STATE STATUTES LIMITING THE DUAL SOVEREIGNTY DOCTRINE: TOOLS FOR TRIBES TO RECLAIM CRIMINAL JURISDICTION STRIPPED BY PUBLIC LAW 280?

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Tribal sovereignty suffered greatly by the 1953 passage of Public Law 280, which gave certain states jurisdiction over the Indian country within their borders. However, recent cases show that tribes can preempt this state jurisdiction, and thereby reclaim some measure of sovereignty, if they prosecute crimes first—so long as the surrounding state has a statute abrogating the dual sovereignty doctrine and the tribal prosecution satisfies the various requirements of that statute. Not all affected states have these statutes; in those that do, the statutes are often difficult to trigger. This Comment answers the ensuing questions: Which Public Law 280 states have such statutes? What are their requirements? If tribes can avail themselves of these statutes, should they go out of their way to do so? This Comment argues that tribes should think carefully about enlisting the protections of these statutes. Taking active steps to do so would require tribes to make their laws and prosecutions mirror those of the surrounding state, thus requiring tribes to abandon their own conceptions of justice.

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INTRODUCTION

"If we permit our existence to be solely defined by Euro-American law, we give the United States power to define who we are and who we are not."
—Dagmar Thorpe[1]

American law recognizes Indian tribes as sovereigns—of a sort. But if called upon to describe this sovereignty in general terms, it has trouble. Almost any U.S. Supreme Court Indian law case has language making the point. Consider:

> The powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never been extinguished*. . . . Indian tribes are, of course, no longer possessed of the full attributes of sovereignty. . . . But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said that: Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . The sovereignty that the Indian tribes retain is of a unique and limited character.[2]

1. Dagmar Thorpe, *Sovereignty, A State of Mind: A Thakiwa Citizen's Viewpoint*, 23 AM. INDIAN L. REV. 481, 483 (1999).

2. United States v. Wheeler, 435 U.S. 313, 322–23 (1978) (internal citations and quotations omitted).

If tribes "have not given up their full sovereignty," then what does it mean to say that they "are, of course, no longer possessed of the full attributes of sovereignty"? Is there anything helpful in the assertions that "Indian tribes are unique aggregations possessing attributes of sovereignty," or that their sovereignty is "of a unique and limited character"? Do these assertions make us understand that sovereignty any better, or just make us wonder more what it is?

As this passage shows, it will not do to describe tribal sovereignty in general terms. Rather, if it is to have meaning and bite, tribal sovereignty must be described by showing how the results we deem illustrative of tribal sovereignty—or of the lack thereof—emerge from particular legal circumstances. This Comment is an exercise in such description. Specifically, this Comment shows how tribal sovereignty is caught in the curious interplay between Public Law 280[3] and state statutes abrogating the dual sovereignty doctrine (DSD). These anti-DSD statutes seemingly bolster tribal sovereignty by enabling tribes to exercise some of the state-exclusive criminal jurisdiction Public Law 280 stripped from them, but the circumstances necessarily attending such exercise undercut any claim of bolstered sovereignty.

A word on Public Law 280: From the start of American history, the federal government claimed that it had all the power to deal with and to regulate indigenous peoples, and that the states had none.[4] This exclusivity was especially pronounced when it came to prosecuting criminal offenses committed within Indian country.[5] But, in 1953, the U.S. Congress passed Public Law 280, giving several states what jurisdiction the federal government had over such offenses.

Tribes were alarmed. Nothing in the text provided for their input—let alone their consent. Thus, the jurisdictional transfers Public Law 280 authorized were to take place regardless of tribal views on the matter. And given that "the people of the states where [tribes] are found are often

3. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2000), 28 U.S.C. § 1360 (2000), and 25 U.S.C. §§ 1321–1326 (2000)).

4. *See, e.g.*, The Indian Trade and Intercourse Acts, ch. 33, 1 Stat. 137 (1790); ch. 13, 2 Stat. 139 (1802); ch. 161, 4 Stat. 729 (1834).

5. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561–62 (1832) (striking down state convictions based on activity within Indian country because states lack inherent authority to exercise criminal jurisdiction there). The term "Indian country," as used throughout this Comment, is a statutorily defined term of art, embracing "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," "all dependent Indian communities within the borders of the United States," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151 (2000).

their deadliest enemies,"[6] those views were unsurprisingly sour. More generally, tribes feared the corrosive effect that Public Law 280 would have on their sovereignty. Reasonably, tribes have since sought to resist its jurisdictional divestiture by minimizing its reach.[7]

This Comment expounds—yet ultimately warns against—a novel and seductive legal strategy for tribes pursuing the sovereignty-maximizing aim of minimizing the reach of Public Law 280. Many states have statutes abrogating the DSD. When their requirements are satisfied, these anti-DSD statutes bar the relevant state from undertaking a prosecution otherwise proper under its laws and policies. Suppose an Indian, already with two felonies on his record, commits a felony in California Indian country. California, a Public Law 280 state, has a well-known repeat offender law, known colloquially as the "three strikes" law.[8] But California also has two anti-DSD statutes.[9] If the tribe with jurisdiction over the land prosecutes the offender before the state does and all the elements of the abrogating statute are satisfied, then California cannot prosecute. The offender is relieved of the threat of a third strike, and the tribe has exercised what amounts to criminal jurisdiction exclusive of state authority, in defiance of Public Law 280.

How can we characterize this outcome? Scholars have developed models of the relations between tribes and the rest of the federal union, so as to organize and critique the various tendencies observable in those relations.[10] There are four such models:

> (1) *Self-Determination*. In this model, "each sovereign totally controls its lands, its citizens and its destiny," while the intersovereign relations proceed on the bases of "mutual respect, comity, equality, and consent."[11]
>
> (2) *Treaty Federalism*. In this model, "the political autonomy and sovereignty of an Indian tribe [is] recognized and protected, like the

6. United States v. Kagama, 118 U.S. 375, 384 (1886). It is still uncontroversial that relations between states and tribes are especially bitter. *See generally* THOMAS BIOLSI, DEADLIEST ENEMIES: LAW AND THE MAKING OF RACE RELATIONS ON AND OFF ROSEBUD RESERVATION (2001).

7. For example, in the years just after Public Law 280 was passed, New Mexico, South Dakota, Washington, and Wyoming considered exercising the jurisdiction offered them under Public Law 280, but were unable to because "the Indians had waged vigorous and successful battles against bills and constitutional amendments imposing state jurisdiction unilaterally." Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 547 (1975).

8. *See* CAL. PENAL CODE §§ 667, 1170.12 (West 1999 & 2004). For the term "three strikes" and a basic overview, see *Recent Legislation*, 107 HARV. L. REV. 2123 (1994).

9. *See infra* Part II.C.1.

10. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 11–15 (5th ed. 2007).

11. *Id.* at 11.

> sovereignty of states of the Union, albeit with somewhat less autonomy but also with federal guarantees of protection."[12]
>
> (3) *Colonial Federalism*. In this model, "tribes retain limited sovereignty, but are subject to the supervening power of the federal government irrespective of their agreement or consent."[13]
>
> (4) *Colonial Domination*. Whereas the preceding three models all "contemplate the permanent existence of tribes as political entities with guaranteed legal rights and autonomy," this last model "envision[s] the eventual disbandment or termination of the tribes and their sovereignty, with individual Indians assimilating into and becoming completely subject to governance by the federal and state authorities."[14]

These models are listed in order of diminishing negative liberty—that is, in order of diminishing tribal sovereignty.[15] Thus, to the extent that they are rational agents seeking to maximize their sovereignty, tribes will want to push their legal relations away from the colonial domination model, and toward the self-determination model.

Public Law 280 fits squarely within the colonial domination model.[16] By the reasoning above, then, it would seem that tribes in Public Law 280 states should, whenever possible, exploit state anti-DSD statutes and exercise exclusive criminal jurisdiction, thus moving their tribal-federal relations away from a colonial domination model, and toward a model of greater sovereignty. This Comment addresses whether tribes can do this, as well as whether they should.

This Comment argues that, while tribes in Public Law 280 states should of course administer their criminal laws as they see fit, they should not systematically exploit state anti-DSD statutes as a means to expand sovereignty. Doing so systematically would be to adopt a policy whereby securing the preclusive effect of a state anti-DSD statute is a primary aim in any prosecution. A number of problems, both practical and philosophical, face a tribe that would adopt such a policy. The practical problems concern the legal requirements of anti-DSD laws, while the philosophical problems concern the normative implications of aggressive

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12. *Id.* at 11–12.
13. *Id.* at 12.
14. *Id.* at 14.
15. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122–31 (1969).
16. *See, e.g.*, ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 891 (rev. 4th ed. 2005) ("As a nonconsensual imposition of state jurisdiction, Public Law 280 fits the colonial domination model of tribal ↔ federal relations.").

efforts to accommodate those legal requirements. To better illustrate the philosophical problems, this Comment defines and develops an analytic distinction between direct and reflexive accommodation.

Part I gives the basic legal background, with an exposition of Public Law 280 and of the dual sovereignty exception to double jeopardy. These strands of law come together in *Booth v. State*,[17] the one case in a Public Law 280 state in which a tribal prosecution preempted a subsequent state prosecution by virtue of an anti-DSD statute. Part II surveys the status of anti-DSD laws in Public Law 280 states, in order to determine the extent to which tribes in those states can avail themselves of the strategy of systematic exploitation of state anti-DSD laws. This Comment presents the first compilation and analysis of such information. Finally, Part III explores the practical and philosophical problems described above, and assesses the extent to which tribes in Public Law 280 states should avail themselves of this strategy.

I. THE DUAL SOVEREIGNTY DOCTRINE, PUBLIC LAW 280, AND *BOOTH V. STATE*

A. The Dual Sovereignty Doctrine

Under the Double Jeopardy Clause of the U.S. Constitution, no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[18] Its "underlying idea . . . 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."[19] But, also ingrained in the Anglo-American system of jurisprudence is an understanding of crime as a transgression against whatever sovereign has the power to define the offending action as such.[20]

17. 903 P.2d 1079 (Alaska Ct. App. 1995).

18. U.S. CONST. amend. V.

19. Green v. United States, 355 U.S. 184, 187–88 (1957).

20. The concept of crime as a transgression against a sovereign seems to have developed at least as much from law enforcement problems as from philosophizing about the nature of crime. For example, *R. v. Thomas* (1662) Eng. Rep. 1043, 83 Eng. Rep. 326, 83 Eng. Rep. 1172 (K.B.), arose under a 1534 statute that gave England authority to prosecute felonies in some Welsh border counties, *see* 1534, 26 Hen. 8, c. 6, § 6, *cited in* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8 & n.30 (1956). Wales also had authority to prosecute. *See* Grant, *supra*, at 8. The shared sovereignty was colorfully explained as follows:

> The people of Wales and marches of the same, not dreading the good and wholsom laws and statutes of this realm, have of long time continued and persevered in perpetration

By this understanding, a person who jaywalks across a street where two separate sovereigns have (and exercise) the authority to criminalize jaywalking has committed two distinct crimes. This is the foundation of the DSD.

In the mid-nineteenth century, the Supreme Court began to suggest that something like the DSD existed in American law.[21] It was not until 1922, however, that the DSD actually emerged. In *United States v. Lanza*,[22] the Court permitted a federal prosecution after a state prosecution. The Court reasoned that because the federal government and the state government derive power from separate sources, they are distinct sovereigns, and offenses defined according to the criminal laws promulgated under their respective sovereign powers are, in turn, distinct.[23] Thus, because the Double Jeopardy Clause operates only in the context of the "same offence," it cannot block prosecutions of offenses construed as distinct under the DSD. The Court has since affirmed the DSD several times,[24] though the doctrine is constantly criticized.[25]

B. Public Law 280

In 1953, Congress passed Public Law 280 under the title, "An Act To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes."[26] The act transferred to the listed states what criminal

> and commission of divers and manifold thefts, murders, rebellions, willful burnings of houses and other scelerous deeds and abominable malefacts, to the high displeasure of God, inquietation of the King's well-disposed subjects, and disturbance of the publick weal . . . .

Id. (internal quotation marks omitted).

21. Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852) ("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 on the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted.").

22. 260 U.S. 377 (1922).

23. *Id.* at 382.

24. *See, e.g.*, Heath v. Alabama, 474 U.S. 82 (1985); United States v. Wheeler, 435 U.S. 313 (1978); Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

25. *See generally* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE. L.J. 281 (1992); J.A.C. Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932).

26. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2000), 28 U.S.C. § 1360 (2000), and 25 U.S.C. §§ 1321–1326 (2000)).

jurisdiction[27] the federal government had over Indian country. A 1958 amendment added Alaska to that list.[28] The act further provided that other states containing Indian country could, "by affirmative legislative action," receive a similar transfer of jurisdiction.[29] Sensibly, the named states become known as the mandatory Public Law 280 states, and the others as the optional or voluntary ones.[30]

Three motives are commonly ascribed to Congress in passing Public Law 280: (1) to combat perceived lawlessness in Indian country; (2) to lower federal spending related to the federal government's jurisdictional obligation in Indian country; and (3) to encourage the assimilation of tribes into mainstream society.[31] First, the lawlessness motive: In 1953, the exercise of criminal jurisdiction in Indian country was perplexing business—as it remains today. Here is how one writer described the situation as it existed at the time that Public Law 280 was passed:

> If a non-Indian committed a crime against another non-Indian or a crime without an apparent victim, such as gambling or drunk driving, only state authorities could prosecute him under state law. But if either the offender or the victim was Indian, the federal government had exclusive jurisdiction to prosecute, applying state law in federal court under the Assimilative Crimes Act. Finally, if offender and victim were both Indians, the federal government had exclusive jurisdiction if the offense was one of the "Ten Major Crimes;" otherwise, tribal courts had exclusive jurisdiction.[32]

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27. Public Law 280 gave states some degree of civil jurisdiction as well. *See* 28 U.S.C. § 1360; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3] (2005 ed.). However, this Comment confines itself to issues of criminal jurisdiction.

28. Pub. L. No. 85-615, 72 Stat. 545 (1958). Alaska was not on the original list because it was not yet a state.

29. 67 Stat. at 590 ("The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.").

30. *See* Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 559–60 (9th Cir. 1991) ("Public Law 280 *mandated* the transfer of civil and criminal jurisdiction over 'Indian country' from the federal government to the governments of [the named] states, and *permitted* other states to assume such jurisdiction *voluntarily*." (emphasis added) (internal citations omitted)), *rev'd on other grounds sub nom.* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998).

31. *See* Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 471, 488 (1979).

32. Goldberg, *supra* note 7, at 541 (internal citations omitted). For the perplexity today, see, for example, Traci L. Hobson, *Criminal Jurisdiction in Indian Country: A Primer*, JUDGES' J. Winter 2004, at 35.

The upshot of these byzantine rules was a "hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept [it]."[33] By removing the federal government from the play of those rules, Public Law 280 simplified the system somewhat, and that was seen as a step toward strengthened law enforcement.

The latter two motives also bear mention. The spending motive is straightforward: The exercise of federal jurisdiction had a cost, and Congress no longer wanted to pay it.[34] Finally, though not made explicit in the act or the statute, the assimilation motive is plain from the historical context. Indeed, it is sufficiently plain for the Supreme Court to have written that Public Law 280 is "without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's."[35]

Thus, based on the these motives, on July 27, 1953, Congress announced its aim

> as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States . . . .[36]

The policy was retrograde from the start: It was a "return to the philosophy of the General Allotment Act of 1887," a more nakedly assimilationist statute whose "philosophy . . . had been rejected with the passage of the Indian Reorganization Act of 1934."[37]

Public Law 280 was ill-received, and discontent spread quickly at the federal, state, and tribal levels. President Eisenhower, who signed the act into law, expressed "grave doubts" about its lack of any provision requiring tribal consent, and recommended that such a provision be added immediately.[38] Ineffectual as President Eisenhower's expression may have been, it nonetheless presaged the executive's shift toward

33. Bryan v. Itasca County, 426 U.S. 373, 380 (1976) (quoting H.R. REP. NO. 83-848, at 6 (1953)).

34. *Yakima Indian Nation*, 439 U.S. at 488 ("Public Law 280 was the first jurisdictional bill of general applicability ever to be enacted by Congress. It reflected congressional concern over the law-and-order problems on Indian reservations and the financial burdens of continued federal jurisdictional responsibilities on Indian lands." (internal citation omitted)).

35. *Id.*

36. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

37. *Yakima Indian Nation*, 439 U.S. at 488 n.32 (internal citations omitted).

38. Goldberg, *supra* note 7, at 546 n.54.

embracing a policy of tribal self-determination and away from Public Law 280's policy of assimilation.[39]

By 1968, Congress came around to the executive point of view by passing the Indian Civil Rights Act (ICRA).[40] The ICRA made two important changes to Public Law 280. First, it amended the law to make tribal consent a necessary prerequisite to any future jurisdictional transfer.[41] Second, it amended the law to make it possible for states to return to the federal government any jurisdiction acquired under the law.[42] This process is called retrocession. For a tribe dissatisfied with Public Law 280, retrocession to the federal government is the premiere remedy. However, the statute's language clearly expresses that the state is the sole author of retrocession—the tribe cannot petition for it by itself.[43] Nonetheless, since ICRA came into effect, state jurisdiction under Public Law 280 has not grown because no tribe has consented to the requisite transfer from federal to state government.[44] Finally, the federal courts—in an interesting disavowal of the canon that laws are to be interpreted in light of the original intent of the legislature—have responded to these shifts in executive and legislative policy by interpreting Public Law 280 in a manner "more attuned to the [pro-sovereignty] policies of the 1970s and 1980s than to the [assimilationist] policies of the 1950s."[45]

States were more quickly upset by Public Law 280 than Congress was. The mandatory states received neither money to pay for their new law enforcement obligations, nor an exemption from the federal prohibition on taxing economic activity in Indian country.[46] Suddenly required to "hire

39. For forceful expressions of this policy shift, see President Johnson's Message to Congress of Mar. 6, 1968, 114 CONG. REC. 5394–95 (1968), and especially President Nixon's Message to Congress of Jul. 8, 1970, 116 CONG. REC. 23,131 (1970).

40. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 25 U.S.C.).

41. *Id.* § 401, 82 Stat. at 78 (codified at 25 U.S.C. § 1321 (2000)).

42. *Id.* § 403, 82 Stat. at 79 (codified at 25 U.S.C. § 1323 (2000)).

43. *Id.*

44. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1686 n.339 (1998). But some states, through land settlement and restoration acts, have acquired state jurisdiction as though by Public Law 280. *See, e.g.*, Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. § 1755 (2000) (conferring state jurisdiction upon Connecticut, "[n]otwithstanding the provision relating to a special election" designed to test for tribal consent to state jurisdiction).

45. CAROLE GOLDBERG-AMBROSE WITH THE ASSISTANCE OF TIMOTHY CARR SEWARD, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, 126 (1997).

46. *Id.* at 56. Of course, the federal government's unwillingness to cover the bill is in keeping with the spending motive. The refusal to allow states to tax economic activity in Indian country, though, seems like an isolated exercise of the federal trust responsibility.

more police, more judges, more prison guards, more probation and parole officers, and more juvenile aid officers, and to build new police stations, courthouses, and jails," they tottered under their new financial obligations.[47] Moreover, states balked at "the large gray area [created by Public Law 280] where state jurisdiction is doubtful, largely where a criminal law is part of a broader state regulatory scheme."[48] This confusion persists today, and has had predictably grim consequences for the quality of law enforcement in Indian country.[49]

Naturally, the tribes affected by Public Law 280 were the most unhappy. They deeply resented the nonconsensual imposition of state law enforcement regimes. Many statements could be offered in support here, but none better than this one:

> [A]s far as the American Indians are concerned [Public Law 280] is a despicable law. Public Law 280 if it is not amended, will destroy Indian self-government and result in further loss of Indian lands. On those reservations where states have assumed jurisdiction under the provisions of Public Law 280, lawlessness and crimes have substantially increased and have become known as a no man's land because the state and federal officials will not assume the responsibility of Public Law 280.[50]

Like the states—but, as seen in the quote above, for more thoroughgoing reasons—tribes today remain deeply dissatisfied with Public Law 280.[51]

C. *Booth v. State*

In a 1995 Alaska case,[52] the DSD and Public Law 280 came together with dramatic effect.

1. The Case

On January 22, 1993, in the Metlakatla Indian Community on Alaska's Annette Islands, Metlakatla tribal member Lester Booth, Jr., kicked Debbie

47. *Id.*

48. American Indian Studies Center, XI. Funding Inequity and California's Special Legal Status: Public Law 280 and the Breakdown of Law in California Indian Country, http://www.aisc.ucla.edu/ca/Tribes11.htm (last visited Oct. 22, 2007).

49. *See* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century?*, 38 CONN. L. REV. 697, 698–99 (2006).

50. ROBERT N. CLINTON ET AL., *supra* note 16, at 907 (quoting Wendell Chino, President of the National Congress of American Indians, in 1974).

51. *See* Goldberg & Champagne, *supra* note 49, at 698–99.

52. Booth v. State, 903 P.2d 1079 (Alaska Ct. App. 1995).

Booth in the stomach and the face.[53] Prosecuted by both his tribe and state, he first pled guilty to the Metlakatla charges, whereupon the tribal court punished him by imposing a fine of $400.[54] Booth then pled no contest to the Alaska charges, but expressly reserved his right to appeal his ensuing conviction.[55] And when he did so, he won, obtaining a judgment that Alaska had no jurisdiction over his offense.

On appeal, Booth argued that Alaska was legally barred from prosecuting him by its own law.[56] He pointed to section 12.20.010 of the Alaska Statutes, which provides that "[w]hen an act charged as a crime is within the jurisdiction of the United States, another state, *or a territory*, as well as of this state, a conviction or acquittal in the former is a bar to the prosecution for it in this state."[57] He then argued that because he had been convicted by another territory—namely, the Metlakatla Indian Community—of crimes based on his attack on Debbie Booth, section 12.20.010 barred Alaska from subsequently prosecuting him for any crime arising from the same acts.[58]

This argument gave the court two subissues to analyze. First, it had to decide whether the Metlakatla Indian Community is within the scope of the phrase "jurisdiction of the United States, another state, or a territory." Second, it had to decide whether Booth had been subject to legal exposure properly called a "conviction or acquittal."

Regarding the first subissue, the court held that the Metlakatla Indian Community was a "territory" within the scope of section 12.20.010.[59] The court began by asserting that, whatever jurisdiction it may exercise, the Community does not exercise the "jurisdiction of the United States," nor that of "another state." Yet, its jurisdiction must be considered something separate from that of Alaska, because "its right of limited self-governance

53. *Id.* at 1082.

54. *Id.* at 1088. Should the punishment seem light, note that the Indian Civil Rights Act (ICRA) sharply limits the punishments tribes can impose. *See* 25 U.S.C. § 1302(7) (2000).

55. *Booth*, 903 P.2d at 1082.

56. *Id.* at 1085. Lester Booth, Jr., made two other arguments. First, he argued that the state lacked jurisdiction over his offense, because Public Law 280 has a specific exception for the Metlakatla Indian Community that granted the Community exclusive criminal jurisdiction. *Id.* at 1082–83. Interestingly, the court held instead that the tribe and the state exercised concurrent jurisdiction. *Id.* at 1084. Second, he argued that the Double Jeopardy Clause of the U.S. Constitution barred Alaska from prosecuting him after the Metlakatla tribe had already done so. *Id.* at 1085. But this argument was frivolous, as it was foreclosed by U.S. Supreme Court precedent directly on point. *See* United States v. Wheeler, 435 U.S. 313 (1978); *see also* Bartkus v. Illinois, 359 U.S. 121 (1959).

57. ALASKA STAT. § 12.20.010 (2005) (emphasis added).

58. *Booth*, 903 P.2d at 1086.

