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Statutory Bars to Dual Sovereign Prosecutions: The Minnesota and North Dakota Approaches Compared

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STATUTORY BARS TO DUAL SOVEREIGN PROSECUTIONS: THE MINNESOTA AND NORTH DAKOTA APPROACHES COMPARED

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I. INTRODUCTION

One of the foundation stones on which American law is built is the idea that a person should not be subjected to multiple prosecutions for the same offense.[1] This idea is embodied in the Federal Constitution and the constitutions of most of the states.[2] The United States Supreme Court, however, has long held that while multiple prosecutions are generally proscribed, it is constitutional for different sovereigns to subject a person to multiple prosecutions for the same act.[3] Such prosecutions are constitutional because the accused person, through the commission of a single act, committed an offense against two sovereigns.[4]

This exception to the prohibition against double jeopardy is called the dual sovereign doctrine. This doctrine long existed as a mere philosophical concept, and was not used to permit multiple prosecutions until the 1920s.[5] In the past thirty-five years, however, the doctrine has often been used to allow multiple prosecutions.[6] As the reach of federal crim-

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1. Green v. United States, 355 U.S. 184, 187-88 (1957). The Court in *Green* observed that:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the 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, as well as enhancing the possibility that even though innocent he may be found guilty.

Id.

2. *See infra* notes 11-21 and accompanying text (discussing federal and state double jeopardy prohibitions).

3. *See infra* notes 22-25 and accompanying text (discussing the basic tenets of the dual sovereign doctrine).

4. *Id.*

5. *See infra* notes 26-39 and accompanying text (discussing the early history of the dual sovereign doctrine).

6. *See infra* notes 40-47 and accompanying text (discussing the recent history of the dual sovereign doctrine). *See also* United States v. Koon, 34 F.3d 1416, 1439 (9th Cir. 1994) (allowing federal prosecution following state acquittal in the case of the police officers accused of beating Rodney King), *aff'd in part, rev'd in part on other grounds*, 116 S. Ct. 2035 (1996); United States v. Kummer, 15 F.3d 1455, 1461 (8th Cir. 1994) (allowing federal prosecution of accused North Dakota drug dealer following overturn of state conviction).

inal law expands, and the overlap between federal and state law grows, the use of the dual sovereign doctrine will inevitably expand.[7]

The reach of the dual sovereign doctrine, however, is not unlimited.[8] Nearly half the states have imposed some sort of statutory control on dual sovereign prosecutions.[9] This study will focus on the history and interpretation of the statutory bars to dual sovereign prosecutions in Minnesota and North Dakota. The Minnesota and North Dakota statutes have very similar roots, but have developed in different ways.[10] This study will analyze this development with an eye toward determining the current scope and reach of the statutes.

II. LEGAL BACKGROUND

The Fifth Amendment's Double Jeopardy Clause protects persons from being subjected to multiple prosecutions for the same offense.[11] The prohibition exists to shield the individual from the raw power of the state.[12] The Supreme Court in *North Carolina v. Pearce*[13] stated that the prohibition against double jeopardy "consist[s] of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[14]

The Court has struggled to define "same offense" in the double jeopardy context. In *United States v. Dixon*,[15] the Court indicated that the appropriate test of whether a prosecution is for the "same offense" is the "same elements" test.[16] This test was first enunciated in *Blockburger v. United States*.[17] In applying the *Blockburger* test, a court must compare the statutory provisions at issue and ask "whether each provision requires proof of a fact which the other does not."[18]

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7. *See* Andrew Blum, *Fighting Crime With a 'Kitchen Sink': Critics Say Federal Bill Promises More Than It Can Deliver and Offers Few Real Solutions*, NAT'L L.J., Nov. 7, 1994, at A1, A26 (discussing the increase in federal crimes under the 1994 crime bill and critics' claims that this will lead to increased and duplicative federal prosecutions).

8. *See infra* notes 48-61 and accompanying text (discussing barriers to the application of the dual sovereign doctrine).

9. *See infra* note 59 (listing state statutes limiting dual sovereign prosecutions).

10. *See infra* part III (discussing the history of the Minnesota and North Dakota statutes).

11. U.S. CONST. amend. V. The clause specifically provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." *Id.*

12. *See supra* note 1 (stating the philosophical basis of the prohibition against double jeopardy).

13. 395 U.S. 711 (1969).

14. North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted).

15. 113 S. Ct. 2849 (1993).

16. United States v. Dixon, 113 S. Ct. 2849, 2856 (1993). In *Dixon*, the Court rejected the "same conduct" test enunciated in Grady v. Corbin, 495 U.S. 508 (1990). *Dixon*, 113 S. Ct. at 2864.

17. 284 U.S. 299 (1932).

18. Blockburger v. United States, 284 U.S. 299, 304 (1932).

The Supreme Court extended the Federal Constitution's prohibition against double jeopardy to the states in 1969.[19] Most states, however, had imposed constitutional protections against double jeopardy long before the Court finally incorporated the federal double jeopardy bar.[20] Some states, including North Dakota, had both constitutional and statutory prohibitions against double jeopardy embodied in their law.[21]

The dual sovereign doctrine embodies an exception to the Federal Constitution's prohibition against double jeopardy.[22] Under the doctrine, multiple prosecution of a person under separate statutes requiring proof of the same elements is constitutional if the statutes are promulgated by discrete sovereigns.[23] For example, if a person accused of bank robbery was tried and acquitted in federal court, she could still face trial on bank robbery charges in state court, based on the identical acts and evidence.[24] The second prosecution would be constitutional because the person's single act was an offense to two separate sovereigns.[25]

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19. Benton v. Maryland, 395 U.S. 784, 794 (1969). The *Benton* Court stated that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . it should apply to the States through the Fourteenth Amendment." *Id.*

20. JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 78-79 (1969). Sigler indicated that only five states did not have "a constitutional provision against a second trial for the same offense" in 1969. *Id.* (footnote omitted). Those states were Connecticut, Maryland, Massachusetts, North Carolina, and Vermont. *Id.* at 79 n.6.

21. *See* N.D. CONST. art. I, § 12 (providing that "[n]o person shall be twice put in jeopardy for the same offense"); N.D. CENT. CODE § 29-01-07 (1993) (providing that:

> [n]o person can be twice put in jeopardy for the same offense, nor can any person be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted, or acquitted, or put in jeopardy, except as is provided by law for new trials).

The following statutes also impose similar broad restrictions against multiple prosecutions: ARIZ. REV. STAT. ANN. § 13-116 (1989); CAL. PENAL CODE § 687 (West 1985); GA. CODE ANN. § 16-1-7 (Harrison 1994); IDAHO CODE § 19-107 (1987); ILL. ANN. STAT. ch. 720, para. 5/3-4 (Smith-Hurd 1993); IOWA CODE ANN. § 816.1 (West 1994); LA. CODE CRIM. PROC. ANN. art. 591 (West 1981); MASS. GEN. LAWS ANN. ch. 263, § 7 (West 1990); MISS. CODE ANN. § 99-11-31 (1994); MONT. CODE ANN. § 46-11-503 (1995); NEV. REV. STAT. ANN. § 178.391 (Michie 1992); N.M. STAT. ANN. § 30-1-10 (Michie 1994); N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1992); OKLA. STAT. ANN. tit. 22, § 14 (West 1992); 18 PA. CONS. STAT. ANN. § 109 (1983); P.R. LAWS ANN. tit. 34, § 6 (1991); TEX. CODE CRIM. PROC. ANN. art. 1.10 (West 1977); UTAH CODE ANN. § 77-1-6 (1995); VA. CODE ANN. § 19.2-292 (Michie 1995); W.VA. CODE § 61-11-13 (1992).

22. *See* Moore v. Illinois, 55 U.S. (14 How.) 13 (1852) (advancing the principle that the Fifth Amendment's double jeopardy bar does not forbid successive prosecutions by different sovereigns based on the same act).

23. *Id.* The Court in *Moore* observed that:

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.

Id. at 19.

24. *See* Bartkus v. Illinois, 359 U.S. 121 (1959) (upholding bank robber's state court conviction that followed a federal court acquittal on bank robbery charges).

25. *Id.*

The legal theory supporting the dual sovereign doctrine has a long history.[26] In the early 1800s, the Supreme Court thought that state laws extending into areas already within the scope of federal law were invalid.[27] In *Fox v. Ohio*,[28] however, the Court abandoned this view, finding a state law that overlapped a federal law enforceable.[29] The Court, in *Fox*, admitted that its decision could lead to successive prosecutions based on the same act; and, it opined that such prosecutions would be constitutional.[30] In *United States v. Marigold*,[31] the Court read this dicta to be the holding of *Fox*.[32] The door was thus open to expansive development of what was to become the dual sovereign doctrine.[33]

It was not until the 1920s that the dual sovereign doctrine was applied to allow a successive prosecution by a second sovereign.[34] In *United States v. Lanza*,[35] the Court allowed the federal government to prosecute a group of defendants under the National Prohibition Act even though these defendants had been previously convicted, based on the same conduct, of violating state liquor laws.[36] The Court in *Lanza*,

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26. *See* J. A. C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 1-8 (1956) (discussing the early history of the dual sovereign doctrine).

27. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 21-23 (1820). Justice Washington, writing for the *Moore* Court, commented that "[t]o subject [the people] to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression . . . ." *Id.* at 23.

28. 46 U.S. (5 How.) 410 (1847).

29. Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847). The *Fox* Court upheld an Ohio law punishing distributors of counterfeit coins. *Id.* The law had been challenged as repugnant to federal law. *Id.* at 432.

30. *Id.* at 435. The *Fox* Court indicated that the government's "benignant spirit" would prevent offenders from being punished by both state and federal governments for the same act. *Id.* The Court stated, however, that it would be constitutional to mete out such successive punishments. *Id.*

31. 50 U.S. (9 How.) 560 (1850).

32. United States v. Marigold, 50 U.S. (9 How.) 560, 569-70 (1850). The *Marigold* Court interpreted *Fox* to have held "that the same act might . . . constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either . . . ." *Id.*

33. Grant, *supra* note 26, at 1 n.1. For example, the Court in *Moore v. Illinois* stated that it would not be a violation of the Constitution's prohibition against double jeopardy to inflict multiple punishments based on the same act. 55 U.S. (14 How.) 13, 19 (1852). The *Moore* Court commented that, if an offender is punished by a state and the federal government based on the same act, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Id.* The Court held consistently to this view until the early twentieth century, even though the doctrine was never invoked during this period to actually allow a successive prosecution by a second sovereign. *See* Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 291-92 (1992) (discussing the history of the dual sovereign doctrine).

34. *See* United States v. Lanza, 260 U.S. 377, 385 (1922) (allowing prosecution under the National Prohibition Act following defendants' conviction under state liquor laws).

35. 260 U.S. 377 (1922).

36. United States v. Lanza, 260 U.S. 377, 385 (1922). The defendants were convicted under Washington law of illegally manufacturing, transporting, and possessing liquor. *Id.* at 379. They were then indicted under the National Prohibition Act for illegally manufacturing, transporting, and possessing the same liquor, and for having a still and still paraphernalia. *Id.* at 378-79. The district court dismissed five counts of the indictment based on defendant's special plea. *Id.*

relying on a line of decisions dating back to *Fox*, found that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[37] This interpretation by the Court of the dual sovereign doctrine was applied in a series of cases,[38] but the doctrine seemed on the verge of extinction by the mid-1950s.[39]

In 1959, the Supreme Court reaffirmed and revived the dual sovereign doctrine.[40] In *Bartkus v. Illinois*,[41] the Court found that neither the Fifth Amendment's double jeopardy prohibition nor the Fourteenth Amendment's Due Process Clause barred a state bank robbery prosecution of a defendant who had been previously acquitted in federal court on charges based on the same acts.[42] In *Abbate v. United States*,[43] decided the same day as *Bartkus*, the Court found that the federal double

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37. *Id.* at 382. The Court in *Lanza*, while reaffirming the dual sovereign doctrine, seemed to hedge a bit in dealing with the interplay between the doctrine and the Fifth Amendment's double jeopardy bar. *Id.* The Court stated that the second prosecution at issue was valid under the Fifth Amendment be-cause the double jeopardy bar applied only to the federal government, and thus only forbade a second prosecution following a prior federal prosecution. *Id.*

38. Screws v. United States, 325 U.S. 91 (1945); Jerome v. United States, 318 U.S. 101 (1943); Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Westfall v. United States, 274 U.S. 256 (1927); Hebert v. Louisiana, 272 U.S. 312 (1926).

39. *See* Grant, *supra* note 26, at 6-7 (discussing the "increasing hesitancy on the part of the Court to sustain overlapping laws"). In *Pennsylvania v. Nelson*, for example, the Court upheld a Pennsylvania Supreme Court ruling that the Pennsylvania Sedition Act was superseded by the federal Smith Act. 350 U.S. 497, 509-10 (1956). The Court did not reach the question of "whether double or multiple punishment for the same overt acts . . . has constitutional sanction." *Id.* at 509. It commented, however, that "[w]ithout compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment." *Id.* at 509-10.

40. *See* Abbate v. United States, 359 U.S. 187 (1959) (upholding federal conviction following state court conviction); Bartkus v. Illinois, 359 U.S. 121 (1959) (upholding state court conviction following federal acquittal).

41. 359 U.S. 121 (1959).

42. Bartkus v. Illinois, 359 U.S. 121 (1959). Bartkus was tried and acquitted in federal district court on bank robbery charges. *Id.* at 122. He was then tried and convicted on similar charges in state court and sentenced to life imprisonment. *Id.* Justice Frankfurter, writing for the Court, indicated that since it was well settled that the Fifth Amendment's double jeopardy provisions did not apply to the states, any challenge to a state prosecution following a federal prosecution must rest on the Fourteenth Amendment's Due Process Clause. *Id.* at 124. Relying on Fox v. Ohio, 46 U.S. (5 How.) 410 (1847), and its progeny, the Court found the Due Process Clause did not bar a second trial following a prior trial by a different sovereign based on the same acts. *Bartkus*, 359 U.S. at 136. *Bartkus* was a 5-4 decision. Justice Black, joined by Chief Justice Warren and Justice Douglas, dissented. *Id.* at 150. Justice Brennan, likewise joined by Chief Justice Warren and Justice Douglas, also dissented. *Id.* at 164. Justice Black's arguments were relied on by the Supreme Courts of Pennsylvania and New Hampshire, which chose not to follow *Bartkus*. *See infra* notes 54-58 and accompanying text (discussing state court responses to the dual sovereign doctrine). Justice Black argued that:

> If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

Bartkus, 359 U.S at 155 (Black, J., dissenting).

43. 359 U.S. 187 (1959).

jeopardy bar did not prohibit a federal conspiracy prosecution of a defendant convicted in state court on charges based on the same acts.[44] In the years since 1959, the Court has consistently applied the dual sovereign doctrine to allow successive prosecutions.[45] In *Heath v. Alabama*,[46] for example, the Court affirmed a new application of the doctrine, finding no bar to a state murder prosecution that followed another state's conviction of the same defendant for the same murder.[47]

A number of mechanisms exist to limit wholesale application of the dual sovereign doctrine.[48] The federal government's ability to conduct successive prosecutions under the dual sovereign doctrine is limited by the *Petite* policy.[49] This policy is aimed at limiting federal prosecutions

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44. Abbate v. United States, 359 U.S. 187, 196 (1959). The defendants in *Abbate* had conspired to destroy telephone facilities and pled guilty in state court to conspiring to injure the property of another. *Id.* at 188. Based on the same acts, they were then indicted in federal court on charges of conspiracy to destroy communications facilities. *Id.* at 188-89. They were convicted in federal court, but appealed claiming a violation of the Fifth Amendment's double jeopardy prohibition. *Id.* at 189. The Court observed that the decision in United States v. Lanza, 260 U.S. 377 (1922), had firmly established the principle that the Fifth Amendment did not apply to federal prosecutions subsequent to state prosecutions based on the same acts. *Abbate*, 359 U.S. at 194. The Court indicated that this principle had been accepted "without question" since *Lanza* and therefore concluded that the defendants' prior state convictions did not bar subsequent federal prosecution. *Id.* at 194-96.

45. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 332 (1978) (allowing federal prosecution subsequent to tribal court conviction of same person based on same incident). The vitality of the dual sovereign doctrine has not always been certain. In the early 1960s, it seemed to be in decline. *See* Elkins v. United States, 364 U.S. 206, 215 (1960) (rejecting dual sovereign doctrine arguments and denying admission of evidence obtained by state authorities in a search that would have been a violation of the Fourth Amendment had it been conducted by federal authorities). The Court in *Elkins* commented that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* (footnote omitted). *See also* Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-78 (1964) (rejecting dual sovereign doctrine arguments and holding that "privilege against self-incrimination protects a state witness against incrimination under federal law as well as state law and a federal witness against incrimination under state as well as federal law"); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1544-49 (1967) (arguing that *Elkins* and *Murphy* were representative of the "erosion" of the dual sovereign doctrine).

46. 474 U.S. 82 (1985).

47. Heath v. Alabama, 474 U.S. 82 (1985). Heath had hired a pair of hit men to kill his wife. *Id.* at 83. The hiring took place in Alabama and the murder itself took place in Georgia. *Id.* at 83-84. Heath pled guilty to a murder charge in Georgia, and was then indicted on another murder charge in Alabama. *Id.* at 84-85. He argued that the Double Jeopardy Clause barred the second prosecution. *Id.* at 85. The Supreme Court, ruling for the first time on whether the Double Jeopardy Clause barred successive prosecutions by two states based on the same conduct, found that the second prosecution was not barred. *Id.* at 93-94. The court based its opinion on the dual sovereign doctrine. *Id.* at 88.

48. *See* Bartkus v. Illinois, 359 U.S. 121, 138 (1959) (discussing state statutory bars on successive prosecutions). The Court in *Bartkus* indicated that the state and federal legislatures were in the best position to determine how to deal with the issue of successive prosecutions by different sovereigns and that the Court "ought not to utilize the Fourteenth Amendment to interfere with this development." *Id.* at 138-39.

49. UNITED STATES ATTORNEYS' MANUAL § 9-2.142 (1992). Attorney General William P. Rogers announced the Justice Department's policy against dual or successive prosecutions on April 6, 1959. Delay v. United States, 602 F.2d 173, 176 (8th Cir. 1979). The policy takes its name from Petite v. United States, 361 U.S. 529, 529-30 (1960) (per curiam), a case in which federal prosecutors indicted and convicted the same defendant on conspiracy charges in two separate federal district courts. The offenses for which Petite was convicted arose out of the same transaction. *Id.* at 530. The govern

subsequent to prior state or federal prosecutions "based on substantially the same act, acts or transaction . . . ."[50] Subsequent prosecutions are allowed only if "there is a compelling federal interest supporting the dual or successive federal prosecution."[51] The policy, however, is not "constitutionally mandated."[52] Criminal defendants thus have no right to the *Petite* policy's protection unless the government chooses to invoke it.[53]

Several state courts have rejected the dual sovereign theory. In Pennsylvania, the supreme court has forbidden successive prosecutions based on the same transaction except when shown "that the interests of the Commonwealth of Pennsylvania and the jurisdiction which initially prosecuted and imposed punishment are substantially different."[54] The Michigan Supreme Court interpreted the Michigan Constitution[55] to require imposition of a similar rule against successive prosecutions.[56] In

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ment moved to vacate the second conviction based on its policy "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions." *Id.* The Court granted the motion without offering any "opinion on the question of double jeopardy." *Id.* at 531.

50. UNITED STATES ATTORNEYS' MANUAL § 9-2.142(A).

51. *Id.* The decision on whether a "compelling federal interest" exists is left up to "the appropriate Assistant Attorney General." *Id.* Federal prosecutors must obtain authorization from this person prior to "initiating or continuing" a successive prosecution. *Id.*

52. Rinaldi v. United States, 434 U.S. 22, 29 (1977) (per curiam).

53. *Id.* at 31. The Rinaldi Court observed that: "The overriding purpose of the Petite policy is to protect the individual from any unfairness associated with needless multiple prosecutions. The defendant, therefore, should receive the benefit of the policy whenever its application is urged by the Government." *Id.* (footnote omitted). *See also* Delay, 602 F.2d at 178 (holding "that a criminal defendant has no rights under the internal policy of the Justice Department to limit dual federal-state prosecutions").

54. Commonwealth v. Mills, 286 A.2d 638, 642 (Pa. 1971) (footnote omitted). *Mills* involved a defendant who had pled guilty to federal bank robbery charges and was then convicted on state charges arising out of the same transaction. *Id.* at 639. He challenged the state conviction as double jeopardy. *Id.* The Pennsylvania Supreme Court considered the dual sovereign doctrine and granted that it was valid. *Id.* at 640. Nonetheless, it criticized the doctrine for focusing on the interests of the state and federal governments rather than the individual. *Id.* at 641. Relying in part on Justice Black's dissent in Bartkus v. Illinois, 359 U.S. 121, 150 (1959), the court announced that it would allow successive prosecutions only when "substantially different" sovereign interests could be shown. *Mills*, 286 A.2d at 642. The court found that the case at issue did not meet its test and vacated the state conviction. *Id.*

55. MICH. CONST. art. I, § 15. In pertinent part, this section provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy." *Id.*

56. People v. Cooper, 247 N.W.2d 866, 870 (Mich. 1976). Cooper was acquitted on bank robbery charges in federal court, but subsequently convicted in state court on charges stemming from the same transaction. *Id.* at 867. The court read article one, section 15 of the Michigan Constitution to forbid such a successive prosecution. *Id.* at 870. It adopted the approach of the court in *Mills*, ruling that the state constitution "prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different." *Id.* The court observed that this rule was to be applied on a case-by-case basis. *Id.* Analyzing Cooper's case in light of this rule, it reversed his conviction. *Id.* at 871.

New Hampshire, the supreme court went even further, ruling that the state constitution[57] barred second prosecutions by different sovereigns.[58]

State legislatures, however, have been far more active than state courts in challenging the dual sovereign doctrine. Statutes restricting the application of the doctrine are in place in twenty-four states.[59] These statutes fall generally into two groups: statutes which bar successive prosecution based on the same offense[60] and those which bar successive prosecution based on the same act.[61] The remainder of this study will be devoted to analyzing the statutory bars to successive prosecutions by different sovereigns. This analysis will focus on the statutory schemes in

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57. N.H. CONST. pt. 1, art. 16. This provision provides that "[n]o subject shall be liable to be tried, after an acquittal, for the same crime or offense." *Id.*

58. State v. Hogg, 385 A.2d 844 (N.H. 1978). *Hogg* involved defendants who were acquitted on bank robbery charges in federal court, but then indicted on state charges stemming from the same transaction. *Id.* at 844. The court quickly found that *Bartkus*, 359 U.S. 121, was not binding on its interpretation of the state constitution. *Hogg*, 385 A.2d at 845. The court then stated its belief that the underlying basis of the double jeopardy protections in the federal and state constitutions was protection of the individual from repeat punishment. *Id.* The court observed that "[i]t is fundamentally and morally wrong to try a man for a crime of which he has already been tried and found not guilty." *Id.* The court also noted that Justice Black expressed a similar view in his dissent to *Bartkus*. *Id.* at 846. The court thus held that successive prosecutions by different sovereigns were barred by part one, article 16 of the New Hampshire Constitution. *Hogg*, 385 A.2d at 847. Analyzing the charges at issue, the court stated that "[i]t is pure fiction to say that they are different crimes because of dual sovereignty" and thereby sustained defendants' exceptions. *Id.* at 846-47.

59. ALA. CODE § 15-3-8 (1995); ALASKA STAT. § 12.20.010 (1995); ARK. CODE ANN. § 5-1-114 (Michie 1993); CAL. PENAL CODE § 793 (West 1985); DEL. CODE ANN. tit. 11, § 209 (1995); GA. CODE ANN. § 16-1-8 (Harrison 1994); HAW. REV. STAT. § 701-112 (1993); IDAHO CODE § 19-315 (1987); ILL. ANN. STAT. ch. 720, para. 5/3-4 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-4-5 (Burns 1994); KY. REV. STAT. ANN. § 505.050 (Michie/Bobbs-Merrill 1990); MINN. STAT. ANN. § 609.045 (West 1987); MISS. CODE ANN. § 99-11-27 (1994); MONT. CODE ANN. § 46-11-504 (1995); NEV. REV. STAT. ANN. § 171.070 (Michie 1992); N.J. STAT. ANN. § 2C:1-11 (West 1995); N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1992); N.D. CENT. CODE § 29-03-13 (1991); OKLA. STAT. ANN. tit. 22, § 130 (West 1992); 18 PA. CONS. STAT. ANN. § 111 (1983); UTAH CODE ANN. § 76-1-404 (1995); VA. CODE ANN. § 19.2-294 (1995); WASH. REV. CODE ANN. § 10.43.040 (West 1990); WIS. STAT. ANN. § 939.71 (West 1996).

60. ARK. CODE ANN. § 5-1-114 (Michie 1993); DEL. CODE ANN. tit. 11, § 209 (1995); HAW. REV. STAT. § 701-112 (1993); MINN. STAT. ANN. § 609.045 (West 1987); MISS. CODE ANN. § 99-11-27 (1994); N.J. STAT. ANN. § 2C:1-11 (West 1995); 18 PA. CONS. STAT. ANN. § 111 (1983); WIS. STAT. ANN. § 939.71 (West 1996).

61. ALA. CODE § 15-3-8 (1995); ALASKA STAT. § 12.20.010 (1995); CAL. PENAL CODE § 793 (West 1985); IDAHO CODE § 19-315 (1987); IND. CODE ANN. § 35-41-4-5 (Burns 1994); MONT. CODE ANN. § 46-11-504 (1995); NEV. REV. STAT. ANN. § 171.070 (Michie 1992); N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1992); N.D. CENT. CODE § 29-03-13 (1991); OKLA. STAT. ANN. tit. 22, § 130 (West 1992); UTAH CODE ANN. § 76-1-404 (1995); VA. CODE ANN. § 19.2-294 (1995); WASH. REV. CODE ANN. § 10.43.040 (West 1990).

place in Minnesota[62] and North Dakota,[63] which are representative of the two different statutory approaches noted above.

III. STATUTORY HISTORY

Both the Minnesota and North Dakota statutes barring successive prosecutions by different sovereigns have their origins in the 19th century codification movement.[64] Both can also be traced back to the individual most identified with this movement, David Dudley Field.[65] Field was the guiding force behind New York's law reform commissions,[66] which drafted a Code of Civil Procedure, a Code of Criminal Procedure, a Political Code, a Penal Code, and a Civil Code.[67] With the exception of the Code of Civil Procedure, the codes were not enthusiastically accepted

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62. MINN. STAT. ANN. § 609.045 (West 1987). This section provides:

> If an act or omission in this state constitutes a crime under both the laws of this state and the laws of another jurisdiction, a conviction or acquittal of the crime in the other jurisdiction shall not bar prosecution for the crime in this state unless the elements of both law and fact are identical.

Id.

63. N.D. CENT. CODE § 29-03-13 (1991). This section provides: "When an act charged as a public offense is within the jurisdiction of another state, country, or territory as well as in this state, a conviction or acquittal thereof in the former is a bar to a prosecution or indictment therefor in this state." *Id.*

64. *See infra* notes 70-84 and accompanying text (discussing the origins of the North Dakota and Minnesota statutes). The ideas of Jeremy Bentham are widely seen as providing the philosophical basis for the codification movement. *See* William B. Fisch, *Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D. L. REV. 485, 487-94 (1967) (discussing the 19th century codification movement and Bentham's influence on it). Bentham believed that the law should be written by legislators rather than propounded on a case-by-case basis by judges. *Id.* at 490-92. Bentham helped bring the idea of "law reform through codification" to the United States through correspondence in the early 1800s with President James Madison and each of the nation's state governors. CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 97-101 (1981). Partly as a result of Bentham's efforts, "law reform would remain a preoccupation of the legal profession" in the United States from the 1820s through the 1850s. *Id.* at 69.

65. *See infra* notes 70-84 and accompanying text (discussing the origins of the North Dakota and Minnesota statutes). Field was among the most influential law reformers of his day because of "his relentless . . . promotion of codification throughout most of his professional career." Cook, *supra* note 64, at 188. His involvement with the actual formation of draft codes was one factor that made him unique among his peers. *Id.*

66. *See* DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW 34-45 (1986) (discussing Field's paramount role in New York's law reform process). New York's 1846 Constitution called for the reduction of the law of the state to a written code. Fisch, *supra* note 64, at 497. The constitution called for the creation of a commission to accomplish this task. *Id.* Field was not among the original commissioners, but was appointed to the commission on practice and pleading in 1847. VAN EE, *supra*, at 34. His appointment "revitalized" the commission and the commission completed a draft Code of Procedure in 1848. *Id.* at 35.

67. *See* VAN EE, *supra* note 66, at 39-51 (discussing the commission's codification work). The final Code of Civil Procedure was completed in 1850, as was the Code of Criminal Procedure. *Id.* at 44. At the same time, however, the commission which had been given the task of reforming the substantive law of New York lost its authorization. Fisch, *supra* note 64, at 497. Field's "constant agitation" led to the commission's revival in 1857. *Id.* With Field as chairman, the commission completed the Political Code in 1860, the Penal Code in 1864 and the Civil Code in 1865. VAN EE, *supra* note 66, at 50-51.

in New York.[68] The codes, however, had a great influence in the Western United States, especially in California.[69]

North Dakota's statute barring prosecution, in the wake of a foreign prosecution or acquittal,[70] traces its roots to Field's Code of Criminal Procedure.[71] The New York commissioners completed this code in 1850.[72] Their goal had been to create a guide to criminal procedure that could be understood by citizens and non-law-trained magistrates.[73] New York did not adopt this code until 1881, but the Dakota Territory made it law in 1869.[74] Section 138 of the Code of Criminal Procedure provided that: "When an act charged as a public offence, is within the jurisdiction of another state, country or territory, as well as of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state."[75] North Dakota Century Code section 29-03-13 is identical to section 138, but for the substitution of the modern spelling of "offense" and the use of the words "in this state" instead of "of this state."[76]

Minnesota's "[f]oreign conviction or acquittal" statute[77] can also be traced to one of the Field commission's works: the Penal Code of 1865.[78] The Penal Code was "reported complete" in 1865.[79] It was

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68. *See* Burke Corbet et al., *Preface* to N.D. REV. CODES at iii, iv (1895) (discussing the legislative history of the New York statutes). The first draft of the Code of Procedure was enacted in New York in 1848. VAN EE, *supra* note 66, at 35. After much debate, the Penal Code and Code of Criminal Procedure were enacted in 1881. *Id.* at 332. Field's great work, the Civil Code, was never enacted into law in New York. *Id.* at 335.

69. Corbet et al., *supra* note 68, at iv-v (1895). Field's brother Stephen, later to become a justice of the United States Supreme Court, moved to California in 1848 and became active in California's law reform movement. *Id.* As a member of the legislature and of California's law reform commission, he was influential in the promulgation of a series of codes bearing great similarity to the New York codes. *Id.*

70. N.D. CENT. CODE § 29-03-13 (1991). *See supra* note 63 (setting out text of statute).

71. *See infra* notes 74-76 and accompanying text (comparing North Dakota's statute with the New York statute).

72. VAN EE, *supra* note 66, at 44.

73. *Id.* at 43.

74. Corbet et al., *supra* note 68, at iv-v.

75. COMMISSIONERS ON PRACTICE AND PLEADINGS, THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK § 138 (1850). Section 138 was not one of Field's innovations: it was derived from a prior New York statute. *Id.* The base statute applied specifically to persons accused of killing others in duels, and provided that:

> Every person indicted under the provisions of the last section [on duels], may plead a former conviction or acquittal for the same offence, in another state or country; and if such plea be admitted or established, it shall be a bar to any further or other proceeding against such person for the same offence within this state.

N.Y. REV. STAT. ch. I, tit. 1, § 7 (1846).

76. N.D. CENT. CODE § 29-03-13 (1991). *See supra* note 63 (setting forth text of statute).

77. MINN. STAT. ANN. § 609.045 (1987).

78. *See infra* notes 83-84 and accompanying text (comparing the Minnesota statute with the New York statute).

79. COMMISSIONERS OF THE CODE, THE PENAL CODE OF THE STATE OF NEW YORK (1865).

based on extant statutes which were "systematized and harmonized."[80] The code was not adopted in New York until 1882.[81] Minnesota adopted a Penal Code in 1885,[82] and its code drafters drew heavily on the work of the New York commissioners. The Minnesota drafters, however, did not parrot the model code. For example, section 739 of the New York Penal Code dealing with foreign convictions and acquittals provided:

> But whenever it appears upon the trial of an indictment that the accused has already been acquitted or convicted upon any criminal prosecution under the laws of another state, government or country, founded upon the act or omission in respect to which he is upon trial, this is a sufficient defense.[83]

While Minnesota's code drafters retained this language in enacting their own foreign conviction and acquittals statute, they also added language that clarified the circumstances under which the statute would apply and required that the prior conviction or acquittal be "on the merits."[84] Thus, unlike North Dakota, Minnesota showed itself willing, from the first, to depart from the original language of Field's codes.

The Field statutes on which the North Dakota and Minnesota statutes were based were products of the age in which they were drafted—the mid 1800s. The Federal Constitution's protection against double jeopardy did not apply to the states during this period.[85] Thus, protection against multiple prosecution was granted state-by-state through state constitutions and statutes.[86] Section 138 of the Code of Criminal Procedure and section 739 of the Penal Code were examples of state-level statutory protections against multiple prosecution. Each dealt with a narrow area of concern within the broad field of double jeopardy, and each imposed specific protection. The statutes thus also reflect one of

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80. VAN EE, *supra* note 66, at 50.

81. Corbet et al., *supra* note 68, at iv.

82. *See* 1885 Minn. Laws ch. 240 (providing for the separate publication of the penal code passed during the 1885 legislative session).

83. COMMISSIONERS OF THE CODE, THE PENAL CODE OF THE STATE OF NEW YORK § 739 (1865).

84. MINN. STAT. § 6818 (1894). The statute provided:

> Whenever it appears upon the trial of an indictment that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

Id.

85. *See supra* note 19 and accompanying text (discussing the 1969 extension of the constitution's double jeopardy protection to the states).

86. *See supra* notes 20-21 and accompanying text (discussing state constitutional and statutory protections against multiple prosecution).

the underlying philosophies of the codification movement: the desire to clarify the law through specific legislative enactments that allowed little room for judicial interpretation.[87]

Because these statutes were drafted so specifically, it is not difficult to determine what sort of action they were promulgated to bar: successive prosecution based on an act for which the individual charged had already been prosecuted in another jurisdiction.[88] As such, these statutes reflect the policy of the era in which they were drafted. Even though the Supreme Court of the mid-1800s was ready to admit the constitutionality of multiple prosecutions by different sovereigns, it was not inclined to allow such prosecutions.[89] No less an authority than Justice Story stated that allowing separate sovereigns to twice punish an offender for the same act would be contrary to "the principles of the common law, and the genius of our free government."[90]

North Dakota Century Code section 29-03-13 arguably reflects Story's attitude. It was adopted by Dakota Territory in 1869[91] and was based on a statute that was law more than a decade before the Supreme Court articulated the dual sovereign doctrine.[92] It was absorbed into

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87. *See, e.g.*, JEREMY BENTHAM, THEORY OF LEGISLATION 155-57 (R. Hildreth trans., 1911). Bentham argued that when laws are written and literally followed, even if "difficult, obscure [or] incoherent," citizens will at least have a chance to understand them. *Id.* at 155. On the other hand, Bentham stated that when judges are allowed to freely interpret or make laws "there are no bounds to the possible evil" because the law can be changed from case to case. *Id.* at 155-56.

88. *See* COMMISSIONERS OF THE CODE, THE PENAL CODE OF THE STATE OF NEW YORK § 739 (1865), Commissioners' Note, (stating that "[t]his section is intended to apply in cases where the foreign acquittal or conviction took place in respect to the particular *act or omission* charged against the accused upon the trial in this state, and is not restricted to cases where the accused was tried abroad under the same *charge*").

89. *See* J. A. C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1311 (1932) (stating that United States v. Lanza, 260 U.S. 377 (1922), was the first case "in which the Supreme Court, faced with an actual instance of double prosecution, failed to find some remedy, consistent with the law, to avoid it"); Coleman v. Tennessee, 97 U.S. 509 (1878) (ordering state authorities to release defendant who had been convicted of murder in state court in the wake of his conviction on the same charge by a military tribunal; Justice Field indicated that the dual sovereign doctrine was not implicated because the federal government had exclusive jurisdiction over the defendant).

90. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 72 (1820) (Story, J., dissenting). In Fox v. Ohio, 46 U.S. (5 How.) 410, 439 (1847) (McLean, J., dissenting), the case in which the Supreme Court opened the door to the development of the dual sovereign doctrine, Justice McLean expressed agreement with Story. He stated that:

> There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government.

Id.

91. *See supra* notes 74-76 and accompanying text (discussing Dakota Territory's adoption of the Code of Criminal Procedure which contained the base version of the foreign conviction statute).

92. *See supra* note 75 and accompanying text (discussing the history of section 138 of Field's Code of Criminal Procedure).

North Dakota law at statehood[93] and has been little altered during the state's history.[94] Because the statute essentially has no North Dakota legislative history, it seems reasonable to conclude that it continues to reflect the venerable policy against dual sovereign prosecutions that undergirded its model. Whether this policy remains the policy of North Dakota is a question that likely will not be answered until section 29-03-13 is actually interpreted to bar a prosecution.[95]

The legislative history of Minnesota's foreign prosecution statute has not been as uneventful as that of North Dakota's. The statute survived fundamentally unaltered from 1885 to 1963.[96] In 1963, however, the statute was repealed[97] and replaced by a new foreign prosecution statute.[98] This action was taken as part of Minnesota's criminal code revision.[99] The new statute, Minnesota Statutes Annotated section 609.045, was a rewording of the previous statute and included language that explicitly broadened the application of the statute to federal court convictions as well as those of other states or countries.[100] The statute was apparently routinely used to block state prosecutions that followed federal prosecu-

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93. N.D. REV. CODE § 7868 (1895). Section 7868 is identical to North Dakota Century Code section 29-03-13, the current statute. The Revised Code of 1895 was North Dakota's first code compilation. Corbet et. al, *supra* note 68, at vi. Section 7868 of the 1895 code was an amended version of Dakota Code of Criminal Procedure section 82. N.D. REV. CODE § 7868 (1895). The Dakota Code statute provided: "When an act charged as a public offense is within the jurisdiction of another territory, county, or state, as well as this territory, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this territory." DAKOTA CODE CRIM. PROC. § 82 (1877).

94. *See supra* notes 70-76 and accompanying text (tracing the history of North Dakota Century Code section 29-03-13).

95. In the one reported case which mentions North Dakota Century Code section 29-03-13, the North Dakota Supreme Court held the statute not to bar a drug delivery prosecution in North Dakota that followed a Florida drug conspiracy conviction of the same defendant. State v. Mayer, 356 N.W.2d 149 (1984).

96. *See* MINN. STAT. § 610.23 (1947). This statute provided:

> When, upon the trial of any person indicted for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission in respect of which he is upon trial, such former acquittal or conviction is a sufficient defense.

Id.

97. 1963 Minn. Laws ch. 753, art. 2, § 17.

98. 1963 Minn. Laws ch. 753, art. 1, § 609.045. Before its 1983 amendment, this statute provided: "If an act or omission constitutes a crime under both the laws of this state and the laws of another jurisdiction, a conviction or acquittal of such crime in the other jurisdiction bars prosecution for the crime in this state." *Id.*

99. 1963 Minn. Laws ch. 753. *See* Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417 (detailing the policies that drove the criminal code revision).

100. MINN. STAT. ANN. § 609.045 (1987) (amended by 1983 Minn. Laws ch. 152, § 1). The advisory committee comment indicated that the revised statute was a rewording of Minnesota Statutes section 610.23 "without change in substance," but for the addition of language that explicitly allowed inclusion of federal court convictions. *Id.*

tions based on the same acts.[101] Because of this fact, section 609.045 did not linger in obscurity.[102]

Section 609.045 came before the Minnesota legislature for amendment in 1983. Representative Coleman, sponsor of the amendment, pushed for the addition of new language to Section 609.045 providing that conviction or acquittal in other jurisdictions would *not* bar a Minnesota prosecution unless "the elements of both law and fact are identical."[103] Coleman indicated that the new test was intended to mirror the *Blockburger* test.[104] Testifying in support of the amendment, Melinda Elledge, an assistant county attorney for Ramsey County, stated that an amended statute would still protect defendants.[105] She indicated, by way of example, that the redrafted statute would protect bank robbers from being prosecuted under fundamentally similar state and federal bank robbery statutes.[106] On the other hand, Representative Coleman stated that an amended statute would protect "citizens" when criminals commit different federal and state offenses in a "single behavioral incident" by allowing both state and federal prosecutions.[107]

Elledge cited *State v. Ming Sen Shiue*[108] as an example of an instance where section 609.045 had barred a state prosecution.[109] In that case, Ming Sen Shiue kidnapped a woman and her daughter in May 1980 and held them prisoner for seven weeks.[110] He was convicted on

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101. *See* Tape of *Hearing on H.F. 530 Before the Subcomm. on Judicial Administration of the Minnesota House Comm. on the Judiciary* (March 16, 1983) (on file with Minnesota House Librarian) [hereinafter Hearing] (testimony of Melinda S. Elledge, Assistant Ramsey County Attorney) (detailing several instances in which state prosecutions were barred because the defendant had been previously tried in federal court).

102. *See infra* notes 103-115 and accompanying text (discussing the 1983 amendment of Minnesota Statutes section 609.045).

103. Hearing, *supra* note 101 (statement of Rep. Coleman).

104. *Id.* Rep. Coleman indicated that Blockburger v. United States, 284 U.S. 299 (1932), was the leading dual sovereign doctrine case, and that it barred prosecutions by different sovereigns in cases in which the "law and fact" at issue are identical. *Id.* Application of the *Blockburger* test, in reality, will not bar a dual sovereign prosecution: two offenses cannot have the same elements when they are offenses against different sovereigns. *See supra* notes 18-25 and accompanying text (explaining the *Blockburger* test and the dual sovereign exception). Minnesota courts had, however, long applied a "*Blockburger*-like" test to all double jeopardy matters at the time the amendment to section 609.045 was considered. *See infra* notes 147-152 and accompanying text (discussing Minnesota's approach to double jeopardy issues). The judicial *Blockburger*-like test was phrased in the same terms used by the amendment to section 609.045. *See* Lupino v. State, 171 N.W.2d 710, 711 (Minn. 1969) (laying out the test).

105. Hearing, *supra* note 101 (testimony of Melinda Elledge).

106. *Id.*

107. *Id.* (statement of Rep. Coleman). Elledge testified that the unamended statute gave defendants an incentive to rush into federal court so that they could claim a bar to state prosecution, and urged passage so that this incentive could be removed. *Id.* (testimony of Melinda Elledge).

108. 326 N.W.2d 648, 649-50 (Minn. 1982).

109. Hearing, *supra* note 101 (testimony of Melinda Elledge).

110. State v. Ming Sen Shiue, 326 N.W.2d 648, 649-50 (Minn. 1982). Shiue kidnapped Mary Stauffer and her daughter Elizabeth on May 16, 1980, and held them prisoner in his St. Paul apartment

federal kidnapping charges, and the state was thus barred from prosecuting him for rape and assault charges that arose out of the same course of conduct.[111] With this notorious case in the background,[112] and with broad support from the law enforcement community,[113] the amendment to section 609.045 moved through the Minnesota House and Senate with little debate.[114] The amended statute became law August 1, 1983.[115]

The Minnesota and North Dakota foreign convictions statutes overall have similar roots but have grown in quite different ways. The North Dakota statute's language has imposed, since its inception, an affirmative bar against dual sovereign prosecutions.[116] It thus reflects a very old and possibly obsolete legal philosophy, one that viewed such prosecutions as clearly wrong.[117] The Minnesota statute, however, has been altered to provide only a conditional bar to dual sovereign prosecutions.[118] It probably reflects a more "modern" attitude because it frees prosecutors to be "tough on crime."[119] The next section of this study will examine what guidance can be gleaned from the courts as to how these fundamentally different statutes should be interpreted.

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until they escaped on July 7, 1980. *Id.* Shiue also killed six-year-old Jason Wilkman, who witnessed the abduction. *Id.* Shiue was tried on state charges for the Wilkman killing, was convicted of second degree murder, and was sentenced to 40 years in prison. *Id.* at 649.

111. Hearing, *supra* note 101 (testimony of Melinda Elledge). Shiue was charged in federal court with kidnapping and interstate transportation. United States v. Ming Sen Shiue, 650 F.2d 919, 920 (8th Cir. 1981). He was found guilty on these charges and sentenced to life in prison. *Regional News*, UPI, Mar. 18, 1981, *available in* LEXIS, Nexis Library, UPI File.

112. In a UPI poll of subscribers and broadcasters, the Ming Sen Shuie kidnapping case was named the number three Minnesota news story of 1980. Richard McFarland, *Minnesota Year in Review–Top Ten*, UPI, Dec. 29, 1980, *available in* LEXIS, Nexis Library, UPI File.

113. Hearing, *supra* note 101 (testimony of Melinda Elledge). The Minnesota State Sheriff's Association, the Minnesota County Attorney's Association, the Minnesota Attorney General's Office, and the Crime Victim/Witness Programs of Minneapolis and St. Paul supported the amendment. *Id.* Sheriff Chuck Zacharias testified that it was difficult to explain to victims why state prosecution of a defendant was barred in certain cases, and indicated that if the amendment was passed, it would give victims some satisfaction because they would know that justice was really being served. Hearing, *supra* note 101 (testimony of Chuck Zacharias).

114. *See* Minutes of *Hearing on H.F. 530 Before the Subcomm. on Judicial Administration of the Minnesota House Comm. on the Judiciary* (March 16,1983); Minutes of *Hearing on H.F. 530 Before the Minnesota House Comm. on the Judiciary* (March 21, 1983); Minutes of *Hearing on S.F. 549 Before the Subcomm. on Criminal Law of the Minnesota Senate Comm. on the Judiciary* (March 25, 1983); Minutes of *Hearing on S.F. 549 Before the Minnesota Senate Comm. on the Judiciary* (March 29, 1983) (indicating that all committees forwarded the amended statute with little debate).

115. 1983 Minn. Laws ch. 152, § 1.

116. *See supra* notes 70-76 and accompanying text (detailing the history of the North Dakota foreign conviction statute).

117. *See supra* notes 88-90 and accompanying text (discussing the legal philosophy underlying the North Dakota statute).

118. *See supra* notes 103-115 and accompanying text (discussing the amendment of Minnesota Statutes section 609.045).

119. *See supra* note 113 (discussing support for the amended statute within the law enforcement community).

IV. STATUTORY INTERPRETATION

Minnesota Statutes Annotated section 609.045 and North Dakota Century Code section 29-03-13 have long histories.[120] Neither, however, has been much discussed by Minnesota nor North Dakota courts, and only two reported opinions deal specifically with these statutes.[121] Fortunately, the extant opinions provide significant insight into how the statutes should be construed.[122]

The North Dakota Supreme Court faced the question of whether section 29-03-13 could be used to bar a state prosecution in *State v. Mayer*.[123] The defendant in *Mayer* had pled guilty in Florida to conspiracy to distribute drugs.[124] He was charged with possession and delivery of the same drugs in North Dakota.[125] He argued that section 29-03-13 should bar the North Dakota prosecution because both the North Dakota charges and the Florida conviction were based on the same acts.[126] Justice VandeWalle, expressing the unanimous opinion of the North Dakota Supreme Court, found that section 29-03-13 did not bar the second prosecution.[127] He stated that delivery and distribution of drugs in North Dakota were "not acts 'within the jurisdiction of another state'" as required by the statute.[128] Furthermore, he found that conspiracy was "not the same act as delivery . . . or possession" of drugs.[129]

The statutory reading of the *Mayer* court may be characterized as restrictive. In finding that delivery and possession of the drugs were not included in the act of conspiring to deliver the drugs, the court in *Mayer* seemed to read "act" as a very specific event. Contrast this with the preamendment interpretation of the Minnesota statute: Representative

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120. *See supra* part III (discussing the histories of the North Dakota and Minnesota statutes).

121. *See* State v. Aune, 363 N.W.2d 741 (Minn. 1985) (applying section 609.045); State v. Mayer, 356 N.W.2d 149 (N.D. 1984) (applying section 29-03-13).

122. *See infra* part IV (discussing the judicial interpretation of the North Dakota and Minnesota statutes).

123. 356 N.W.2d 149 (N.D. 1984).

124. State v. Mayer, 356 N.W.2d 149, 151 (N.D. 1984). Mayer pled guilty to "conspiracy to possess, deliver, or sell in excess of 100 pounds of marijuana." *Id.* The marijuana that the conspiracy charge was based on was marijuana that police seized from Mayer in North Dakota. *Id.*

125. *Id.*

126. *Id.* At his North Dakota trial, Mayer was found guilty of possession and delivery of marijuana. *Id.* at 150. He raised the issue of statutory bar on appeal. *Id.* Mayer had initially also been charged with conspiracy under North Dakota law. *Id.* at 151. These charges were dismissed. *Id.*

127. *Id.* at 151-52.

128. *Id.* at 151.

129. *Mayer*, 356 N.W.2d at 151. VandeWalle stated that "[c]onspiracy . . . consists only of an agreement to engage in or cause conduct constituting an offense, together with an overt act, which need not itself be a crime." *Id.* He then observed that the acts for which Mayer was charged in North Dakota were offenses that required actual possession and distribution of drugs. *Id.* at 152. He indicated that it would be "illogical" to find that a conviction for conspiracy to commit an act barred prosecution for commission of the act itself. *Id.*

Coleman construed the "act" language contained in the Minnesota statute as meaning a "single behavioral incident."[130] Relying on this reading, she asserted that a convicted felon who robbed a grocery store using a firearm, and then rushed to federal court to plead guilty to being a con-victed felon in possession of a firearm, would escape a robbery prosecution in Minnesota based on the statute.[131] Under the rationale of *Mayer*, the North Dakota Supreme Court would likely determine that the act of possessing the firearm and the act of robbing the store were different acts and there would therefore be no bar to a second prosecution under section 29-03-13. The North Dakota Supreme Court thus may have already dealt with the "evil" that seems to have inspired Minnesota's amendment of its statute: an expansive reading of the term "act."

Justice VandeWalle's characterization in *Mayer* of the jurisdiction language in section 29-03-13 also could limit the use of the statute to bar second prosecutions. For example, Minnesota prosecutors in the Ming Sen Shiue case apparently determined that they were barred from prosecuting Ming Sen Shiue on rape charges because the rapes took place during a kidnapping for which he had already been prosecuted by the federal government.[132] Under the reasoning of the *Mayer* court, at least some of the rapes could be characterized as acts not within the jurisdiction of another sovereign because they were distinct crimes, occurring wholly within the jurisdiction of the state.[133] Therefore, section 29-03-13 would not apply to those acts.[134] In a factual scenario like the Ming Sen Shiue case, a North Dakota rape prosecution could likely go forward.

The *Mayer* case provides significant insight as to how section 29-03-13 should be interpreted. Because the case involved a prior state prosecution, however, the question of whether section 29-03-13 applies to prior federal prosecutions was not addressed by the court. The question

130. Hearing, *supra* note 101 (statement of Rep. Coleman).

131. *Id.*

132. Hearing, *supra* note 101 (statement of Melinda Elledge).

133. *See* 18 U.S.C. § 1201 (1994) (proscribing interstate abduction and kidnapping, but not rape). In 1980, when Ming Sen Shiue's crimes took place, rape was a federal offense only "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 2031 (1976) (repealed 1986). Special maritime and territorial jurisdiction includes certain vessels on the high seas and Great Lakes, land reserved for the use of the United States (such as military reservations), and certain aircraft and spacecraft. 18 U.S.C. § 7 (1994). None of Ming Sen Shiue's crimes took place within the special maritime and territorial jurisdiction of the United States. *See supra* notes 110 and accompanying text (detailing Ming Sen Shiue's crimes). The federal rape statutes were repealed in 1986. *See* Act of Nov. 10, 1986, P.L. 99-646, 87(c)(1), 100 Stat. 3623; Act of Nov. 14, 1986, P.L. 99-654, 3(a)(1), 100 Stat. 3663.

134. *See* State v. Mayer, 356 N.W.2d 149, 151 (N.D. 1984) (indicating that if an act is not within the jurisdiction of another sovereign, the statute does not bar prosecution for the act).

is important because it is more likely that overlapping jurisdiction will be a problem between federal and state governments than between the governments of two states.[135] Minnesota's section 609.045 allows a prior federal prosecution to bar a subsequent state prosecution.[136] The language of North Dakota's section 29-03-13 does not explicitly state that a prior federal prosecution would be a bar: it provides only that a second prosecution may be barred after a prior prosecution in "another state, country, or territory."[137]

Courts in two states with statutes similar to North Dakota's, however, have found that this language is broad enough to include federal prosecutions. In New York, the Court of Appeals held that its statute's "another state, territory or country" language was "a general reference to sovereigns other than New York" and not a deliberate exclusion of the federal government.[138] The Indiana Supreme Court came to a similar conclusion in construing identical language in its statute.[139] Both courts relied on essentially the same rationale, reasoning that it would be improper to construe the language narrowly because such a construction would defeat the purpose of the statute as a whole.[140] Based on this reasoning, it could be argued that section 29-03-13 of the North Dakota

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135. *See supra* notes 101-115 (discussing Minnesota's amendment of Minnesota Statutes section 609.045 in response to bars imposed due to prior federal prosecutions). If a person commits an act that simultaneously violates state and federal law, the state may take jurisdiction over the person because the act was committed within its borders and the federal government may take jurisdiction because the act was also committed within *its* borders. Before two states can take jurisdiction over a person, however, the person generally has to have extended her criminal conduct beyond the borders of a state. *See, e.g.*, Heath v. Alabama, 474 U.S. 82 (1985) (involving a person whose criminal conduct was under the jurisdiction of two states).

136. MINN. STAT. ANN. § 609.045 (1987) (Advisory Committee Comment).

137. N.D. CENT. CODE § 29-03-13 (1991).

138. People v. Lo Cicero, 200 N.E.2d 622, 623-24 (N.Y. 1964). *Lo Cicero* involved a defendant who had been acquitted in federal court on charges of "obstructing by robbery the movement of goods in interstate commerce." *Id.* at 623. The New York Court of Appeals held that prosecution of the defendant on robbery charges in state court was therefore barred under New York Code of Criminal Procedure section 139. *Id.* at 624. Section 139 was fundamentally identical to North Dakota Century Code section 29-03-13. *Compare id.* at 623 (providing text of section 139 of the New York Code of Criminal Procedure) *with supra* note 63 (setting forth text of section 29-03-13 of the North Dakota Century Code).

139. Wilson v. State, 383 N.E.2d 304 , 305-06 (Ind. 1978). The defendant in *Wilson* pled guilty to federal armed robbery and assault charges. *Id.* at 305. The Indiana Supreme Court ruled that Wilson's prosecution on state charges was thereby barred under Indiana Code section 35-1-2-15. *Id.* at 306. Indiana Code section 35-1-2-15 was fundamentally identical to North Dakota Century Code section 29-03-13. *Compare id.* at 305 (providing text of section 35-1-2-15 of the Indiana Code) *with supra* note 63 (setting forth text of section 29-03-13 of the North Dakota Century Code). Indiana Code section 35-1-2-15 was subsequently amended. *Wilson*, 383 N.E.2d at 305.

140. *See Lo Cicero*, 200 N.E.2d at 624 (stating that "in view of the fundamental character of the rule that a man shall not be twice vexed for the same cause and the deep roots it throws into the history of the criminal law, we are not inclined to narrow its application by exceptions based on an ambiguity of statutory draftmanship"); *Wilson*, 383 N.E.2d at 306 (stating that "the purpose of this statute was to extend the constitutional double jeopardy provision to include [all] 'dual sovereigns' .... To leave out the federal government would defeat the purpose of extended protection").

Century Code should also apply to prior prosecutions by the federal government as well as those involving "another state, territory or country."

The Minnesota Supreme Court assessed the applicability and interpretation of its foreign conviction statute in *State v. Aune*.[141] The defendant in *Aune* pled guilty in federal court to conspiring to deal in firearms without a license.[142] He was also charged in state court with a number of charges based on the same acts underlying the federal charge, including selling stolen goods and selling firearms without a license.[143] Aune argued that section 609.045 barred the state prosecution.[144] In making this argument, he relied on the unamended version of section 609.045, which had been in force at the time of his trial.[145] Justice Simonett, writing for a unanimous court, found that section 609.045 did not bar Aune from being tried on state charges because it "envisions a *Blockburger*-type standard."[146]

Justice Simonett based this conclusion on five grounds.[147] First, he looked to the result in *State v. Lupino*,[148] in which the Minnesota Supreme Court affirmed the denial of a postconviction relief petition.[149] The court in *Lupino* indicated that a defendant was protected from successive prosecution only when the second prosecution was for the identical act and the second crime charged was identical "*[b]oth in law and fact*" to the first.[150] Even though the court in *Lupino* did not consider section 609.045, Justice Simonett in *Aune* indicated that the statute would have required the same result.[151] Essentially, Justice Simonett seemed to suggest that *Lupino* demonstrated a policy to apply the *Blockburger* rationale in all Minnesota double jeopardy questions.[152]

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141. 363 N.W.2d 741 (Minn. 1985).

142. State v. Aune, 363 N.W.2d 741, 742 (Minn. 1985).

143. *Id.* at 742-44.

144. *Id.* at 742.

145. *Id.* at 745. *See supra* note 98 (giving text of the unamended statute).

146. *Aune*, 363 N.W.2d at 746.

147. *Id.* (laying out the grounds for the rejection of Aune's argument).

148. 171 N.W.2d 710 (Minn. 1969).

149. *Aune*, 363 N.W.2d at 746 (citing State v. Lupino, 171 N.W.2d 710, 712 (Minn. 1969)). In *State v. Lupino*, the defendant had been convicted on federal flight from prosecution charges and on state kidnapping charges. 171 N.W.2d at 711. The acts on which the charges had been based were all within the same course of conduct. *Id.* In rejecting the petition, the *Lupino* court did not directly consider the foreign conviction statute then in force, Minnesota Statutes section 610.23. *See id. See also supra* note 96 (giving the text of section 610.23 of the Minnesota Statutes).

150. *Lupino*, 171 N.W.2d at 711 (quoting State v. Fredlund, 273 N.W. 353, 355 (Minn. 1937).

151. *Aune*, 363 N.W.2d at 746.

152. *Id.* Before analyzing *Lupino*, Justice Simonett reviewed bars to successive prosecutions across the country. *Id.* at 745. In analyzing states which did not apply a "*Blockburger*-type" test, he focused on the broadness of their statutes as compared to Minnesota. *Id.* (citing Blockburger v. United States, 284 U.S. 299 (1932)). He implied, at least, that states applying the *Blockburger* test to foreign prosecutions were in the majority. *Id.* After his analysis of *Lupino*, Justice Simonett concluded that the

Justice Simonett next looked to how courts in other jurisdictions had construed statutes "not as clear" as section 609.045.[153] In particular, he looked to cases from Arizona and California.[154] Both these states had statutes similar to Minnesota Statutes section 610.23,[155] which was the immediate predecessor of section 609.045 and was repealed in 1963 when section 609.045 was put in place.[156] In the first case noted by the Minnesota Supreme Court, *State v. Poland*,[157] the Arizona Supreme Court found that its statute did not block the murder prosecution of a defendant who had been prosecuted in federal court for a kidnapping and armed robbery that were part of the course of conduct that led to the murder.[158] The court in *Poland* reasoned that the state and federal prosecutions were not parallel because they "were for distinct and separate crimes occurring at different times."[159] In the next example cited by Justice Simonett, *People v. Belcher*,[160] the California Supreme Court indicated that its statute barred a second prosecution only when "all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution."[161] Justice Simonett concluded that the courts in *Poland* and *Belcher* applied "*Blockburger*-type" standards and that this supported application of similar standards in Minnesota.[162]

Justice Simonett then looked to the statute's language.[163] He indicated that the legislature could write statutes capable of broad

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Minnesota statute was "sufficiently clear" in requiring application of a "*Blockburger*-type standard." *Id.* at 746.

153. *Id.*

154. *Id.*

155. *See supra* note 96 (giving text of section 610.23).

156. *See supra* notes 97-100 and accompanying text (discussing the repeal of Minnesota Statutes section 610.23 and the Minnesota criminal code revision).

157. 645 P.2d 784 (Ariz. 1982).

158. State v. Poland, 645 P.2d 784, 791 (Ariz. 1982). The Arizona statute provided that:

> When on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States, or of another state or country, founded upon the act or omission in respect to which he is on trial he has been acquitted or convicted, it is a sufficient defense.

ARIZ. REV. STAT. 13-146 (transferred and renumbered as ARIZ. REV. STAT. 13-112 by Ariz. Sess. Laws 1977, ch. 142) (repealed by Ariz. Sess. Laws 1982, ch. 238).

159. *Poland*, 645 P.2d at 791.

160. 520 P.2d 385 (Cal. 1974).

161. People v. Belcher, 520 P.2d 385, 390-91 (Cal. 1974). The California statute provides that "[w]henever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense." CAL. PENAL CODE § 656 (West 1994).

162. State v. Aune, 363 N.W.2d 741, 746 (Minn. 1985).

163. *Id.*

interpretation.[164] He suggested that if the legislature had wanted the courts to interpret section 609.045 to require application of something other than the *Blockburger* test, it would have written the statute in a different way.[165] In making this analysis, however, Justice Simonett did not look specifically at the language of 609.045 itself. He nonetheless concluded that because the statute's language was not as broad as other double jeopardy and successive prosecution statutes, it did not support a broad interpretation.[166]

Justice Simonett concluded by examining the legislature's amendment of section 609.045.[167] He indicated that the court believed the amendment to be a clarification of the statute, rather than a substantive change.[168] He thus read the language of the amendment, which provided that there would be no bar to a second prosecution "unless the elements of law and fact are identical,"[169] to support the court's position that the unamended statute should be interpreted as requiring application

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164. *Id.* In particular, he referred to Minnesota Statutes section 609.035 which then provided that:

> Except as provided in Section 609.585, if a person's conduct constitutes more than one offense under the laws of this state he may be punished for only one of such offenses and a conviction or acquittal of any of them is a bar to prosecution for any other of them. All such offenses may be included in one prosecution which shall be stated in separate counts.

Id. at 746 n.5. (quoting Minnesota Statutes section 609.035 as it appeared in 1982).

165. *Id.* at 746. He indicated that if the legislature wanted a statute that could be broadly applied, it could have written a statute with language similar to section 609.035. *Id. See supra* note 164 (giving language of 609.035). He further observed that if the legislature had wanted a statute amenable to an intermediate interpretation, it had available to it the Model Penal Code formulation. *Aune*, 363 N.W.2d at 746. The model code provides:

> When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:
>
> (1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is based on the same conduct, unless (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or (b) the second offense was not consummated when the former trial began; or
>
> (2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is subsequently prosecuted.

MODEL PENAL CODE § 1.10 (1962).

166. *Aune*, 363 N.W.2d at 746.

167. *Id.*

168. *Id.*

169. *Id.* (citing Minnesota Statutes section 609.045).

of the *Blockburger* test.[170] He indicated that the fact the new statutory language was identical to the language in *Lupino* further supported this interpretation.[171]

The Minnesota Supreme Court in *Aune* was unequivocal in supporting the application of the *Blockburger* test under section 609.045.[172] The history of the amended statute indicates that the legislature intended the statute to require application of the *Blockburger* standard.[173] It is not so clear, however, that the language of the unamended statute supported such an interpretation. The unamended statute was read by prosecutors as a broad bar to successive prosecutions, and the legislature passed the amendment based on arguments that it was necessary to narrow the scope of the statute.[174] The court's interpretation, in *Aune*, of unamended section 609.045 thus was contrary to that of the prosecutors and the legislature. Since the legislature had so clearly and recently expressed its support for a narrow interpretation of section 609.045, it is possible that the court in *Aune* had no other option but to conclude that the unamended statute should be interpreted to express this policy. If this is so, it may explain why the court made little effort to analyze the language of the statute itself.

The extant case law on the North Dakota and Minnesota statutes, even though sparse, gives significant insight into the scope of the statutes. In North Dakota, the supreme court has shown that it will interpret the term "act" from section 29-03-13 narrowly.[175] If a second prosecution is to be barred, the first prosecution must have been based on the identical, discrete act rather than the same course of action.[176] In Minnesota, the rule is even narrower: a second prosecution is only barred if the offense charged is identical to the offense tried in the initial prosecution.[177] The Minnesota rule, however, may be broader than the North Dakota rule in one respect: it is possible that a Minnesota prosecution may be barred after a federal prosecution for the same offense.[178] In North Dakota, it is not completely clear whether this would be the

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170. *Id.*

171. *Aune*, 363 N.W.2d at 746.

172. *See supra* notes 146-171 and accompanying text (discussing the *Aune* court's analysis of whether the *Blockburger* standard should apply under Minnesota Statutes section 609.045).

173. *See supra* notes 101-115 and accompanying text (discussing the history of the 1983 amendment to Minnesota Statutes section 609.045).

174. *Id.*

175. *See supra* notes 123-134 and accompanying text (discussing the North Dakota Supreme Court's interpretation of section 29-03-13 of the North Dakota Century Code in State v. Mayer, 356 N.W.2d 149 (N.D. 1984)).

176. *Id.*

177. *See supra* notes 141-171 and accompanying text (discussing the Minnesota Supreme Court's interpretation of Minnesota Statutes section 609.045 in State v. Aune, 363 N.W.2d 741 (1985)).

178. MINN. STAT. ANN. § 609.045 (Advisory Committee Comment).

case.[179] Overall, while the language of the Minnesota and North Dakota statutes is different, it is likely that both would be interpreted similarly: neither would seem to bar a second prosecution unless the act at its base was fundamentally identical to the act that formed the basis of the first prosecution.

V. CONCLUSION

While the laws of Minnesota and North Dakota provide a barrier to dual sovereign prosecutions, this barrier is not impermeable. In Minnesota, the legislature created a statute designed to bar only limited types of prosecutions, and the courts have interpreted the statute in line with legislative intent.[180] In North Dakota, the legislature has been silent for more than a century as to state policy regarding dual sovereign prosecutions.[181] North Dakota courts, guided only by the language of the statute itself, have found the state's bar against dual sovereign prosecutions to be a narrow one.[182] Thus, in both Minnesota and North Dakota, the statutory barrier to dual sovereign prosecutions may be more symbolic than real: it will probably not be applied to stop a second prosecution except in the most egregious of cases.

179. *See supra* notes 137-140 and accompanying text (considering whether section 29-03-13 would bar a state prosecution subsequent to a federal prosecution).

180. *See supra* notes 103-115, 141-171 and accompanying text (discussing, respectively, the legislative history and judicial interpretation of Minnesota Statutes section 609.045).

181. *See supra* notes 91-94 and accompanying text (discussing the legislative history of section 29-03-13 of the North Dakota Century Code).

182. *See supra* notes 123-134 and accompanying text (discussing the judicial interpretation of section 29-03-13 of the North Dakota Century Code).