indian tribe restored by Congress.[125]

Most recently, the Supreme Court has reaffirmed the dual-sovereignty doctrine in cases involving dual prosecutions by the Commonwealth of Puerto Rico and the U.S. federal government in *Puerto Rico v. Sanchez Valle*[126] and by the State of Alabama and the federal government in *Gamble v. United States*.[127] In each of these cases reaffirming the doctrine, the Court emphasized that the inquiry at the heart of the test for determining whether two prosecuting governments are separate sovereigns (thus removing their dual prosecutions from the ambit of the Double Jeopardy Clause) is the ultimate source of each government's prosecuting authority. While neither of these cases directly presented the Court with the question of whether the dual-sovereignty doctrine should continue to apply to Indian tribes, the Court addressed the issue in dicta in both cases, signaling its continuing approval of the doctrine's vitality in the

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[124] *Id*. at 210 ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute. That being so, the Spirit Lake Tribe's prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign. Consequently, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete *federal* offense.").

[125] United States v. Long, 324 F.3d 475, 478 (7th Cir. 2003).

[126] 136 S. Ct. 1863 (2016) (finding that the ultimate source of Puerto Rico's prosecutorial power is the U.S. Congress and therefore holding dual prosecutions by Puerto Rico and the federal government unconstitutional under the Double Jeopardy Clause).

[127] 139 S. Ct. 1960 (2019).

tribal-federal context based on the long recognized principle that tribal sovereignty—and the inherent prosecuting authority that stems from that sovereignty—predates, and thus is not a delegation from, the U.S. federal government.[128]

In *Puerto Rico v. Sanchez Valle*, the Court reaffirmed that the test for determining whether two prosecuting governments are considered separate sovereigns for purposes of the Double Jeopardy Clause is "whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same 'ultimate source.'"[129] The inquiry does not require an examination of any other commonly recognized indicia of sovereignty, such as the extent of a sovereign entity's control, the "degree to which an entity exercises self-governance," or its "ability to enact and enforce its own criminal laws."[130] It is thus a purely "historical, not functional" test.[131] In dicta, the *Sanchez Valle* Court reiterated that Indian tribes meet this historical test, stating:

> Indian tribes also count as separate sovereigns under the Double Jeopardy Clause. . . . [U]nless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form. . . . The ultimate source of a tribe's power to punish tribal offenders thus lies in its primeval or, at any rate, pre-existing sovereignty. A tribal prosecution, like a State's, is attributable in no way to any delegation . . . of federal authority. . . . And that alone is what matters for the double jeopardy inquiry.[132]

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[128] *See Sanchez Valle*, 136 S. Ct. at 1872 (noting that "Indian tribes also count as separate sovereigns under the Double Jeopardy Clause" because the "'ultimate source' of a tribe's 'power to punish tribal offenders' . . . lies in its 'primeval' or, at any rate, 'pre-existing' sovereignty") (quoting United States v. Wheeler, 435 U.S. 313, 320, 322, 328 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978))).

[129] *Id*. at 1867 (quoting *Wheeler*, 435 U.S. at 320).

[130] *Id*. at 1870.

[131] *Id*. at 1871.

[132] *Id*. at 1872 (internal quotations and citations omitted).

Reservations expressed in *Sanchez Valle* by several justices, however, prompted the Court to grant certiorari in *Gamble v. United States* only a few years later to reexamine the dual-sovereignty doctrine for the first time since it was first introduced in American jurisprudence. These reservations reflected concern: (1) about the dual-sovereignty doctrine's vitality because of issues of procedural unfairness it raises for defendants who are subject to dual prosecution;[133] and (2) that the historical 'ultimate source' test renders the dual-sovereignty doctrine applicable inconsistently, or even arbitrarily, across contexts that are, for practical purposes, largely similar.[134]

In *Gamble*, the defendant faced dual prosecutions by the State of Alabama and the federal government and explicitly asked the Supreme Court to "overrule the dual-sovereignty doctrine."[135] After extensive analysis of the dual-sovereignty doctrine's historical origins and its embeddedness in American jurisprudence for almost two centuries, however, the Court declined "to abandon the sovereign-specific reading of the phrase 'same offense'" in the Fifth Amendment, thus upholding the dual-sovereignty doctrine as a carve-out to the Double Jeopardy Clause and the protections it offers.[136]

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[133] *See id*. at 1877 (Ginsburg, J., concurring) ("I write only to flag a larger question that bears fresh examination in an appropriate case. The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. . . . Current [dual-sovereignty] doctrine hardly serves that objective. . . . The matter warrants attention in a future case in which a defendant faces [dual] prosecutions by parts of the whole USA." (internal quotations and citations omitted)).

[134] *See id*. (Thomas, J., concurring) ("I agree with [the] holding, which hews to the Court's precedents concerning the Double Jeopardy Clause and U.S. Territories. But I continue to have concerns about our precedents regarding Indian law."); *see also id.* at 1880 (Breyer, J., dissenting) (expressing criticism of the majority's interpretation that U.S. territories do not meet the ultimate source test but that Indian tribes do, since "tribes remain sovereign for purposes of the Double Jeopardy Clause only until Congress chooses to withdraw that power," and thus it would be reasonable to recast "Congress' pattern of inaction (*i.e.*, its choice to refrain from withdrawing dual sovereignty)" as "an implicit decision to *grant* such sovereignty to the tribes," in this way making Congress "the source of the Indian tribes' criminal-enforcement power," and meaning that tribes, like territories, would not be separate sovereigns for purposes of the dual-sovereignty doctrine (internal quotations and citations omitted)).

[135] *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019).

Tribal interests were not directly represented in *Gamble*, and the majority opinion did not analyze the dual-sovereignty doctrine's historical or continued application in the Indian law context. Analysis of the doctrine's place in Indian law and specifically its role in the tribal-federal context was limited to the discussion in an amicus brief submitted by the National Indigenous Women's Resource Center urging the Supreme Court to uphold the dual-sovereignty doctrine[137] and several brief mentions during oral argument.[138] The Court's continuing approval of the dual-sovereignty doctrine's place in Indian law, however, is evident from its decision to hold another case involving dual prosecutions by the Northern Cheyenne Tribe and federal government in abeyance pending its decision in *Gamble*. In that case, *Bearcomesout v. United States*, the petitioner also requested that the Court overrule the dual-sovereignty doctrine, but the Court denied certiorari in that case after its decision in *Gamble*, leaving intact the Ninth Circuit's ruling that the defendant's dual prosecutions are permissible under the dual-sovereignty doctrine.[139]

2. Patching Doctrinal Holes: The Dual-Sovereignty Doctrine as a Workaround for Shortcomings of the Indian Country Criminal Justice System

From the ways the dual-sovereignty doctrine interacts with the rules of criminal jurisdiction in Indian country today, the doctrine can perhaps be understood as simultaneously

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[136] *Id*. at 1966.

[137] *See* Brief of Amici Curiae National Indigenous Women's Resource Center and National Congress of American Indians in Support of Respondent at 2, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) (urging the Court not to overturn the dual-sovereignty doctrine because to do so would "undermine core principles of local control for criminal justice [and] preclude the effective prosecution of those who commit serious violent crimes against Native women and children").

[138] *See, e.g.*, Transcript of Oral Argument at 65–67, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) [hereinafter Transcript of Oral Argument in *Gamble*], *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-646_1bn2.pdf.

[139] *See* United States v. Bearcomesout, 696 Fed. Appx. 241, No. 16-30276 (9th Cir. Aug. 17, 2017).

contributing to Indian law's "doctrinal incoherence,"[140] and yet, ironically, enhancing the operational efficacy of criminal law enforcement in Indian country. This is because the manner in which federal law circumscribes tribal criminal jurisdiction and provides in turn for its own invites both sovereigns—a tribe and the federal government—to take prosecutorial action in certain situations in order for a resolution to be reached that may reflect each government's notions of criminal justice and satisfy each government's interests in the matter.

The reality today is that the dual-sovereignty doctrine undergirds the criminal legal framework in Indian country, although this did not necessarily come to be the case by design.[141] Without it, the tribal-federal partnership would be severely undermined, as would, in turn, the safety of those in Indian country—especially Native women, who already experience rates of violence that eclipse those experienced by their non-Native counterparts and by other subgroups of the population in Indian country.[142] Due to the jurisdictional and sentencing restrictions imposed on tribal governments by federal law, the dual-sovereignty doctrine serves the role today of: (1) shielding tribal law from further federal encroachment by ensuring that, in any

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[140] Frickey, *Adjudication and Its Discontents*, *supra* note 13, at 1754.

[141] The General Crimes Act envisioned at least a partial dual-sovereignty regime in Indian country criminal jurisdiction early on, but this regime did not specifically contemplate or incorporate the dual-sovereignty doctrine, which was not yet recognized in American jurisprudence at the time of the GCA's enactment. *See* 18 U.S.C. § 1152 (supplementing tribal jurisdiction in Indian country with federal jurisdiction by extending "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . to the Indian country"). Notably, the General Crimes Act provides a limited, indirect double jeopardy protection that has since come to bear on the dual-sovereignty doctrine's application in the tribal-federal context, insofar as it excepts from the federal Indian country jurisdiction it creates cases in which the defendant "has been punished by the local law of the tribe." *Id*.

[142] *See generally* ANDRÉ B. ROSAY, NAT'L INST. OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2016), *available at* https://www.ncjrs.gov/pdffiles1/nij/249736.pdf. For this report, Rosay studied the prevalence of four different forms of violence experienced by American Indians and Alaska Natives: sexual violence, physical violence by intimate partners, stalking, and psychological aggression by intimate partners. *Id*. at 43. Results of Rosay's study indicate that 84.3 percent of American Indian and Alaska Native women have experienced one or more of these four forms of violence in their lifetimes, and 39.8 percent had experienced one or more of these forms of violence within the year prior to the study. *Id*. at 43–44.

given situation, tribes are able to exercise their criminal prosecutorial and sentencing authority to the fullest extent possible within the law—or the extent tribal authorities deem appropriate or necessary—regardless of the federal government's response to the situation; and (2) ensuring that, where federal law limiting tribal authority precludes a tribe from charging or sentencing a defendant in a manner commensurate with the severity of the alleged crime, the federal government can step in and seek such recourse.

Studies of the criminal justice system in Indian country have time and again supported the maxim that local criminal authority is the most effective criminal authority. In its groundbreaking 2013 report, for example, the Indian Law & Order Commission (ILOC) states that "Federal and State agencies can be invaluable in creating effective partnerships with Tribal governments, but there is no substitute for the effectiveness of locally controlled Tribal governmental institutions that are transparent and accountable."[143] As the report notes, however, "Federal government policies have displaced and diminished the[se] very institutions that are best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities"—i.e., tribal justice systems themselves.[144] The dual-sovereignty doctrine

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[143] INDIAN LAW & ORDER COMM'N, ROADMAP, *supra* note 10, at 3.

[144] *Id*. at v. The ILOC underscored that the "comparative lack of localism in Indian country with respect to criminal justice directly contravenes [a] most basic premise of our American democracy," *id.* at 3, and more importantly, "runs counter to long-standing Native traditions and views," as "[f]or thousands of years, Indian nations provided local management of justice," an "arrangement [which] upheld and respected each nation's specific rights and institutional ways of providing community order and justice." *Id.* at 28, n.2. The delocalization of the criminal justice system in Indian country has also had observable, destructive impacts on the system's operational effectiveness, and in turn on public safety. *See, e.g.*, Riley, *Crime and Governance*, *supra* note 10, at 1583 (arguing that, by "depriving tribes of the localized community control that characterizes virtually all law enforcement in the United States, federal policy itself caused the descent of Indian country into crisis"). Riley discusses the bleak outlook for community wellbeing when local, tribal criminal authority is denied and supplanted with (in many ways, unresponsive and even ineffective) federal authority: "Without basic public safety, communities deteriorate: Students cannot focus on learning; tribes and individual tribal members cannot engage in economic development, attract business, or grow tourism. Tribal members lose faith in tribal governments as well as in the federal system." *Id*.

counterbalances this destructive trend, at least in some measure, by insulating tribal prosecutors from federal incursion. It ensures that tribes can always exercise their criminal authority (in a manner and to an extent deemed appropriate by tribal authorities) in any matter over which they have jurisdiction, free from federal oversight and regardless of whether or how federal authorities might themselves also respond to the matter. While the fact of concurrent federal jurisdiction and the possibility of prior, parallel, or subsequent federal action will certainly be factors tribal authorities consider in making their own charging decisions, the dual-sovereignty doctrine guarantees, at the end of the day, tribal independence in making such decisions. Neither federal action nor inaction forecloses or mandates a particular tribal response.[145]

Of course, tribes and the federal government recognize that "in much of Indian Country, the [federal government] alone has the authority to seek a conviction that carries an appropriate potential sentence when a serious crime has been committed."[146] One way of understanding the importance of this reality for ensuring adequate law enforcement responses in Indian country under current jurisdictional rules is by imagining the messiness of charging decisions if the dual-sovereignty doctrine were *not* to apply in the context of concurrent tribal and federal criminal jurisdiction.

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[145] Of course, on many reservations, when tribes exercise their own criminal jurisdiction, there is significant interdependence between tribal and federal authorities, whether or not the federal government ultimately decides to prosecute a particular defendant or pursue a particular case. For example, federal law enforcement officers, such as Bureau of Indian Affairs officers and Federal Bureau of Investigation agents, are often the ones who respond to crime scenes and carry out investigations. Thus, while tribes may independently choose to prosecute cases regardless of whether federal prosecutors also prosecute those cases, tribal prosecutors in such cases may very well still depend on federally conducted investigations, reports of those investigations, evidence collected by federal authorities, or other similar federal resources and materials.

[146] Memorandum for United States Attorneys with Districts Containing Indian Country from Deputy Attorney General David W. Ogden (Jan. 11, 2010), *available at* https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country.

In such a world, tribes would face a difficult dilemma. On one hand, in the case of serious crimes, a tribe could choose to stay its hand and see if the federal government will file charges. This would be a more appealing decision than being the first sovereign to take action particularly for tribes that do not exercise criminal jurisdiction over felonies or expanded sentencing authority under TLOA. By staying its hand, however, a tribe would essentially be electing to forgo its own (even minimal) authority in order for an external government to have the opportunity to resolve, on its terms, an issue that arose within the tribe's territory—hardly a scenario reflective or generative of self-determination. Furthermore, a tribe would be risking the possibility that a tribal statute of limitation period would elapse in the meantime, ultimately foreclosing a tribal prosecution—and thus any prosecution at all—if the federal government were to ultimately decline to bring charges.

On the other hand, to avoid a scenario where a severe crime goes completely unprosecuted, tribes could choose to bring charges as quickly as possible in order to ensure that at least some sort of criminal process occurs. The risk in this situation would be that even the maximum sentence available under tribal law might be grossly inadequate depending on the severity of the alleged crime. Tribes would have to accept the tradeoff of sacrificing the availability of a sentence commensurate with the severity of the charges in exchange for ensuring that there is any criminal proceeding whatsoever. This is because, without the dual-sovereignty doctrine, any tribal prosecution—even if the sentence the tribe sought was plainly inadequate or the tribe was only able to prosecute a lesser included offense instead of the full extent of alleged criminal conduct—would bar subsequent federal prosecution.

This choice to ensure that at least *some* criminal prosecution occurs, albeit (a tribal) one that is severely hampered by federal limitations on tribal jurisdiction and sentencing authority

and forecloses subsequent federal action that is unencumbered by the same limitations, would perhaps be more appealing to tribes because of the federal government's well-documented history of declining to prosecute Indian country crimes at astonishingly high rates.[147] This history

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[147] A declination is the decision by a United States Attorney's Office (USAO) not to pursue a criminal prosecution in a matter it receives by referral from another law enforcement agency—typically, in Indian country, a tribal law enforcement agency, the Federal Bureau of Investigation (FBI), or the Bureau of Indian Affairs (BIA). *See* U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 18 (2017). Congress has recognized the astonishingly high federal declination rates in Indian country as an issue for quite some time. *See, e.g.*, *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (Sept. 18, 2008), *available at* https://www.hsdl.org/?view&did=688340 (including testimonies made by tribal justice officials, current and former U.S. Attorneys, and other Department of Justice personnel). Congress requested an investigation into the issue, the results of which the Government Accountability Office (GAO) reported in 2010. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS (2010). That report states that "USAOs declined to prosecute 50 percent of the 9,000 matters" from Indian country that it resolved (by prosecuting, declining to prosecute, or administratively closing the matter) in fiscal years 2005 to 2009. *Id*. at 3. Furthermore, "[d]eclination rates tended to be higher for violent crimes, which were declined 52 percent of the time, than for nonviolent crimes, which were declined 40 percent of the time," because, some USAO staff speculate, "generally, less evidence is available for violent crimes"—a problem that is likely exacerbated by the sometimes significant geographic distance between USAOs and the Indian country where an alleged crime has occurred and feelings of distrust of the federal system in many tribal communities that means many individuals in those communities are reluctant or even refuse to participate in federal criminal investigations and prosecutions. *Id*. More specifically, "USAOs declined to prosecute 46 percent of assault matters and 67 percent of sexual abuse and related matters" during the period studied. *Id*. Common reasons cited for declinations included: "weak or insufficient admissible evidence," "no federal offense evident" (either for lack of federal jurisdiction or "because the conduct did not meet other elements of [a federal] crime") and "witness problems." *Id*. at 3, 10–11.

In fact, the unacceptably high federal declination rates of Indian country crimes was recognized as such a pressing issue that Congress included in the Tribal Law and Order Act new requirements for the Attorney General to submit annual reports containing information about the number and types of alleged crimes USAOs declined to prosecute and the reasons why. *See* Pub. L. No. 111-211, § 212(b), 124 Stat. 2261, 2268 (2010). It also requires USAOs to notify and coordinate with tribal justice systems with regard to matters the USAOs decline to prosecute themselves. *Id*. at § 212(a)(3). Unfortunately, the declination notifications and reports mandated by TLOA have not actually come to fruition. *See, e.g.*, INDIAN LAW & ORDER COMM'N, ROADMAP, *supra* note 10, at 108 (noting that the ILOC "heard ample testimony that [USAOs] sometimes do not communicate effectively, or at all, with Tribal jurisdictions when declining a case for Federal prosecution, notwithstanding TLOA's declination reporting requirement. Because the local Tribal courts are almost never notified, they often do not exercise their concurrent jurisdiction and address the matter in Tribal court").

The most recent declination report mandated by TLOA from 2018 confirms that federal declination rates, while certainly lower than they were pre-TLOA, remain significant. *See generally* U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS (2018). The report states:

> The USAO declination rate [has] remained relatively steady [since TLOA's Section 212 reporting requirements went into effect]. USAO data shows that, in CY 2018, 39 percent (999) of all (2,523) Indian country matters resolved were declined. USAOs declined cases at a similar rate in prior years: 37 percent (891) o[f] all Indian country matters resolved (2,390) in CY 2017; 34 percent (903) of all Indian country matters resolved (2,666) in CY 2016; 39 percent (1,043) of all Indian country matters resolved (2,655) in CY 2015; 34 percent (989) of all Indian country matters resolved (2,886) in CY 2014; 34 percent (853) of all Indian country matters resolved (2,514) in CY 2013; 31 percent (965) of all Indian country matters resolved (3,097) in CY 2012; and 38 percent (1,042) of all Indian country matters resolved (2,767) in CY 2011.

has resulted in severe crimes going completely unprosecuted[148] with enough regularity that Indian country has established a reputation as a prosecution-free zone.[149]

To more concretely illustrate these options and the potential challenges tribal prosecutors could face in making rational and fair charging decisions if the dual-sovereignty doctrine did not apply in Indian law, take for example the facts presented in the *Bearcomesout* case.[150]

3. Imagining Indian Law Without the Dual-Sovereignty Doctrine: Implications for (Un)fair and (In)consistent Charging Decisions

When Tawnya Bearcomesout, an enrolled member of the Northern Cheyenne Tribe, was indicted by a federal grand jury for manslaughter in February 2016, she was nearing release from prison, having already served most of the time of her federal sentence stemming from equivalent

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Id. at 3.

[148] Among the crimes in Indian country that federal prosecutors have historically declined to prosecute at astoundingly high rates are crimes of sexual violence, which has had devastating impacts on Native women especially. *See, e.g.*, AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 15 (2007) (discussing the history of "[s]exual violence as a tool of conquest" in Native North America and the continuing legacy of this atrocity that is perpetuated because jurisdictional rules in Indian country are so unworkable that they actually make criminal enforcement of serious crimes like sex crimes more difficult). The Amnesty International report notes that "[t]ribal prosecutors reportedly sometimes decline to prosecute crimes of sexual violence because they expect that federal prosecutors will do so," but "federal prosecutors frequently decline to pursue cases of sexual violence against Native American women." *Id*. at 63. And "[a]lthough some tribal prosecutors may later choose to take up a case if it is declined for federal prosecution, this can result in delays of up to a year or more. Often the net result is that perpetrators are not prosecuted at either level" because, for example, delays have undermined the investigatory process that is required for such a prosecution or a tribal statute of limitations has elapsed in the meantime. *Id*. This issue is exacerbated by the fact that tribal prosecutors may, in other instances, simply lack jurisdiction to prosecute sex and other violent crimes that are committed in Indian country by non-Indians. In these situations, such crimes go unprosecuted if the federal government declines to pursue them. Federal recognition of tribal inherent SDVCJ under VAWA restores a modicum of tribal authority in this respect. *See* NAT'L CONG. OF AM. INDIANS, VAWA SDVCJ FIVE-YEAR REPORT, *supra* note 68, at iv. But the statute's narrow reach means that even the tribes exercising SDVCJ are only partly able to close the enforcement gap created by federal declinations.

[149] *See, e.g.*, Garet Bleir & Anya Zoledziowski, *The Missing and Murdered: 'We As Native Women Are Hunted'*, INDIANZ (Aug. 27, 2018), https://www.indianz.com/News/2018/08/27/the-missing-and-murdered-we-as-native-wo.asp (quoting Lisa Brunner, a member of the White Earth Nation, who says that "[N]ative women are hunted[, they] are deliberately sought after by sexual predators," as a result of potential attackers' awareness of the complicated jurisdictional schemes in Indian country that make the prosecution of cases of sexual violence committed on reservations less likely).

[150] *See generally* United States v. Bearcomesout, 696 Fed. Appx. 241, No. 16-30276 (9th Cir. Aug. 17, 2017).

charges based on exactly the same incident.[151] That incident occurred on November 22, 2014. That evening, Bearcomesout's brother-in-law and his wife arrived at Bearcomesout's residence in Lame Deer, Montana, on the Northern Cheyenne reservation.[152] Upon their arrival, they found Bearcomesout "bloody and dazed" and her husband unresponsive by a back staircase.[153] The brother-in-law and his wife called the Bureau of Indian Affairs (BIA) police, but by the time the police arrived, Bearcomesout, with a black eye and bleeding from cuts to her face and head, had passed out.[154] Both Bearcomesout and her husband were taken to the local Indian Health Service (IHS) clinic, where her husband was pronounced dead later that night.[155] Bearcomesout was arrested upon her release from the IHS clinic. On the phone with her mother from jail the following day, she explained that she and her husband had gotten into an altercation, "he [had] hit her head against the sink," and that she had "stabbed [him] because he was beating on her and nobody was [there to] help[] her."[156] The tribe charged Bearcomesout with homicide.[157] She ultimately pled guilty to the charges in tribal court and served the maximum sentence for homicide under Northern Cheyenne criminal law: one year in prison and a $5,000 fine.[158]

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[151] *See* United States v. Bearcomesout, CR 16-13-BLG-SPW, 2016 WL 3982455, at *1 (D. Mont. July 22, 2016).

[152] *See* Opening Brief of Defendant-Appellant at 7, United States v. Bearcomesout, 696 Fed. Appx. 241, No. 16-30276 (9th Cir. Aug. 17, 2017).

[153] *Id*. (internal quotations omitted).

[154] *See id*.

[155] *See id*. at 7–8.

[156] *Id*. at 8.

[157] *See id*. at 8–9. Criminal homicide is defined in the Northern Cheyenne Tribe's criminal code as "purposely, knowingly, or negligently caus[ing] the death of another human being." Northern Cheyenne Criminal Code § 7-4-1, *available at* https://www.narf.org/nill/codes/northern_cheyenne/.

[158] United States v. Bearcomesout, CR 16-13-BLG-SPW, 2016 WL 3982455, at *1 (D. Mont. July 22, 2016). As of the completion of this thesis, the Northern Cheyenne Tribe has not implemented enhanced sentencing authority under TLOA, so it is limited to applying the maximum criminal sentence permitted for non–TLOA implementing

Instead of being released at the end of her tribal sentence, upon her indictment on federal manslaughter charges, Bearcomesout was transferred to federal custody, where she remained as her second, federal prosecution ensued.[159] Bearcomesout filed a motion to dismiss the federal charges on the grounds that they violated the Fifth Amendment's Double Jeopardy Clause.[160] The district court denied her motion in light of the dual-sovereignty doctrine,[161] a ruling the Ninth Circuit subsequently upheld on appeal.[162]

It is unclear in Bearcomesout's case exactly why she was prosecuted by both the tribe and the federal government. It is not evident in the court filings that the tribe requested the federal government bring charges in the matter or that tribal prosecutors coordinated with the local USAO to ensure that federal charges were brought. In fact, reading between the lines, it appears likely that tribal prosecutors did not request that federal prosecutors bring charges, and that the tribal court judge was unsure whether the possibility of a subsequent, dual federal prosecution in Bearcomesout's case would actually ever materialize during the entirety of her tribal court prosecution. The tribal judge was, of course, aware of the very real possibility of a dual federal prosecution and, at the very least, appears to have alerted Bearcomesout to this possibility.[163] The tribal court judge even urged the federal District Court to credit Bearcomesout

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tribes under ICRA. *See* 25 U.S.C. § 1302(a)(7)(B); *see also* Northern Cheyenne Criminal Code § 7-1-7(A) (detailing that Class A offenses like criminal homicide carry maximum sentences of a fine of no more than $5,000 and term of imprisonment not exceeding one year).

[159] *See* Opening Brief of Defendant-Appellant at 9, United States v. Bearcomesout, 696 Fed. Appx. 241, No. 16-30276 (9th Cir. Aug. 17, 2017).

[160] *See* Memorandum in Support of Defendant's Motion to Dismiss the Indictment: Double Jeopardy, United States v. Bearcomesout, CR 16-13-BLG-SPW, 2016 WL 3982455 (D. Mont. July 22, 2016).

[161] *See* United States v. Bearcomesout, CR 16-13-BLG-SPW, 2016 WL 3982455 (D. Mont. July 22, 2016).

[162] *See* United States v. Bearcomesout, 696 Fed. Appx. 241, No. 16-30276 (9th Cir. Aug. 17, 2017).

[163] *See* Memorandum in Support of Defendant's Motion to Dismiss the Indictment: Double Jeopardy at 2–3, United States v. Bearcomesout, CR 16-13-BLG-SPW, 2016 WL 3982455 (D. Mont. July 22, 2016) (noting that the "Tribal

for the time she served based on her initial tribal prosecution on any federal sentence subsequently imposed in a dual federal prosecution.[164]

It is possible the tribe charged Bearcomesout because it determined that some sort of prosecutorial response was necessary, and as the sovereign entity with jurisdiction over the land on which the alleged crime occurred and authority over the alleged perpetrator and victim who were both Indian, it believed itself to be the most appropriate governing body to handle the matter, and so it exercised its sovereign authority in accordance with that determination. It is also possible the tribe charged Bearcomesout because it determined that some sort of prosecutorial response was necessary and, recognizing historically and continuing high federal declination rates for crimes in its territory, reasonably believed that a tribal prosecution might ultimately be the only way any prosecutorial response came to fruition. Whatever the tribe's reasons for charging Bearcomesout with manslaughter, though, the fact of the matter is that it was able to make the decision to do so independently, without any official interference caused by federal action nor inaction.

This would not be the case if the dual-sovereignty doctrine did not apply in the Indian law context to cases that are subject to concurrent federal and tribal criminal jurisdiction. Without the dual-sovereignty doctrine, federal limitations on tribal criminal jurisdiction and

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Judge accepted [Bearcomesout's] plea and imposed sentence, indicating the plea was entered with the understanding that a defense of self-defense would be a jury question and is somewhat uncertain[,] and that an acquittal in tribal court would make a federal prosecution more likely" (internal quotations omitted)).

[164] *See* Opening Brief of Defendant-Appellant at 9, United States v. Bearcomesout, 696 Fed. Appx. 241, No. 16-30276 (9th Cir. Aug. 17, 2017) (recounting that, recognizing the fact that the incident could "give rise to a [subsequent] federal prosecution, the Tribal Court explicitly urge[d] the United States District Court to credit Defendant on any federal sentence with time served on the[] tribal charges" (internal quotations omitted)). Counsel for Bearcomesout in her federal case indicated that, "[i]n the hope that no federal prosecution would follow—a *quid pro quo*—[she] voluntarily entered her [tribal court] plea and was sentenced." Memorandum in Support of Defendant's Motion to Dismiss the Indictment: Double Jeopardy at 3, United States v. Bearcomesout, CR 16-13-BLG-SPW, 2016 WL 3982455 (D. Mont. July 22, 2016).

sentencing authority would put additional considerations and pressures on tribal prosecutors that very likely would impact the fairness and consistency of tribal and federal charging decisions for Indian country crimes.

In Tawnya Bearcomesout's case, the Northern Cheyenne prosecutor might choose to delay bringing tribal charges because the Northern Cheyenne Tribe does not exercise enhanced sentencing authority under TLOA and thus it would be limited to seeking a sentence with a maximum term of incarceration of only one year for an alleged homicide. The tribe might determine that a year of incarceration is an inadequate response when the allegations involve such a severe offense. It therefore might be unappealing to the tribe to expend its own (likely very limited) resources to investigate and prosecute an alleged crime that, even if the defendant were ultimately found guilty, the tribe would be unable to address in the manner it believes is appropriate, especially since tribal action would preclude federal action. The tribe might choose to essentially forgo exercising its own criminal authority with the hope that federal prosecutors would step in to handle the matter in its place.[165] Such a decision, especially if it is one the tribe makes with any sort of regularity, could have negative implications for tribal self-governance and public safety within the tribe's territory by undermining community trust in the tribal government and even perhaps community members' faith in the local criminal justice system and their willingness in turn to utilize or participate in the system.

Furthermore, the tribe's decision to forgo exercising its own criminal authority and leave the prosecution of more serious crimes up to the federal government could negatively impact

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[165] *See infra* notes 253–58 and accompanying text (discussing tribal Special Assistant United States Attorneys (SAUSAs), tribal prosecutors who receive federal cross-commissions and can therefore prosecute criminal cases in tribal and federal court). Only some tribes have SAUSAs, but where these tribal SAUSA positions exist, they have greatly enhanced the communication and coordination between tribal and federal prosecutors' offices. *See id*.

individual defendants like Tawnya Bearcomesout—most often tribal citizens, or noncitizen Indians who nevertheless have deep ties to the tribal community—who may now be subject to more severe federal sentencing and will likely have to serve out their sentence in a facility far from home, thus straining the community and family support systems that can be so important to individuals during incarceration[166] and potentially denying them access to tribal or other local programs designed to aid their eventual reentry into the community.[167] Federal limitations on tribal sentencing powers mean that individuals found guilty of felony-level crimes in tribal court are subject to maximum tribal sentences that are (perhaps grossly) inadequate based on the severity of the crime, at least as measured according to popular understandings of crime and sentence commensurability evidenced in other, surrounding systems of localized criminal law enforcement (i.e., those of the states). But federal sentencing can also create the opposite effect for Indian defendants who are prosecuted and punished in the federal system for criminal

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[166] *See, e.g.*, Creasie Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, 52 FEDERAL PROBATION 48, 48, 50 (1988) (examining some reasons why "maintain[ing] contact with family and friends during imprisonment" can "reduce . . . future criminal activity"—for example, by providing "concrete resources" (like money, clothing, and food) and "opportunities for nurturing," which can enhance an individual's "morale and sense of security and well-being[, as well as] provide a reassurance of worth and attest to an individual's competence in a social role"); Carrie Pettus-Davis et al., *Acceptability of a Social Support Intervention for Re-Entering Prisoners*, 6 J. OF THE SOCIETY FOR SOCIAL WORK & RES. 51, 53 (2015) ("Incarceration can socially isolate prisoners from [instrumental and emotional] sources of support . . . . Disruption of positive relationships during a person's incarceration is especially problematic for post-prison outcomes because disruption can reduce the availability and sustainability of postrelease social support.").

[167] For examples discussing one exemplary tribal justice initiative aimed at healing offenders through programming centered around community responsibility and support, see generally the companion articles Lee Romney, *Yurok Tribe's Wellness Court Heals With Tradition*, L.A. TIMES (Mar. 5, 2014), https://www.latimes.com/local/lanow/la-me-ln-yurok-wellness-court-20140304-story.html#axzz2vn119mjZ, and Lee Romney, *Tribal Court's Chief Judge Works for Yurok-Style Justice*, L.A. TIMES (Mar. 5, 2014), https://www.latimes.com/local/la-me-yurok-tribal-judge-20140305-dto-htmlstory.html. *See also* Henry Gass, *Native Justice: How Tribal Values Shape Judge Abby's Court*, CHRISTIAN SCI. MONITOR (Mar. 27, 2019), https://www.csmonitor.com/USA/Justice/2019/0327/Native-justice-How-tribal-values-shape-Judge-Abby-s-court (discussing further the efforts of Yurok Chief Judge Abby Abinanti in developing tribal court programming and services that emphasize the values of community responsibility and support in efforts to heal offenders).

offenses committed in Indian country by subjecting them to much harsher penalties than their (predominately non-Indian) counterparts generally face in state courts.[168]

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[168] The relative harshness of federal criminal sentencing compared to state criminal sentencing is explored in the context of the recent federalization of criminal law in Christine DeMaso, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under* Booker*?*, 106 COLUM. L. REV. 2095 (2006). DeMaso argues that, "for a defendant whose case could be brought by either sovereign, much hinges on who prosecutes," because "federal penalties are almost always higher" than state penalties. *Id*. at 2105–06. Furthermore, federal criminal sentences may significantly exceed the actual length of sentences served pursuant to state court convictions for the equivalent conduct because those state sentences "are rarely served out in absolute time but are reduced by operations of parole, good time, and other sentence amelioration schemes that are not available for federal sentences." BJ Jones & Christopher J. Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach*, 89 N.D. L. REV. 53, 55 n. 6 (2013) [hereinafter Jones & Ironroad, *Addressing Sentencing Disparities*]. Because of the unique jurisdictional scheme in Indian country, Indian criminal defendants in non–Public Law 280 states who are accused of committing certain types of offenses in Indian country are funneled into federal court instead of state court—very possibly, of course, in addition to tribal court. As a result, "Indians disproportionately dominate the federal violent-crime docket because of the jurisdictional laws that channel non-Indians [almost] entirely from tribal courts and mostly from federal courts, keep most Indian defendants out of state courts, and prevent tribal courts from adequately punishing serious crimes like murder and aggravated assault." Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 CALIF. L. REV. 1409, 1416–17 (2011) [hereinafter Tredeau, *Tribal Control*]. This combination of a unique federal jurisdictional scheme that applies only to Indians in Indian country and the general relative harshness of federal sentencing together "systematically create harsher sentences for Indian defendants than for non-Indian defendants." *Id*. at 1411; *see also* Charles B. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENT'G REP. 71 (2000) (detailing several types of cases in which the federal sentencing guidelines serve to facilitate the disparate, harsher treatment of American Indian defendants in the federal system as compared to their non-Indian counterparts in state systems); *but see* TRIBAL ISSUES ADVISORY GRP., U.S. SENT'G COMM'N, REPORT OF THE TRIBAL ISSUES ADVISORY GROUP 20–21 (2016), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf (noting that, while anecdotal evidence and "[v]arious academic studies . . . fuel the perception that Native Americans are subject to harsher sentences for Indian country offenses prosecuted in federal court than occur for similar criminal conduct committed in states," unfortunately, "data limitations still prevent a systematic and comprehensive exploration" of the issue).

As just one example, take Tawnya Bearcomesout's situation. Both the State of Montana (where the Northern Cheyenne Indian Reservation lies) and the federal government treat the type of crime with which she was charged much more severely than the Northern Cheyenne Tribe. When Bearcomesout pled guilty to criminal homicide in Northern Cheyenne Tribal Court, a Class A offense under the tribe's criminal code, her crime carried a maximum sentence of a term of imprisonment not to exceed one year and a fine not to exceed $5,000. *See supra* note 158 and accompanying text. Even if the tribe had implemented enhanced sentencing under TLOA, the maximum sentence available in Bearcomesout's case in tribal court would have been a term of imprisonment of no more than three years and a fine of no more than $15,000. *See* 25 U.S.C. § 1302(b). In comparison, negligent homicide carries a maximum penalty under Montana law of twenty years imprisonment, a $50,000 fine, or both. *See* MONT. CODE ANN. § 45-5-104(3) (2017). Defendants found guilty of deliberate homicide can face the death penalty. *See id*. § 45-5-102(2). Under federal law, an individual can receive a term of up to eight years in prison for involuntary manslaughter, *see* 18 U.S.C. § 1112(b); up to fifteen years for voluntary manslaughter, *see id*.; and life in prison or the death penalty for murder, *see* 18 U.S.C. § 1111(b).

Notably, federal law requires tribes to opt into the death penalty as an available punishment for tribal members who are convicted in a federal prosecution under the General Crimes Act or the Major Crimes Act. *See* 18 U.S.C. § 3598 (stating that "no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence . . . for any offense the Federal jurisdiction for which is predicated solely on Indian country . . . and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected" to make capital punishment available in such cases). Federal law also requires tribes to opt into the

In forgoing exercising its own criminal authority over Bearcomesout, the tribe would also run the risks associated with federal idleness or declination. Tribal prosecutors might, understandably, be wary of waiting any prolonged period of time to see whether the federal government will choose to pursue charges if, in the meantime, a tribal limitation period is tolling and could elapse before any clear indication from the federal government one way or the other. This concern on tribal prosecutors' part would be heightened where a violent crime occurs and the alleged perpetrator remains in the community while the tribal government waits to see if the federal government takes action.

On the other hand, if the tribe believed it was likely, or even possible, that federal prosecutors intended to charge Bearcomesout but nevertheless felt it was important to take action itself—possibly simply as a signifier or expression of its sovereign authority but perhaps especially because of a recognition that, as the local governing authority, it is the sovereign entity best positioned to respond to internal tribal affairs like crimes committed in tribal territory and involving members of the tribal community—tribal prosecutors might feel pressured to charge the alleged perpetrator as soon as possible. The flipside of this is true, as well. If federal prosecutors believed federal prosecution was essential in a particular case and prosecution by one sovereign would foreclose prosecution by the other, then federal prosecutors, too, might be pressured to make hasty charging decisions, giving rise to a race to the courthouse. This sort of race to the courthouse scenario could unfairly impact individual defendants and undermine the criminal justice system—and in turn public safety—as a whole. It might encourage prosecutors

availability of life imprisonment as a punishment for repeat offenders who are convicted under the GCA or MCA and already have multiple prior serious violent felonies or drug offenses on their record. *See* 18 U.S.C. § 3559(c)(6) (stating that "[n]o person subject to the criminal jurisdiction of an Indian tribal government shall be subject to [life imprisonment] for any offense for which Federal jurisdiction is solely predicated on Indian country . . . and which occurs within the boundaries of such Indian country unless the governing body of the tribe has elected that [life imprisonment] have effect over land and persons subject to the criminal jurisdiction of the tribe").

to charge individuals with crimes before actually gathering the type or amount of evidence otherwise typically required to support such decisions. This could, in turn, lead to the pursuit of prosecutions without sufficient evidence to support a likelihood of conviction, perhaps increasing the risk of wasting resources on prosecutions that are likely to ultimately be unsuccessful, or even of mistaking the identification of suspects and diverting resources toward prosecuting the wrong individual(s).

If the dual-sovereignty doctrine did not apply to Indian tribes, additional pressures concerning federal governmental authority and inter-sovereign relations wholly unrelated to a particular defendant's guilt or innocence would almost surely arise, in turn impacting charging decisions. Without the dual-sovereignty doctrine, tribal law would not be shielded to the extent it is today from further federal encroachment because the federal government would be able to essentially negate tribal authority simply by prosecuting first.[169] And in the worst-case scenarios, a lack of intergovernmental coordination could exacerbate existing jurisdictional holes, leading to inadequate or, conversely, overly harsh resolutions of criminal cases with even more regularity than occurs now.

4. The Four Jurisdictional Scenarios When the Dual-Sovereignty Doctrine Applies in the Tribal-Federal Context

The jurisdictional maze that characterizes the legal system in Indian country today paradoxically creates coexistent patterns of underenforcement and overenforcement of criminal law in Indian country that have serious, even devastating, consequences for everybody

[169] Conversely, a tribe would be able to negate federal authority over a case by prosecuting first. The federal government would likely be wary of—and particularly concerned about—this possibility in situations involving the prosecution of Indians for offenses allegedly committed against non-Indians. The federal government might view non-Indian victims in these cases as being less protected, since the federal government's enforcement powers would be circumvented altogether and the tribal government's powers to punish will be substantially curtailed compared to the federal government's corresponding power, even if the tribe imposes the maximum penalty it is permitted to under federal law.

involved—victims, defendants, and the broader community. Underenforcement occurs when tribal criminal authority is restricted by federal law, thereby limiting the effectiveness of local law enforcement efforts or even precluding a local prosecution altogether, and federal authorities either fail to step in and fill this void or are ineffectual when they do.[170] Federal ineffectiveness may be attributable to various factors, such as a lack of resources available for federal law enforcement in Indian country, substantial distances between tribal lands and federal facilities such as FBI offices or federal courthouses that impose practical barriers to effective investigation and prosecution, and tribal community members' skepticism of federal authorities and law enforcement processes and thus resistance to cooperate in federal investigations and trials.[171] Overenforcement can occur when tribal and federal jurisdiction is concurrent and both sovereigns choose to exercise their prosecutorial authority over a single matter.[172]

The dual-sovereignty doctrine is the legal doctrine that permits such overenforcement. But because of the peculiar jurisdictional framework in Indian country, it is important to delineate exactly the types of scenarios that may give rise to dual tribal and federal prosecutions. Together, the criminal jurisdiction rules in Indian country discussed earlier *supra* Part II.A, and the dual-sovereignty doctrine permit dual tribal and federal prosecutions in four scenarios:

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[170] *See supra* notes 147–48 (discussing historical and continuing federal underenforcement of criminal law in Indian country, as evidenced by disparately high declination rates).

[171] *See, e.g.,* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 710–12 (2006) [hereinafter Washburn, *American Indians*] (discussing the "alienation" American Indians involved in the federal criminal justice system may experience as a result of cultural and linguistic differences, as well as geographic distances between many reservations and the cities in which federal courthouses are located).

[172] The effects of overenforcement through dual prosecution are exacerbated by the relative harshness of federal sentencing. *See supra* note 168. The relative harshness of federal sentencing is ameliorated in only a few very specific contexts by federal statutes recognizing tribal sovereign authority to opt into some of the harshest penalties, such as capital punishment and life imprisonment, for defendants whose federal prosecution is predicated on federal Indian country criminal jurisdiction pursuant to the General or Major Crimes Acts. *See id*.

(1) When an Indian defendant commits a major crime[173] against an Indian or non-Indian victim in Indian country falling within a tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to the Major Crimes Act,[174] regardless of the order in which the two sovereigns might ultimately prosecute the defendant;

(2) When an Indian defendant commits a crime against a non-Indian victim in Indian country falling within a tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to the General Crimes Act, either where the tribe prosecutes before the federal government but does not impose a punishment (for example, because of an acquittal) or where the federal government prosecutes before the tribe;

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[173] In this scenario, although the offense may be classified as a felony under federal law, in light of a tribe's limited sentencing authority, the equivalent offense under tribal law might technically be classified as only a misdemeanor. This is according to the federal definition of a felony as "any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year." U.S. SENTENCING COMM'N, GUIDELINES MANUAL 114 (2018), *available at* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf. Under the federal definition of a felony, only tribes exercising enhanced sentencing authority under TLOA can truly be said to exercise felony jurisdiction. The vast majority of tribes, therefore, only exercise misdemeanor jurisdiction. But as one scholar has noted, this "leads to the surprising statement that, when prosecuted by an Indian tribe [that does not exercise enhanced sentencing under TLOA], murder is a misdemeanor." Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 410–11, n.32 (2004). For all intents and purposes, however, the definition of these offenses under federal and tribal law in these scenarios may be equivalent. They are differently classified based only on each sovereign's sentencing authority.

In some cases, tribes that exercise only very limited sentencing authority (for example, because they have not implemented enhanced sentencing under TLOA) choose only to exercise misdemeanor jurisdiction. In these cases, the tribal criminal code will only define minor crimes and will not define major crimes under tribal law whatsoever, even by downgrading them to misdemeanors. In these scenarios, the federal government may prosecute for a major crime, which would in this instance be a greater encompassing offense, and the tribe only for a lesser included offense (LIO).

Where the dual-sovereignty doctrine does not apply, successive prosecutions for a greater encompassing offense and a LIO (in any order) are barred in the federal system by the Double Jeopardy Clause because they are considered to be the same offense. *See generally* James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1 (1995).

[174] If the victim in this case is a non-Indian, the offense would also fall under the federal government's General Crimes Act jurisdiction—the second scenario enumerated here—if the defendant was not previously punished for it by the tribe.

(3) When an Indian defendant commits a crime—often victimless but not necessarily—falling within the tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to federal statutory law defining acts constituting federal crimes irrespective of where they occur (i.e., in Indian country or not),[175] regardless of the order in which the two sovereigns might ultimately prosecute the defendant; and

(4) When a non-Indian[176] defendant commits a crime against an Indian victim in Indian country falling within a tribe's inherent Special Domestic Violence Criminal Jurisdiction[177] and the federal government's jurisdiction pursuant to the General Crimes Act—again, either where the tribe prosecutes before the federal government but does not impose a punishment, or the federal government prosecutes before the tribe.

Identifying and understanding these four jurisdictional scenarios that can give rise to dual prosecutions in the tribal-federal context is critical because they underlie and shape the concerns related to tribal sovereignty and fairness to defendants examined later in this thesis.

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[175] Such crimes include, for example, "bank robbery, counterfeiting, sale of drugs, and assault on a federal officer." U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL, *supra* note 24, § 678. The *Lara* case is an example of dual tribal and federal prosecutions arising out of just such a scenario. *See* United States v. Lara, 541 U.S. 193 (2004). In that case, Lara, an Indian defendant, struck a Bureau of Indian Affairs (BIA) officer during his arrest for public intoxication on the Spirit Lake Reservation. *Id*. at 193. He was prosecuted first by the Spirit Lake Tribe for the crime under tribal law of "violence to a policeman." *Id*. at 196. He pled guilty in tribal court and served 90 days in jail. *Id*. The federal government subsequently prosecuted him for an equivalent offense of "assaulting a federal officer," pursuant to its jurisdiction arising out of a federal statute, 18 U.S.C. § 111, that applies regardless of where the criminal act actually occurs (i.e., *both* within and outside of Indian country); it did not prosecute Lara pursuant to its jurisdiction under the General Crimes Act or the Major Crimes Act. *Id*. at 197.

[176] Tribes may also prosecute Indian individuals pursuant to SDVCJ. However, because tribes retain inherent criminal jurisdiction over Indians generally, they are unlikely to invoke SDVCJ in these cases, relying instead on their general powers of criminal enforcement.

[177] *See supra* notes 64–68 and accompanying text (describing tribal Special Domestic Violence Criminal Jurisdiction under the 2013 reauthorization of the Violence Against Women Act).

III. THE DUAL-SOVEREIGNTY DOCTRINE IN THE TRIBAL-FEDERAL CONTEXT: IDENTIFYING POTENTIAL TRIBAL SOVEREIGNTY CONCERNS AND IMPLICATIONS FOR SYSTEMIC UNFAIRNESS IMPACTING DEFENDANTS

Despite the important roles it currently plays in shielding tribal law from further federal encroachment and ensuring that the federal government can take more serious prosecutorial action in cases in which the tribe is not able to (because of federal limitations on its criminal authority), the dual-sovereignty doctrine raises issues of unfairness for defendants who face the possibility of dual prosecution by a tribe and the federal government for a matter that would normally otherwise be resolved in a single criminal proceeding. As discussed above, the bar against double jeopardy provides both a procedural and substantive protection. The procedural protection shields defendants from the risk of multiple prosecutions, and the substantive protection shields defendants from multiple punishments for a single offense.[178]

The dual-sovereignty doctrine's application in the tribal-federal context in Indian law removes dual prosecutions by a tribe and the federal government from the ambit of the Double Jeopardy Clause. Nevertheless, the Double Jeopardy Clause's prohibition against multiple punishments for the same offense is enforced in the tribal-federal context through alternative mechanisms.[179] For example, a central component of the Clause's prohibition against multiple punishments for the same offense is a right to credit for time served. A defendant whose criminal conviction has been set aside and a new trial ordered must, if reconvicted in the subsequent

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[178] *See supra* Part II.B.1 (discussing the Double Jeopardy Clause and the protections it guarantees defendants).

[179] This is arguably a tacit acknowledgement that the characterization of a single criminal act or transaction as violative of two sovereign's criminal laws, and therefore as constituting two separate criminal offenses under the Double Jeopardy Clause, is somewhat of a legal fiction, as Justice Black and other legal commentators have argued. *See, e.g.*, Abbate v. United States, 359 U.S. 187, 202 (1959) (Black, J., dissenting) (noting that the conception of separate offenses under the dual-sovereignty doctrine that would otherwise be considered a single offense if prosecuted or punished by a single government as being "in some, meaningful, sense different" from one another when prosecuted by different governments is a "legal logic . . . too subtle [] to grasp").

proceeding, have any time already served under their first sentence credited in the computation of their new sentence.[180] Multiple prosecutions under the dual-sovereignty doctrine technically evade this rule. Yet, because it is recognized that its circumvention in the context of separate sovereigns would be deeply unfair to defendants who would essentially be made to serve all or part of their sentence twice,[181] alternative mechanisms are implemented to enforce the underlying principle that multiple punishments for the same criminal conduct are unjust.

Defendants who are dually prosecuted by a tribe first and the federal government second, and who are found guilty in both forums are either: (a) if the tribal court sentence is undischarged at the time of federal sentencing, sentenced by the federal court to serve a sentence that runs concurrently with their undischarged tribal court sentence and is adjusted based on the time already served on that undischarged sentence, in which case the defendant essentially serves the remainder of the lengthier federal sentence;[182] or (b) if the tribal court sentence is discharged

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[180] North Carolina v. Pearce, 395 U.S. 711, 718–19 (1969) (holding that "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense . . . by subtracting [the time the defendant has already spent incarcerated] from whatever new sentence is imposed"), *overruled in part on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

[181] *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting) (arguing that "[i]f double punishment is what is feared, it hurts [a defendant] no less for two 'Sovereigns' to inflict it than for one"); *Abbate*, 359 U.S. at 203 (Black, J., dissenting) (arguing that it is "just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense [by two different governments], as it would be for one of these two Governments to throw him in prison twice for the offense").

Dual prosecutions are usually pursued by a government that determines that the sentence a defendant received (or lack thereof, if the defendant was acquitted) in an initial prosecution was inadequate based on the severity of the offense(s) charged or the severity of the offense(s) the second prosecuting government would charge. The goal of the second prosecuting government is not typically to simply stack its own sentence on top of the sentence the defendant received in the first prosecution, thus subjecting the defendant to an unduly lengthy total combined sentence. Rather, it is typically to hand down a second sentence that makes up the difference between the first sentence, which the second prosecuting government views as insufficient, and what the second prosecuting government believes is the more appropriate, or commensurate, sentence for the defendant under the circumstances.

[182] *See* 18 U.S.C. § 3584(a) (vesting the federal courts with the authority to decide whether a sentence shall run concurrently or consecutively when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt"). The federal sentencing guidelines further clarify that the federal court's discretion under 18 U.S.C. § 3584 is limited when the term of imprisonment the defendant is serving at the

at the time of federal sentencing, typically credited through a downward departure in the computation of their second, federal sentence for the time served under their initial tribal court sentence.[183] For example, in the computation of her federal sentence in her second prosecution, Tawnya Bearcomesout was credited for the year she spent in custody after pleading guilty to the tribal court charges stemming from the same incident and conduct.[184] Thus, despite the dual-sovereignty doctrine's contravention of the Double Jeopardy Clause, the Clause's underlying substantive protection against multiple punishments for the same offense is nevertheless enforced through alternative means.

The Double Jeopardy Clause's procedural protection against the threat of multiple prosecutions, however, is not likewise enforced through alternative mechanisms in the dual-sovereignty context, despite widespread recognition of the burdens associated with multiple prosecutions and that the primary safeguard protecting against the risk of multiple prosecutions has effectively been neutralized in that context.[185] It is this failure to enforce the procedural

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time of federal sentencing "resulted from another offense that is relevant conduct to the instant offense of conviction." U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5G1.3(b) (2018). In such cases, the federal court shall "adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons," and impose "the sentence for the instant offense . . . to run concurrently to the remainder of the undischarged term of imprisonment." *Id*. § 5G1.3(b)(1)–(2). A helpful graphic illustrating these sentencing scenarios can be viewed at *§5G1.3 – Imposing Sentence When the Defendant is Serving or Will Serve an Undischarged Term of Imprisonment or Has an Anticipated State Term of Imprisonment*, U.S. SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/training/Podcasts/SPT_5G.pdf (last visited May 11, 2020).

[183] The Federal Sentencing Guidelines contain a policy statement for treating these sorts of scenarios, which provides that:

> A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5K2.23 (2018).

[184] *See* Answering Brief of the United States at 3, United States v. Bearcomesout, 696 Fed. Appx. 241, No. 16-30276 (9th Cir. Aug. 17, 2017).

component through other mechanisms that is ultimately the source of the tribal sovereignty concerns and much of the unfairness for defendants that is created or exacerbated by the dual-sovereignty doctrine's application, and which are the focus of the remainder of Part III.

A. The Three Possible Sequences of Tribal and Federal Dual Prosecutions

In the tribal-federal context, three sequences of dual prosecutions are possible from the four scenarios of concurrent jurisdiction that can give rise to dual tribal and federal prosecutions, enumerated above *supra* Part II.C.4. They are:

(1) Prosecutions by a tribe and the federal government for equivalent non-major (misdemeanor) offenses; [186]

(2) Prosecutions by a tribe for a lesser included offense (LIO) and by the federal government for a greater encompassing offense; and

(3) Prosecutions by a tribe and the federal government for equivalent major (felony) offenses.

There is currently no data to confirm, but the first sequence above likely occurs relatively infrequently compared to how often the second and third sequences occur. This is likely the case

[185] *See, e.g.*, Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (noting that the "double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct," and that the dual-sovereignty doctrine "hardly serves that objective").

[186] It also worth noting here the possibility of *convictions* for equivalent misdemeanor offenses arising out of the second sequence of dual tribal and federal prosecutions enumerated above—that of prosecutions for a LIO by a tribe and a greater encompassing offense by the federal government. This result, while of course not actually arising out of the first sequence above involving dual prosecutions for equivalent non-major offenses, is made possible by the U.S. Supreme Court's decision in *Keeble v. United States*, 412 U.S. 205 (1973). *Keeble* arose out of a federal prosecution of an Indian defendant for the crime of assault with intent to commit serious bodily injury, which is one of the crimes enumerated in the Major Crimes Act. *Id*. at 206. In *Keeble*, the Court was faced with the question of "whether an Indian prosecuted under the [MCA] is entitled to a jury instruction on a lesser included offense where that lesser offense is not one of the crimes enumerated in the Act." *Id*. The Court held that an Indian prosecuted under the MCA is entitled to a jury instruction on a LIO when the evidence warrants such an instruction. *Id*. at 214. While the facts in *Keeble* did not involve a dual prosecution, its holding nevertheless makes possible the situation wherein a defendant is *prosecuted* by a tribe for a misdemeanor offense and by the federal government for an offense enumerated in the MCA—essentially, in this case, a greater encompassing offense of the offense charged by the tribe—but is ultimately *convicted* of the misdemeanor offense in tribal court and of only a misdemeanor in federal court, based upon a LIO jury instruction.

in no small part because of the federal government's history of underenforcement of criminal law in Indian country (as evidenced, for example, by its historically high declination rates of Indian country crimes[187]). With limited resources, the federal government is likely to deprioritize prosecuting minor crimes in Indian country, especially when Indian tribes themselves have broad authority to prosecute these crimes themselves. Furthermore, this first sequence of dual prosecutions would have to arise out of the second scenario of concurrent tribal and federal jurisdiction identified above *supra* Part II.C.4, where an Indian defendant commits a crime against a non-Indian victim in Indian country that falls within a tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to the General Crimes Act (GCA). Thus, these dual prosecutions could occur only when: (a) the tribe prosecutes before the federal government, but only if the tribe does *not* impose a punishment—for example, because of an acquittal; or (b) the federal government prosecutes before the tribe. The fact that the federal government could only pursue a second prosecution if no tribal punishment had previously been imposed probably substantially shrinks the number of possible cases in which this sequence of dual prosecutions can arise right off the bat. Tribes are not as likely to spend their own (often very limited) resources pursuing a second prosecution against a defendant who has already been prosecuted by the federal government unless the alleged crime is severe and the result of the federal prosecution is unsatisfactory to the tribe—which is more likely to be the case if the federal prosecution is dropped after jeopardy attaches or results in acquittal.

Furthermore, using the federal definition of a felony—a crime punishable by a term of imprisonment longer than one year—the third sequence above can only arise if a tribe has implemented enhanced sentencing under TLOA. In the second sequence, the LIO prosecuted by

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[187] *See supra* notes 147–48 and accompanying text.

the tribe might actually be that—i.e., a misdemeanor under tribal law—or it could be an offense that, in terms of its defining elements, would normally be classified as a felony, but is essentially downgraded in its classification to a misdemeanor under tribal law if the tribe does not exercise TLOA enhanced sentencing (and thus all crimes under tribal law are punishable by one year imprisonment or less) or, even if it does, perhaps because the tribe has not yet revised its criminal code to make enhanced sentencing available for that specific offense.

There is no official count of dual tribal and federal prosecutions that occur each year. However, approximate numbers are ascertainable from some of the statistics provided by the United States during oral argument in *Gamble v. United States*. The accuracy of these estimates is, of course, not known. But they suggest that there are significant numbers of dual prosecutions in federal court each year in which the federal government is responsible for the second prosecution. In *Gamble*, the Assistant to the Solicitor General, who argued the case for the United States, stated that there are a few hundred dual prosecutions brought by the federal government each year.[188] Notably, this estimate likely only includes those dual prosecutions in which the federal prosecution is the second, following an initial prosecution by a state, an Indian tribe, or a foreign nation. The Assistant Solicitor also estimated that about two hundred of these dual prosecutions pursued by the federal government each year follow tribal prosecutions.[189]

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[188] *See* Transcript of Oral Argument in *Gamble*, *supra* note 138, at 65–66.

[189] *See id*. (estimating that "prosecutions by the federal government that follow tribal prosecutions . . . are about two-thirds of the . . . few hundred [dual] prosecutions that [the federal government] bring[s] each year"). The Assistant Solicitor's comments suggest that a not insignificant number of these dual federal prosecutions following an initial tribal prosecution are pursuant to federal law which makes domestic assault by a habitual offender a felony offense. *See id*. at 66; 18 U.S.C. § 117 ("Any person who commits a domestic assault within . . . Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for offenses that would be assault, sexual abuse, or other violent felonies if subject to federal jurisdiction "shall be fined . . . , imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results . . . , the offender shall be imprisoned for a term of not more than 10 years.").

Most of the rest of these—about one hundred cases annually—are dual state and federal prosecutions.[190] These estimates from the *Gamble* oral argument suggest that dual prosecutions by the federal government following an initial prosecution by another foreign nation are comparatively rare.

B. The Heightened Risk of Dual Prosecutions in the Tribal-Federal Context and Its Disparate Racial Impact

It may come as somewhat of a surprise that it appears there are about twice as many dual tribal and federal prosecutions under the dual sovereignty doctrine each year than there are state and federal dual prosecutions,[191] especially given that Indian country is a miniscule proportion of the land base within the United States compared to state land and that the population living or otherwise spending significant time within Indian country is also miniscule compared to the population of the states. There are likely thousands more criminal cases that arise each year that are subject to concurrent state and federal jurisdiction than concurrent tribal and federal jurisdiction. Why is it, then, that so many more dual prosecutions actually occur in the tribal-federal context? What implications do these dual prosecutions have for tribal sovereignty? What implications do they have for possible systematic unfairness experienced by defendants in the tribal-federal context as compared to the state-federal context?[192]

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[190] Transcript of Oral Argument in *Gamble*, *supra* note 138, at 54 (noting that the federal government's "number of Petite [P]olicy approvals each year is about a hundred"). The Petite Policy is the federal government's policy for assessing whether to pursue a dual federal prosecution following an initial prosecution by a state of the same defendant for the same conduct. *See infra* notes 193–202 and accompanying text (explaining the Petite Policy in greater detail).

[191] *See supra* notes 188–90 and accompanying text.

[192] A number of states constitutionally or statutorily limit the dual-sovereignty doctrine, curtailing or barring dual prosecutions in state court. *See supra* note 42.

Despite Indian country's comparatively small land base and population, the unique framework of Indian country criminal jurisdiction actually *enhances* the risk of multiple prosecutions for defendants who are subject to concurrent tribal and federal jurisdiction compared to those who are subject to concurrent state and federal criminal jurisdiction. Whereas the states are the primary creators and enforcers of criminal law on state land and thus the federal government charges comparatively very few criminal cases arising on state land, the federal government plays a primary role in criminal law enforcement in Indian country. Thus, the proportion of criminal cases arising in Indian country in which the federal government is a primary enforcing entity is significantly higher. Because of the unique challenges presented by the jurisdictional framework in the tribal-federal context, criminal cases are much more appealing for—and even sometimes *inviting* of—dual prosecution by a tribe and the federal government. Decades-long efforts by the federal government to limit tribal criminal authority and supplant it with federal authority have created a criminal justice system in Indian country that functions very differently from that in the state-federal context. Within this unusual criminal justice system in Indian country, it is oftentimes difficult to reconcile general federal principles of prosecution and policies of prosecutorial discretion that follow more logically from the criminal jurisdiction framework, and therefore typically are also easier to apply, in the state-federal context. The distinct jurisdictional framework in the tribal-federal context even, at times, renders some of these principles and policies inapplicable in the Indian country system.

For example, the U.S. Department of Justice (DOJ) employs the so-called Petite Policy[193] to determine whether to pursue a second prosecution of a defendant who has already endured a

[193] U.S. DEP'T OF JUSTICE, U.S. JUSTICE MANUAL § 9-2.031 [hereinafter JUSTICE MANUAL], *available at* https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031.

state prosecution for the same acts or transactions in which there was a resolution on the merits.[194] The Petite Policy "is grounded in fairness concerns to protect persons from the burdens associated with multiple prosecutions for substantially the same acts or transactions, even if the second proposed prosecution would not technically violate constitutional double jeopardy principles" because of the dual-sovereignty doctrine.[195] It permits (but does not require or even necessarily encourage) a dual federal prosecution only where three prerequisites are met, including that: (1) "the matter . . . involve[s] a substantial federal interest;" (2) "the prior prosecution . . . left that substantial federal interest demonstrably unvindicated;" and (3) "the [U.S.] government . . . believe[s] that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction" in federal court.[196]

Whether dual prosecution in a particular situation is permissible under the Petite Policy usually hinges on prosecutors' determination of whether a substantial federal interest has been left demonstrably unvindicated in the prior prosecution. The Policy requires federal prosecutors contemplating initiating a dual prosecution to presume that the prior prosecution satisfied all federal interests.[197] This presumption may be overcome if the prosecutor determinates that the prior prosecution left a "substantial federal interest demonstrably unvindicated."[198] This could be

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[194] *See id*. § 9-2.031(A), (C).

[195] KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 5.

[196] JUSTICE MANUAL, *supra* note 193, § 9-2.031(D).

[197] *Id*.

[198] *Id*. As a part of this inquiry, federal prosecutors are instructed to weigh all relevant factors to determine whether the initial prosecution left a substantial federal interest demonstrably unvindicated, including:

1. Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
2. The nature and seriousness of the offense;

the case, for example, when a conviction was not achieved in the initial prosecution because of the failure to prove an element of the state offense that is not an element of the federal offense.[199] Even when a conviction was achieved in the first prosecution, though, the presumption may still be overcome if the prior sentence was either "manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence . . . is available through the contemplated federal prosecution," or if the "charges in the initial prosecution trivialized the seriousness of the contemplated federal offense."[200]

Reports suggest that most Petite Policy approvals involve cases in which "'the Department of Justice perception [is] that a guilty individual was either not punished or punished very lightly.'"[201] But even though this perception may be the thing that most often tips the scales in favor of dual prosecution, state and federal dual prosecutions based on this consideration are all in all still exceedingly rare. Only in the rarest of cases in the state-federal context is the presumption overcome that an initial state prosecution satisfied all federal interests, since states have extensive criminal jurisdiction—more extensive in many ways, even, than the federal government's—and wide latitude to exercise their sentencing authority unencumbered by federal restrictions.[202]

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3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others;
7. The person's personal circumstances;
8. The interests of any victims; and
9. The probable sentence or other consequences if the person is convicted.

Id. § 9-27.230.

[199] *Id*. § 9-2.031(D).

[200] *Id*. § 9-2.031(D).

[201] KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 377 (quoting an ABA task force report).

In the tribal-federal context, though, the same consideration of whether a defendant was adequately punished in a prior (tribal) prosecution produces comparatively skewed results in favor of dual prosecution. Where tribal criminal jurisdiction and sentencing authority are severely limited by federal law, the proportion of cases is much higher in which an initial tribal sentence could be deemed manifestly inadequate (by the federal government's, and perhaps even the tribe's, calculation) and a substantially enhanced sentence is available only through a federal prosecution, or the tribal charges trivialized the seriousness of the contemplated federal offense. Tribes frequently do not exercise criminal jurisdiction over felony offenses. For tribes that have implemented enhanced sentencing under TLOA and thus exercise felony jurisdiction, the maximum available sentence under TLOA of three years' imprisonment for any single offense still prohibits them from imparting sentences for the most serious offenses that are in line with the sentences states and even the federal government typically apply for those same offenses.[203]

More fundamentally, the rarity of dual state and federal prosecutions is a reflection of the fact that state and federal interests will generally align, because the two systems are component parts of a larger whole. The state and federal systems are products of the same worldview and thus, for the most part, embrace and espouse the same or similar norms concerning criminality

[202] Out of thousands of cases in which the dual-sovereignty doctrine makes dual state and federal prosecutions possible, estimates suggest that the federal government only makes about 100 to 150 Petite Policy authorizations each year. *See, e.g.*, Transcript of Oral Argument in *Gamble*, *supra* note 138, at 54 (estimating that the "number of Petite [P]olicy approvals each year is about a hundred"); *see also* KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 376–77 (citing statistics on the number of Petite Policy applications each year). Again, the number of Petite Policy approvals each year significantly underestimates the total number of dual state and federal prosecutions annually, since Petite Policy approvals only pertain to dual prosecutions in which the federal prosecution follows the state one, and not vice versa.

[203] *See, e.g.*, *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 40 (Sept. 18, 2008) (statement of M. Brent Leonhard, Deputy Attorney General, Confederated Tribes of the Umatilla Indian Reservation), *available at* https://www.hsdl.org/?view&did=688340 (discussing how, "of the States that define felonies, 64 percent of them define their lowest-level felony as having a maximum sentence of five years," imprisonment, exceeding the maximum sentence available to tribes for even the most egregious felonies, such as murder and rape).

and criminal law enforcement. The only overlapping criminal offenses between the federal government and the states are those for which the federal government has constitutional authority to criminalize the conduct—i.e., federal crimes of general applicability. Overlapping tribal and federal crimes, however, can include standard violent crimes, such as those enumerated in the Major Crimes Act like assault and murder.[204] The unique criminal jurisdiction framework in Indian country, which allocates jurisdiction between tribal governments and the federal government, favoring the latter and severely restricting the former, thus creates comparatively fertile ground for dual prosecutions compared to that of the state-federal context. And this ground is made more fertile by the broader overlap in the types of criminal offenses that are subject to concurrent tribal and federal jurisdiction.

The nature of this heightened risk of dual prosecution in the tribal-federal context is even more disconcerting than it may, at first glance, appear. This is because it disparately impacts Indian individuals, as compared to non-Indians. Three factors working together cause this disparate racial impact: first, the unique jurisdictional framework in Indian country that, comparatively, encourages dual prosecution; second, that concurrent tribal and federal criminal jurisdiction goes beyond merely those offenses in common between tribal law and federal laws of general applicability and includes even regular felony offenses; and, third, that Indian individuals, almost exclusively, are the ones subject to concurrent tribal and federal jurisdiction.[205] Together, these factors mean that the burden of the dual-sovereignty doctrine in the tribal-federal context—namely, the issues of unfairness that it creates or exacerbates at the

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[204] *See generally* Tredeau, *Tribal Control*, *supra* note 168, at 1416 (discussing how "Indians disproportionately dominate the federal violent-crime docket" as a result of this jurisdictional scheme).

[205] The exception is when non-Indians are subject to federal criminal jurisdiction and tribal SDVCJ under VAWA. But SDVCJ cases are a very recent advent and still infrequent.

individual case level, identified and discussed further *infra* Subparts III.C and III.D—is borne almost completely by Indians, while non-Indians remain relatively unaffected.

Subparts III.C. and III.D examine tribal sovereignty concerns and implications for systemic unfairness impacting defendants that arise when the dual-sovereignty doctrine applies in the tribal-federal context. They explore the concerns and issues of unfairness that arise when a tribal prosecution precedes a federal prosecution and vice versa. It is important to preface those discussions, however, by emphasizing that, although slightly different issues might arise as a result of the order in which the sovereigns prosecute, that the disparate impact on Indian individuals remains, regardless of which government prosecutes first.

C. Tribal → Federal Dual Prosecutions: Tribal Sovereignty Concerns and Issues of Unfairness Impacting Defendants

Because of the structural inequities discussed above with regard to the allocation of criminal jurisdiction between the tribes and the federal government, it is a reasonable hypothesis that dual prosecutions arising in Indian country more often take the form of a tribal prosecution followed by a federal prosecution. In these cases, a dual federal prosecution might be deemed appropriate by federal authorities (and perhaps by tribal authorities, as well) when a defendant who the federal government perceives as obviously guilty was acquitted in the initial tribal prosecution, or the defendant received—in the federal government's calculation—a "manifestly inadequate" sentence, presumably because of federal restrictions on tribal sentencing authority or because the federal government determines that the charges in tribal court "trivialized the seriousness of the contemplated federal offense."[206]

[206] JUSTICE MANUAL, *supra* note 193, § 9-2.031(D).

In the state-federal context, the 'obviously guilty' defendant scenario often arises when the state fails to prove an element in the first prosecution that is not an element of the offense charged in the second, federal prosecution. This could also occur in the tribal-federal context, but it may also occur when the federal government believes it will be more likely to achieve a conviction because it has greater resources, financially and in terms of investigatory capacity, at its disposal (including personnel with specialized training and available technology), to collect and effectively marshal evidence at trial. More often than not, though, a dual federal prosecution probably arises simply because the federal government deems a prior tribal sentence "manifestly inadequate" or believes that the charges in the prior tribal prosecution "trivialized the seriousness of the contemplated federal offense." Instances of a manifestly inadequate sentence or trivializing charges are exceptionally rare in the state-federal context because: (1) states are the ones primarily tasked with criminal law enforcement in the federalist system and have jurisdictional and sentencing authority that is typically at least on par with, or may even exceed, the federal government's; and (2) the Petite Policy substantially reduces the number of cases the federal government *actually* pursues that have already been prosecuted by a state, compared to the number it *could* pursue under the dual-sovereignty doctrine. But the unique jurisdictional landscape in Indian country actually gives rise to the very circumstances that are ripe for dual prosecution, especially if charging decisions are not closely coordinated between tribes and the federal government up front.

The possibility of dual prosecution raises issues related to tribal sovereignty and systematic unfairness for defendants. Tribal sovereignty concerns arise because a subsequent (dual) federal prosecution undercuts the finality of tribal court judgments—in actuality, at least, although technically not legally. The possibility of dual prosecution gives the appearance that

tribal judgments rendered may not ultimately be treated as sufficient on their own because the state of affairs they dictate remain at the whim of possible additional federal action. This issue of lack of finality can ultimately undermine the integrity of the tribal court system, for example, if community members do not buy into the system as much because they perceive it as less capable or less authoritative than the federal system, even though the tribal system's limitations are the result of historic and continuing federal incursions into tribal criminal authority.

Issues of systematic unfairness for defendants arise because the looming threat of dual prosecution can severely disadvantage defendants in their ability to make a well-informed, comprehensive case strategy in tribal court. Tawnya Bearcomesout's case illustrates this issue. When Bearcomesout was charged with homicide in tribal court, she presumably weighed her options, including fighting the charges and perhaps going to trial or negotiating a plea deal with tribal prosecutors. She likely considered contextual factors, such as her feelings concerning her own guilt or innocence, the evidence against her in the prosecutor's possession, the evidence in her favor, the cost to herself and others (like family members) posed by the possibility of a lengthier court process if she were to fight the charges and go to trial, and the costs or advantages of striking some sort of plea deal with prosecutors to resolve the case more quickly in exchange for accepting some sort of punishment. These, of course, are considerations many defendants make in all sorts of criminal proceedings, regardless of what jurisdiction they are in or what government is prosecuting the case. But in Bearcomesout's situation an additional factor arises: the possibility that she could be prosecuted a second time by the federal government for the same conduct. This factor in turn raises questions about how the resolution of her tribal court prosecution might be used to her disadvantage if she were subsequently prosecuted for the same incident by the federal government, for example, as discussed in further detail below, if she were

to enter a guilty plea in tribal court and it were later admitted as substantive or impeachment evidence against her in federal court.[207] Bearcomesout was made aware during the course of her case in tribal court that the federal government could prosecute her again for the same incident.[208] That very possibility—and the fact that it is just that, a *possibility*—casts uncertainty over the entire situation and makes it extremely challenging, if not simply impossible, to make a fully informed, sound case strategy for her tribal court prosecution.

While Bearcomesout ultimately decided it was in her best interest to plead guilty to the homicide charge in tribal court—perhaps because she estimated that even the maximum sentence she would receive in tribal court would ultimately be less onerous for her and for others who might be impacted, like family members, than spending the time and resources to defend herself during what would otherwise surely be a lengthier court process[209]—we can only speculate as to whether Bearcomesout was provided comprehensive information about how her guilty plea in tribal court might be used to her disadvantage in a subsequent federal prosecution based on the same incident and underlying facts, and whether similarly positioned tribal court defendants are likewise generally provided comprehensive information that is sufficient to enable them to make informed decisions about their tribal court case strategy.[210] But even if Bearcomesout were

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[207] *See infra* notes 211–37 and accompanying text (discussing the admissibility in federal court of a defendant's prior tribal court plea arising from the same incident as substantive or impeachment evidence against the defendant).

[208] *See* Memorandum in Support of Defendant's Motion to Dismiss the Indictment: Double Jeopardy at 2–3, United States v. Bearcomesout, CR 16-13-BLG-SPW, 2016 WL 3982455 (D. Mont. July 22, 2016) (stating that the "Tribal Judge accepted [Bearcomesout's] plea and imposed sentence, indicating [that Bearcomesout entered] the plea . . . with the understanding . . . that an acquittal in tribal court would make a federal prosecution more likely" (internal quotations omitted)).

[209] As of the writing of this thesis, the Northern Cheyenne Tribe has not implemented enhanced sentencing authority under TLOA.

[210] Notably, in another high profile tribal-federal dual prosecution case discussed in greater depth later, *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), the court noted that the defendant was "not advised" in tribal court "that the

provided this information, she is caught in the nearly impossible position of being asked to make a potentially life-altering decision while many of the details of her future involvement in the criminal justice system—especially the federal arm of that system—remain highly speculative and beyond her control. Defendants who are potentially subject to dual prosecution face this dilemma whether they are subject to concurrent tribal and federal or concurrent state and federal jurisdiction. But defendants in the tribal-federal context face it for cases involving alleged felony offenses in addition to cases involving federal crimes of general applicability, whereas defendants in the state-federal context face it only in the latter.

As one of the preeminent scholars on the dual-sovereignty doctrine, Professor Adam Kurland, has identified, one of the main pitfalls the doctrine creates for criminal defendants who may be or are subject to dual prosecution is that a "guilty plea, the statements that constitute the factual basis of the plea, and the judgment of conviction" resulting from the plea or from a jury verdict in the first prosecution "may be admitted as evidence against [the] defendant at a subsequent [federal] criminal trial."[211]

The rule governing the admissibility in a subsequent federal criminal prosecution of a *felony* conviction sustained in an initial (tribal court) prosecution based on the same incident or conduct is clear-cut: The judgment of conviction is admissible under Federal Rule of Evidence 803(22), which excepts it from the general rule against the admissibility of hearsay, if:

> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
> (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
> (C) the evidence is admitted to prove any fact essential to the judgment [in the second prosecution]; and

tribal court proceedings could be used against him in a subsequent felony prosecution in federal district court." *Id*. at 1393.

[211] KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 293.

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.[212]

In other words, the first felony conviction judgment is admissible as *substantive evidence* in the second, federal prosecution, assuming the abovementioned requirements are met.[213] Notably, this rule is only relevant in the third sequence of dual tribal and federal prosecutions enumerated earlier *supra* Part III.A—prosecutions for equivalent major (felony) offenses by a tribe and the federal government, which can only arise if a tribe has implemented TLOA enhanced sentencing. And as Kurland notes, "such an evidentiary admission is not conclusive of the facts admitted, but may be considered by a jury [in the second, federal prosecution] for whatever weight it wishes to assign to it."[214] Of course, in the context of dual tribal and federal prosecutions, a jury could understandably accord significant weight to a prior tribal court judgment of conviction stemming from exactly the same incident, and which therefore concerns many if not all the same underlying facts that are at issue in the federal prosecution, perhaps even to an extent that is essentially preclusive of other evidence proffered in the case.

The Federal Rules of Evidence are less conclusive with regard to the admissibility of prior misdemeanors. As Kurland notes, the "Advisory Committee Notes to [Federal] Rule [of Evidence] 803(22) state . . . that practical considerations require exclusion of convictions for minor offense . . . because motivation to defend at this level is often minimal or non-existent."[215]

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[212] FED. R. EVID. 803(22).

[213] *See also* KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 296 (citing Federal Rule of Evidence 803(22) for the principle that, when "an underlying guilty plea results in a felony conviction as measured by the federal definition, or when a trial results in a felony guilty verdict in a felony case, a judgment of conviction is [] admissible as substantive evidence").

[214] *Id*. at 297.

[215] *Id*. at 298 (internal quotations omitted).

However, Federal Rule of Evidence 801(d)(2)(A) holds that a statement that "is offered against an opposing party and . . . was made by the party in an individual or representative capacity" is not hearsay and is thus admissible.[216] A "misdemeanor guilty plea and its related statements satisfy the requirements of" just such an "evidentiary admission under Federal Rule of Evidence 801(d)(2)(A)."[217]

There was perhaps a caveat to Rule 801(d)(2)(A) at one point as it pertained to the tribal-federal context. Previously, it appeared that federal courts distinguished between the admissibility in federal court of tribal court guilty pleas depending on whether their admission was sought as substantive evidence of guilt or as impeachment evidence, with the former being impermissible and the latter permissible.[218] This distinction was borne out in two appeals court cases, *United States v. Ant*[219] and *United States v. Denetclaw*.[220] *Ant* involved the dual prosecution of a defendant who had entered a guilty plea in Northern Cheyenne Tribal Court to the charge of assault and battery and then was subsequently prosecuted by the federal government for voluntary manslaughter based on the same incident.[221] During Ant's federal case, the prosecution sought to admit his tribal court guilty plea as substantive evidence.[222] On appeal, the Ninth Circuit ruled that the tribal court guilty plea was inadmissible as substantive evidence

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[216] FED. R. EVID. 801(d)(2)(A).

[217] KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 298.

[218] *See id*. at 300 (noting that, "[b]ecause of the lack of [U.S.] Constitutional protections in some tribal prosecutions, some courts have held that guilty pleas entered in tribal court are not admissible as substantive evidence, but may be used for impeachment purposes under Federal Rule of Evidence 609").

[219] 882 F.2d 1389 (9th Cir. 1989).

[220] 96 F.3d 454 (10th Cir. 1996).

[221] *Ant*, 882 F.2d at 1390–91.

[222] *Id*. at 1391.

in the second federal prosecution.[223] The Ninth Circuit reasoned that, although the plea complied with tribal law and with ICRA and thus was valid when entered, it did not comport with Sixth Amendment requirements.[224] Therefore, "had [the] prior guilty plea been made in a [state or] federal court under identical circumstances, it would be inadmissible in a subsequent federal prosecution."[225]

Denetclaw, decided seven years after *Ant*, involved the dual prosecution of an enrolled member of the Navajo Nation who pled guilty to the misdemeanor offense of aggravated battery in Navajo tribal court and was subsequently prosecuted for charges arising from the same incident in federal district court, where he was convicted of the felony offenses of assault with a dangerous weapon, assault resulting in serious bodily injury, and maiming.[226] The Tenth Circuit held the defendant's tribal court guilty plea was admissible as impeachment evidence in his subsequent federal trial to refute statements he made in his trial testimony.[227] In so holding, the court explicitly distinguished from the Ninth Circuit's holding in *Ant*, differentiating between the propriety of admitting prior tribal court pleas in a federal prosecution arising from the same incident as merely impeachment evidence rather than as substantive evidence of guilt, as had been the issue in *Ant*.[228] The apparent distinction between the admissibility of a tribal court plea in a subsequent federal prosecution for impeachment purposes versus substantive evidentiary

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[223] *Id*. at 1395.

[224] *Id*.

[225] *Id*.

[226] United States v. Denetclaw, 96 F.3d 454, 456 (10th Cir. 1996).

[227] *Id*. at 458.

[228] *Id*. (emphasizing that the district court below "did not allow the use of the tribal pleas as substantive evidence, but only for impeachment purposes," and thus "the constitutional concerns underlying *Ant* [were] not present").

purposes held fast for the better part of two decades, until the Supreme Court's 2016 decision in *United States v. Bryant*,[229] abrogating *Ant*, cast doubt on the continuing viability of the distinction.

In *Bryant*, the Court considered the constitutionality of using a defendant's uncounseled tribal court domestic abuse convictions as predicate offenses for a federal felony domestic violence habitual offender statute.[230] It held that using uncounseled tribal court convictions as predicate offenses for the federal habitual offender statute does not violate the Sixth Amendment right to counsel because they comported with tribal law and ICRA, and such convictions that "did not violate the Constitution" and thus were "valid when entered . . . retain that status when invoked in a subsequent proceeding."[231] In so holding, the Court overturned the Ninth Circuit's decision, which had relied on *Ant* to conclude that uncounseled tribal court convictions "'may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right.'"[232]

Bryant appears to dissolve the distinction created by *Denetclaw* and *Ant*, suggesting that, today, tribal court guilty pleas are likely admissible in subsequent federal prosecutions as both impeachment evidence and as substantive evidence of guilt. Generally, "a conviction obtained in state or federal court in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent [federal] proceeding 'to support guilt or enhance punishment for another offense.'"[233] But a tribal court guilty plea like those of the defendants in *Denetclaw* and *Ant*, or

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[229] 136 S. Ct. 1954 (2016).

[230] *Id*. at 1959.

[231] *Id*. at 1965.

[232] *Id*. at 1964 (quoting United States v. Bryant, 769 F.3d 671, 677 (9th Cir. 2014)).

like Tawnya Bearcomesout's, that was neither obtained in state or federal court nor violated the U.S. Constitution in any way when it was entered, appears to fall, according to the Supreme Court's reasoning in *Bryant*, beyond the bounds of this general principle. Importantly, the *Bryant* decision can be interpreted as decidedly pro–tribal sovereignty: It reaffirms that Indian tribes are "'separate sovereigns pre-existing the Constitution, . . . unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.'"[234] And it demonstrates respect for the validity of tribal court processes and judgments. But from another perspective, federal respect for tribal sovereignty in this instance comes at the expense of fairness for some of society's most vulnerable members: defendants who are subject to concurrent tribal and federal jurisdiction, most of whom are Indian.[235] These defendants face the grim task of creating a case strategy in one case that is dependent on variables created by the risk of multiple prosecutions—variables that are perhaps unresolvable or unknowable at the time of the first prosecution. And they face this task not only in cases involving federal offenses of general applicability, as defendants who are subject to concurrent state and federal criminal jurisdiction are, but for run-of-the-mill felony offenses, as well.

From the defense's standpoint in cases of dual tribal and federal prosecution, the policy consideration put forth by the Advisory Committee in its notes to Rule 803(22) takes on heightened importance. This is especially the case in the tribal-federal context compared to the state-federal context because tribal court pleas for misdemeanor offenses can actually include offenses that are definitionally misdemeanors and felonies. Minor offenses under tribal law

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[233] *Id*. at 1956–57 (quoting Burgett v. Texas, 389 U.S. 109, 115 (1967)).

[234] *Id*. at 1962 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

[235] This is because tribes only have criminal jurisdiction over Indian defendants, unless they exercise SDVCJ under VAWA, in which case tribes can prosecute non-Indian defendants in limited circumstances under that statute. *See generally supra* Part II.A.

might only be classified as misdemeanors due to federal restrictions on tribal sentencing authority. They may be, in terms of their defining elements, otherwise essentially equivalent to the analogous federal offense, which is a felony. This policy consideration takes on heightened importance in the tribal-federal context especially since the sequence of dual prosecutions involving these types of offenses—a tribal prosecution for a misdemeanor offense followed by a federal felony prosecution for an offense that is, in terms of its elements, essentially the same[236]—likely occurs with some regularity, at least relative to the other possible sequences of tribal and federal prosecutions under the dual-sovereignty doctrine. The underlying issue of a lack of motivation to defend against less severe criminal charges is exacerbated in the tribal context because federal restrictions on tribal sentencing authority broadens the scope of cases that will fall within this category. Tribal court defendants, like their federal court counterparts, will likely exhibit less motivation to defend against charges for truly minor offenses—i.e., those which would be categorized as misdemeanors whether they are prosecuted in the tribal or federal system. But tribal court defendants may very well also exhibit less motivation to defend against charges for offenses that are definitionally felonies but punishable under tribal law only as misdemeanors. In these situations, a guilty plea (and the associated plea colloquy or judgment of conviction) in tribal court can be damning evidence against the defendant in a subsequent federal prosecution based on the same incident because it will cover the full scope of the federal offense charged, rather than only a portion of the federal offense like a true misdemeanor or lesser included offense previously prosecuted in tribal court would.[237]

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[236] This is the second sequence identified and discussed in greater detail *supra* Part III.A.

[237] Furthermore, even if the prior tribal court plea arising from the same incident is introduced in a subsequent federal prosecution merely as impeachment evidence to rebut a statement the defendant makes on the stand during their federal prosecution, it may create a heightened risk of prejudice against the defendant if the federal jury—

D. Federal → Tribal Dual Prosecutions: Tribal Sovereignty Concerns and Issues of Unfairness Impacting Defendants

Although dual prosecutions arising in Indian country that take the form of tribal prosecutions followed by federal prosecutions surely happen with some frequency, federal prosecutions followed by tribal ones certainly occur, as well.[238] Because of the dynamics of criminal prosecutorial authority in Indian country, the reasons why dual prosecutions happen in the order of a federal prosecution followed by a tribal one are probably different. These prosecutions probably happen more frequently when a tribe believes that a defendant is obviously guilty, but the defendant was acquitted in their first federal prosecution.

The geographic distance and cultural difference separating many federal law enforcement institutions from tribal communities can pose logistical barriers and breed distrust that help give rise to situations where a defendant who tribal authorities believe is guilty is acquitted in a federal prosecution. The significant geographic distance between federal law enforcement institutions and Indian country has a variety of impacts on federal investigations and the capacities of federal prosecutors to gather evidence in support of their case. These include, for example: delayed response times of federal investigatory personnel to crime scenes; delayed or limited access to witnesses; difficulties in facilitating cooperative communication with tribal authorities who might be first responders or have investigative or prosecutorial responsibilities within the tribal justice system; and difficulties in ensuring key witnesses, especially those with

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despite jury instructions otherwise—"consider[s] the evidence not as probative of credibility, but as proof of ultimate guilt." United States v. Denetclaw, 96 F.3d 454, 460 (10th Cir. 1996) (Lucero, J., concurring).

[238] *See, e.g.*, Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995) (denying a tribal member's petition for writ of habeas corpus challenging the term of imprisonment she received pursuant to a tribal court conviction for manslaughter, which occurred after she was acquitted by a federal jury of the charge of voluntary manslaughter under the Major Crimes Act based on the same incident). Dual prosecutions where the tribal prosecution follows the federal one are almost certainly not included in the couple hundred dual tribal and federal prosecutions annually, as estimated by the attorney for the United States during oral argument in *Gamble*, since the U.S. Department of Justice almost surely does not keep statistics on cases it has prosecuted that are subsequently also prosecuted by an Indian tribe.

limited means or access to transportation, or who are resistant to federal involvement in tribal affairs, will appear at trial in a federal courthouse that could be hundreds of miles from home.[239]

Histories of hostility and brutality by the federal government toward Indian peoples, as well as continuing cultural differences—especially in terms of conceptions of justice—between many tribal communities and non-Indians breeds distrust in some tribal communities of federal authorities and the federal criminal justice system. This distrust is exacerbated for many Indian individuals by well-founded feelings that the American criminal justice system treats Indians more harshly than non-Indians.[240] The result of these sorts of feelings of distrust can be reluctance or even refusal by Indian people to participate in federal criminal justice proceedings, especially, for example, as witnesses against their own community and sometimes their own family members in federal trials. Thus, the logistical barriers and distrust created by the geographic distances and cultural differences separating federal law enforcement institutions from tribal communities can have a material impact on the federal cases coming out of those tribal communities.

In terms of unfairness to defendants posed by dual prosecution, similar issues arise when a tribal prosecution follows a federal one compared to the other way around, namely: the psychological burden to the defendant from the threat of dual prosecutions looming over their

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[239] *See generally* Washburn, *American Indians*, *supra* note 171, at 710–12 (discussing the "alienation" American Indians involved in the federal criminal justice system may experience as a result of cultural and linguistic differences, as well as geographic distances between many reservations and the cities in which federal courthouses are located).

[240] *See, e.g.*, SOUTH DAKOTA EQUAL JUSTICE COMM'N, FINAL REPORT AND RECOMMENDATIONS (2006) (examining some types of, and the reasons for, unfairness perceived and experienced by Native people in the criminal justice system in South Dakota); Jones & Ironroad, *Addressing Sentencing Disparities*, *supra* note 168, at 54–55 ("draw[ing] attention to the disparate sentences of Native Americans in the Dakotas for crimes prosecuted by the United States under the Major Crimes Act and federal subject matter jurisdiction statutes, as compared to sentences for similar offenses under state law").

head; the impracticability for the defendant of being able to rationally strategize in their first case without knowing for sure whether they will be subject to a second prosecution or not; and, if the defendant is ultimately subject to dual prosecutions, the burden of having to "marshal the resources and energ[y] necessary for [their] defense more than once for the same alleged criminal acts."[241] The gravity of these issues might be somewhat tempered when tribal prosecutions follow federal ones, however, because federal restrictions on tribal criminal authority will mean that the tribal offense charged, as well as the types and lengths of any tribal sentence handed down, in the second prosecution will often be less severe than what was charged or sought as recourse by federal prosecutors. Then again, if the tribe is prosecuting because the federal prosecution resulted in an acquittal, the relative leniency of the tribal charges or sentence sought will likely mean little to the defendant, for whom the dual prosecution will feel like the federal government and tribe are doing together what neither could do alone—i.e., making "repeated attempts" at a conviction.[242]

E. From the Theoretical to the Grounded

The conditions, doctrinal and factual, that arise in Indian country and make dual prosecution in many cases not only possible but even at times inviting, stem first and foremost from the federal government's failure to respect tribal sovereignty, as evidenced by a history of incremental federal displacement of tribal criminal authority. This, in turn, has undermined and continues to undermine local mechanisms—i.e., tribal institutions—responsible for criminal law enforcement. These institutions are handicapped in their authority by federal restrictions, leading to tribal laws and sentencing that can exacerbate the unfairness experienced by individual

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[241] Abbate v. United States, 359 U.S. 187, 198–99 (1959) (Brennan, J., dissenting).

[242] Green v. United States, 355 U.S. 184, 187 (1957).

defendants who are subject to concurrent federal and tribal criminal jurisdiction by making their cases more prone to dual prosecution. Dual prosecution is even more likely when there is not sufficient intergovernmental cooperation from the very beginning at the charging stage.

Still, much is unknown about how the dual-sovereignty doctrine plays out on the ground in Indian country. The analysis in this thesis so far has been grounded primarily in legal doctrine because no comprehensive studies—qualitative or quantitative—have been done to produce data on tribal-federal dual prosecutions. Until such studies are done, understandings of the dual-sovereignty doctrine's impact in Indian country will remain purely theoretical. Identifying factors like those described above which give rise to the doctrinal and factual conditions creating the possibility of dual prosecution in the tribal-federal context is a first step in conceptualizing further studies that can begin to uncover more solid evidence of the doctrine's impact on the ground in Indian country to supplement the mostly theoretical work of this thesis.

Part III, *infra*, proposes a research agenda to examine the dual-sovereignty doctrine's impact on the ground in Indian country. It begins by recasting the factors discussed above that give rise to the conditions conducive to dual prosecution in the positive, hypothesizing that tribal sovereignty and the rights of defendants in the Indian country criminal justice system would both be strengthened if dual tribal and federal prosecutions can be made less frequent across Indian country by:

(1) Strengthening federal commitments to respecting tribal sovereign authority;

(2) Supporting local mechanisms of criminal law enforcement in Indian country;

(3) Facilitating intergovernmental cooperation in criminal cases;

(4) Enhancing fairness for individual defendants who are subject to concurrent criminal jurisdiction; and thereby

(5) Improving the sustainability and cultural compatibility of the Indian country criminal justice system.

Part III then discusses some key considerations and steps federal and tribal law enforcement and justice officials can take to address each of these five objectives. It concludes with a survey for tribal justice officials that includes questions reflective of the five objectives. These questions and a broad survey response would begin to uncover more precisely the frequency of dual prosecutions by tribes and the federal government, their implications, and the degree to which responding tribes are taking some of the steps that correspond to each of the five objectives. The hope is that illuminating when, why, and how frequently dual tribal and federal prosecutions arise can begin to shed light on best practices for curbing dual prosecutions that are already at play in Indian country, inspiring their more widespread adoption and perhaps even positive changes to federal Indian country laws.

IV. RESEARCH AGENDA

Analysis of the dual-sovereignty doctrine against the backdrop of the criminal jurisdiction framework in Indian country illuminates the types of scenarios[243] and sequences[244] in which dual tribal and federal prosecutions can occur. This analysis also makes it possible to speculate about which of these scenarios give rise to dual prosecutions more frequently and in what form—i.e., what sequence—they most often occur. But without further study, such speculation is purely theoretical. Further study is therefore critical to gain a better understanding of when (i.e., in what jurisdictional and factual circumstances), why, and with what frequency dual tribal and federal prosecutions arise. This Part advances a research agenda for just such a study.

Based on the doctrinal and theoretical background discussed *supra* Parts II and III, respectively, the basis of this survey-based study is the hypothesis that at least five objectives are essential for minimizing the instances of dual prosecution in the tribal-federal context that undermine tribal court legitimacy or present or exacerbate unique issues of unfairness for defendants. These factors are:

(1) Strengthening federal commitment to respecting tribal sovereign authority;

(2) Supporting local mechanisms of criminal law enforcement in Indian country;

(3) Facilitating intergovernmental cooperation in criminal cases;

(4) Enhancing fairness for individual defendants who are subject to concurrent criminal jurisdiction; and

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[243] *See supra* Part II.C.4 (discussing the four scenarios of concurrent tribal and federal criminal jurisdiction that can give rise to dual tribal and federal prosecutions under the dual-sovereignty doctrine).

[244] *See supra* Part III.A (discussing the three possible sequences of dual tribal and federal prosecutions under the dual-sovereignty doctrine).

(5) Improving the sustainability and cultural compatibility of the Indian country criminal justice system.

Many tribes are already considering and taking steps that address these five objectives. For example, some of these considerations and steps are:

(a) Relaxing federal restrictions on tribal criminal jurisdiction and sentencing authority;

(b) Enhancing coordination in charging decisions by implementing federal and tribal protocols for handling cases of concurrent jurisdiction, increasing the number of tribal Special Assistant United States Attorneys (SAUSAs), and making widespread use of non-prosecution agreements;

(c) Implementing tribal law limiting the application of the dual-sovereignty doctrine;

(d) Using no contest and narrowly tailored guilty pleas in tribal court cases that are potentially subject to subsequent, dual federal prosecution; and

(e) Implementing tribal court rules of criminal procedure or evidence that limit the admissibility in a tribal prosecution of pleas entered in a prior federal prosecution stemming from the same incident.

For example, enhanced tribal sentencing authority under TLOA and tribal SDVCJ under the 2013 VAWA reauthorization are two recent instances of the federal government loosening restrictions it has previously placed on tribal criminal authority. These are, undoubtedly, critically important developments in Indian law and very well may already be curbing the instances of dual tribal and federal prosecutions. After all, when the offense charged in a tribal prosecution and any sentence imposed by the tribe are more commensurate in the federal government's calculation with the severity of the alleged crime, the federal government is less likely to feel the need to subsequently pursue the matter again, itself. Still, the federal

government should expand its commitment to affirming tribal sovereign authority—especially tribal criminal law enforcement authority—by further loosening the restrictions it has placed on tribal criminal jurisdiction and sentencing authority. This could take the form of committing further resources to aid more tribes that are interested in exercising TLOA enhanced sentencing authority and VAWA SDVCJ to do so; further loosening the existing restrictions under TLOA and VAWA; or even, as some commentators have proposed, loosening federal restrictions to allow tribes that have the resources and choose to do so to opt out of federal Indian country jurisdiction altogether and resume exercising their full inherent criminal jurisdiction.[245]

While the Indian country criminal justice system continues as a cooperative effort between the federal and tribal governments, however, it is imperative that there is enhanced coordination in charging decisions, so that fewer cases that can be prosecuted by both governments actually are. To this end, both federal and tribal prosecutors' offices should implement formal protocol for handling concurrent jurisdiction cases, addressing in particular the coordination of investigatory and prosecutorial resources.[246] It has been an important focus of the U.S. Department of Justice since 2010 "to improve public safety on tribal land" by facilitating "better communication and coordination" between "U.S. Attorneys' Offices with districts containing Indian country" and the respective tribal authorities in those districts.[247] To that end,

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[245] *See, e.g.*, INDIAN LAW & ORDER COMM'N, ROADMAP, *supra* note 10, at ix (recommending that Congress "clarify that any Tribe that so chooses can opt out immediately, fully or partially, of Federal Indian country criminal jurisdiction," at which time "Congress would immediately recognize the Tribe's inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe's lands").

[246] Coordination of probationary resources may also be important for enhancing the effectiveness and efficiency of the criminal justice system in Indian country but perhaps bears less on the issue of dual prosecution.

[247] *Attorney General Announces Significant Reforms to Improve Public Safety in Indian Country*, U.S. DEP'T OF JUSTICE (Jan. 11, 2010), https://www.justice.gov/opa/pr/attorney-general-announces-significant-reforms-improve-public-safety-indian-country.

the Department requires all USAOs with Indian country jurisdiction to "engage annually . . . in consultation with the tribes in th[eir] district" and "develop an operational plan addressing public safety in Indian Country," which is, "[i]n coordination with the law enforcement agencies and tribes in that district," to be "review[ed] and, as necessary, revise[d] . . . on an annual basis."[248] Furthermore, enhancing coordination among various sovereigns and their respective law enforcement agencies in Indian country was one of the main purposes of the Tribal Law and Order Act of 2010.[249] TLOA mandates USAOs with districts containing Indian country to designate at least one assistant United States Attorney (AUSA) as a tribal liaison, whose duties include, among others, "[d]eveloping working relationships and maintaining communication with tribal leaders, tribal community and victims' advocates, and tribal justice officials to gather information from, and share appropriate information with, tribal justice officials" and "[c]oordinating with tribal prosecutors in cases in which a tribal government has concurrent jurisdiction over an alleged crime."[250] However, a 2017 Justice Department report states that implementation of TLOA mandates "varies across USAOs and . . . no one in the Department has responsibility for ensuring that all USAOs comply with all TLOA requirements," and that, regarding the Justice Department's directive that USAOs with Indian country in their districts create operational plans, "no individual or entity was tasked under the directive with evaluating

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[248] Memorandum for United States Attorneys with Districts Containing Indian Country from Deputy Attorney General David W. Ogden (Jan. 11, 2010), *available at* https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country.

[249] *See* Pub. L. No. 111-121, § 202(b)(1)–(2), (6), 124 Stat. 2258 (2010) (stating the purposes of the Act, including to: "clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country;" "increase coordination and communication among Federal, State, tribal, and local law enforcement agencies;" and "increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and tribal officials responsible for responding to and investigating crimes in Indian country").

[250] *Id*. § 213.

the plans to ensure adoption, update, or compliance," resulting in various deficiencies in the plans.[251] Ultimately, the report found that "not all districts ensure that TLOA requirements are being met and most Tribal Liaisons work autonomously and carry out duties at their own discretion."[252]

Another recent key development in this area was the expansion of the U.S. Attorney's Office's initiative to increase the number of tribal Special Assistant United States Attorneys (SAUSAs) as a result of TLOA.[253] SAUSAs are tribal prosecutors who are federally cross-commissioned. They are trained in "federal law, procedure and investigative techniques to increase the likelihood that every viable criminal offense is prosecuted in tribal court, federal court or both."[254] Cross-commissioning also allows SAUSAs to "serve as co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities."[255] SAUSAs ensure a stronger line of communication between tribes and their respective USAOs.[256] This facilitates coordinated charging decisions in

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[251] OFF. OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT'S TRIBAL LAW ENFORCEMENT EFFORTS PURSUANT TO THE *TRIBAL LAW AND ORDER ACT OF 2010* 15, 20, 22–24 (2017) [hereinafter U.S. DEP'T OF JUSTICE, REVIEW OF DEPARTMENT'S EFFORTS].

[252] *Id*. at 19.

[253] *See generally* Pub. L. No. 111-121, § 213(d), 124 Stat. 2258 (2010) (calling for the appointment of SAUSAs in districts that include Indian country in order to increase the "prosecut[ion of minor] crimes in Indian country as necessary[,] particularly when . . . the crime rate exceeds the national average . . . or the rate at which criminal offenses are declined to be prosecuted exceeds the national average" and enhance "coordinat[ion] with applicable United States district courts regarding scheduling of Indian country matters and holding trials or other proceedings in Indian country").

[254] *Tribal Community Prosecutors Receive Federal Cross-Commissioning*, U.S. DEP'T OF JUSTICE (Nov. 17, 2011), https://www.justice.gov/archives/opa/blog/tribal-community-prosecutors-receive-federal-cross-commissioning.

[255] *Id*.

[256] *See* U.S. DEP'T OF JUSTICE, REVIEW OF DEPARTMENT'S EFFORTS, *supra* note 251, at 29 (finding that "tribal prosecutors who serve as SAUSAs have improved information sharing with USAOs and greater involvement in federal case prosecutions").

concurrent jurisdiction cases, and in instances where the two sovereigns determine that one should prosecute a particular case instead of the other, non-prosecution agreements should be standard procedure out of fairness to the defendant and to give the defendant the peace of mind that dual prosecution is a diminished possibility and they can focus on case strategy in a single prosecution.

However, as of late 2016, "there were only 22 SAUSAs working in Indian country serving 9 of 49 USAO districts (18 percent) with Indian country jurisdiction."[257] The Justice Department has found that program participation is low because of tribal sovereignty concerns—for example, some tribes may be wholly uninterested in increased federal involvement in law enforcement on their lands—as well as "conflicts of interest with other tribal duties," and insufficient and inconsistent funding for the programs.[258]

Where communication and coordination between tribal and federal prosecutors is not as robust—for example, for any of the tribal sovereignty, conflict of duty, or resource reasons above—and in order to protect defendants from unfairness that can arise from dual prosecutions that occur as a result of breakdowns in communication between the sovereigns, tribal courts could consider permitting more widespread use of nolo contendere, or no contest, pleas instead of guilty pleas. The Federal Rules of Evidence prohibit the admission of no contest pleas as evidence in civil and criminal cases.[259] Thus, they can be used as a mechanism to ensure that a

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[257] *Id*.

[258] *Id*.

[259] *See* FED. R. EVID. 410 (prohibiting the admission of a "nolo contendere plea" as "evidence . . . against the defendant who made the plea"). *See also* KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 294 (explaining that the "most widely recognized manner in which to limit the subsequent use of a criminal conviction is to enter a plea of no contest or nolo contendere, if such an option is possible," because "Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) severely limit the manner in which pleas of nolo contendere . . . may be used in subsequent legal proceedings").

tribe is able to sentence a defendant in the manner it feels is appropriate given the offense charged—as it would if the defendant were to plead guilty—but shields the defendant from the plea entered in tribal court being used to his disadvantage in a subsequent, dual federal prosecution. In instances where a tribal judge deems a no contest plea to be inappropriate and the defendant enters a guilty plea, tribal judges may still want to make every effort to ensure that the guilty plea and associated plea colloquy containing the factual basis for the plea and factual admissions by the defendant are crafted as narrowly as possible—again, to provide the defendant at least some protection against additional disadvantage in a dual prosecution.

In consideration of the reverse sequence in which a tribal prosecution follows a federal one, tribal courts may consider implementing rules of criminal procedure or evidence to limit the admissibility of pleas (and supporting plea colloquies) entered in a prior federal prosecution stemming from the same incident as the tribal case at bar.

Finally, tribes may consider implementing laws, either statutory or constitutional, to limit the dual-sovereignty doctrine's applicability in the tribal context. Notably, dozens of states have implemented their own laws limiting the dual-sovereignty doctrine and thus curtailing the number of cases in which state prosecutors are permitted to prosecute a defendant who has already been prosecuted by another sovereign based on the same incident.[260] It may be in tribes' best interest—especially with regard to enhancing community trust in and buy-in to the justice system—to extend similar protections to defendants, at least in certain types of cases.

As noted previously, justice and law enforcement officials throughout Indian country are already considering and taking many of these steps to varying degrees. To exactly what degree is

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[260] *See* KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS, *supra* note 42, at 87–289 (providing a state-by-state rundown of state laws limiting the dual-sovereignty doctrine).

likely context- and tribe-specific. How these sorts of considerations and steps are impacting when, why, and how frequently dual prosecutions arise is likely also context- and tribe-specific. More comprehensive data concerning the matter could begin to uncover helpful patterns and trends throughout Indian country. Hopefully, in turn, these would illuminate best practices for curbing instances of dual prosecution in the tribal-federal context that are already in play and could facilitate more widespread implementation of these best practices. The questions in the following sample survey seek to gather this type of information from tribal justice system officials, including prosecutors, defense attorneys, and tribal court judges.

A. Sample Survey to be Administered to Tribal Justice System Officials (Prosecutors, Defense Attorneys, and Judges)

Survey of Tribal Justice System Officials

Background Questions:

- Does the tribe maintain records tracking the frequency of dual prosecutions, when (i.e., in what types of legal or factual scenarios) they arise, and their outcomes? If so, please discuss.
- If not, how often do you perceive dual prosecutions occur? Under what circumstances do they occur? Are there any patterns?
- When dual prosecutions occur, are they typically desired by tribal officials?
- Are they typically desired by the community?

Tribal Sovereignty – Respect for and Enhancement of Tribal Authority and Autonomy:

- Has the tribe implemented TLOA and/or VAWA? If so, when did this start?
- How has implementing these laws influenced the frequency of dual tribal and federal prosecutions?
- What types of cases are subject to dual prosecution? Has this changed or do you believe it is likely to in light of TLOA and VAWA?
- Can you provide examples of where this has occurred in the past? What issues were the most important or the most difficult to contend with?

Fairness – Respect for Individual Liberty & Fairness to Defendant in Sentencing:

- Does tribal law—constitutional or statutory—address dual prosecution?
- For situations of dual prosecution in which a federal prosecution precedes a tribal prosecution, does tribal law address the admissibility in tribal court of a verdict, plea, or

statements constituting the factual basis underlying a verdict or plea from the federal prosecution?
    - Do tribal court procedural rules (such as rules of evidence) address the admissibility of a verdict, plea, or statements underlying a verdict/plea from the prior federal prosecution?
- Does your tribal court accept or in any way limit the use of pleas of *nolo contendere*?
- How does the possibility of dual prosecution of defendants who are subject to concurrent federal and tribal criminal jurisdiction impact the use of plea bargains in tribal court?
- When a tribal prosecution follows a federal one, is there tribal law or policy concerning how a federal sentence already imparted shall be considered in tribal sentencing?
- Does the tribe use punishment or rehabilitation alternatives to incarceration?
    - If so, in what types of cases are they available and typically employed?
    - How does the availability of alternatives to incarceration affect sentencing, particularly in SDVCJ cases or those in which enhanced sentencing under TLOA is available?
- Do you believe alternatives to incarceration impact the federal calculation of the adequacy of a tribal prosecution or sentence?
    - Is this belief based on past experience? If so, please explain.
- Is the tribe's use of alternatives to incarceration impacted by the possibility of dual prosecution of a defendant?
    - Are there specific examples of this that you can share?
    - Are there examples of when the use of alternatives to incarceration were either implemented with more or less frequency as a result of the dual prosecution possibility?

Public Safety – Local Mechanisms Provide Efficient and Adequate Responses for Victims, as well as Protection to Broader Community:

- Who responds to calls for law enforcement—tribal or federal officials?
    - If tribal police, at what point in the process does the federal government enter the picture? Please discuss the federal entity involved at this point and any protocol for their notification.
- What agency carries out investigations?
- Please discuss the effectiveness of any tribal-federal cooperative agreements in effect, such as cross-deputization, cross-commissions, or data collection and sharing agreements.
    - When were these agreements made and what was the impetus?
    - How could they be improved?
    - Are there additional types of tribal-federal agreements that you believe would improve public safety on tribal land?

Intergovernmental Cooperation:

- Does the tribe have an official policy or protocol for, or guidance material addressing, the handling of cases subject to concurrent tribal and federal criminal jurisdiction?
- Please describe the tribe's relationship with the U.S. Attorney's Office.
    - How has this relationship been affected by TLOA and VAWA?

- What impact have SAUSAs had on the federal prosecution of criminal cases from Indian country?
    - Has the SAUSA program changed how the tribe's approach to, or goals related to, criminal enforcement are considered by federal officials or incorporated into the federal process in federal prosecutions of criminal cases from Indian country?
- What impact have SAUSAs had on the prosecution of criminal cases in tribal court?
    - Has the SAUSA program changed how the federal government's approach or goals related to criminal enforcement are considered in or incorporated into the tribal criminal justice system?
- How are cases handled when some counts can be prosecuted in tribal and federal court and others only in one or the other?

Sustainability & Cultural Compatibility:

- How will the implementation of TLOA and VAWA affect the trajectory of the tribe's criminal justice system going forward?
    - Will it affect interactions with the federal criminal justice system?
    - Will it limit the tribal justice system's ability to develop or implement culturally compatible programming, even (or especially) if that programming does not align with federal convention or priorities?
- In your opinion, will TLOA, VAWA, or other potential relaxations of federal restrictions placed on tribal jurisdiction impact the frequency of dual prosecutions going forward?
- How has implementation of TLOA and VAWA impacted community impressions of the tribal criminal justice system?
    - Is it your impression that the possibility of dual prosecution is common knowledge among tribal citizens?
    - How do you believe understandings of concurrent tribal and federal criminal jurisdiction and the possibility of dual prosecution in cases of concurrent jurisdiction impact community trust in the tribal and federal systems?
    - Are tribal court judges, tribal prosecutors, and defense lawyers in tribal court well-versed in the possibility of dual prosecution? In your opinion, how knowledgeable are they of these possibilities?
        - Do you believe defense lawyers are able to adequately advocate for their clients in these situations?
    - In your opinion, are Indian defendants in tribal court—especially those who appear pro se—provided sufficient information about the possibility (if it exists) of dual prosecution and all its implications in order to make a well-informed decision about how to proceed in tribal court?

V. CONCLUSION

Despite much legal scholarship on the dual-sovereignty doctrine, knowledge of the doctrine's impact in the tribal-federal realm remains underdeveloped. This thesis has taken an initial step toward remedying this knowledge gap by providing a comprehensive theoretical analysis of the doctrine's interaction with the current criminal jurisdiction landscape in Indian country. In the process, it has identified potential tribal sovereignty concerns and issues of systemic unfairness that the doctrine creates or exacerbates in the tribal-federal context. It has also identified areas for further study and proposed a research agenda for examining the dual-sovereignty doctrine's impact on the ground in Indian country. The hope is that such future research will begin to answer some of the questions raised by the theoretical analysis herein—such as when (i.e., in what jurisdictional and factual circumstances), why, and with what frequency dual tribal and federal prosecutions arise—as well as identify the best practices tribal court systems are currently using, or could potentially use, that may mitigate some of the potential tribal sovereignty concerns and fairness issues raised by the dual-sovereignty doctrine.

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