59. *Id.*

is not derived from the organic law of the State."[60] Legislative intent supported this reading.[61] Further, the court found that the statute was enacted to guard against the "overly harsh results" sometimes wrought by application of the DSD.[62] Interpreting the statutory language to include the Metlakatla Indian Community would best realize that intent, and so the court reached its holding that the Community was a "territory" within the scope of section 12.20.010.[63]

Regarding the second subissue, the court held that Booth had indeed been subject to legal exposure properly called a "conviction or acquittal.[64] Alaska had argued that, because Metlakatla law did not authorize imprisonment as a punishment for Booth's offenses, and because he was punished only with fines, Booth had not been subjected to an action sufficiently criminal in nature to trigger the protection of section 12.20.010.[65] In response, the court tacitly agreed that "fines of no more than $360 are not the sort of severe sanction that denotes criminality."[66] But, it thought that whether an action was criminal in nature does not depend upon whatever punishment the defendant actually received but rather depends upon the severity of the punishment the defendant could have received.[67] While the Metlakatla court punished Booth only with fines, it could have

60. *Id.*

61. *Id.*

62. *Id.* at 1085.

63. *Id.* at 1086. The court found support for this part of its holding in the identical result reached by the Colorado Supreme Court in *People v. Morgan*, 785 P.2d 1294 (Colo. 1990).

64. *Booth*, 903 P.2d at 1089.

65. *Id.* at 1087.

66. *Id.* Here, the court was jostled into contact with a nice academic question: Semantics aside, what exactly distinguishes a criminal proceeding from a civil one? The academic literature is fairly insistent that the distinguishing should not be done on the basis of the punishment that might come from the proceeding. *See, e.g.*, JOEL FEINBERG, DOING AND DESERVING 96 (1970) ("The hypotheses yielded by this approach . . . are not likely to survive close scrutiny."). Rather, according to many scholars, we should look to the action that brought about the proceeding, and see if it is violative of "basic natural duties," JOHN RAWLS, A THEORY OF JUSTICE 314 (1st. ed. 1971)—say, by virtue of making people "fearful . . . even though they know they will be compensated fully if and when the wrongs occur," ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 67 (1974). In *Booth*, the court took the academically proscribed route of deciding whether the proceeding was criminal by looking to the punishment that might have come about. As a result, it becomes incredibly important that a tribe seeking to characterize a proceeding against a defendant as a criminal prosecution have laws authorizing punishment of the defendant with penalties resembling those that might be imposed in a state criminal prosecution. *See infra* Part III.A.2.

67. *Booth*, 903 P.2d at 1088. The reasoning is that a defendant's rights should be fixed before the trial begins, rather than changing in response to the vagaries of the trial process.

punished him with one year of "community labor."[68] The court reasoned that this possibility denoted criminality, because Alaska has a criminal statute quite similar to the Metlakatla community labor statute, and because the Thirteenth Amendment prohibits "'involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.'"[69] Thus, the court held that because Booth had been subject to legal exposure rightly called a "conviction or acquittal" in Metlakatla court, section 12.20.010 preempted his prosecution in Alaska state court.[70]

2. The Issues

Booth is a striking case. This is because it is the only known case in which—by virtue of subtle interactions between the DSD, Public Law 280, and Alaska's state statute restricting the DSD (an anti-DSD statute)—a tribe nominally subject to state criminal jurisdiction under Public Law 280 successfully exercised what amounts to criminal jurisdiction exclusive of state authority.

Booth also indicates some key issues to analyze. First and foremost, which Public Law 280 states actually have laws like Alaska's section 12.20.010? Of those that do, how useful are they? Do they seem harder to satisfy than section 12.20.010, because they either have more elements or have more stringent thresholds? Finally, what consequences might proceed from the systematic use of those laws, and are there any normative problems with such use? In short, is it workable for tribes to counter Public Law 280 in this way, and is it a good idea for them to do so? These questions occupy the rest of this Comment.

II. LEGAL RESTRICTIONS ON THE DUAL SOVEREIGNTY DOCTRINE IN PUBLIC LAW 280 STATES

The Public Law 280 states are: (1) Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin (the mandatory states);[71] and (2) Florida,

68. Booth faced three charges under the Metlakatla Code: assault, battery, and threat or intimidation. *Id.* at 1087 (citing Metlakatla Ordinance No. 86-735a). Beyond fines, the battery charge allows for up to six months of community labor; the other two each allow for up to three months of community labor. *Id.* Thus, the Metlakatla court could have imposed a sentence of twelve months of community labor.

69. *Id.* at 1088 (quoting U.S. CONST. amend. XIII, § 1).

70. *Id.* at 1089.

71. The so-called mandatory Public Law 280 states are those specifically named in the statutory text. *See* 18 U.S.C. § 1162 (2000).

Idaho, Montana, and Washington (the optional states).[72] This Part surveys the law in each of these states in order to determine which Public Law 280 states actually have anti-DSD statutes, and to determine the legal characteristics of those statutes.[73]

A. Closed, DSD Public Law 280 States

Alaska and Washington have expressly decided whether a prosecution in tribal court can preempt the criminal jurisdiction exercised by the state pursuant to Public Law 280—so the issue is, in a basic sense, closed. Alaska did so in the case of *Booth v. State*, as described above.[74] Washington addressed the issue in 2002.

In *State v. Moses*,[75] Tulalip tribal member Anthony Moses, Sr., was charged in state and tribal court with substantially similar offenses, and on the basis of the same acts.[76] After pleading guilty in tribal court, Moses moved to dismiss the state court action under section 10.43.040 of the Revised Code of Washington, which bars prosecution when

> 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 upon the merits, in a [criminal] judicial proceeding . . . founded upon the act or omission with respect to which he is upon trial . . . .[77]

The trial court denied the motion; the state appellate court affirmed.[78]

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72. These are the states that, by virtue of Public Law 280, currently exercise some degree of criminal jurisdiction over Indian country within their borders. *See* FLA. STAT. ANN. § 285.16 (West 2003); IDAHO CODE ANN. § 67-5101 (2006); MONT. CODE ANN. § 2-1-301 (2007); WASH. REV. CODE ANN. § 37.12.010 (West 2003). Montana's jurisdiction is minimal; it only assumed jurisdiction over the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation. MONT. CODE. ANN. § 2-1-301.

By retrocession to the federal government, many states often identified as optional Public Law 280 states, like Arizona and Nevada, *see, e.g.*, Emily Kane, *State Jurisdiction in Idaho Indian Country Under Public Law 280*, IDAHO ADVOC., Jan. 2005, at 10, 11, have either eliminated their jurisdiction over Indian country, or reduced it to a level not within the scope of this Comment, *see, e.g.*, ARIZ. REV. STAT. ANN. § 49-561 (West 2003) (repealed 2003); *id.* § 36-1856 (repealed 1986); NEV. REV. STAT. ANN. § 41.430.4 (LexisNexis 2006).

73. This effort represents the first known compiling and analysis of such information.

74. *See supra* Part I.C.

75. 37 P.3d 1216 (Wash. 2002).

76. *Id.* at 1217. Anthony Moses, Sr., had shot and killed some elk at night. *Id.* Washington charged him with hunting out of season, wastage, shooting from a public road, and hunting with an artificial light; soon thereafter, the Tulalip Tribes charged him with similar violations of the same regulatory character. *Id.*

77. *Id.* (emphasis omitted) (quoting WASH. REV. CODE ANN. § 10.43.040).

78. *Id.*

On appeal, the Washington Supreme Court framed the issue as whether Indian tribes are "among the sovereigns included within the statutory meaning of RCW 10.43.040"[79]—that is, whether they fit into the phrase "another state or country." Following *Queets Band of Indians v. State*,[80] in which the court had held that a statute's silence as to inclusion of Indian tribes strongly suggests that the legislature expressly omitted them, the court found that there was such silence in section 10.43.040, and that it gave weight "to the proposition that Indian tribes are not among the sovereigns within its meaning."[81] Next, the court observed that, after *Queets*, the legislature had not amended section 10.43.040 to include Indian tribes, but had so amended the civil regulatory statute at issue in *Queets* and others like it.[82]

Finally, the court made two points in rebutting the defendant's arguments. Moses had argued that the court's concern with explicit inclusion was inconsistent with two of its other cases, in which it had held that the phrase "another state or country" included the federal government even though that entity is not explicitly included in the statute.[83] The court responded simply by noting that tribal governments are distinguishable from the federal government in that tribes are limited in the criminal penalties they can impose, and that this difference "moots the chief concern underlying the double jeopardy statute that prosecution by dual sovereigns may unfairly result in excessive penalties."[84] Moses had pointed to the Alaska case *Booth* and to the Colorado case *People v. Morgan*,[85] which reached the same result as *Booth*, to support his position, because they both dealt with statutes quite similar to section 10.43.040.[86] The court dispatched this argument by distinguishing Colorado from Washington on the ground that Washington had assumed criminal jurisdiction over its Indian country in 1963, when it was first authorized to

79. *Id.*
80. 682 P.2d 909 (Wash. 1984).
81. *Moses*, 37 P.3d at 1218 (following *Queets*, 682 P.2d 909).
82. *Id.* at 1218–19.
83. *Id.* at 1219 (citing State v. Ivie, 961 P.2d 941 (Wash. 1998); State v. Caliguri, 664 P.2d 466 (Wash. 1983)).
84. *Id.* The court's depiction of the limitation on the punishment imposable by an Indian tribe is somewhat misleading: The limits of the ICRA apply "for conviction *of any one offense*." 25 U.S.C. § 1302(7) (2000) (emphasis added). Thus, a tribe may impose total penalties of, say, five years in prison or $25,000 in fines, if the defendant has been convicted of five distinct offenses, each meriting the maximum penalty allowed under the ICRA.
85. 785 P.2d 1294 (Colo. 1990).
86. *See Moses*, 37 P.3d at 1219. *People v. Morgan*, though interesting, is not discussed here because Colorado is not a Public Law 280 state.

do so, while Colorado did not assume such jurisdiction until 1984, and then under another federal statute.[87] The court said nothing about *Booth*, other than that it "followed Colorados [sic] reasoning."[88]

B. Open, Non-DSD Public Law 280 States

Florida, Nebraska, and Oregon[89] have no anti-DSD statutes. Moreover, cases from all three states establish that they do in fact accept the DSD.[90]

C. Open, DSD Public Law 280 States

1. California

California has two anti-DSD statutes. The first encountered in the California Penal Code is section 656, which provides:

> Whenever 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 territory of the United States based upon the act or omission in respect to which he or she is on trial, he or she has been acquitted or convicted, it is a sufficient defense.[91]

The next is section 793, which provides:

> When an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of this state, a conviction or acquittal thereof in that other jurisdiction is a bar to the prosecution or indictment in this state.[92]

87. *Id.* at 1219–20.
88. *Id.* at 1219.
89. Oregon has a statute resembling an anti-DSD statute. *See* OR. REV. STAT. § 131.515 (2005). However, it is designed to effect joinder, not to abridge the DSD. *See id.* § 131.505(5); State v. Emerson, 739 P.2d 1079 (Or. Ct. App. 1987); State v. Alexander, 607 P.2d 181 (Or. Ct. App. 1980).
90. For Florida, see, for example, *Koon v. State*, 463 So. 2d 201 (Fla. 1985); *Chipman v. State*, 875 So. 2d 827 (Fla. Dist. Ct. App. 2004); *State v. Jones*, 668 So. 2d 1073 (Fla. Dist. Ct. App. 1996). For Nebraska, see, for example, *State v. Pope*, 211 N.W.2d 923 (Neb. 1973), and *State v. Nielsen*, No. A-01-780, 2002 WL 262060 (Neb. Ct. App. Feb. 26, 2002). And for Oregon, see, for example, *State v. Charlesworth*, 951 P.2d 153 (Or. Ct. App. 1997), and *State v. Emerson*, 739 P.2d 1079 (Or. Ct. App. 1987).
91. CAL. PENAL CODE § 656 (West Supp. 2007).
92. *Id.* § 793.

The two statues were enacted simultaneously.[93] Though they differ in wording, no legal significance attaches to that difference; rather, each statute provides equivalent protection.[94]

California's two statutes are affirmative proscriptions, rather than conditional ones. That is, they are of the general form "a prior conviction or acquittal *is* a bar against a subsequent prosecution in this state," rather than of the form "a prior conviction or acquittal *is not* a bar against a subsequent prosecution in this state *unless* . . . ."[95] While this construction may suggest that California offers fairly broad protection against successive prosecutions by dual sovereigns, it is not clear from the case law how broad that protection really is.

The California Supreme Court has been inclined to interpret the protection broadly, but has not considered the issue in recent years. For example, in the 1977 case of *People v. Comingore*,[96] the defendant was charged with grand theft auto and the unlawful taking of a vehicle.[97] When the trial court found that he had been convicted in Oregon of an analogous offense based on the same incident, it dismissed the charges.[98] The California Supreme Court affirmed, holding the defendant's prosecution barred by section 793.[99]

Comingore is particularly important for how the court handled a certain argument regarding the identity of elements. Because California required the prosecution to prove that the defendant had the "intent to deprive the owner of his vehicle temporarily or permanently," while Oregon did not, the prosecution argued that the action should have gone forward because it was not based upon the same act as the Oregon conviction.[100] The court rejected this argument on the ground that intent was an aspect of a crime or a public offense, not of an act.[101]

Also showing the California Supreme Court's inclination to interpret the protection broadly is the 1974 case of *People v. Belcher*.[102] In *Belcher*, the

93. Both were enacted in 1872. *Id.* §§ 656, 793.

94. *See, e.g.*, People v. Comingore, 570 P.2d 723, 726–27 (Cal. 1977); People v. Lazarevich, 115 Cal. Rptr. 2d 419, 423 (Cal. Ct. App. 2001).

95. *See* CAL. PENAL CODE §§ 656, 793. Several states have anti-DSD statutes cast in the latter, narrower form. Such states considered in this Comment are Minnesota and Montana. *See infra* Parts II.C.3, II.C.4.

96. 570 P.2d 723.

97. *Id.* at 723–24.

98. *Id.* at 724.

99. *Id.* at 727.

100. *Id.* at 725 (internal citations omitted).

101. *Id.* at 726.

102. 520 P.2d 385 (Cal. 1974).

California Supreme Court held that the defendant had waived his defense under section 656 by failing to assert it properly at trial.[103] But, the court also found that the defendant's forfeited defense in fact had merit, and so held that the attorney's failure to assert it properly amounted to denial of the defendant's constitutional right to effective assistance of counsel, and reversed the portion of the conviction defensible under section 656.[104]

Meanwhile, California appellate courts have been interpreting the protection more narrowly. In *People v. Walker*,[105] the defendant claimed he was placed twice in jeopardy when he was prosecuted in California for robbing an American Express office after being prosecuted in Nevada for spending the proceeds there.[106] He appealed under section 656. The California Court of Appeal affirmed his conviction, because the robbery conviction required "proof of an important additional act by defendant, namely, the taking of another person's personal property by fear or force, which [was unnecessary] to establish the Nevada offense."[107] Similarly, in *People v. Brown*,[108] the California Court of Appeal rejected the defendants' appeal under section 656, because their California robbery conviction did not require proof of an unlawful agreement, which was necessary for their prosecution in Nevada federal court.[109]

Finally, in *People v. Lazarevich*,[110] the defendant was charged with two counts of retaining and concealing a minor child.[111] He did not have custody over his children but had taken them to Serbia.[112] He moved to dismiss under sections 656 and 793, because he had already been convicted of kidnapping in Serbia on January 15, 1992, based on the same acts.[113] The California Court of Appeal denied his motion to dismiss, reasoning that California could prosecute the defendant for detaining the children between January 15, 1992, and June 7, 1995 (when the children were recovered by Serbian officials), because detention between those dates constituted an act wholly distinct from that for which he had been prosecuted in Serbia.[114]

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103. *Id.* at 388.
104. *Id.* at 392.
105. 177 Cal. Rptr. 147 (Ct. App. 1981).
106. *Id.* at 148.
107. *Id.* at 150 (internal citation omitted).
108. 251 Cal. Rptr. 889 (Ct. App. 1988).
109. *Id.* at 892–93.
110. 115 Cal. Rptr. 2d 419 (Ct. App. 2001).
111. *Id.* at 421.
112. *Id.* at 421–22.
113. *Id.* at 422.
114. *Id.* at 425–26.

Thus, we see some tension in the California case law. The California Supreme Court cases from the 1970s suggest a court anxious to give effect to the protections of sections 656 and 793. But, the more recent appellate cases show more of a "tough on crime" approach, with courts insisting on perfect identity of elements. If the appellate cases better indicate the current state of law in California, then sections 656 and 793 do not protect against successive prosecutions based on the same conduct in a manner consonant with their broad language.

2. Idaho

Idaho exercises very limited jurisdiction over Indian country.[115] Its one anti-DSD statute, section 19-315 of the Idaho Code Annotated, provides that "[w]hen an act charged as a public offense, is within the venue of another state, territory, or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state."[116] Only one case has directly interpreted the statute, and not in a manner that sheds light on our inquiry here.[117] Thus, the only clue as to the statute's scope is its language.

Two aspects of that language suggest a broad scope. First, like the California statutes, the Idaho statute is broad in the sense that it amounts to a complete, affirmative proscription. Second, the Idaho statute has no requirements as to conduct, elements, substantive facts, or the like, which have a clear restrictive effect.[118] So, it appears that section 19-315 offers broad protection against successive prosecutions by dual sovereigns.

3. Minnesota

Minnesota has one anti-DSD statute, section 609.045, which provides that 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

115. *See* IDAHO CODE ANN. § 67-5101 (2006). Idaho law also provides for the assumption of further civil and criminal jurisdiction over Indian country, but only upon tribal consent, and none have given it. *See id.* § 67-5102.

116. *Id.* § 19-315.

117. Garcia v. State Tax Comm'n, 38 P.3d 1266 (Idaho 2002) (holding that section 19-315 applies only to criminal actions, not to civil tax assessment).

118. At the very least, such requirements enable restrictive arguments. *See, e.g.*, *supra* text accompanying note 100; *see also* People v. Morgan, 785 P.2d 1294, 1301 (Colo. 1990).

> in the other jurisdiction shall not bar prosecution for the crime in this state unless the elements of both law and fact are identical.[119]

Compared with the statutes considered thus far, this one is quite narrow. It bans a subsequent Minnesota prosecution only on the condition that the elements of "both law and fact" are identical. In this sense, it is a conditional ban.

The one case interpreting section 609.045 strongly supports a restrictive reading of the statute.[120] In *State v. Aune*,[121] the defendant had the misfortune to sell various items of contraband to officers running a sting operation.[122] After pleading guilty in federal court to unlicensed gun dealing, he moved unsuccessfully under section 609.045 to dismiss his state charge of transferring stolen property; the Minnesota Supreme Court affirmed the trial court's denial of the defendant's motion.[123]

Sensibly, the defendant argued for a broad reading barring prosecution for "any crime arising out of the same course of conduct as a previously prosecuted federal charge that has resulted in a conviction or acquittal."[124] The court rejected this reading in favor of what it called a "*Blockburger*-type standard,"[125] which yields protection from a second prosecution only when (1) that latter prosecution is for the same act; and (2) the jurisdictionally distinct crimes are "the same both in law and in fact."[126] Finding that those crimes were not the same "in law and in fact," the court rejected the defendant's argument.[127]

Aune shows that section 609.045 provides little protection against a subsequent Minnesota prosecution.[128] Courts will require the two prosecutions to be the same in almost every respect—based on the same acts, and comprising the same elements and substantive facts. This is a difficult standard to meet.

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119. MINN. STAT. ANN. § 609.045 (West 2003).

120. It appears that two Minnesota cases have cited this statute. However, only *State v. Aune*, 363 N.W.2d 741 (Minn. 1985), actually interpreted it; the other simply mentioned it. State *ex rel.* Boswell v. Tahash, 154 N.W.2d 813, 815 (Minn. 1967).

121. 363 N.W.2d 741. At the time of this case, section 609.045 had slightly more open language.

122. *Id.* at 742.

123. *Id.*

124. *Id.* at 745.

125. After *Blockburger v. United States*, 284 U.S. 299 (1932), which formulated this standard.

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

127. *Id.*

128. *See* Michael J. Hagburg, *Statutory Bars to Dual Sovereign Prosecutions: The Minnesota and North Dakota Approaches Compared*, 72 N.D. L. REV. 583, 605 (1996) ("[I]n 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.").

4. Montana

Montana has one anti-DSD statute, section 46-11-504.[129] It provides that when conduct constitutes

> an offense within the jurisdiction of any state or federal court, a prosecution in any jurisdiction is a bar to a subsequent prosecution in this state if:
>
> . . . the first prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on an offense arising out of the same transaction . . . .[130]

This language appears very broad. For instance, the Minnesota Supreme Court proclaimed the Montana statute the broadest of all state anti-DSD laws.[131] And the Montana Supreme Court has explicitly held that section 46-11-504 "affords criminal defendants greater protection from double jeopardy than is provided under *Blockburger*,"[132] the source of the crabbed standard adopted by Minnesota in *Aune*.[133]

However, since 1981, the Montana Supreme Court has only twice held section 46-11-504 to bar a subsequent state prosecution—and in one case, the court based its reasoning on an interpretation of a now repealed statute,[134] while in the other the court recommended that the state legislature change the statute's language,[135] which was done. In the bulk of the cases interpreting section 46-11-504, there was no bar to a subsequent state prosecution, mainly because the "same transaction" requirement was not met.[136] Thus, the statute appears to have a fairly narrow construction, akin—but not identical—to Minnesota's.

5. Wisconsin

Wisconsin, like California, has two anti-DSD statutes. The first encountered in the Wisconsin code is section 939.71, which provides that when

> an act forms the basis for a crime punishable under . . . [the laws of this state and] of another jurisdiction, a conviction or acquittal on

129. MONT. CODE ANN. § 46-11-504 (2007).
130. *Id.*
131. *See Aune*, 363 N.W.2d at 745.
132. State v. Tadewalt, 922 P.2d 463, 467 (Mont. 1996).
133. *See Aune*, 363 N.W.2d at 746.
134. State v. Houser, 626 P.2d 256 (Mont. 1981).
135. State v. Sword, 747 P.2d 206, 210 (Mont. 1987).
136. *See, e.g.*, State v. Gazda, 82 P.3d 20 (Mont. 2003); State *ex rel.* Booth v. Dist. Court, 972 P.2d 325 (Mont. 1998); State v. Couture, 959 P.2d 948 (Mont. 1998).

> the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require.[137]

The next is section 961.45, which provides that "[i]f a violation of this chapter is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state."[138]

Unlike the California anti-DSD statutes, the Wisconsin statutes have distinct purposes. Section 939.71 is the general anti-DSD law for the state, as it falls within the code chapter entitled "Crimes—General Provisions." Section 961.45, by contrast, applies solely in the context of drug offenses, as it is part of the state's Uniform Controlled Substances Act.

Both statutes have broad language. Section 939.71 is broad in several ways. First, it takes an "act" as its predicate, rather than the narrower "offense."[139] Second, it only fails when each provision requires proof of a fact the other does not, as opposed to failing when only one provision requires proof of a fact the other does not.[140] Finally, it specifies that only facts of the type required "for conviction" can be defeating facts. This confines the relevant analysis to substantive facts, and forecloses challenges to statute applicability based on jurisdictional facts. Section 961.45 has even broader language, in that it sets forth a simple, affirmative bar on subsequent prosecutions without requiring identity of facts or elements.

But, despite this broad language, both provisions have been interpreted narrowly. In the great majority of cases, section 939.71 has been read so as not to apply.[141] Section 961.45 has given more protection,[142] yet is invoked far less frequently, owing to its restricted subject matter.

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137. WIS. STAT. ANN. § 939.71 (West 2005).

138. *Id.* § 961.45.

139. "Offense" is narrower than "act" because one act can support several offenses.

140. Compare the Wisconsin statute with the Minnesota statute. *See supra* note 119 and accompanying text.

141. *See, e.g.*, State v. Vassos, 579 N.W.2d 35 (Wis. 1998); State v. Ramirez, 265 N.W.2d 274 (Wis. 1978); State v. Van Meter, 242 N.W.2d 206 (Wis. 1976); State v. