

# MAPPING DUAL SOVEREIGNTY AND DOUBLE JEOPARDY IN INDIAN COUNTRY CRIMES

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*The Double Jeopardy Clause guarantees no individual will be put in jeopardy twice for the same offense. But, pursuant to the dual-sovereignty doctrine, multiple prosecutions for offenses stemming from the same conduct do not violate the Clause if the offenses charged arise under the laws of separate sovereigns, even if the laws are otherwise identical. The doctrine applies to tribal prosecutions, but its impact in Indian country is rarely studied. Such an inquiry is overdue, particularly as the scope of crimes potentially subject to dual tribal and federal prosecutions has broadened in recent years.*

*This Article is the first to undertake a preliminary examination of the dual-sovereignty doctrine in the tribal–federal context and describe the complex interplay between the doctrine and the rest of the criminal law fabric in Indian country. Perhaps most significantly, it includes an original typology highlighting when a defendant may be subject to the doctrine, which sovereigns have the authority to prosecute, pursuant to what source of power each sovereign operates, and when and how the sequence of prosecutions matters, if at all. This leads to the Article’s central thesis: Indian tribes are separate sovereigns with inherent sovereignty, and, under current conditions, the dual-sovereignty doctrine plays a central role in ensuring safety in Indian country. The doctrine’s application in Indian country, however, creates unique complexities that may threaten tribal sovereignty and raise issues of unfairness for defendants. This Article offers numerous reforms—some highly ambitious and others more modest—to address these issues.*

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## INTRODUCTION

The Constitution’s Fifth Amendment is a stalwart against governmental overreach in the criminal justice system. It sets forth numerous individual rights, including the guarantee in the Double Jeopardy Clause that no individual will be put in jeopardy twice for the same offense.<sup>1</sup> Animated by popular culture, storied television procedurals, and crime novels, most Americans have at least a cursory understanding of the right, which is commonly understood to prevent a defendant from being tried multiple times for the same offense. However, the Clause maintains various and perhaps less obvious complexities when applied. Just in recent years, defendants in high-profile cases have been tried more than once for crimes arising from the same underlying conduct. Consider, for example, that the three men who killed Ahmaud Arbery were convicted of murder

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1. U.S. Const. amend. V.

in a state trial in 2021 and sentenced to life in prison but were tried again and convicted of federal hate crimes in February 2022.<sup>2</sup>

Such prosecutions are possible because they fall within the dual-sovereignty, or separate-sovereigns, doctrine. Pursuant to the doctrine, which the Supreme Court reaffirmed as recently as 2019 in *Gamble v. United States*,<sup>3</sup> multiple prosecutions for the same underlying conduct are permissible and do not violate the Double Jeopardy Clause as long as the offense charged in each prosecution derives from a separate sovereign.<sup>4</sup> As the Arbery case exemplifies, the Court has recognized that more than one sovereign may have a deeply held interest in pursuing its own justice in a criminal case. Most attention is focused on the doctrine as applied in the state–federal context. Much less well-known—though adhered to just as firmly in Supreme Court jurisprudence—is the doctrine’s application to prosecutions by Indian tribes.<sup>5</sup> That is the subject of this Article.

For decades, the Supreme Court has applied the dual-sovereignty doctrine to tribal prosecutions,<sup>6</sup> reinforcing a basic tenet of federal Indian

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2. Ahmaud Arbery Shooting: A Timeline of the Case, N.Y. Times (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html> (on file with the *Columbia Law Review*).

3. 139 S. Ct. 1960, 1964 (2019) (rejecting *Gamble*’s call that the Court overturn the dual-sovereignty doctrine).

4. See *Denezpi v. United States*, 142 S. Ct. 1838, 1849 (2022) (finding a defendant’s dual prosecution for “violations of a tribal ordinance and federal statute” permissible because tribes and the federal government are distinct sovereigns).

5. This Article 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) (2018). There are currently 574 such tribes that are federally recognized. Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022).

6. When discussing tribal prosecutions, this Article is referring to the full range of legal proceedings—adversarial and nonadversarial—employed by tribes and tribal courts. For the most part, prosecutions by tribal courts today take the form of adversarial proceedings like those in federal and state courts. See *infra* section II.A (describing the evolution of the criminal justice system in Indian country). The authors, however, support decisions by tribes to utilize alternative systems to the adversarial model employed by federal and state courts and to seek resolutions that diverge from the punitive carceral approach in the American system. As an example of one particularly successful traditional, restorative tribal justice program, see, e.g., 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> (on file with the *Columbia Law Review*) (describing a Yurok Tribal Court judge’s replacement of incarceration with supervised release and Yurok traditions); 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-htlmlstory.html> [<https://perma.cc/J8RG-BFCN>] (discussing the judge’s wellness court, which offers a healing path for nonviolent offenders struggling with substance abuse). Ultimately, this Article advocates for increased federal funding to support the expansion of tribal restorative justice programs and other tribally driven approaches. It also calls for federal policy grounded in a respect for such programs, and which treats them as legitimate responses to crime in Indian country. See *infra* section IV.A.

law: Tribal sovereignty is inherent, and, therefore, Indian tribes are separate sovereigns for the purpose of the dual-sovereignty doctrine.<sup>7</sup> Nevertheless, the on-the-ground application of the doctrine in Indian country<sup>8</sup> prosecutions—and, concomitantly, its impact on tribal sovereignty and individual defendants' rights—is grossly understudied and rarely examined. Such an inquiry is long overdue, particularly as federal law over the last decade has broadened the scope of crimes potentially subject to dual tribal and federal prosecution.<sup>9</sup>

There is a substantial body of legal scholarship on the dual-sovereignty doctrine, much of it critical, which is principally devoted to its application in the context of dual state and federal prosecution.<sup>10</sup> But remarkably little attention has been focused on the doctrine's application to Indian country prosecutions.<sup>11</sup> Without sufficient data to inform the conversation, the precise scope and mechanics of the doctrine in the tribal–federal context are elusive. But these prosecutions raise weighty and novel issues in need of study. As this Article will examine in depth, the existing dual-sovereignty literature does little to illuminate the unique legal issues that arise in Indian country because Indian tribes are not

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7. *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978) (holding that tribes are separate sovereigns for the purpose of a double jeopardy claim).

8. “Indian country” is a term of art defined by federal law. See 18 U.S.C. § 1151 (2018).

9. See *infra* section II.A.

10. See, e.g., Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 Wash. U. L. Rev. 769, 782–90 (2009) (discussing the dual-sovereignty doctrine's application to the U.S. federal system in the context of successive federal and state prosecutions); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights “Exception”*, 41 UCLA L. Rev. 649, 655 (1994) (discussing the theory that the federal government should be permitted to prosecute individuals for the same conduct of which they were acquitted at the state level when federal civil rights are at stake); Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 Annals Am. Acad. Pol. & Soc. Sci. 72, 73 (1996) (endorsing “overlapping federal-state jurisdiction where necessary to permit the federal government to address aspects of national problems that the states cannot fully solve”); David Bryan Owsley, Note, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 Wash. U. L.Q. 765, 768 (2003) (considering justifications for the dual-sovereignty doctrine in the context of a federal prosecution following a state acquittal). See also Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1161–63 (1995) (criticizing the dual-sovereignty doctrine); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609, 625–27 (1994) (same); Adam J. Adler, Note, *Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem*, 124 Yale L.J. 448, 451 (2014) (same); 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, 1643 (2000) (same).

11. One exception is Ross Naughton, Comment, *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). Naughton analyzes the dual-sovereignty doctrine primarily in the tribal–state context, however, not the tribal–federal context. See *id.* at 491 (“[T]his Comment shows how tribal sovereignty is caught in the curious interplay between Public Law 280 and state statutes abrogating the dual sovereignty doctrine (DSD).”).

similarly situated to states vis-à-vis the federal government. Moreover, because of the unusual jurisdictional and sentencing framework in Indian country, a disproportionate number of dual prosecutions in the United States are tribal-federal, and virtually all of these involve Indian defendants.<sup>12</sup> Thus, the stakes—for tribal sovereignty and for the rights of defendants—are incredibly high.

This Article is the first work of its kind. At its heart, it is a mapping project, intended to describe the dual-sovereignty doctrine in the tribal-federal context and analyze how it works on the ground in Indian country. To be clear, this Article does not endorse the existing framework—in fact, it proposes numerous reforms in Part IV—but it does take the system as it is for purposes of describing how the doctrine operates in Indian country today. In addition to undertaking a preliminary examination of the dual-sovereignty doctrine in the tribal-federal context, this Article also describes the complex interplay between the doctrine and the rest of the criminal law fabric in Indian country. Perhaps most significantly, it presents an original typology that highlights precisely when a defendant may be subject to the doctrine, which sovereigns—tribal or federal—have the authority to prosecute, pursuant to what source of power they operate, and when and how the sequence of prosecutions matters, if at all, in a particular instance.

All of this leads to the Article's central thesis: Indian tribes are separate sovereigns with rights of inherent sovereignty, and, under current conditions, the dual-sovereignty doctrine plays a central role in ensuring the safety and security of Indian country. At the same time, however, the current formation of criminal jurisdiction and sentencing in Indian country creates complexities for tribes and Indian defendants that may threaten tribal sovereignty or raise issues of unfairness for defendants. This Article offers numerous reforms—some highly ambitious and others more modest—to address these issues. In doing so, this Article acknowledges the discriminatory and assimilative history of federal law that has created the jurisdictional maze of Indian country criminal law today. Thus, its most ambitious proposals would require the federal government to honor its trust obligation to Indian tribes, necessitating adequate funding of tribal legal systems, including Indigenous, non-Western practices rooted in Indigenous worldviews, such as restorative justice programs, among others. The Article's more modest proposals could improve Indian country criminal justice in its present form. All proposals are designed to advance tribal sovereignty and Indigenous Peoples' rights of self-determination. Certainly, in the absence of greater empirical research in the field, there

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12. See *infra* section III.B. Due to the Supreme Court's ruling in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), tribes lack criminal jurisdiction over non-Indians unless exercising inherent special Tribal criminal jurisdiction (STCJ) under the Violence Against Women Act (VAWA). See *infra* section II.A. As of the date of writing, the authors are not aware of any case where a non-Indian defendant has been subject to dual prosecution by a tribe and the federal government.

are limits to a project of this nature. Nevertheless, this Article strives to inspire closer and deeper examination of the dual-sovereignty doctrine's impact in the tribal–federal context and, in turn, promote the development of law and policy to address the unique concerns of stakeholders in Indian country criminal justice, particularly tribes and tribal members.

The Article proceeds as follows: Part I sets forth the development of the Supreme Court jurisprudence delineating and affirming the dual-sovereignty doctrine. Part II describes the doctrinal landscape of the Indian country criminal justice system and examines how the dual-sovereignty doctrine applies to Indian tribes and Indian country prosecutions. It then presents a detailed typology, analyzing eight different jurisdictional scenarios to highlight when and how dual tribal and federal prosecution may occur in Indian country. Part III turns to the question of how the dual-sovereignty doctrine is operationalized in Indian country. Here, the Article explains why the doctrine is so crucial for safety and security in Indian country—particularly for protecting Native women, girls, queer people, and Two-Spirit people. Part III then explains why there is a comparatively heightened possibility of dual prosecution in Indian country and details some of the potential consequences of the doctrine for Indian tribes and (mostly Indian) defendants. It further explains the implications for both tribal sovereignty and for individual defendants' rights under the current system, discussing, in turn, issues that may arise when a tribal prosecution is followed by a federal prosecution and vice versa. Part IV concludes by offering several proposed reforms designed to mitigate the tribal sovereignty and fairness concerns this work identifies.

### I. DOUBLE JEOPARDY AND THE DUAL-SOVEREIGNTY DOCTRINE

The Fifth Amendment's Double Jeopardy Clause guarantees no individual will be put in jeopardy twice for the same offense by the federal government.<sup>13</sup> The guarantee binds state action via the Fourteenth Amendment,<sup>14</sup> and tribal governments are similarly restricted under the Indian Civil Rights Act (ICRA).<sup>15</sup> The prohibition on double jeopardy has at least two key features to shield defendants. The Clause is intended to protect individuals from multiple prosecutions for the same offense and to avoid multiple punishments for a single offense.<sup>16</sup> These dual protections promote the integrity of the criminal justice system and the fair treatment of defendants. At the systemic level, when prosecutors get only one crack at convicting a defendant for a particular offense, judicial economy

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13. U.S. Const. amend. V.

14. *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

15. 25 U.S.C. § 1302(a)(3) (2018) (“No Indian tribe in exercising powers of self-government shall . . . subject any person for the same offense to be twice put in jeopardy.”).

16. 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”).

commands efficient marshaling of prosecutorial resources and protects the finality of judgments. At the individual case level, the doctrine ensures that a defendant 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.

However, the Supreme Court has recognized a significant carve-out to the double jeopardy protection in the dual-sovereignty doctrine. Pursuant to the doctrine, dual prosecutions do not violate double jeopardy if the offense charged in each prosecution arises under the laws of a separate sovereign, even if the laws are otherwise identical.<sup>17</sup> Although there are harsh critics of the doctrine, including some current sitting Justices on the Supreme Court, the dual-sovereignty doctrine has deep roots in Supreme Court jurisprudence and was reexamined and affirmed by the Court as recently as 2019.<sup>18</sup>

The Court's earliest discussion of the dual-sovereignty doctrine appears in dicta in the 1847 case *Fox v. Ohio*.<sup>19</sup> In *Fox*, the Court concluded that double jeopardy was not implicated when it determined that the state and federal laws giving rise to a dual prosecution in fact defined entirely different offenses.<sup>20</sup> Justice Peter Daniel's opinion posited, however, that even when two sovereigns prosecuted equivalent offenses—a situation he believed would rarely arise—the bar against double jeopardy would not limit either government's prerogative to enforce its own criminal laws, irrespective of the actions of the other.<sup>21</sup>

Five years later in *Moore v. Illinois*, faced with precisely the type of situation Justice Daniel had thought would be so rare, the Court formally adopted the dual-sovereignty doctrine.<sup>22</sup> The defendant in *Moore* had been convicted under an Illinois state law that criminalized harboring fugitive enslaved persons,<sup>23</sup> which was also a federal offense under the Fugitive

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17. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016).

18. See, e.g., *Denezpi v. United States*, 142 S. Ct. 1838, 1849 (2022) (Gorsuch, J., dissenting) (“I believe that [the dual-sovereignty] doctrine is at odds with the text and original meaning of the Constitution.”). But see *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (reaffirming the doctrine).

19. 46 U.S. (5 How.) 410 (1847).

20. *Id.* at 411 (noting that the federal and state offenses were different in “character[.]”—the former being one “directly against the government, by which individuals may be affected” and the latter being a “private wrong, by which the government may . . . remotely, if it will in any degree, be reached”).

21. *Id.* at 435 (explaining that while it would be unusual for both the state and federal governments to prosecute the same offense, the Constitution does not prohibit this practice). But see *id.* at 439–40 (McLean, J., dissenting) (arguing that to permit multiple sovereigns to punish an individual under essentially equivalent criminal laws would be “repugnant” and would constitute a “great defect in our system” and a “mockery of justice”).

22. 55 U.S. (14 How.) 13, 19–20 (1852).

23. *Id.* at 17.

Slave Act of 1850.<sup>24</sup> The Court defined an offense as “the transgression of a law.”<sup>25</sup> Because the “same act may be . . . [a] transgression of the laws of both” a state and the federal government, the Court reasoned, an individual may “by one act . . . commit[] two offences, for each of which he is justly punishable.”<sup>26</sup>

After *Moore*, criminal cases subject to the concurrent jurisdiction of two or more sovereigns continued to emerge, presenting the Court with opportunities in which it reconsidered, reaffirmed, and further developed the dual-sovereignty doctrine, solidifying its place in American jurisprudence. In 1922, in *United States v. Lanza*, the Court considered the permissibility of successive prosecutions by the federal government and a state for violations of equivalent prohibition laws in each jurisdiction.<sup>27</sup> It held that when two sovereigns are involved, each “deriving power from different sources, [and] capable of dealing with the same subject matter within the same territory,” both “may, without interference by the other, enact [equivalent] laws,” and a single act that violates both laws is considered an offense “against [the] peace and dignity of[,] . . . and may be punished by[,] each.”<sup>28</sup>

The Court reaffirmed the doctrine without seriously reconsidering it on a handful of occasions after *Lanza* until 1959.<sup>29</sup> Faced with two cases involving dual state and federal prosecutions, *Barthkus v. Illinois*<sup>30</sup> and *Abbate v. United States*, it was specifically asked by the petitioner in *Abbate* to overturn *Lanza*.<sup>31</sup> The Court declined.<sup>32</sup> It determined there was “[n]o . . . persuasive reason . . . [to] depart from its firmly established principle.”<sup>33</sup> This conclusion was perhaps hardly surprising given that *Abbate* presented a factual scenario much like many of its predecessor dual-sovereignty cases: a state prosecution pursuant to state law followed by a federal prosecution pursuant to federal law, both resulting in guilty verdicts—the first by plea

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24. Fugitive Slave Act of 1850, Pub. L. No. 31-60, 9 Stat. 462 (repealed 1864).

25. *Moore*, 55 U.S. at 19.

26. *Id.* at 20. Again, Justice John McLean dissented. *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.”).

27. 260 U.S. 377, 379–80 (1922).

28. *Id.* at 382.

29. See, e.g., *Abbate v. United States*, 359 U.S. 187, 193–94 (1959) (“The *Lanza* principle has been accepted without question in [a collection of cases].”); *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” for each).

30. 359 U.S. 121 (1959).

31. *Abbate*, 359 U.S. at 195.

32. *Id.*

33. *Id.*

agreement and the second by jury verdict.<sup>34</sup> *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.<sup>35</sup> *Bartkus*, on the other hand, presented a slightly novel factual scenario for the Court—a dual prosecution wherein the defendant was acquitted in the first (federal) prosecution and convicted in the second (state) prosecution—but the Court nevertheless applied the dual-sovereignty doctrine.<sup>36</sup>

Questions about the doctrine’s viability have continued to emerge, with Justices repeatedly raising concerns of potential procedural unfairness for defendants subject to dual prosecution.<sup>37</sup> As recently as 2019, the Court again took up a case, *Gamble v. United States*, in which it was urged to overturn the dual-sovereignty doctrine.<sup>38</sup> In *Gamble*, the defendant had been dually prosecuted, first by the State of Alabama and then by the federal government, for equivalent firearms offenses arising out of the same incident.<sup>39</sup> After analysis of the dual-sovereignty doctrine’s historical origins and its embeddedness in American jurisprudence for almost two centuries, the Court declined “to abandon the sovereign-specific reading of the phrase ‘same offence’” in the Fifth Amendment, thus upholding the doctrine.<sup>40</sup>

Most of the Court’s dual-sovereignty jurisprudence has focused on the state–federal context and occasionally on cases involving dual prosecutions by different states.<sup>41</sup> Much of this body of law is devoid of any discussion or analysis of the separate sovereignty of Indian tribes. As tribes asserted greater jurisdiction in Indian country in the last several decades, however, criminal defendants began to question the source and scope of tribal authority. In the 1970s, the Court eventually addressed head-on (a) whether Indian tribes possess a sovereignty separate from the United States for purposes of the dual-sovereignty doctrine; and (b) whether it

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34. *Id.* at 188–90.

35. See *id.* at 195–96. The Court, however, was narrowly divided 5–4. And even Justice Brennan, who authored the majority opinion finding for the government, wrote separately to reject the government’s other argument that the Clause would not bar separate prosecutions for the same conduct if those prosecutions sought to vindicate different interests. *Id.* at 198–200 (opinion of Brennan, J.).

36. See *Bartkus v. Louisiana*, 359 U.S. 121, 124, 136 (1959).

37. See, e.g., *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (“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.” (citation omitted)).

38. 139 S. Ct. 1960, 1963 (2019).

39. *Id.* at 1964.

40. *Id.* at 1966.

41. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 86–87 (1985) (permitting dual prosecution by the states of Georgia and Alabama of a lesser included offense and greater encompassing offense stemming from the same homicide).

would apply the doctrine in the face of double jeopardy challenges arising out of dual tribal and federal prosecutions. This is the subject of Part II.

## II. INDIAN TRIBES AS SEPARATE SOVEREIGNS

Virtually from the point of contact between Europeans and Indian nations, the colonizing powers have acknowledged the separate and distinct sovereignty of Indian tribes. This sovereignty has meant that tribes operate and maintain their own criminal justice systems, wherein the dual-sovereignty doctrine plays a critical role.

In this Part, section II.A first explains the complex nature of Indian country criminal justice. Section II.B takes up the topic of tribes' separate sovereign status and explains how that status, coupled with the unique jurisdictional landscape, implicates double jeopardy and the dual-sovereignty doctrine in Indian country. Section II.C then lays out the on-the-ground mechanics, presenting the eight jurisdictional scenarios when dual prosecutions may arise in the tribal–federal context.

### A. *The Indian Country Criminal Justice System*

The criminal justice system in Indian country is commonly characterized as a “jurisdictional maze”—an ill-coordinated tangle of rules creating a complex web of overlapping sovereign authority.<sup>42</sup> The system today is reflective of the “piecemeal” approach by which it has been constructed,<sup>43</sup> as the U.S. Congress and Supreme Court have announced and then subsequently developed jurisdictional rules during various eras of federal Indian law and policy that have been, at times, utterly at odds with each other.<sup>44</sup> This process has resulted in a bizarrely disjointed, multi-layered framework of criminal law enforcement in Indian country.<sup>45</sup> Within this framework, several sovereigns operate in varying capacities depending on a range of factors, such as the type of offense alleged, the

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42. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 *Ariz. L. Rev.* 951, 991 (1975).

43. Angela R. Riley, *Crime and Governance in Indian Country*, 63 *UCLA L. Rev.* 1564, 1575 (2016).

44. See, e.g., Clinton, *supra* note 42, 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); Sarah Deer, *Native People and Violent Crime: Gendered Violence and Tribal Jurisdiction*, 15 *Du Bois Rev.* 89, 92 (2018) (“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.”); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 *Harv. L. Rev.* 1754, 1776 (1997) (“[F]ederal Indian law remains about as unruly as ever . . . [T]he 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.”).

45. Riley, *supra* note 43.

geographic location where the offense purportedly occurred, and whether the alleged perpetrator or victim is Indian.<sup>46</sup> The complexity of the system has contributed to the comparatively high crime rates experienced on many Indian reservations.<sup>47</sup>

For about two hundred years, Indian tribes and the federal government have been responsible for coadministering the criminal justice system in Indian country, largely to the exclusion of the states. A long history—as manifested in treaties,<sup>48</sup> the U.S. Constitution,<sup>49</sup> congressional acts,<sup>50</sup> and an entire body of Supreme Court jurisprudence<sup>51</sup>—confirmed this arrangement. During this time, for the most part, if an Indian country crime involved an Indian, either as perpetrator or as victim, states lacked criminal jurisdiction altogether.<sup>52</sup> The

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46. *Id.*

47. Kevin Washburn has written extensively about the issues of criminal jurisdiction in Indian country, particularly with regard to tribal–federal coordination. E.g., Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 *Mich. L. Rev.* 709, 710–12 (2006) [hereinafter Washburn, *American Indians*]; Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 *N.C. L. Rev.* 779, 784 (2006) [hereinafter Washburn, *Federal Criminal Law*]; Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 *Ariz. St. L.J.* 403, 410–11 & n.32 (2004) [hereinafter Washburn, *Tribal Courts and Federal Sentencing*]; see also Indian L. & Ord. Comm’n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States*, at v (2013), [https://www.aisc.ucla.edu/iloc/report/files/a\\_roadmap\\_for\\_making\\_native\\_america\\_safer-full.pdf](https://www.aisc.ucla.edu/iloc/report/files/a_roadmap_for_making_native_america_safer-full.pdf) [<https://perma.cc/9G63-R89X>] [hereinafter ILOC, *Roadmap*] (“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.”); Riley, *supra* note 43, at 1566 (“Decades 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 . . .”).

48. See, e.g., *Treaty with the Cherokees, Cherokee Nation-U.S.*, art. III, Nov. 28, 1785, 7 *Stat.* 19; *id.* art. VIII, 7 *Stat.* 19 (acknowledging that the Cherokees would be under the protection of the federal government alone and providing for the punishment of non-Indians who committed crimes against Indians).

49. See U.S. Const. art. I, § 8 (giving Congress the power to “regulate commerce with . . . the Indian tribes”).

50. See, e.g., Carole E. Goldberg, Rebecca Tsosie, Robert N. Clinton & Angela R. Riley, *American Indian Law: Native Nations and the Federal System* 18 (7th ed. 2015) (discussing how the Trade and Intercourse Act of 1790 and its later iterations were meant to facilitate uniform, efficient relations between the federal government and tribes as American settlement expanded westward—more efficient, the idea was, than if individual states were left to make and enforce their own Indian policies).

51. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 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”); *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).

52. An important exception to this rule is crimes involving Indians that are subject to state jurisdiction pursuant to Public Law 280. See *infra* notes 105–106 and accompanying

Supreme Court only recently changed this rule, holding in 2022 in *Oklahoma v. Castro-Huerta* that states retained jurisdiction over crimes committed by non-Indians against Indians in Indian country.<sup>53</sup>

Initially, by casting tribes as distinct political entities vis-à-vis the federal and state governments, the tribal-federal framework served as a buffer against state encroachment into tribal affairs and provided a certain measure of protection for tribal autonomy. Over time, however, the federal government became increasingly committed to a policy of forced assimilation of Indian people into the broader American polity<sup>54</sup> and, to this end, enhancing its own control over Indian lands and people, particularly in the arena of criminal jurisdiction.<sup>55</sup> Federal criminal law became an instrument for enacting assimilationist policy and tipping the balance of powers within the tribal-federal framework further in the federal government's favor.<sup>56</sup>

In 1817, Congress passed the General Crimes Act (GCA), which extends federal enclave laws<sup>57</sup> to Indian country and provides for federal jurisdiction over violations of those laws when either the perpetrator or victim is Indian and the other is non-Indian.<sup>58</sup> Excluded from the jurisdiction conferred by the GCA are situations: (1) when both the alleged perpetrator and victim are Indian; (2) when the perpetrator has already been punished under tribal law; and (3) when a treaty gives exclusive jurisdiction over the particular type of offense to a tribe.<sup>59</sup> Essentially, the GCA was primarily intended to address interracial crime by granting federal jurisdiction over all crimes committed by a non-Indian against an

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text. Where both the perpetrator and victim are non-Indian, the state has exclusive jurisdiction. *United States v. McBratney*, 104 U.S. 621, 624 (1881).

53. 142 S. Ct. 2486, 2491 (2022).

54. See *infra* note 62 and accompanying text (discussing the Dawes Act of 1887 and federal assimilation-by-allotment policy).

55. 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) (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”).

56. *Id.* at 1091 (“With the federal criminal law and enforcement mechanism firmly in place by the turn of the last century, all that remained was to stand back while assimilation proceeded apace and the mighty pulverizing engine allotted the remaining tribes out of existence.”).

57. Federal enclave laws are laws that apply within the maritime and territorial jurisdiction of the federal government and include offenses such as arson, assault, theft, manslaughter, murder, and various sex offenses, among others. See U.S. Dep’t of Just., *Criminal Resource Manual* § 678 (2020) [hereinafter U.S. Dep’t of Just., *Criminal Resource Manual*].

58. 18 U.S.C. § 1152 (2018).

59. *Id.*

Indian in Indian country and over nonmajor crimes committed by Indians against non-Indians in Indian country.<sup>60</sup>

Congress subsequently 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 enumerated felony offenses committed by an Indian person in Indian country.<sup>61</sup> Congress intended for the MCA to serve only as a temporary measure 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 they would primarily be subject to state criminal law like non-Indians.<sup>62</sup> Nevertheless, the MCA has experienced notable longevity and even expansion. Despite the federal government's long-ago abandonment of formal assimilationist policy and its contemporary commitment to tribal self-determination, Congress still "largely abdicate[s] 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."<sup>63</sup>

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60. With the Court's *Castro-Huerta* decision, states have jurisdiction over those crimes that are committed by a non-Indian against an Indian in Indian country. See *supra* text accompanying note 53.

61. 18 U.S.C. § 1153. 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." Eid & Doyle, *supra* note 55, at 1074.

62. Eid & Doyle, *supra* note 55, at 1095 ("[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 . . . [until] tribal lands were finally allotted away and criminal jurisdiction thereby transferred to the states . . ."). The MCA was passed as an appropriations rider. *Id.* at 1079. Its 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. *Id.* at 1081. Assimilation-by-allotment policy was codified by the General Allotment (Dawes) Act of 1887. Dawes Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–357 (1994)) (repealed 2000). President Theodore Roosevelt infamously described the policy as "a mighty pulverizing engine to break up the tribal mass." Theodore Roosevelt, President, Message of the President of the United States, Communicated to the Two Houses of Congress, at the Beginning of the First Session of the Fifty-Seventh Congress (Dec. 3, 1901), in *Presidential Addresses and State Papers: December 3, 1901, to January 4, 1904*, at 529, 594 (1943). The Dawes Act diminished tribal land holdings by approximately ninety million acres. Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* 130 (2009).

63. Eid & Doyle, *supra* note 55, at 1093; see also Washburn, *Federal Criminal Law*, *supra* note 47, at 784 ("[E]ven though it seems to represent an anachronistic legal regime from a bygone era, the Major Crimes Act . . . undermines tribal self-governance today more than ever.").

Shortly after enacting the MCA, the federal government also began establishing Courts of Indian Offenses, commonly known as CFR courts, to enforce criminal law on Indian lands.<sup>64</sup> CFR courts were originally assimilative in purpose and sought to impose greater federal control over Indian country crime.<sup>65</sup> Over time, however, they evolved to be more tribally focused and administered. CFR courts now have trial and appellate divisions<sup>66</sup> and are tasked with the “administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction.”<sup>67</sup> They exercise criminal jurisdiction over certain offenses enumerated in the Code of Federal Regulations,<sup>68</sup> as well as offenses defined in tribal law.<sup>69</sup>

Today, CFR courts are largely a relic, with only five currently operating.<sup>70</sup> They were, however, a mainstay in Indian country until the passage of the Indian Reorganization Act of 1934, which marked a shift away from assimilationist federal Indian policy and toward facilitating tribal self-governance.<sup>71</sup> At that point, CFR courts began to experience a significant decline in number, a trend that continued in the following decades, particularly in the 1960s onward as the federal government committed to a policy of tribal self-determination and many tribes established their own tribal judicial systems to administer the same functions.<sup>72</sup> Tribal courts are now the norm in Indian country, and the evidence suggests that the few tribes still operating CFR courts do so primarily because of a lack of resources to create an entirely tribally based system.<sup>73</sup>

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64. Court of Indian Offenses: “Committed to Providing Quality Judicial Services to Our Tribal Nations”, Bureau of Indian Affs., <https://www.bia.gov/regional-offices/southern-plains/court-indian-offenses> [<https://perma.cc/UK35-DN2U>] (last visited Aug. 1, 2022).

65. See Eid & Doyle, *supra* note 55, at 1094–95 (describing how Congress enacted the MCA in support of forced assimilation).

66. 25 C.F.R. § 11.200(a) (2021).

67. *Id.* § 11.102.

68. *Id.* §§ 11.400–11.454 (enumerating criminal offenses).

69. See *id.* § 11.108 (describing how the governing tribe of the Indian country over which the CFR court has jurisdiction can enact ordinances that, subject to Bureau of Indian Affairs (BIA) approval, are enforceable in that CFR court and supersede any conflicting regulation in the Code).

70. See Court of Indian Offenses: CFR Courts, Bureau of Indian Affs., <https://www.bia.gov/CFRCourts> [<https://perma.cc/B3TC-2EC6>] (last visited Aug. 1, 2022).

71. Brief of Amici Curiae Federal Indian Law Scholars and Historians in Support of Respondent at 10, *Denezpi v. United States*, 142 S. Ct. 1838 (2022) (No. 20-7622), 2022 WL 1052058.

72. *Id.* at 11–12. 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 (codified as amended at 25 U.S.C. §§ 5301–5423 (2018)).

73. Brief of Amici Curiae Federal Indian Law Scholars and Historians, *supra* note 71, at 12–13.

Under the current legal regime, there are two key limitations on tribes' criminal authority: sentencing limitations and jurisdictional constraints—imposed by Congress and the Supreme Court, respectively. In 1968, Congress passed the ICRA,<sup>74</sup> extending certain protections of the Bill of Rights to Indian tribal governments.<sup>75</sup> The ICRA also restricted the sentences that tribes could impose, capping them at six months of incarceration and a fine of \$500 for any single offense.<sup>76</sup> Responding to calls from tribes for greater flexibility in sentencing, Congress expanded sentencing authority slightly in 1986, amending the ICRA to allow tribes to impose maximum sentences of up to one year of imprisonment and a \$5,000 fine for any single offense.<sup>77</sup> This cap was firm, even for the most egregious crimes like murder and sexual abuse.

But the Supreme Court arguably imposed the greatest restraint on tribes through its 1978 decision in *Oliphant v. Suquamish Indian Tribe*, in which the Court held that Indian tribes do not have criminal jurisdiction over non-Indians.<sup>78</sup> After the Court stripped tribes of criminal jurisdiction over non-Indians, public safety on some Indian reservations deteriorated.<sup>79</sup> The common understanding following *Oliphant*—up until only a few months ago when the Supreme Court issued its 2022 ruling in *Castro-Huerta*—was that only the federal government could prosecute crimes committed by non-Indians against Indian victims in Indian country.<sup>80</sup> Given the astonishingly high rates at which the federal government has historically declined to prosecute Indian country crimes, this understanding created a de facto jurisdictional void.<sup>81</sup> Scholars trace a

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74. Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 25 U.S.C. § 1302).

75. Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, Introduction to the Indian Civil Rights Act at Forty, at xi, xi (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012).

76. Indian Civil Rights Act § 202(7).

77. 25 U.S.C. § 1302(a)(7)(B).

78. 435 U.S. 191, 195 (1978). After a challenge to tribes' authority to exercise criminal jurisdiction over nonmember Indians within their territory, see *Duro v. Reina*, 495 U.S. 676, 679 (1990), Congress passed legislation affirming that inherent authority. See Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (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").

79. Riley, *supra* note 43, at 1581–83.

80. One minor exception was made in 2013 when Congress included provisions in the reauthorization of VAWA permitting tribes to exercise limited inherent jurisdiction over non-Indians. See *infra* text accompanying notes 90–102. The general understanding since *Oliphant* has been upended by the Court's 2022 ruling in *Castro-Huerta*, though it remains to be seen if states will exercise the jurisdiction *Castro-Huerta* recognizes and take an active role in prosecuting crimes allegedly perpetrated by non-Indians against Indians in Indian country. See *supra* text accompanying note 53.

81. See *infra* notes 166–168 and accompanying text (discussing high federal declination rates in Indian country and their impact).

proliferation of crime—particularly sexual and gendered violence—to the Supreme Court’s decision in *Oliphant*.<sup>82</sup>

In 2010, Congress responded to tribal advocacy for increased sentencing authority that would protect Indian people and make reservations safer. Recognizing that tribal justice systems are best positioned to respond to the criminal justice needs of Indian country and that the sentencing limitations of the ICRA harshly constrained tribes’ ability to effectively do so,<sup>83</sup> Congress again amended the ICRA to expand tribal sentencing authority—this time through the enactment of the Tribal Law and Order Act (TLOA) in 2010.<sup>84</sup> Tribes that opt in to the expanded sentencing authority that TLOA offers must guarantee in their proceedings additional protections and safeguards that are in line with the federal Constitution.<sup>85</sup> In return, they may impose a maximum sentence of three years of imprisonment and a fine of \$15,000 for any single offense and stack penalties for multiple offenses in a single proceeding up to a maximum total of nine years of imprisonment.<sup>86</sup> To date, however, only a small number of tribes have implemented enhanced sentencing authority under TLOA,<sup>87</sup> primarily because many tribes lack funding for the services and positions needed to provide defendants these federally mandated protections.<sup>88</sup> The vast majority of tribes, therefore, are still limited to imposing a maximum term of incarceration of one year for any single offense.<sup>89</sup>

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82. See, e.g., Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* 41–42 (2015) (discussing *Oliphant*’s effect of creating a “crisis situation in some tribal communities” because non-Indians “perceive [Indian country] as a location in which crimes can be committed with impunity”).

83. U.S. Dep’t of Just., *Tribal Law and Order Act Report on Enhanced Tribal-Court Sentencing Authority* 5, <https://www.justice.gov/tribal/file/796981/download> [<https://perma.cc/BH6N-XCEU>] [hereinafter U.S. Dep’t of Just., *Tribal Law and Order Act Report*] (last visited Aug. 1, 2022).

84. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified in scattered sections of 18 U.S.C. and 25 U.S.C.).

85. See 25 U.S.C. § 1302(c) (2018) (requiring tribes that exercise enhanced sentencing authority pursuant to TLOA to ensure (1) the effective assistance of counsel; (2) judges licensed to practice law in the United States; (3) the availability of their criminal laws, rules of evidence, and rules of criminal procedure; and (4) a record of the proceedings).

86. See 25 U.S.C. § 1302(a) (7) (C)–(D).

87. 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> [<https://perma.cc/TW7K-VBC2>] (last updated Nov. 2, 2018) (listing sixteen tribes that had implemented TLOA-enhanced sentencing as of late 2018).

88. The federal government’s creation of a legislative pathway for Indian tribes to assume enhanced sentencing authority without providing sufficient resources—especially financial—for them to do so accords with the federal government’s history of failing to fulfill its trust responsibility. See generally U.S. Comm’n on C.R., *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* 12–13 (2018), <https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf> [<https://perma.cc/2QEX-6A4C>] (noting the failure of the federal government to honor treaties, among other guarantees).

89. Nat’l Cong. of Am. Indians, *supra* note 87.

Though TLOA addressed issues of sentencing limitations, it did nothing to reverse the devastating consequences of *Oliphant*. Thus, Congress acted again in 2013 in response to tribal advocacy that raised awareness of high rates of sexual abuse, assault, violence, and murder of Native women and girls by non-Native offenders in Indian country.<sup>90</sup> The 2013 reauthorization of the Violence Against Women Act (VAWA) once again permitted tribes to exercise a small but significant slice of their inherent criminal jurisdiction over non-Indians.<sup>91</sup> This expanded authority became available to all tribes in 2014 and, like TLOA, is entirely optional.<sup>92</sup> Though the expansion empowered tribes to better respond to domestic violence in Indian country, it soon became clear that the jurisdiction was inadequate to quell Indian country crime. Congress responded by broadening the scope of this restored tribal criminal authority over non-Indians through the adoption of even more expansive tribal provisions in the 2022 VAWA reauthorization, which tribes can begin to implement in October 2022.<sup>93</sup>

The restored tribal authority recognized in the 2022 VAWA reauthorization is known as “special Tribal criminal jurisdiction” (STCJ).<sup>94</sup> Like enhanced tribal sentencing authority under TLOA, STCJ is entirely elective. Under STCJ, tribes may choose, pursuant to their inherent sovereignty, to exercise criminal jurisdiction over nine covered crimes occurring in the Indian country of the participating tribe:<sup>95</sup> assault of tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violations of certain protection orders.<sup>96</sup> Participating tribes may exercise STCJ over all persons, except when both the defendant and victim are non-Indian.<sup>97</sup>

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90. See, e.g., Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before the Comm. on Indian Affs., 112 Cong. 63–65 (2011) (statement of Mickey Percy, Executive Director, Health Services of Choctaw Nation of Oklahoma) (advocating the reauthorization of VAWA).

91. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (codified as amended at 25 U.S.C. § 1304).

92. See *id.* (defining a participating tribe as an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that tribe).

93. See Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, § 804, 136 Stat. 840, 898 (codified as amended at 25 U.S.C. § 1304).

94. 25 U.S.C. § 1304(a)(14) (defining “special Tribal criminal jurisdiction” as “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise”). The 2013 reauthorization referred to this restored tribal jurisdiction as special domestic violence criminal jurisdiction, or SDVCJ—reflective of the narrower scope of primarily dating and domestic violence jurisdiction available to tribes between 2013 and 2022—and therefore some of the publications cited herein that predate the 2022 reauthorization use that term and abbreviation. See § 904, 127 Stat. at 120. The 2022 provisions permitting participating tribes to exercise expanded STCJ take effect October 1, 2022. § 4, 136 Stat. at 840.

95. 25 U.S.C. § 1304(a)(5).

96. See *id.* § 1304(a) (defining each of the nine covered crimes).

97. *Id.* § 1304(b)(4).

This exception does not apply to the covered crimes of obstruction of justice or assault of tribal justice personnel, and participating tribes may exercise STCJ over these offenses even if neither the defendant nor the victim is an Indian.<sup>98</sup> For a participating tribe to exercise STCJ over an assault of tribal justice personnel, however, the assault must involve an alleged violation of law during or related to the enforcement of a covered crime over which the tribe exercises STCJ.<sup>99</sup> Tribes exercising STCJ must provide additional guarantees for defendants above and beyond even those required of tribes implementing TLOA enhanced sentencing.<sup>100</sup> Since 2013, relatively few tribes have opted into VAWA's expanded jurisdiction.<sup>101</sup> Evidence suggests this is largely due to a lack of resources to carry out the implementation process and maintain the infrastructure to ensure provision of the federally mandated rights of defendants.<sup>102</sup>

As the history reflects, the administration of criminal justice in Indian country has remained a largely tribal and federal responsibility for the past two hundred years. That said, states do have a role to play in Indian country criminal justice in a few instances. Today, pursuant to the Supreme Court's 1881 opinion in *United States v. McBratney*, states have exclusive jurisdiction over crimes occurring solely between non-Indians in Indian

98. *Id.* § 1304(b)(1), (4).

99. See *id.* § 1304(a)(1). STCJ over the obstruction of justice is not as limited, and participating tribes may prosecute offenses involving the “interfer[ence] with the administration or due process of the laws of the Indian tribe, including any Tribal criminal proceeding or investigation of a crime.” *Id.* § 1304(a)(9).

100. See *id.* § 1304(d). Section 1304(d) reads:

In a criminal proceeding in which a participating tribe exercises [STCJ], the participating tribe shall provide to the defendant—

- (1) all applicable rights under [TLOA];
- (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
- (3) the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

- (4) all other rights 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 [STCJ] over the defendant.

*Id.*

101. See Nat'l Cong. of Am. Indians, VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report 1 (2018), [http://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf) [<https://perma.cc/WL7M-FX2E>] [hereinafter NCAI, VAWA SDVCJ Five-Year Report] (noting that, as of March 2018, only eighteen tribes were exercising that jurisdiction).

102. See *id.* at 29–30 (stating that the “primary reason tribes report for why [restored tribal criminal jurisdiction pursuant to VAWA] has not been more broadly implemented is a focus on other priorities and a lack of resources . . . [needed] to support implementation”).

country.<sup>103</sup> And, due to the Supreme Court's 2022 ruling in *Castro-Huerta*, states also have retained authority, concurrent with the federal government's General Crimes Act jurisdiction, over crimes committed by non-Indians against Indians in Indian country.<sup>104</sup> Finally, select states have full criminal jurisdiction in Indian country pursuant to Public Law 280 (PL-280),<sup>105</sup> which confers state criminal jurisdiction to six "mandatory" states and includes a pathway for additional states to elect to assume Indian country criminal jurisdiction, but only with tribal consent.<sup>106</sup> Notably, using the power of retrocession—to return jurisdiction from the states to the federal government<sup>107</sup>—the trend has been to move away from state jurisdiction in Indian country, even in PL-280 states.

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103. 104 U.S. 621, 624 (1881). The 2022 reauthorization of VAWA modified this slightly, however, authorizing a tribe to exercise STCJ jurisdiction over alleged obstructions of justice and assaults on tribal justice personnel, even if both the defendant and victim are non-Indians. See *supra* notes 98–99 and accompanying text. However, as these rules do not go into effect until October 2022, 25 U.S.C. § 1304 note (Effective Date of 2022 Amendment), as of the date of this writing, no such case has ever been prosecuted or tried.

104. 142 S. Ct. 2486, 2491 (2022) (“[T]he Federal Government and the State[s] have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.”). Tribes may also have jurisdiction in such cases that fall within the VAWA reauthorization. See *supra* notes 94–101 and accompanying text (describing STCJ over non-Indians).

105. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2018), 25 U.S.C. §§ 1321–1326, and 28 U.S.C. § 1360 (2018)). Where the defendant is Indian, tribes retain concurrent jurisdiction. Today, “nearly a quarter of the reservation-based tribal population in the lower 48 states” is subject to state criminal jurisdiction pursuant to PL-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*, at 14 (2012). For a complete account of the reach of PL-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 additional online resources related to PL-280's scope and impact, see generally Tribal L. & Pol'y Inst., *Public Law 280, Tribal Ct. Clearinghouse*, <http://www.tribal-institute.org/lists/pl280.htm> [https://perma.cc/5T5P-HRSZ] (last visited Aug. 1, 2022).

106. See 18 U.S.C. § 1162. PL-280's initial adoption and application to the original mandatory states was done entirely without tribal consent. See Champagne & Goldberg, *supra* note 105, at 11 (“One of the striking features of Public Law 280, however, is the fact of its adoption and implementation without the consent of the affected tribes.”). Congress subsequently amended PL-280 via the ICRA to require tribal consent before a state could assume criminal jurisdiction on the tribe's lands and, since then, no tribe has consented. See 25 U.S.C. § 1326. Likewise, Congress recently created a pathway for the federal re-assumption of concurrent Indian country criminal jurisdiction over reservation land in mandatory PL-280 states. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 221, § 401(a), 124 Stat. 2261, 2271–72 (codified as amended in scattered sections of 18 U.S.C. and 25 U.S.C.). A tribe must make a request to the DOJ Office of Tribal Justice for the federal re-assumption of criminal jurisdiction over its reservation land. See 28 C.F.R. § 50.25(b) (2021); U.S. Att'y's Off., Dist. of Minn., *Frequently Asked Questions About Public Law 83-280*, U.S. Dep't of Just., <https://www.justice.gov/usao-mn/Public-Law%2083-280> [https://perma.cc/64AW-ETJ7] (last updated May 1, 2015).

107. See 25 U.S.C. § 1323. Several states have retroceded PL-280 jurisdiction back to the federal government. See Carole Goldberg & Heather Valdez Singleton, *Research Priorities:*

Thus, while acknowledging the role of states in prosecuting some Indian country crime, the tribal–federal framework in Indian country criminal jurisdiction remains widespread, and this Article retains its focus on dual tribal and federal prosecutions.

B. *The Dual-Sovereignty Doctrine in the Tribal–Federal Context*

Given the complex jurisdictional interplay in Indian country, the dual-sovereignty doctrine plays an integral role in criminal law enforcement on reservations today, even though the bulk of the doctrine’s history and development arose outside of Indian law. In fact, until relatively recently, tribal interests were not present in or relevant to the Court’s dual-sovereignty doctrine jurisprudence. As discussed above, those cases centered on federal and state prosecutions of varying formations.<sup>108</sup> The separate sovereignty of Indian tribes was well established even prior to the establishment of the United States itself and affirmed by the Supreme Court as early as 1896 in *Talton v. Mayes*.<sup>109</sup> But the Court did not address the question of how the dual-sovereignty doctrine would apply in cases involving Indian tribes until 1978 in *United States v. Wheeler*.<sup>110</sup>

In *Wheeler*, the defendant, Anthony Robert Wheeler, an enrolled member of the Navajo Nation, had already been prosecuted by the Navajo Nation for a lesser included offense, to which he pled guilty, a full year before being indicted on federal charges under the MCA for a greater encompassing offense arising from the same incident.<sup>111</sup> Whether the defendant’s second, federal prosecution violated double jeopardy thus turned on whether an Indian tribe—in this case, the Navajo Nation—is a separate sovereign from 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.”<sup>112</sup> 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

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Law Enforcement in Public Law 280 States, at 3 & nn.9–10 (1998), <https://www.ojp.gov/pdffiles1/nij/grants/209926.pdf> [<https://perma.cc/4NC3-4YXH>] (identifying seven states that retroceded their jurisdiction over more than twenty reservations); U.S. Att’y’s Off., Dist. of Minn., supra note 106 (“Th[e] [retrocession] process was successfully utilized by a number of tribes and states during the 1970’s and 1980’s . . .”). Though TLOA also created a process by which the federal government may “reassume” jurisdiction over Indian country in PL-280 states, this re-assumption does not remove state authority—states retain concurrent jurisdiction. See sec. 221, § 401(b)(2), 124 Stat. at 2271–72.

108. See supra Part I.

109. 163 U.S. 376, 384 (1896).

110. 435 U.S. 313, 332 (1978).

111. See *id.* at 314–16.

112. *Id.* at 322 (emphasis added).

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.<sup>113</sup> When the tribe exercised that power, "it [did] so as part of its retained sovereignty and not as an arm of the Federal Government."<sup>114</sup> Thus, "[s]ince tribal and federal prosecutions are brought by separate sovereigns," the dual-sovereignty doctrine applies, and dual tribal and federal prosecutions for what would otherwise be considered the same offense do not violate double jeopardy.<sup>115</sup>

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 *United States v. Lara* 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, reaffirm inherent tribal jurisdiction.<sup>116</sup> *Lara* arose when the Spirit Lake Tribe charged the defendant, Billy Jo Lara, with the crime of violence to a policeman for allegedly striking an officer.<sup>117</sup>

The tribe asserted jurisdiction over the defendant, who was an Indian but not an enrolled member of the prosecuting tribe,<sup>118</sup> pursuant to the so-called "Duro-fix."<sup>119</sup> Congress passed the *Duro*-fix legislation in response to the Supreme Court's decision in *Duro v. Reina*, in which the Court held that tribal criminal jurisdiction did not extend to Indians who were not enrolled members of the prosecuting tribe.<sup>120</sup> The *Duro* decision left a jurisdictional gap, resulting in a scenario in which no sovereign had jurisdiction over certain crimes committed by Indians.<sup>121</sup> The congressional response to *Duro* was to enact the *Duro*-fix, which "relax[ed] restrictions" previously articulated by the Court in *Duro* "on the bounds of . . . inherent tribal authority."<sup>122</sup>

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113. *Id.* at 323–24.

114. *Id.* at 328.

115. *Id.* at 329–30.

116. 541 U.S. 193, 210 (2004).

117. *Id.* at 196.

118. *Id.* at 197–98.

119. See Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1892, 1892–93 (codified at 25 U.S.C. § 1301 (2018)) (recognizing as among the "powers of self-government" of Indian tribes the "inherent power . . . to exercise criminal jurisdiction over all Indians"); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified at 25 U.S.C. § 1301) (making the earlier recognition of tribes' inherent power permanent).

120. 495 U.S. 676, 679 (1990).

121. See *id.* at 705 n.3 (Brennan, J., dissenting) ("[U]nder the Court's holding today, the tribe, the Federal Government, and the State each lack jurisdiction to prosecute . . . an entire class of crimes."); Nell Jessup Newton, Commentary, Permanent Legislation to Correct *Duro v. Reina*, 17 *Am. Indian L. Rev.* 109, 109–10 & n.8 (1992) (describing the jurisdictional gap left by the *Duro* decision).

122. *Lara*, 541 U.S. at 207.

Lara pled guilty in tribal court but then was charged by the federal government with assaulting a federal officer based on the same act.<sup>123</sup> Lara challenged his federal prosecution on double jeopardy grounds.<sup>124</sup> Thus, the case 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 federal restrictions on inherent tribal authority.<sup>125</sup> The Court answered the 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."<sup>126</sup> The Court held that the dual-sovereignty doctrine applied because the source of both the tribal and federal governments' prosecutions was each sovereign's own inherent authority, and, therefore, Lara's dual prosecutions were permissible.<sup>127</sup>

The Supreme Court reaffirmed the dual-sovereignty doctrine's application in the tribal-federal context in dicta in the 2016 case *Puerto Rico v. Sanchez Valle*, in which it upheld the doctrine but found that Puerto Rico, as a territory of the United States, was not a separate sovereign for purposes of the doctrine's application.<sup>128</sup> The Court signaled its continuing approval of the doctrine's vitality in the tribal-federal context based on the long-recognized principle that tribes' sovereignty predates colonization and thus is not a delegation from the federal government.<sup>129</sup> Justice Ruth Bader Ginsburg, joined by Justice Clarence Thomas, concurred but called for a "fresh examination" of the dual-sovereignty doctrine as a

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123. *Id.* at 196–97.

124. *Id.* at 197.

125. See *id.* at 198–99.

126. *Id.* at 197–98 (quoting 25 U.S.C. § 1301(2) (2018)).

127. *Id.* at 210 ("[T]he 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."). In its *Lara* opinion, the Court also tacitly signaled its approval of a circuit court decision holding that a tribe retains its separate sovereign status if the tribe was once subject to federal termination but later had its status as a federally recognized Indian tribe restored by Congress. See *id.* at 203 ("Congress has restored previously extinguished tribal status—by re-recognizing a Tribe whose tribal existence it previously had terminated." (citing *United States v. Long*, 324 F.3d 475, 478 (7th Cir. 2003), cert. denied, 540 U.S. 882 (2003))).

128. 136 S. Ct. 1863, 1876 (2016) (finding that the ultimate source of Puerto Rico's prosecutorial power is the U.S. Congress, and, therefore, dual prosecutions by Puerto Rico and the federal government are unconstitutional under the Double Jeopardy Clause).

129. *Id.* at 1872 (stating "Indian tribes also count as separate sovereigns under the Double Jeopardy Clause" because tribal sovereignty is a "primeval" or, at any rate, "pre-existing" sovereignty" compared to that of the federal and state governments).

whole.<sup>130</sup> The Court heeded and again addressed the doctrine a few years later in *Gamble v. United States*.<sup>131</sup>

In a 7-2 opinion, the Court in *Gamble* reexamined and ultimately reaffirmed the dual-sovereignty doctrine.<sup>132</sup> Tribal interests were not directly represented in *Gamble*, and, unlike in *Sanchez Valle*, the majority did not analyze the dual-sovereignty doctrine's historical or continued application in the context of Indian law.<sup>133</sup> But the Court nevertheless hinted at its thinking along this line. While *Gamble* was pending before the Court, the Court held in abeyance the case of *Bearcomesout v. United States*, discussed further below, which involved a challenge to the constitutionality of a dual prosecution by the Northern Cheyenne Tribe and the federal government.<sup>134</sup> In that case, the petitioner also requested that the Court overrule the dual-sovereignty doctrine, but the Court denied certiorari after issuing its decision in *Gamble*,<sup>135</sup> leaving intact the Ninth Circuit's ruling that the defendant's dual tribal and federal prosecution was permissible under the dual-sovereignty doctrine.<sup>136</sup>

Most recently, in 2022, the Court considered whether dual prosecutions by a CFR court and the federal government violate double jeopardy in *Denezpi v. United States*.<sup>137</sup> In *Denezpi*, the defendant, a member of the Navajo Nation, pled guilty to assault and battery under the tribal law of the Ute Mountain Ute Tribe. He was subsequently indicted in federal district court pursuant to the MCA and convicted by a jury of a greater encompassing offense, aggravated sexual abuse.<sup>138</sup> In its analysis, the Court noted that the case “present[ed] a twist on the usual dual-sovereignty scenario”—whereas “[t]he mine run of these cases [have] involve[d] two sovereigns, each enforcing its own law,” the Court understood *Denezpi* as raising the issue of a single sovereign (the United States) enforcing its own law in federal court after prosecuting the law of a separate sovereign (the Ute Mountain Ute Tribe) in a different forum.<sup>139</sup>

The Court went to great lengths to avoid deciding whether a CFR court is a federal or tribal court for the purpose of a double jeopardy challenge. Instead, the Court posited that, even if a CFR court were federal, a

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130. Id. at 1877 (Ginsburg, J., concurring). Justice Stephen Breyer, joined by Justice Sonia Sotomayor, wrote a blistering dissent, arguing that it was inconsistent to say that Puerto Rico did not maintain a separate sovereignty, but Indian tribes do. Id. at 1884, 1879–80 (Breyer, J., dissenting).

131. 139 S. Ct. 1960 (2019).

132. Id. at 1964.

133. See id.

134. *United States v. Bearcomesout*, 696 F. App'x 241 (9th Cir. 2017), cert. denied, 139 S. Ct. 2739 (2019).

135. Id.

136. See id.

137. 142 S. Ct. 1838, 1843 (2022).

138. Id. at 1844.

139. Id. at 1842–43.

second prosecution in federal court following a CFR court prosecution nevertheless would not violate double jeopardy because the successive prosecutions—even if by the same sovereign—were for distinct offenses.<sup>140</sup> Because an “offense defined by one sovereign is necessarily different from an offense defined by another, even when the offenses have identical elements,”<sup>141</sup> the Court determined that the defendant’s single act broke the laws of separate sovereigns—here, the laws of the Ute Mountain Ute Tribe and the United States.<sup>142</sup> Therefore, pursuant to the dual-sovereignty doctrine, whether the prosecutors in the first and second proceedings exercised tribal and federal prosecutorial power, respectively, or federal prosecutorial power in both instances, the defendant could be successively prosecuted for the two offenses without triggering double jeopardy.<sup>143</sup>

Thus, the dual-sovereignty doctrine applies today to dual prosecutions by an Indian tribe and the federal government and, given the Supreme Court’s very recent reaffirmations, is likely to for the foreseeable future. The following section II.C identifies and describes the eight possible scenarios when dual tribal and federal prosecutions may arise in Indian country.

### C. *Eight Jurisdictional Scenarios*

Undoubtedly, the current system of criminal jurisdiction in Indian country has migrated from a maze to a morass,<sup>144</sup> and it only seems to be growing more complex as Congress and the Supreme Court continue to walk the tightrope of distributing jurisdiction among tribes, the states, and the federal government. This Article posits that the entire system is in desperate need of a sweeping overhaul—one that respects tribal sovereignty and advances tribal rights of self-determination—to achieve coherence. The current structure means that neither tribal governments nor the federal government alone can adequately respond to Indian country crime. As a result, despite its challenges, the dual-sovereignty doctrine serves as an antidote to the federal jurisdictional and sentencing limitations on tribes.

Dual tribal and federal prosecutions are not always permissible. In fact, because of the peculiar framework in Indian country, they may occur in only a limited set of circumstances that turn on the identity of the offender, the identity of the victim, the types of crimes prosecuted, and the

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140. *Id.* at 1843.

141. *Id.* at 1842.

142. *Id.* at 1845 (finding the defendant’s “single act transgressed two laws: the Ute Mountain Ute Code’s assault and battery ordinance and the United States Code’s proscription of aggravated sexual abuse in Indian country”).

143. *Id.* at 1843.

144. ILOC, Roadmap, *supra* note 47, at ix (“The Commission has concluded that criminal jurisdiction in Indian country is an indefensible morass of complex, conflicting, and illogical commands . . .”).

source of authority pursuant to which each sovereign exercises its prosecutorial power. This Article identifies eight jurisdictional scenarios when dual tribal and federal prosecutions may arise:

1. When (a) an Indian defendant (b) commits a serious offense<sup>145</sup> (c) against an Indian or non-Indian victim in Indian country falling within (d) a tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to the MCA, with the tribal prosecution charging a lesser included offense of the greater encompassing offense charged by the federal government, regardless of the order in which the two sovereigns ultimately prosecute the defendant;

2. When (a) an Indian defendant (b) commits a serious offense (c) against an Indian or non-Indian victim in Indian country falling within (d) a tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to the MCA, with the tribal and federal prosecutions charging definitionally equivalent offenses, regardless of the order in which the two sovereigns ultimately prosecute the defendant;

3. When (a) an Indian defendant (b) commits an offense (c) against a non-Indian victim in Indian country falling within (d) a tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to the GCA, and the tribe prosecutes before the federal government but does not impose a punishment (for example, because of an acquittal);

4. When (a) an Indian defendant (b) commits an offense (c) against a non-Indian victim in Indian country falling within (d) a tribe's inherent criminal jurisdiction and the federal government's criminal jurisdiction pursuant to the GCA, and the federal government prosecutes before the tribe;

5. When (a) an Indian defendant (b) commits an offense (c) against an Indian or non-Indian victim, or which is victimless, falling within (d)

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145. This refers specifically to those crimes that are enumerated within the MCA. Under the federal definition of a felony—defined as “any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year,” U.S. Sent’g Guidelines Manual § 4A1.2(o) (U.S. Sent’g Comm’n 2021)—only tribes exercising enhanced sentencing authority under TLOA truly exercise felony jurisdiction. The vast majority of tribes, therefore, only exercise misdemeanor jurisdiction. See Washburn, *Tribal Courts and Federal Sentencing*, supra note 47, at 410–11 & n.32 (noting the surprising fact that, when prosecuted by an Indian tribe that does not exercise enhanced sentencing authority under TLOA, murder is a misdemeanor).

In some cases, tribes with limited sentencing authority (non-TLOA tribes, for example) may choose to exercise misdemeanor jurisdiction only and decline to even define felonies under tribal law. In these scenarios, the federal government may prosecute for a major crime—a greater encompassing offense—and the tribe only for a lesser included offense. See *id.* at 411 (describing the tribal–federal criminal justice partnership with federal prosecutors handling “major crimes” and tribal courts handling misdemeanors); see also Washburn, *American Indians*, supra note 47, at 717 (noting that tribes can technically “define and prosecute any offense,” but because of the sentencing limitation, the federal government “address[es] serious crimes with felony sentences”).

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),<sup>146</sup> regardless of the order in which the two sovereigns ultimately prosecute the defendant;

6. When (a) a non-Indian defendant (b) commits an offense (c) against an Indian victim in Indian country falling within (d) a tribe's STCJ<sup>147</sup> and the federal government's jurisdiction pursuant to the GCA—where the tribe prosecutes before the federal government but does not impose a punishment;

7. When (a) a non-Indian defendant (b) commits an offense (c) against an Indian victim in Indian country falling within (d) a tribe's STCJ and the federal government's jurisdiction pursuant to the GCA—where the federal government prosecutes before the tribe; and

8. When (a) a non-Indian defendant (b) commits an offense (c) against a non-Indian victim (for example, one who qualifies as both tribal justice personnel and a federal officer) in Indian country falling within (d) a tribe's STCJ and the federal government's jurisdiction pursuant to federal statutory law defining acts constituting federal crimes irrespective of where they occur, regardless of the order in which the two sovereigns ultimately prosecute the defendant.

These eight jurisdictional scenarios are presented in tabular format as follows:

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146. Such crimes include, for example, "bank robbery, counterfeiting, sale of drugs, and assault on a federal officer." U.S. Dep't of Just., Criminal Resource Manual, *supra* note 57, § 678.

For a case that exemplifies this fifth scenario, see *United States v. Lara*, 541 U.S. 193 (2004). *Lara*, an Indian defendant, struck a BIA officer during his arrest for public intoxication on the Spirit Lake Reservation. *Id.* at 196. *Lara* was prosecuted first by the Spirit Lake Tribe for the tribal crime of "violence to a policeman." *Id.* 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 (2018), which 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 GCA or the MCA. *Id.* at 197.

147. See *supra* notes 93–102 and accompanying text (describing the scope of STCJ under the 2022 VAWA reauthorization). It is worth noting that tribes may also prosecute Indian individuals pursuant to STCJ. See 25 U.S.C. § 1304(b)(1) (2022) (establishing tribes' "special Tribal criminal jurisdiction over *all* persons" (emphasis added)). But since they retain inherent criminal jurisdiction over Indians generally, they need not invoke STCJ in cases against Indian defendants and can instead rely on their general inherent authority.

TABLE 1: EIGHT JURISDICTIONAL SCENARIOS FOR TRIBAL/FEDERAL DUAL PROSECUTION

	Defendant	Victim	Type of Crime Charged by Tribe	Type of Crime Charged by U.S.	Tribal Authority	Federal Authority	First to Prosecute
1.	Indian	Indian or non-Indian	Lesser Included Offense	Felony offense within MCA	Inherent sovereignty	MCA	Order is irrelevant
2.	Indian	Indian or non-Indian	Offense definitionally equivalent to felony offense charged by U.S. under MCA	Felony offense within MCA	Inherent sovereignty	MCA	Order is irrelevant
3.	Indian	Non-Indian	Criminal offense	Criminal offense not within MCA	Inherent sovereignty	GCA	Tribe, but it does <i>not</i> impose punishment
4.	Indian	Non-Indian	Criminal offense	Criminal offense not within MCA	Inherent sovereignty	GCA	U.S.
5.	Indian	Indian, non-Indian, or victimless	Criminal offense	Federal crime of general applicability	Inherent sovereignty	Federal statute	Order is irrelevant
6.	Non-Indian	Indian	Criminal offense falling within Tribe's STCJ	Criminal offense	VAWA	GCA	Tribe, but it does <i>not</i> impose punishment
7.	Non-Indian	Indian	Criminal offense falling within Tribe's STCJ	Criminal offense	VAWA	GCA	U.S.
8.	Non-Indian	Non-Indian ("tribal justice personnel" who is also a "federal officer")	Criminal offense falling within Tribe's STCJ	Federal crime of general applicability	VAWA	Federal statute	Order is irrelevant

These eight jurisdictional scenarios giving rise to the possibility of dual tribal and federal prosecutions underlie and shape the metes and bounds of the dual-sovereignty doctrine's application in the tribal-federal context. There is no authoritative source to quantify the precise number of dual tribal and federal prosecutions that occur each year. Approximate numbers are ascertainable, however, from the statistics provided by the

United States in *Gamble*. Counsel for the United States stated during oral argument that the federal government brings several hundred dual prosecutions each year, approximately two-thirds of which follow tribal prosecutions.<sup>148</sup> Notably, these statistics likely include only the dual tribal and federal prosecutions that occurred in that order—that is, with the federal prosecution following the tribal prosecution—and not dual prosecutions where a tribal prosecution followed a federal one.

Though available data is not granular enough to draw definitive conclusions as to which of the eight jurisdictional scenarios map onto these prosecutions, it is possible to draw some inferences based on existing data and knowledge about Indian country criminal justice. For example, dual prosecutions by a tribe and the federal government for equivalent nonmajor (misdemeanor) offenses—the third and fourth scenarios identified above—probably occur very infrequently.<sup>149</sup> There is some evidence to support this claim. Documentation submitted around the passage of TLOA, for example, revealed the incredibly high rates at which federal prosecutors historically have declined to prosecute Indian country cases.<sup>150</sup> With limited resources, the federal government is likely to deprioritize prosecuting misdemeanor crimes in Indian country, especially when Indian tribes themselves exercise broad authority to prosecute the same crimes, which is the case when a defendant is Indian. Federal authorities may also fail to step in where tribal criminal authority is *restricted* by federal law—when the defendant is non-Indian, for example; or, if they do try to fill this void, they may be ineffective.<sup>151</sup> Federal ineffectiveness may be attributable to various factors, including 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

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148. See Transcript of Oral Argument at 66, *Gamble v. United States*, 139 S. Ct. 1960 (2019) (No. 17-646), 2018 WL 8581793 [hereinafter Transcript of Oral Argument in *Gamble*]. As these statistics were provided during oral argument, they have not been independently verified.

149. Dual convictions by a tribe and the federal government for equivalent misdemeanor offenses may be possible, as well, where a tribe prosecutes a lesser included offense and the federal government prosecutes the greater encompassing offense but only sustains a conviction as to the lesser included offense. *Keeble v. United States*, 412 U.S. 205, 214 (1973) (holding that an Indian prosecuted under the MCA is entitled to jury instruction on a lesser included offense when the evidence warrants one, even though the lesser offense is not enumerated under the MCA and the federal government would not have the jurisdiction to charge it as a standalone offense).

150. See *infra* notes 166–168 and accompanying text (discussing historical and continuing federal underenforcement of criminal law in Indian country, as evidenced by disparately high declination rates).

151. See *infra* notes 166–168.

prosecution; and tribal community members' skepticism of federal authorities and law enforcement processes and thus resistance to cooperate in federal investigations and trials.<sup>152</sup>

At the same time, tribes are also unlikely to spend their own (often very limited) resources pursuing a second prosecution of a misdemeanor offense against a defendant who has already been prosecuted by the federal government, unless the result of the federal prosecution is unsatisfactory to the tribe. This may be the case if, for example, the federal prosecution is dropped after jeopardy attaches or if the case results in an acquittal.

Similarly, the second scenario—prosecutions by a tribe and the federal government for equivalent major (felony) offenses—likely also occurs infrequently. Recall that tribes, in general, do not have the authority to impose felony sentencing, which removes most tribal prosecutions from the definition of a “felony” under federal law. The second scenario can thus arise only if a tribe has implemented enhanced sentencing under TLOA, allowing the tribe to impose a term of imprisonment up to three years for a single offense or up to nine years for multiple offenses in the same proceeding.<sup>153</sup> Since very few tribes have implemented enhanced sentencing under TLOA,<sup>154</sup> the number of dual prosecutions of the type described by scenario two is likely small.

Scenarios five through eight also probably rarely occur. Most criminal enforcement is left to the states and subsovereigns within, such that there are simply not many federal crimes of general applicability overall and few instances where such crimes would correspond with a victimless crime by an Indian defendant, limiting the scope of scenario five. As to scenarios six, seven, and eight—prosecution of a non-Indian pursuant to the tribe's STCJ and a subsequent prosecution by the federal government—to date, there has never been such a prosecution reported. The expanded scope of STCJ available to participating tribes beginning in October 2022, however, broadens the possible pool of non-Indian defendants who could be subject to dual tribal and federal prosecution, though it is too early to tell whether more non-Indians will actually face dual tribal and federal prosecutions.

Thus, the most common formation of a dual tribal and federal prosecution in Indian country likely arises under the first scenario—a prosecution by a tribe for a lesser included offense<sup>155</sup> and by the federal

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152. See, e.g., Washburn, *American Indians*, *supra* note 47, 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).

153. See *supra* note 86 and accompanying text.

154. See *supra* note 87 and accompanying text.

155. In this scenario, the lesser included offense prosecuted by the tribe may be (a) an actual misdemeanor offense that is a lesser included offense of the felony offense charged

government for a greater encompassing offense. Though, as we discuss below, it is important to maintain dual sovereignty, it can also unintentionally result in overenforcement. Overenforcement may occur when tribal and federal jurisdiction are concurrent and both sovereigns choose to exercise their prosecutorial authority over a single matter.<sup>156</sup> We define this as overenforcement simply because, even though a dual prosecution can occur outside of Indian country, such prosecutions are quite unusual compared to dual prosecutions arising in Indian country.<sup>157</sup> Moreover, it bears noting again that the defendants subject to dual tribal and federal prosecutions are overwhelmingly, if not exclusively, Indian.

We take a closer look at the mechanics of the doctrine and concomitant issues it raises in Part III.

### III. HOW THE DUAL-SOVEREIGNTY DOCTRINE IS OPERATIONALIZED

The dual-sovereignty doctrine plays a central role in ensuring safety and security in Indian country. But the doctrine is also connected to the harms that Native reservation residents report resulting from on-reservation crime and governance structures.<sup>158</sup> The jurisdictional maze that characterizes the legal system in Indian country today paradoxically creates coexistent patterns of underenforcement and overenforcement of criminal law that can have serious, even devastating, consequences for tribes, defendants, and tribal members. In this Part, we discuss why the dual-sovereignty doctrine is so essential to criminal justice for tribes and then address some of the concerns that arise from the doctrine's application.

#### A. *The Dual-Sovereignty Doctrine Is Central to the Indian Country Criminal Justice System*

The reality today is that the dual-sovereignty doctrine undergirds the criminal legal framework in Indian country, even if not by design.<sup>159</sup>

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by the federal government, or (b) an offense that, in terms of its defining elements, is equivalent to the felony offense charged by the federal government but is downgraded to a misdemeanor under tribal law due to sentencing limitations. See Washburn, *Tribal Courts and Federal Sentencing*, supra note 47, at 410 (explaining that many tribes' jurisdiction over Indians is limited to misdemeanors).

156. The effects of overenforcement through dual prosecution are exacerbated by the relative harshness of federal sentencing. See *infra* note 172.

157. See *infra* notes 186–191 and accompanying text.

158. See *supra* note 47 and accompanying text.

159. The GCA 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 (2018) (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 GCA

Though part of Indian law's "doctrinal incoherence,"<sup>160</sup> the dual-sovereignty doctrine, perhaps ironically, enhances the operational efficacy of criminal law enforcement in Indian country. Without it, the tribal-federal partnership would be severely undermined, as would, in turn, tribal autonomy to make decisions insulated from federal encroachment.

Due to the federally imposed jurisdictional and sentencing restrictions on tribal governments, the dual-sovereignty doctrine serves two roles. First, it shields tribal law from further federal encroachment by ensuring that tribes can exercise their criminal authority to the fullest extent possible within the law—or the extent tribal authorities deem appropriate—regardless of the federal government's response to a situation. Second, it ensures 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 to fill the void.

Studies of the criminal justice system in Indian country have time and again supported the maxim that local criminal authority is most effective.<sup>161</sup> While evidence shows that federal and state cooperation with tribes is essential to functional relationships in Indian country, local control of criminal justice remains the primary goal.<sup>162</sup> Evidence suggests that locally controlled institutions are buoyed by transparency and accountability.<sup>163</sup> The imposition of federal regimes in place of tribal structures has degraded tribal criminal justice systems, resulting in a lack of trust in the criminal justice system for reservation-based crime.<sup>164</sup> Local, tribally

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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 the GCA excludes from its federal Indian country jurisdiction cases in which the defendant already "has been punished by the local law of the tribe." *Id.*

160. Frickey, *supra* note 44, at 1754.

161. See ILOC, Roadmap, *supra* note 47, at 3 ("[T]here is no substitute for the effectiveness of locally controlled Tribal governmental institutions . . .").

162. See *id.* ("The Commission's primary response is to request that the President and Congress act immediately to undo the prescriptive commands of Federal criminal law and procedure in Indian country and . . . recognize Tribal governments' inherent authority to provide justice in Indian country.")

163. See *id.* (citing the benefits of transparent and accountable local institutions).

164. *Id.* at 4. 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. More importantly, it "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, *supra* note 43, 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"). "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

controlled justice systems are an antidote to centuries of federal interference.

The dual-sovereignty doctrine counterbalances the destructive trend of federal interference, at least in some measure, in several ways. First, the doctrine respects tribal sovereignty by affirming tribes as separate sovereigns and empowering tribes themselves to address reservation crime on their own terms. In this sense, the doctrine insulates tribes from federal incursion. It ensures that tribes can always exercise their criminal authority (to an extent deemed appropriate by tribal authorities and permissible under the law) in any matter over which they have jurisdiction, free from federal oversight and regardless of whether or how the federal government might 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, ultimately, the dual-sovereignty doctrine guarantees tribal independence in making such decisions. Neither federal action nor inaction forecloses or mandates a particular tribal response.<sup>165</sup>

Second, collective anecdotal experience in Indian country reveals that the application of the dual-sovereignty doctrine in the context of Indian law is essential to ensure the safety and security of tribes. As the data on declination rates indicate, the federal government too often fails to prosecute even major crimes in Indian country.<sup>166</sup> In fact, there is a well-documented history of the federal government declining to prosecute

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members lose faith in tribal governments as well as in the federal system.” *Id.* (footnote omitted).

165. Of course, on many reservations, the reality is that when tribes exercise their own criminal jurisdiction, there is significant interdependence between tribal and federal authorities. For example, federal law enforcement officers, such as BIA officers and FBI agents, are often the ones who respond to crime scenes and carry out investigations. See U.S. Dep’t of Just., *Indian Country Investigations and Prosecutions 6* (2019), <https://www.justice.gov/otj/page/file/1405001/download> [<https://perma.cc/R79S-RR7Q>] [hereinafter U.S. Dep’t of Just., *Indian Country Investigations and Prosecutions*] (describing how the FBI has investigative responsibility for federal crimes on Indian reservations, which it shares with other federal agencies). While tribes may independently choose to prosecute cases regardless of whether the federal government also does, tribal prosecutors in those cases may very well depend on federally conducted investigations, reports from those investigations, evidence collected by federal authorities, or other federal resources and materials. See *id.* at 2 (“In much of Indian country, tribal law enforcement and tribal justice systems hold criminals accountable . . . . These efforts are often in partnership with federal agencies or accomplished with support from federal programs and federal funding.”).

166. See *id.* at 28–34 (reporting nearly 800 declinations by United States Attorneys’ Offices (USAOs) in 2019). A declination is the decision by a 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 FBI, or the BIA. *Id.* at 5, 18.

Indian country crimes at astonishingly high rates.<sup>167</sup> This history has resulted in severe crimes going completely unanswered<sup>168</sup> with enough regularity that, in some respects, Indian country has established a reputation as a prosecution-free zone,<sup>169</sup> with particularly devastating impacts for Native women and girls.<sup>170</sup>

On the other hand, tribes and the federal government recognize that “in much of Indian Country, the [federal government] alone has the

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167. 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 Affs.*, 110th Cong. 1–4 (2008) [hereinafter *Examining Federal Declinations to Prosecute Crimes in Indian Country*] (statement of Sen. Dorgan, Chairman, S. Comm. on Indian Affs.) (“So the question is, why would we have declination rates of 50 percent on murder and manslaughter, 76 percent on adult sex crimes, including rape? I don’t know the answer to that, but I intend to find the answer to that.”). Congress requested an investigation into the issue, and the Government Accountability Office (GAO) reported the results in 2010. U.S. Gov’t Accountability Off., *GAO-11-167R*, U.S. Department of Justice Declinations of Indian Country Criminal Matters (2010). The report found that USAOs declined to prosecute 50% 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. The declination rate for violent crimes was 52% due to numerous attributed factors, such as lack of evidence, geography, and witness problems. See *id.* at 6–7, 27–28. USAOs declined 46% percent of assault matters and 67% percent of sexual abuse and related matters. *Id.* at 3, 9. Congress responded with new reporting requirements under TLOA. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 212(b), 124 Stat. 2261, 2267–68 (codified in scattered sections of 18 U.S.C. and 25 U.S.C.). But see ILOC, Roadmap, *supra* note 47, at 108 (“[The ILOC] heard ample testimony that [USAOs] sometimes do not communicate effectively . . . with Tribal jurisdictions when declining a case for Federal prosecution . . . notwithstanding TLOA’s declination reporting requirement.”). Nevertheless, declination rates in 2019 were lower than in previous years. U.S. Dep’t of Just., *Indian Country Investigations and Prosecutions*, *supra* note 165, at 3.

168. Crimes of sexual violence have had particularly high declination rates, which has been especially devastating for Native women. See, e.g., Amnesty Int’l, *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA 15–17* (2007), <https://www.amnesty.org/en/documents/amr51/035/2007/en/> [<https://perma.cc/KBW6-DWDZ>] (describing the high levels of impunity enjoyed by the attackers of Native American women). Some of this has been remediated by the reauthorization of VAWA. See NCAI, *VAWA SDVCJ Five-Year Report*, *supra* note 101, at iv (providing examples of successful prosecution under VAWA).

169. See, e.g., Gareth 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> [<https://perma.cc/A3P2-5HAZ>] (recounting a Native woman’s perception that sexual predators target Native women because of potential attackers’ awareness that the complicated jurisdictional schemes in Indian country make the prosecution of sexual violence committed on reservations less likely).

170. See *id.* (“In some U.S. counties composed primarily of Native American lands, murder rates of Native American women are up to 10 times higher than the national average for all races . . .”); see also Amnesty Int’l, *supra* note 168 (“Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in the USA in general.” (footnote omitted)).

authority to seek a conviction that carries an appropriate potential sentence when a serious crime has been committed.”<sup>171</sup> Thus, because of the strict sentencing limitations on tribes, the doctrine expressly acknowledges the sovereignty of tribes and, concomitantly, does not foreclose the possibility for major crimes to be taken up by federal prosecutors, even if the tribe also chooses to prosecute.

If the dual-sovereignty doctrine did not apply in the tribal–federal context, only one prosecution could occur, and tribes would find themselves making a virtually impossible set of choices. Consider the tribal dilemma in the case of a serious crime. In such an instance, a tribe would have to decide between staying its hand and seeing if the federal government would file charges or being the first and sole sovereign to take action. In electing to wait and defer to a federal prosecution, the tribe would essentially be forced into forgoing its own authority to address criminal activity that arose within its territory—hardly a scenario reflective or generative of self-determination.<sup>172</sup> Furthermore, a tribe would be risking the possibility that a tribal statute of limitations period could lapse in the meantime, foreclosing a tribal prosecution altogether if the federal government ultimately declined to bring charges.

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171. David W. Ogden, Memorandum for United States Attorneys With Districts Containing Indian Country, U.S. Dep’t of Just. Archives (Jan. 11, 2010), <https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country> [<https://perma.cc/WVP4-JZAQ>] [hereinafter Ogden, Memorandum].

172. Furthermore, federal sentences are typically harsher than state criminal sentences and obviously far harsher than tribal sentences, as discussed above. *Supra* notes 83–89 (describing the statutorily imposed limits on tribal sentencing authority). See 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, 2105–06 (2006) (explaining disparities in federal and state sentencing). Scholars have also addressed this comparison in the federal–tribal context. See 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) (comparing sentences for Indian country crimes); Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 *Calif. L. Rev.* 1409, 1411, 1416–17 (2011) (same); cf. Tribal Issues Advisory Grp., U.S. Sent’g Comm’n, *Report of the Tribal Issues Advisory Group 20–21, 22 & fig.1* (2016), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606\\_TIAG-Report.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf) [<https://perma.cc/8CH5-MKZ4>] (noting that, despite data limitations, anecdotal evidence and various academic studies contribute to an understanding that Native Americans are subject to harsher sentences for Indian country offenses prosecuted in federal court than occur for similar conduct committed in states). Scholars note that federal sentences also take defendants far from their reservation, family, and support systems. See, e.g., Creasie Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, 52 *Fed. Prob.* 48, 48, 50 (1988) (examining some reasons why family contact may be essential to reduce future criminal behavior and reintegrate offenders); Carrie Pettus-Davis, Matthew O. Howard, Vithya Murugan, Amelia Roberts-Lewis, Anna M. Scheyett, Claire Botnick & Michelle Vance, *Acceptability of a Social Support Intervention for Re-Entering Prisoners*, 6 *J. Soc’y for Soc. Work & Rsch.* 51, 53 (2015) (same); Washburn, *American Indians*, *supra* note 47, at 710–12 (“Unlike a felony involving only non-Indians, which would be routinely adjudicated at the local county or district courthouse, the Navajo felony will be tried in a distant federal court . . .”).

On the other hand, if the tribe moved to prosecute first, the tribe would only be able to impose a maximum sentence of one year of incarceration per count—or three years per count and a maximum of nine years total for multiple counts if the tribe has opted into TLOA—for even serious felonies. And the tribal prosecution would bar a subsequent federal one. In such cases, the tribe would have to sacrifice a potentially more severe federal sentence that it might view as more commensurate with the severity of the alleged crime to ensure that there is any criminal proceeding whatsoever.

Thus, the dual-sovereignty doctrine's application in the tribal–federal context ensures tribes have the independence to make their own decisions without being overly influenced or altogether controlled by considerations stemming from inter-sovereign dynamics. It also allows a reasonable work-around to the strict sentencing limitations imposed on tribes.

Nevertheless, the dual-sovereignty doctrine's application in the tribal–federal context does not come without challenges. These challenges are unique—given the nature of the tribal–federal relationship and how it differs from the state–federal relationship—and merit attention, as they magnify serious issues related to both tribal sovereignty and the individual rights of defendants. The following section explains the conditions that make dual prosecutions more likely in the tribal–federal context and their corresponding impacts.

B. *The Heightened Risk of Dual Prosecutions in the Tribal–Federal Context and Its Impact*

Having delineated the precise scenarios that may give rise to dual tribal and federal prosecutions, this section describes how and why the unique formation of Indian country criminal jurisdiction enhances the likelihood that dual prosecutions will occur in the tribal–federal context. It is important to emphasize the gravity of such outcomes, particularly because it is almost exclusively Indian defendants who are subject to concurrent tribal and federal criminal jurisdiction. This places Indians at an increased risk of exposure to dual prosecution vis-à-vis non-Indian defendants and may also produce sentencing disparities.<sup>173</sup>

There are about twice as many dual tribal and federal prosecutions each year than there are state and federal dual prosecutions.<sup>174</sup> These numbers are particularly striking given that Indian country represents a

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173. In fact, there is no evidence that any non-Indian has ever been subjected to a dual prosecution by a tribe and the federal government. Under existing law, such a prosecution could only occur if a tribe prosecutes a non-Indian pursuant to its jurisdiction under the VAWA reauthorization and the federal government also prosecutes the same individual based on the same conduct. No such case has ever been reported. For a discussion of the relative harshness of federal sentences compared to state sentences for the same or similar crimes, see *supra* note 172.

174. See *supra* note 148 and accompanying text (citing statistics given by counsel for the United States during oral argument in *Gamble*).

tiny fraction of the total land base in the United States and that the population living or otherwise spending significant time within Indian country is also miniscule compared to the population of the states. Under current data, enrolled members of federally recognized tribes comprise only around 0.83% of the U.S. population, and evidence suggests a majority of these tribal citizens now live off of reservation lands.<sup>175</sup> Notably, however, one need not necessarily be enrolled in a federally recognized tribe to be considered Indian for purposes of federal jurisdiction.<sup>176</sup>

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. The fact is that the federal government plays a primary role in criminal law enforcement in Indian country. As a result, the proportion of criminal cases arising in Indian country in which the federal government is the primary enforcing entity is significant.<sup>177</sup> This cannot be said of crimes occurring outside of Indian country and other federal enclaves. Thus, 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.

Furthermore, decades-long efforts by the federal government to limit tribal criminal authority and supplant it with federal authority have created a criminal justice system that is unique to Indian country. Within this unusual context, it is often difficult to reconcile general federal principles of prosecution and policies of prosecutorial discretion that follow more logically from the state–federal criminal jurisdiction framework. The distinct jurisdictional framework in the tribal–federal context even, at times, renders some of these principles and policies entirely inapplicable to the Indian country system.

For example, the DOJ employs the Petite Policy<sup>178</sup> to determine whether to pursue a second prosecution of a defendant who has already

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175. Profile: American Indian/Alaska Native, HHS Off. of Minority Health, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlID=62> [<https://perma.cc/22CW-HHNS>] (last modified Jan. 11, 2022).

176. See U.S. Dep't of Just., Criminal Resource Manual, *supra* note 57, § 686 (“Tribal membership . . . ‘has not been held to be an absolute requirement for federal jurisdiction.’” (quoting *United States v. Antelope*, 430 U.S. 641, 647 n.7 (1977))).

177. Furthermore, a number of states constitutionally or statutorily limit the dual-sovereignty doctrine, curtailing or barring dual prosecutions in state court. See generally Naughton, *supra* note 11 (analyzing the dual-sovereignty doctrine in the tribal–state context).

178. U.S. Dep't of Just., Just. Manual § 9-2.031 (2021) [hereinafter U.S. Dep't of Just., Just. Manual].

endured a state prosecution stemming from the same underlying conduct.<sup>179</sup> The Petite Policy “is grounded in fairness concerns to protect persons from the burdens associated with multiple prosecutions . . . even if the second proposed prosecution” would be permissible under the dual-sovereignty doctrine.<sup>180</sup> It permits (but does not require or even necessarily encourage) a dual federal prosecution only where: (1) the matter involves a “substantial federal interest,” (2) the first prosecution “left that substantial federal interest demonstrably unvindicated,” and (3) federal prosecutors believe they have a likelihood of obtaining a conviction for a federal offense.<sup>181</sup>

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 by the prior prosecution.<sup>182</sup> Such a scenario may arise in the case of a federal prosecution following a state prosecution if, for example, the initial prosecution did not result in conviction because of the failure to prove an element of the state offense that is not an element of the federal offense.<sup>183</sup> Or, even when the first prosecution achieved a conviction, a prosecutor may find the demonstrably unvindicated standard met if the prior sentence was either “manifestly inadequate . . . and a substantially enhanced sentence . . . is available through the contemplated federal prosecution” or the “charges in the initial prosecution trivialized the seriousness of the contemplated federal offense.”<sup>184</sup> Reports suggest that most Petite Policy approvals involve cases in which the DOJ perceives “that a guilty individual was either not punished or punished very lightly.”<sup>185</sup> It is exceedingly rare that the Petite Policy standard is met and a dual prosecution pursued in the state–federal context, since states have extensive criminal jurisdiction—more extensive than the federal government has—and wide latitude to exercise their sentencing authority unencumbered by federal restrictions.<sup>186</sup>

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179. See *id.* § 9-2.031(A), (C).

180. Adam Harris Kurland, *Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts* 5 (2001).

181. U.S. Dep’t of Just., *Just. Manual*, *supra* note 178, § 9-2.031(D).

182. *Id.* § 9-2.031(A).

183. *Id.*

184. *Id.*

185. Kurland, *supra* note 180, at 377 (quoting an American Bar Association task force report).

186. 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 148, at 54 (estimating that the “number of Petite [P]olicy approvals each year is about a hundred”); see also Kurland, *supra* note 180, 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

In the tribal–federal context, though, the same query into whether a defendant’s punishment was adequate in an initial tribal prosecution produces comparatively skewed results in favor of dual prosecution. Where federal law severely limits tribal criminal jurisdiction and sentencing authority, the proportion of cases is much higher in which the tribe, the federal government, or both may believe that the tribal charges trivialized the seriousness of the matter or that the tribal sentence imposed was manifestly inadequate. As this Article has detailed, federal law tightly constrains tribal sentencing authority, often making federal prosecution the only vehicle for achieving sentences in Indian country that are comparable to those seen in state courts. This is largely true even if a tribe exercises enhanced sentencing under TLOA.<sup>187</sup>

More fundamentally, the rarity of dual state and federal prosecutions is in part 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, criminal law enforcement, and punishment. The only overlapping criminal offenses between the federal government and the states are those types of offenses for which the federal government has constitutional authority to criminalize the underlying conduct—that is, federal crimes of general applicability.

Overlapping tribal and federal crimes, by contrast, include the general panoply of crimes that are not unique to federal jurisdiction, such as those enumerated in the MCA, like assault and murder.<sup>188</sup> This system—which allocates jurisdiction between tribal governments and the federal government, favoring the latter and severely restricting the former—creates comparatively fertile ground for dual prosecutions compared to the state–federal context. Furthermore, the nature of this heightened risk of dual prosecution of Indian country crimes overwhelmingly impacts Indian defendants because Indians, almost exclusively, are subject to tribal criminal jurisdiction.<sup>189</sup> Under existing law, dual tribal and federal prosecutions of a non-Indian could only occur if a tribe exercises jurisdiction pursuant to the VAWA reauthorization.<sup>190</sup> As discussed in section II.A, few

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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.

187. See, e.g., *Examining Federal Declinations to Prosecute Crimes in Indian Country*, supra note 167, at 40 (statement of M. Brent Leonhard, Deputy Att’y Gen., Confederated Tribes of the Umatilla Indian Reservation) (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).

188. See generally Tredeau, supra note 172, at 1416 (discussing how “Indians disproportionately dominate the federal violent-crime docket” as a result of this jurisdictional scheme).

189. See supra section II.A.

190. 25 U.S.C. § 1304(b)(2)–(3) (2018).

tribes currently do so, and no such dual prosecution has ever been publicly reported.<sup>191</sup> Thus, the issues of unfairness identified and discussed in section III.C are borne almost completely by Indians, while non-Indians remain relatively unaffected.

C. *Tribal Sovereignty Concerns and Issues of Unfairness Impacting Defendants*

This section turns to a discussion of issues the dual-sovereignty doctrine raises in the tribal–federal context for both tribal sovereignty and individual defendants. As discussed in Part I, the prohibition against double jeopardy is a two-fold protection, with both substantive and procedural components. The substantive component guarantees that no defendant will be punished twice for the same offense. The procedural component guarantees that no defendant will be prosecuted twice for the same offense. In the context of a dual prosecution, the substantive component of the double jeopardy protection can still be honored through mechanisms such as running the sentences imposed by the two sovereigns concurrently and crediting a defendant for time already served on the earlier imposed sentence when computing the defendant’s second sentence.<sup>192</sup> The procedural protection against the threat of multiple prosecutions, however, is not easily enforced through alternative mechanisms.

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191. See *supra* text accompanying notes 154–155.

192. For defendants who are dually prosecuted—first by a tribe, then by the federal government—and are found guilty in both forums, there are two possible outcomes.

First, if the tribal court sentence is undischarged at the time of federal sentencing, the federal court may impose a sentence on the defendant to run concurrently or consecutively with the defendant’s undischarged tribal court sentence, except “[multiple] terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt.” 18 U.S.C. § 3584(a) (2018). 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 time of federal sentencing “resulted from another offense that is relevant conduct to the instant offense of conviction.” U.S. Sent’g Guidelines Manual, *supra* note 145, § 5G1.3(b). 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); see also § 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. Sent’g Comm’n, [https://www.ussc.gov/sites/default/files/pdf/training/Podcasts/SPT\\_5G.pdf](https://www.ussc.gov/sites/default/files/pdf/training/Podcasts/SPT_5G.pdf) [<https://perma.cc/J2KA-6LU5>] (last visited Aug. 2, 2022) (illustrating the sentencing scenarios in a graphic).

Alternatively, if the tribal court sentence is fully discharged at the time of federal sentencing, the federal court may impose a sentence that fully credits the defendant for the time they have already served through a downward departure. See U.S. Sent’g Guidelines Manual, *supra* note 145, § 1B1.1(1)(F) (defining a downward departure as a departure “that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence”). The Federal Sentencing Guidelines contain a policy statement to this effect:

This reality gives rise to issues related to tribal sovereignty and unfairness to defendants. These issues are the focus of this section.

1. *Dual Prosecution: Tribal, Then Federal.* — As this Article has set forth, the allocation of criminal jurisdiction between the tribes and the federal government has created significant structural inequities in Indian country criminal justice. Part IV explicates several possibilities for reform of this system, some more ambitious and others more modest, that are meant to enhance tribal sovereignty and self-determination. Nevertheless, as this Article demonstrates, given the system that is currently in place and that greatly impacts the day-to-day lives of reservation Indians, the dual-sovereignty doctrine serves an important role and ought to remain in place unless and until there is broad, comprehensive reform.

From that starting place, it is important to understand two of the reasons that dual tribal and federal prosecutions, in that order, are particularly problematic. First, the potential for a subsequent federal prosecution following a tribal proceeding may undermine people's faith in and respect for tribal systems and call into question the finality of a tribal judgment. Second, individual defendants—who are most often Indian—may also experience serious disadvantages as they attempt to navigate the strategy involved in plea bargaining or going to trial in their first prosecution when the risk of a second, federal prosecution looms large. And such difficulties for a defendant may increase if the defendant is not provided a lawyer at the tribal court stage.

The complexities of the system dictate that dual prosecutions arising in Indian country likely more often take the form of a tribal prosecution followed by a federal prosecution, rather than the other way around. In these cases, federal authorities (and perhaps tribal authorities, as well) might deem a subsequent federal prosecution appropriate when a defendant whom the federal government perceives as obviously guilty was acquitted in the initial tribal prosecution or received, in the federal government's estimation, a "manifestly inadequate" sentence.<sup>193</sup> Such inadequacies would likely be attributable either to federal restrictions on tribal sentencing authority or the federal government's perception that

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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.

Id. § 5K2.23.

193. See U.S. Dep't of Just., Just. Manual, *supra* note 178, § 9-2031(A), (D) (describing the factors that federal authorities consider in deciding whether to conduct a subsequent federal prosecution, including whether the matter involves a substantial federal interest, whether the prior prosecution left that interest demonstrably unvindicated, and whether a trier of fact could convict on the evidence).

the tribal court proceedings “trivialized the seriousness of the contemplated federal offense.”<sup>194</sup>

A subsequent federal prosecution of an “obviously guilty” defendant may arise where the tribe fails to prove an element in the tribal prosecution that is not an element of the offense charged in the federal prosecution.<sup>195</sup> But the federal government may also be inclined to pursue a subsequent prosecution after acquittal merely due to a belief that it will be more likely to achieve a conviction because it has greater resources—financially and in terms of investigatory and prosecutorial capacity (including personnel with specialized training and available technology)—at its disposal to collect and effectively marshal evidence at trial.<sup>196</sup> More often than not, though, a dual federal prosecution probably arises simply because the federal government deems a prior tribal charge or sentence inadequate given the severity of the matter.<sup>197</sup>

Thus, while this Article posits that the dual-sovereignty doctrine is important to maintain in the tribal context, even the possibility of dual prosecution raises problematic questions about tribal sovereignty and systematic unfairness for defendants. Tribal sovereignty concerns arise because a subsequent federal prosecution potentially undercuts the finality of tribal court judgments in actuality, if not legally. When a subsequent federal prosecution hangs over the head of a tribal court proceeding, it may offer the appearance that tribal judgments are somehow insufficient or inadequate on their own, because they remain at the whim of possible additional federal action. This lack of finality may ultimately undermine the integrity of the tribal court system if, for example, community members do not buy into the system 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 for several reasons. First, the looming threat of dual prosecution can severely disadvantage defendants in their ability to make a well-informed, comprehensive case

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194. *Id.* § 9-2.031(D).

195. *Id.*

196. *Id.* (explaining that a substantial federal interest may be demonstrably unvindicated due to the “unavailability of significant evidence” that was “not timely discovered or known by the prosecution”).

197. See *supra* text accompanying notes 184–187. As discussed in section III.B, by contrast, 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 dual prosecutions the federal government actually pursues compared to how many it could pursue. The unique jurisdictional landscape in Indian country sometimes incentivizes dual prosecution, especially if charging decisions are not closely coordinated between tribes and the federal government up front.

strategy in tribal court. And such decisions will be particularly hampered if the defendant has not been afforded a lawyer in their tribal case. Additionally, the outcome of a tribal court proceeding could stick with the defendant and even increase the likelihood of a subsequent federal conviction or undermine a defendant's defense strategy in a federal prosecution.

Consider the case of *United States v. Bearcomesout*, which presents a real-life illustration of the tribal sovereignty concerns and potential issues of unfairness for defendants that may arise because of the dual-sovereignty doctrine.<sup>198</sup> 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 her tribal sentence stemming from equivalent charges based on the same incident.<sup>199</sup>

After an altercation with her husband one evening, Bearcomesout and her husband were taken to the local Indian Health Service (IHS) clinic, where her husband was pronounced dead later that night.<sup>200</sup> Bearcomesout was arrested upon her release from the IHS clinic.<sup>201</sup> The tribe charged Bearcomesout with homicide.<sup>202</sup> She was convicted in tribal court upon entering an *Alford* plea<sup>203</sup> and subsequently received the maximum sentence for homicide under Northern Cheyenne criminal law—one year in prison and a \$5,000 fine.<sup>204</sup> Upon her indictment on federal manslaughter charges, Bearcomesout was transferred to federal custody, where she remained while her federal prosecution unfolded.<sup>205</sup> Bearcomesout filed a motion to dismiss the federal charges on the grounds

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198. No. CR 16-13-BLG-SPW, 2016 WL 3982455 (D. Mont. July 22, 2016), *aff'd*, 696 F. App'x 241 (9th Cir. 2017), cert. denied, 139 S. Ct. 2739 (2019).

199. See *id.* at \*1.

200. See Opening Brief of Defendant-Appellant at 7–8, *United States v. Bearcomesout*, 696 F. App'x 241 (9th Cir. 2017) (No. 16-30276), 2017 WL 696209.

201. See *id.* at 8. The facts of the case are incredibly disturbing, including significant evidence that Bearcomesout may have been acting in self-defense as her husband brutally beat her. See *id.* at 8–9. It is not clear whether self-defense was raised at her tribal court proceeding.

202. 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 Crim. Code § 7-4-1 (1998).

203. See *Alford v. North Carolina*, 400 U.S. 25 (1970).

204. *United States v. Bearcomesout*, No. CR 16-13-BLG-SPW, 2016 WL 3982455, at \*1 (D. Mont. July 22, 2016), *aff'd*, 696 F. App'x 241 (9th Cir. 2017), cert. denied, 139 S. Ct. 2739 (2019). As of the writing of this Article, the Northern Cheyenne Tribe has not implemented enhanced sentencing authority under TLOA, so it is limited to imposing a maximum term of imprisonment of one year for any single offense. 25 U.S.C. § 1302(a)(7)(B) (2018); Northern Cheyenne Crim. Code § 7-1-7(A) (detailing that Class A offenses like criminal homicide carry a maximum sentence of a term of imprisonment not to exceed one year and a fine not to exceed \$5,000).

205. Opening Brief of Defendant-Appellant, *supra* note 200, at 4.

that they violated the Double Jeopardy Clause.<sup>206</sup> The district court denied her motion in light of the dual-sovereignty doctrine,<sup>207</sup> a ruling the Ninth Circuit later upheld on appeal.<sup>208</sup>

It is not evident in the court filings precisely why Bearcomesout was prosecuted by both the tribe and the federal government or whether the tribe requested the federal government bring charges in the matter. There is no evidence of coordination between tribal prosecutors and the local U.S. Attorney's Office (USAO). The tribal court 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.<sup>209</sup> The tribal court judge even urged the federal district court to credit Bearcomesout for the time she served under her tribal sentence in the event of a subsequent federal prosecution and sentence.<sup>210</sup>

The case broadly illustrates how the dual-sovereignty doctrine's operation in Indian country prosecutions forces tribes and defendants to make strategic decisions. It is possible, for example, that the tribe charged Bearcomesout rather than wait for a federal prosecution because it determined that a swift prosecutorial response was necessary. The tribe may also have been concerned that the federal government would, consistent with past practice, decline to prosecute the case, making a tribal prosecution the only way any prosecutorial response would come to fruition. Whatever its motivations, the tribe was able to make its decision to prosecute without federal interference.

When Bearcomesout was charged with homicide and assault in tribal court, she presumably weighed her options, including whether she should fight the charges at trial or negotiate a plea deal. She likely considered contextual factors, such as her feelings concerning her own innocence or guilt, the evidence against her in the prosecutor's possession, the evidence

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206. Memorandum in Support of Defendant's Motion to Dismiss the Indictment: Double Jeopardy at 13, *Bearcomesout*, ECF No. 26 ("This federal prosecution runs afoul of the Double Jeopardy Clause because the Northern Cheyenne tribal prosecution was thoroughly dominated by the United States government.").

207. *Bearcomesout*, 2016 WL 3982455, at \*1.

208. *United States v. Bearcomesout*, 696 F. App'x 241, 242 (9th Cir. 2017).

209. Memorandum in Support of Defendant's Motion to Dismiss the Indictment: Double Jeopardy, *supra* note 206, at 2–3 ("The Tribal 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.'" (quoting the Northern Cheyenne Tribal Court judge)).

210. Opening Brief of Defendant-Appellant, *supra* note 200, at 9 (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 citation 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, *supra* note 206, at 3.

in her favor, the cost to herself and others (like family members) posed by the possibility of a lengthy trial, and the relative costs and benefits of striking a plea deal with prosecutors to resolve the case more quickly in exchange for accepting punishment. These 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 Bearcomesout's situation presented an additional factor: the higher likelihood that the federal government might prosecute her a second time for the same conduct. This factor in turn raised questions about how the resolution of her tribal court prosecution could be used against her in a subsequent federal prosecution. For example, federal prosecutors might offer a guilty plea entered in tribal court as substantive or impeachment evidence against her in the federal case.<sup>211</sup> And the concerns related to this possibility are heightened when considering that Bearcomesout may not have had counsel during her tribal court case, making navigating these decisions even more challenging.

Bearcomesout ultimately decided to plead guilty to the charges 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 her family members than spending the time and resources to defend herself during what would otherwise likely be a lengthier court process.<sup>212</sup> The case filings show that the tribal court made Bearcomesout aware that the federal government could prosecute her again for the same incident.<sup>213</sup> But the filings are not clear about whether Bearcomesout was provided comprehensive information about how her plea in tribal court might be used to her disadvantage in a subsequent federal prosecution, and it is unclear whether such information is typically provided to tribal court defendants to enable them to make informed decisions in their initial tribal case.<sup>214</sup>

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211. See *infra* notes 215–237 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).

212. As of the writing of this Article, the Northern Cheyenne Tribe has not implemented enhanced sentencing authority under TLOA. See U.S. Dep't of Just., Tribal Law and Order Act Report, *supra* note 83, at 3–4.

213. See Memorandum in Support of Defendant's Motion to Dismiss the Indictment: Double Jeopardy, *supra* note 206, at 2–3 (“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 quotation marks omitted) (quoting the Northern Cheyenne Tribal Court judge)).

214. Notably, in another high profile dual tribal and federal 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 tribal court proceedings could be used against him in a subsequent felony prosecution in federal district court.” *Id.* at 1393. Nor do we know definitively whether the tribal court provided Bearcomesout with legal counsel in her case.

In fact, because the issue of how a tribal court guilty plea may be used in a subsequent federal proceeding is itself murky, it would be unsurprising to learn that tribal court defendants are not routinely provided this information. The issue turns on a variety of factors, including whether the offense charged by the tribe is a misdemeanor or a felony and whether the tribal court plea is being offered as substantive or impeachment evidence in the subsequent federal prosecution.

Pursuant to the Federal Rules of Evidence, if a defendant is charged with and pleads guilty to a felony in their initial tribal case, that guilty plea is admissible in the later federal proceeding.<sup>215</sup> This situation can only arise if the tribe has implemented TLOA-enhanced sentencing.<sup>216</sup> In such situations, the rule governing the admissibility of a tribal court felony conviction in a subsequent federal criminal prosecution based on the same conduct is clear: The judgment of conviction is admissible under Federal Rule of Evidence 803(22), which excepts the judgment from the general rule against 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

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.<sup>217</sup>

In other words, the judgment of conviction from the first prosecution is admissible as substantive evidence in the second, federal prosecution, assuming the above four requirements are met. A jury may assign to that evidence whatever weight it finds appropriate—which may, understandably, be significant since the prior conviction would concern many, if not all, of the same underlying facts.<sup>218</sup>

The Federal Rules of Evidence are less clear regarding the admissibility of a judgment of conviction from the first prosecution if it was a misdemeanor conviction. However, a misdemeanor conviction may also be admissible under current law, unless the judge in the second, federal prosecution excludes the evidence as overly prejudicial.<sup>219</sup> On one

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215. Fed. R. Evid. 803(22); Kurland, *supra* note 180, at 293.

216. See *supra* notes 86 and 154 and accompanying text.

217. Fed. R. Evid. 803(22).

218. See Kurland, *supra* note 180, at 296 (“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 pursuant to Federal Rule of Evidence 803(22).”).

219. See Fed. R. Evid. 403 (permitting the court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice”).

hand, the Advisory Committee Notes on Rule 803(22) urge that convictions for minor offenses be excluded “because motivation to defend at this level is often minimal or non-existent.”<sup>220</sup> However, Rule 801(d)(2)(A) dictates 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.<sup>221</sup> A misdemeanor guilty plea and its accompanying factual basis statement are just such an evidentiary admission.<sup>222</sup>

Historically, federal courts have made a distinction regarding Rule 801(d)(2)(A) and how it pertains to the admissibility of prior tribal court misdemeanor judgments in subsequent federal proceedings. Recognizing that tribal court convictions may not comport with all constitutional requirements—particularly the Sixth Amendment right to counsel—federal courts have distinguished between the admissibility of tribal court guilty pleas depending on whether their admission was sought as substantive evidence of guilt or as impeachment evidence, permitting the latter but not the former.<sup>223</sup> The distinction—between the admissibility of a tribal court plea in a subsequent federal prosecution for impeachment purposes versus as substantive evidence of guilt—held fast for some time,<sup>224</sup> until the Supreme Court’s 2016 decision in *United States v. Bryant*, which potentially casts doubt on its continuing viability.<sup>225</sup>

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.<sup>226</sup> It determined 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 the underlying conviction comported with both tribal law and the ICRA.<sup>227</sup> The Court, in an 8-0 decision, held that such convictions, which were “valid when

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220. Fed. R. Evid. 803(22) advisory committee’s note on proposed rules.

221. Fed. R. Evid. 801(d)(2)(A).

222. See Kurland, *supra* note 180, at 298.

223. *Id.* at 300 (noting that, “[b]ecause of the lack of 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”).

224. Compare *United States v. Ant*, 882 F.2d 1389, 1396 (9th Cir. 1989) (holding that a prior tribal misdemeanor guilty plea offered as substantive evidence of the defendant’s guilt in his dual federal prosecution was inadmissible because the plea did not comport with the Sixth Amendment), with *United States v. Denetclaw*, 96 F.3d 454, 457–58 (10th Cir. 1996) (holding that a prior tribal misdemeanor plea was admissible in the defendant’s dual federal prosecution, but only as impeachment evidence, not substantive evidence of guilt, because the plea did not comport with the Sixth Amendment).

225. 136 S. Ct. 1954, 1966 (2016).

226. *Id.* at 1959.

227. *Id.* at 1965.

entered[,] . . . retain that status when invoked in a subsequent proceeding.”<sup>228</sup>

In so holding, *Bryant* calls into question the continued viability of the distinction federal courts have historically made when interpreting the admissibility of prior tribal court pleas under Rule 801(d)(2)(A), suggesting they may be admissible in subsequent federal prosecutions as both impeachment evidence and as substantive evidence of guilt. 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.”<sup>229</sup> And the habitual offender statute itself does similarly, by placing tribal court judgments on the same level as those of other sovereigns.<sup>230</sup> In this sense, it demonstrates respect for the validity of tribal court processes and judgments.

But, from the defendant’s standpoint in a case of dual tribal and federal prosecution, the admissibility in a subsequent federal prosecution of evidence of a conviction in the first tribal prosecution raises serious concerns. For one, the issue related to using evidence of a conviction in a prior proceeding where there was a lack of motivation to defend is exacerbated in the tribal context because federal restrictions on tribal sentencing authority broaden the scope of cases that fall within this category.<sup>231</sup> Misdemeanors under tribal law include offenses that are truly misdemeanors, as well as many serious offenses that masquerade as misdemeanors because they are not punishable under tribal law as felonies (i.e., with more than one year of incarceration).<sup>232</sup> In these situations, a guilty plea and the associated factual basis statement or judgment of conviction in tribal court can be damning evidence against the defendant in a subsequent federal prosecution based on the same conduct because it may cover the full scope of the federal offense charged, rather than only a portion like a true misdemeanor or lesser included offense would.<sup>233</sup>

And finally, though many tribes provide legal counsel to defendants<sup>234</sup>—and, in fact, if the tribe exercises felony sentencing under

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228. *Id.*

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

230. 18 U.S.C. § 117 (2018).

231. See 25 U.S.C. § 1302(a)–(b) (2018) (limiting the sentences available to tribal courts to three years imprisonment and a \$15,000 fine for a single offense).

232. See *id.* § 1302(b).

233. 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—despite jury instructions mandating 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).

234. Contrasting the First 18 Implementing Tribes on Right to Counsel, Resources, Nat’l Cong. of Am. Indians, <https://www.ncai.org/tribal-vawa/resources/code-development/>

TLOA or exercises jurisdiction pursuant to the VAWA reauthorization, the tribe must provide counsel<sup>235</sup>—defendants are not guaranteed a right to counsel in tribal court, unless tribal law provides such a guarantee.<sup>236</sup> This means a tribe could initiate a prosecution of a defendant in tribal court and secure a guilty plea or a conviction without the defendant having had the benefit of legal counsel throughout the course of proceedings. Then, the outcome of and facts developed in the tribal court proceedings may be used against the defendant in a subsequent federal prosecution concerning the same underlying events and conduct. Notably, because VAWA—which currently provides the only avenue through which tribes may exercise jurisdiction over non-Indians under certain conditions—mandates that participating tribes provide counsel to defendants in STCJ cases, only Indian defendants will potentially experience dual tribal and federal prosecution without the benefit of counsel in their tribal case.<sup>237</sup>

2. *Dual Prosecution: Federal, Then Tribal.* — Though less common, it is also possible for a tribal prosecution to follow a federal one.<sup>238</sup> Because of the dynamics of prosecutorial authority in Indian country, these prosecutions probably happen most often when a tribe believes that a defendant is obviously guilty, but the defendant was acquitted in their first, federal case.

Histories of hostility and brutality by the federal government toward Indian people, as well as continuing cultural differences—especially in terms of conceptions of justice—between many tribal communities and non-Indians, breed distrust of federal authorities and the federal criminal justice system in some tribal communities. This distrust is exacerbated for many Indian individuals by well-founded beliefs that the American criminal justice system treats Indians more harshly than non-Indians.<sup>239</sup> The result 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 or family members in federal trials.<sup>240</sup> This

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judicial-court-resources/defendants-rights/contrasting-the-first-18-implementing-tribes-on-right-to-counsel [https://perma.cc/E6VT-FXWL] (last visited Aug. 6, 2022).

235. See 25 U.S.C. § 1302(c)(1) (TLOA); id. § 1304(d)(2) (VAWA reauthorization).

236. Id. § 1302(a)(6).

237. Id. § 1304(d)(2).

238. See, e.g., *Wetsit v. Stafne*, 44 F.3d 823, 826 (9th Cir. 1995) (denying a tribal member's petition for a writ of habeas corpus challenging the prison term she received for a tribal court manslaughter conviction, which occurred after she was acquitted by a federal jury of the charge of voluntary manslaughter under the MCA based on the same incident).

239. E.g., S.D. Equal Just. Comm'n, 2006 Final Report and Recommendations 2, 7–8, 10, 12 (2006), [https://ujcs.sd.gov/uploads/docs/Equal\\_Justice\\_Commission\\_Report.pdf](https://ujcs.sd.gov/uploads/docs/Equal_Justice_Commission_Report.pdf) [https://perma.cc/2Q82-ZCHU] (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, *supra* note 172, at 54–55 (examining “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” (footnotes omitted)).

240. See Washburn, *American Indians*, *supra* note 47, at 710–12 (discussing the “alienation” American Indians involved in the federal criminal justice system may

distrust, combined with logistical barriers 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 tribal communities.<sup>241</sup>

In terms of potential burdens to defendants posed by dual prosecution, familiar issues arise when a tribal prosecution follows a federal one—namely: the psychological burden to the defendant from the threat of dual prosecution; the impracticability for the defendant of being able to 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 prosecution, the burden of having to “marshal the resources and energ[y] necessary for [their] defense more than once for the same alleged criminal acts.”<sup>242</sup> But, when tribal prosecutions follow federal ones, these issues may be tempered because federal restrictions on tribal criminal authority will mean that the tribal offense charged and the type and length of any tribal sentence will often be less severe than the charge and sentence sought 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 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—that is, making “repeated attempts” at a conviction.<sup>243</sup>

#### IV. PROPOSED REFORMS

With Parts I through III having set the doctrinal foundation, this Part turns to potential reforms that address some of the consequences of the dual sovereignty doctrine’s application in Indian country prosecutions. From the outset, it is critical to note that by identifying, describing, and analyzing the phenomenon of dual prosecution in Indian country, this Article is not offering an implicit endorsement of the current Indian country criminal justice system. In fact, consistent with a long line of scholarship focused in this area, this Article asserts that the entire system is in desperate need of an overhaul to fully support tribal sovereignty and tribal rights of self-determination, as well as to adequately protect the rights of individual (largely Indian) defendants. It is also important to emphasize that the conflicts that arise from a system of dual prosecution

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experience due to cultural and linguistic differences and geographic distances between reservations and the cities where federal courthouses are located, resulting in decreased participation in the system and a reluctance to assist in investigations and trials).

241. See Jones & Ironroad, *supra* note 172, at 54–55 (describing the disproportionate sentences Native Americans receive as a result of having their cases heard in federal court).

242. *Abbate v. United States*, 359 U.S. 187, 198–99 (1959) (opinion of Brennan, J.).

243. *Green v. United States*, 355 U.S. 184, 187 (1957) (“[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .”).

are themselves the product of a carceral model that has, quite justifiably, come under serious scrutiny in recent decades.<sup>244</sup> It is a flawed model that does not leave adequate space or funding for tribal justice systems, such as restorative justice practices, traditional peacemaking, or other Indigenous methods of community-based problem solving. Federal recognition of and support for such systems would be a critical step in pursuing true justice in Indian country, as more fully discussed below.

The goal of this Article is to map dual prosecution in Indian country and to explain and analyze an existing, observable phenomenon that has gone ignored for far too long. The reforms, therefore, are designed to address the system as it currently exists. As such, these reforms should be understood as a possible “menu” of options—some ambitious and some more modest—that could, working in concert, improve the situation for defendants and for tribes in Indian country cases. Some of the proposals, such as amending the ICRA, should be understood as necessary to the success of other proposals, like changing the way the MCA applies to tribes. Other proposals, such as more federal funding for tribal justice systems, can stand alone. This Part recognizes that not all these reforms are feasible or even desirable for every tribe but presents them as a panoply of possibilities that ultimately should serve to benefit tribes, be tribally driven, and promote tribal sovereignty and self-determination.<sup>245</sup>

A. *Provide Adequate, Accessible, and Reliable Federal Funding to Support Tribal Legal System Development and Fulfill the Federal Trust Responsibility*

At the heart of all the proposed reforms is the principle that criminal law—both its pronouncement and enforcement—is most effectively handled locally, by tribes themselves. But this vision, which would dramatically improve the effectiveness and fairness of the criminal justice system in Indian country, is only practical if adequate and reliable funding is available to tribes to build, expand, and maintain their own justice systems in ways reflective of community conceptions of justice, even where that might mean a divergence from Western legal frameworks and institutions.

Virtually since its inception, the United States has acknowledged that it owes a trust responsibility to Indian tribes.<sup>246</sup> The obligation to act in the

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244. See *supra* notes 3, 6, 10 and accompanying text. As the rate of incarceration has increased in the United States, more attention is being paid to the carceral model of punishment. See, e.g., Nat'l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (“From 1973 to 2009, the state and federal prison populations . . . [rose] from about 200,000 to 1.5 million . . . . The U.S. penal population of 2.2 million adults is the largest in the world.”).

245. This Article does not include a full *Oliphant*-fix, even though the authors support such a change. But such a proposal would not address the very specific issue raised here—dual prosecution—and, therefore, is outside the scope of this particular project.

246. E.g., *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (affirming that there is an “undisputed existence of a general trust relationship between the United States and the

best interests of the tribes was evident from the United States' founding through hundreds of statutes, Supreme Court cases, and treaties.<sup>247</sup> Part and parcel of this duty is the federal government's obligation to allocate proper funding to support rights of tribal self-determination and to rebuild, revitalize, and support the tribal legal systems that the federal government spent hundreds of years destroying. This would include authorizing permanent, non-grant funding for tribal courts and tribal court personnel (including public defenders) and providing dedicated support for traditional, restorative justice programs and other tribally driven responses to Indian country crime. For these reforms to make an impact regarding dual prosecutions, key changes in federal policy would be required. For example, restorative justice programs would need to be funded at the same (or higher) levels as carceral systems, and the federal government, in turn, would have to afford respect to those systems, treating traditional forms of justice with respect equal to carceral systems when it comes to considering whether dual federal prosecutions are warranted. The latter principle could be brought to bear through a new federal policy statement, akin to the Petite Policy but specific to the tribal-federal context, providing guidance to federal prosecutors in situations where there is the potential for dual tribal and federal prosecutions.

Historically, federal funding for tribal justice systems has been inadequate and unreliable, which has been a contributing factor in their disintegration over time. Such funding is available primarily through the DOJ and Department of the Interior (DOI).<sup>248</sup> However, much of it is short-term, grant-based funding.<sup>249</sup> These funding streams are fragmented, inconsistent, and imbued with bureaucratic red-tape, making them impractical sources upon which to rely and even, at times, essentially

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Indian people"); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) ("Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with . . . [Indians]."); Larry B. Leventhal, *American Indians—The Trust Responsibility: An Overview*, 8 *Hamline L. Rev.* 625, 634 (1985) (explaining that there is a "unique trust obligation of the federal government to the Indian" which has resulted from the "special United States-Indian Nation relationship").

247. 1 *Am. Indian Pol'y Rev. Comm'n, Final Report* 126 (1977) ("[The trust responsibility] has its genesis in international law, colonial and U.S. treaties, agreements, Federal statutes, and Federal judicial decisions . . . . Its broad purposes, as revealed by a thoughtful reading of the various legal sources, is to protect and enhance the people, the property and the self-government of Indian tribes."); see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 *Utah L. Rev.* 1471, 1497–98 nn.117–120, 122 (collecting treaties); *id.* at 1499–1500 nn.130–132 (collecting Supreme Court cases); *id.* at 1514–15 nn.202–204 (collecting statutes).

248. See ILOC, *Roadmap*, *supra* note 47, at 83 ("Since the late 1980s, DOJ has become a major funder of Indian country criminal justice infrastructure. In FY 2012, for example, Congress allocated \$316 million to DOJ Native American programs . . . [and] provided the U.S. Department of Interior \$346 million for law enforcement and justice programming . . .").

249. *Id.* at 83, 85 (describing DOJ's funding approach as short-term, competitive grants).

inaccessible to many tribes.<sup>250</sup> This bifurcated administration of Indian country criminal justice funding through both the DOJ and DOI results in “duplicative, over managed, and misallocated” funds.<sup>251</sup> In fact, overall funding levels may be sufficient, but reorganization and streamlining at the federal level, as well as movement away from a grant-based system as the mechanism for disbursing funds, is necessary to resolve the accessibility and reliability issues that have long plagued federal funding of tribal justice systems.<sup>252</sup> The Indian Law and Order Commission made numerous recommendations for effecting such change.<sup>253</sup> Many of these modifications, or similar ones, are necessary for tribes on a broad scale to build, expand, and maintain their own justice systems capable of carrying out the full range of functions that comes with exercising their criminal authority to the fullest legal extent. Where tribes are able, they will begin to close some of the gaps in the jurisdictional maze that are today filled, if at all, by federal action.

B. *Amend the Indian Civil Rights Act to Permit Tribes to Exercise Unrestricted Sentencing Authority*

The dual-sovereignty doctrine’s unique import in the tribal–federal context stems directly from the federal government’s historical usurpation of tribal criminal authority and present-day limitations on tribal sentencing authority. Pursuant to the ICRA, most of the more than 570 federally recognized tribes today are limited to imposing a term of imprisonment up to one year and a \$5,000 fine for any single offense, regardless of severity.<sup>254</sup> The few tribes that have implemented enhanced sentencing can now impose a term of imprisonment up to three years and a fine of \$15,000 for any single offense, as well as stack penalties for multiple offenses in a single proceeding up to a maximum term of imprisonment of nine years.<sup>255</sup> Many of the dual prosecutions where the second prosecution is federal likely occur because of a lack of coordination between the two sovereigns during the investigatory and charging stages and because federal

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250. *Id.* at 83 (“Small Tribes and Tribes with thinly stretched human capital lack the capacity to write a ‘winning’ application. These Tribes often have disproportionate criminal justice needs, and the grant process can prevent them from accessing DOJ funds altogether.”).

251. *Id.* at 83.

252. See *id.* at 83–89 (“The Commission has concluded that a mechanism other than grant funding must be found. Base funding from pooled resources, for example, may be a way to more permanently and stably fund criminal justice in Indian country.”).

253. See *id.* at 89–91 (recommending the creation of an Indian-country component in DOJ and the end of grant-based and competitive criminal justice funding in DOJ in favor of a permanent, recurring base funding system).

254. 25 U.S.C. § 1302(a)(7)(B) (2018).

255. *Id.* § 1302(a)(7)(C)–(D).

(and potentially even tribal) authorities view the resolution available in tribal court as incommensurate with the severity of the offense.<sup>256</sup>

As tribes continue to build out and shore up their justice systems, this proposal could create a pathway for the full restoration of inherent tribal criminal jurisdiction. The ICRA currently governs sentencing schemes available to tribes and the attendant rights of defendants that tribes must ensure in return (although tribes can, of course, offer further protections to defendants through tribal law).<sup>257</sup> Congress should amend the ICRA to permit tribes to opt in to a system for the reassumption of their full, inherent sentencing authority, as long as defendants subject to that authority are afforded certain basic rights. This reform, on its own, would reduce the number of cases the federal government takes up for dual prosecution because tribes would be empowered to impose sentences commensurate with sentences imposed in comparable situations outside Indian country.

This reform is one that may be considered in tandem with other possible reforms that would even further reduce the possibility of dual prosecution.

C. *Create a Pathway for Tribes to Opt Out of Federal Major Crimes Act Jurisdiction*

The MCA, which Congress intended as only a temporary measure until assimilation of Native peoples rendered tribal institutions obsolete,<sup>258</sup> is incompatible with the federal government's policy of supporting tribal sovereignty and self-determination today. It is a vestige of the federal usurpation of tribal authority, and, as a result, the federal criminal apparatus it undergirds today not only garners significant skepticism and even outright opposition from tribal governmental institutions and citizens, ultimately hindering that system's effectiveness,<sup>259</sup> but also hampers the expansion and legitimation of tribal criminal justice institutions. As discussed throughout this Article, even where tribes today establish robust systems to respond to criminal matters involving their own members and occurring on their own lands, the possibility of a federal response—the nature of which may be entirely antithetical to a tribe's values—undermines the substance, finality, and legitimacy of tribal prosecutions.<sup>260</sup>

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256. See *supra* text accompanying notes 186–187.

257. 25 U.S.C. § 1302(b)–(e).

258. See *supra* note 62 and accompanying text.

259. See, e.g., ILOC, Roadmap, *supra* note 47, at 4 (discussing how the federal origins of the Indian country justice system lead tribal citizens to view it as illegitimate, which, in turn, diminishes crime-fighting capacity, dissuades victims from reporting, makes witnesses reluctant to testify, and fails to deter potential violators).

260. See, e.g., *id.* at 21 (noting that federal limitations on tribal criminal jurisdiction and sentencing authority “erode Tribal community members’ and outsiders’ confidence in Tribal governments’ ability” to maintain safety on tribal lands). One high-profile case exemplifying how federal and tribal interests and values sometimes significantly diverge is the death penalty case of Navajo Nation citizen Lezmond Mitchell. See Carl Slater, Opinion,

One meaningful way Congress could empower tribes and advance tribal self-determination is by creating a legislative pathway for tribes to withdraw from the MCA. Congress could condition withdrawal on a tribe having a criminal justice system that is prepared to address matters that are currently subject to federal jurisdiction under the MCA. This would necessarily require an accompanying amendment of the ICRA, as set forth in section IV.B. This proposal would not only support tribal self-determination, bringing federal Indian country criminal law more in line with contemporary federal Indian policy, but would also significantly reduce the number of matters subject to concurrent tribal and federal criminal jurisdiction and dual prosecution. Because only Indians may be prosecuted by the federal government pursuant to the MCA, such a shift would also diminish the dual-sovereignty doctrine's disparate impact on Indian versus non-Indian individuals in the tribal–federal context. Hand-in-hand with an amendment to the ICRA, tribes would then be free to enforce their own criminal laws unencumbered by federally imposed sentencing limitations. Such a program would ultimately enhance the legitimacy and impact of tribal justice systems and demonstrate federal respect for them, including for potential noncarceral approaches. If taken seriously by the federal government, it could provide an innovative pathway for federal support for the expansion of restorative justice practices and other Indigenous-centered responses to Indian country crime.

D. *Amend the Major Crimes Act and General Crimes Act to Exclude From Federal Jurisdiction Matters a Tribe Has Already Prosecuted*

Another possibility would be for Congress to amend the MCA and GCA to exclude from federal jurisdiction matters that a tribe has already prosecuted. Again, recognizing existing limitations, this Article proffers this reform could be effective only if accompanied by an amendment to the ICRA permitting tribes to exercise unrestricted sentencing authority, as discussed in section IV.B.

The GCA extends “the general laws of the United States . . . to the Indian country.”<sup>261</sup> But the federal government’s jurisdiction under the GCA does not extend to cases that involve “any Indian committing any offense in the Indian country who has been punished by the local law of the tribe.”<sup>262</sup> The MCA does not contain a similar exception. In keeping with the federal Indian policy of tribal self-determination, where tribal institutions and processes exist that are capable of handling criminal matters arising on their own lands, the federal government should take a step back.

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Lezmond Mitchell’s Death Sentence Is an Affront to Navajo Sovereignty, N.Y. Times (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/opinion/lezmond-mitchell-death-sentence-execution.html> (on file with the *Columbia Law Review*) (detailing the Navajo Nation’s opposition to the federal government’s execution of Mitchell).

261. 18 U.S.C. § 1152 (2018).

262. *Id.*

Consequently, Congress should consider amending the GCA exception to also exclude from its grant of federal jurisdiction cases in which the defendant has already been prosecuted—not merely punished—under the local law of the tribe and amending the MCA to add a similar provision.

This Article has already highlighted the problems that might arise if tribal sentencing limits are in place and only one prosecution is permissible.<sup>263</sup> Where federal law limits a tribe's ability to seek a resolution the tribe finds appropriate, that tribe might be discouraged from exercising its authority over certain serious matters.<sup>264</sup> With the knowledge that a tribal prosecution would foreclose any subsequent federal action under the GCA or MCA, a tribe may forgo exercising its own authority in favor of the federal government stepping in.<sup>265</sup> Thus, as stated at the outset, this reform would require a simultaneous relaxing of the current restrictions on tribal sentencing authority under the ICRA.

E. *Enhance Coordination Between Sovereigns and Utilization of Inter-Sovereign Agreements*

Though not all tribes are open to coordinating with federal law enforcement, many are. For these tribes, enhanced communication and coordination by tribal and federal authorities in the investigatory and charging stages can significantly reduce the overall number of dual tribal and federal prosecutions. To this end, tribal and federal agencies should implement formal protocol for handling concurrent jurisdiction cases.

On the federal side, the DOJ requires all USAOs with Indian country jurisdiction to “engage annually . . . in consultation with the tribes in th[eir] district” to develop operational plans in “coordination with the law enforcement agencies and tribes in that district.”<sup>266</sup> Furthermore, one of TLOA's main purposes was to enhance coordination among various sovereigns and their respective law enforcement agencies in Indian country.<sup>267</sup> TLOA requires that USAOs with districts containing Indian country designate at least one Assistant United States Attorney as a tribal liaison, whose duties include “[d]eveloping working relationships and maintaining

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263. See *supra* notes 171–172 and accompanying text.

264. See *supra* note 172 and accompanying text.

265. See *supra* notes 166–168 and accompanying text (discussing high federal declination rates of Indian country criminal cases) and text accompanying notes 150–152 (discussing barriers hindering the effectiveness of federal investigations and prosecutions of Indian country crime).

266. Ogden, Memorandum, *supra* note 171.

267. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(b)(1)–(2), (6), 124 Stat. 2261, 2263 (codified in scattered sections of 18 U.S.C. and 25 U.S.C.) (defining the Act's purposes to include clarifying responsibilities of different governments for crimes committed in Indian country and increasing and standardizing 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).

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."<sup>268</sup> However, a 2017 DOJ report states that implementation of this requirement "varies across USAOs and that no one in the Department has responsibility for ensuring that all USAOs comply with all TLOA requirements."<sup>269</sup> Regarding the DOJ directive for USAOs with Indian country jurisdiction to create operational plans, "no individual or entity was tasked under the directive with evaluating the plans to ensure adoption, update, or compliance," resulting in various deficiencies in the plans.<sup>270</sup> 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."<sup>271</sup>

Another recent key development in this area was the expansion of the initiative to increase the number of tribal Special Assistant United States Attorneys (SAUSAs) as a result of TLOA.<sup>272</sup> 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."<sup>273</sup> 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."<sup>274</sup> SAUSAs ensure a stronger line of communication between tribes and their respective USAOs.<sup>275</sup> This communication, in turn, facilitates coordinated charging decisions in concurrent jurisdiction cases, and in instances where the two sovereigns determine that one should prosecute a particular case instead of the other, nonprosecution agreements or multijurisdictional pleas should be standard procedure out of fairness to defendants. Knowledge

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268. *Id.* § 213.

269. Off. of the Inspector Gen., U.S. Dep't of Just., *Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010*, at 15 (2017), <https://oig.justice.gov/reports/2017/e1801.pdf> [<https://perma.cc/6KVC-4UVH>] [hereinafter U.S. Dep't of Just., *Review of the Department's Efforts*].

270. *Id.* at 15, 20–21, 24.

271. *Id.* at 19.

272. See Tribal Law and Order Act of 2010 § 213(d) (calling for the appointment of SAUSAs in districts that include Indian country to, for one, increase the prosecution of minor crimes in Indian country, especially where the crime rate exceeds the national average).

273. U.S. Dep't of Just., *Tribal Community Prosecutors Receive Federal Cross-Commissioning*, U.S. Dep't of Just. Archives (Nov. 17, 2011), <https://www.justice.gov/archives/opa/blog/tribal-community-prosecutors-receive-federal-cross-commissioning> [<https://perma.cc/A5TG-CPHQ>].

274. *Id.*

275. See U.S. Dep't of Just., *Review of the Department's Efforts*, *supra* note 269, at 29 ("[T]ribal prosecutors who serve as SAUSAs have improved information sharing with USAOs and greater involvement in federal case prosecutions.").

that dual prosecution is a diminished possibility would give defendants peace of mind and allow them to focus on case strategy in a single prosecution.

As of 2016, however, there were only twenty-two SAUSAs throughout the country, serving just nine of the forty-nine USAO districts with Indian country jurisdiction.<sup>276</sup> The DOJ found that program participation is low because of tribal sovereignty concerns. For example, some tribes may be uninterested in increased federal involvement in tribal law enforcement or may view federal objectives as conflicting with tribal duties or funding priorities.<sup>277</sup> Where productive communication and coordination exists or can be enhanced between tribal and federal authorities, however, mechanisms like case referrals and inter-sovereign deferred prosecution agreements, nonprosecution agreements, and multijurisdictional pleas could significantly reduce the overall number of matters that result in dual prosecutions.

#### CONCLUSION

The dual-sovereignty doctrine is a significant carve-out to the protections afforded by the Double Jeopardy Clause. Although the doctrine has long been recognized in American jurisprudence and significant scholarly attention has addressed its role and impact in the context of the states and the federal government, little attention has been paid to the way the doctrine functions in the tribal–federal context.

This Article has taken a preliminary step in examining the dual-sovereignty doctrine’s application and impact in the Indian country criminal justice system. It has detailed the unique interplay between the doctrine and the broader fabric of criminal law in Indian country, identifying the scenarios under current law where dual tribal and federal prosecutions may arise. It has highlighted the critical importance of the doctrine for ensuring safety and security in Indian country given the current jurisdictional framework. But this Article has also illuminated the real concerns the doctrine’s application raises for tribal sovereignty and for defendants subject to the system.

There are limitations to a project of this kind. With scant data on tribal and federal dual prosecutions in Indian country, much of this Article is theoretical. Further research, especially empirical, is necessary to move toward a better understanding of the dual-sovereignty doctrine in the tribal–federal context and the prevalence and characteristics of dual tribal and federal prosecutions. Such research will be crucial to further honing reform efforts, such as those offered in this Article, and improving Indian country criminal justice for all stakeholders involved.

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276. *Id.*

277. *Id.*

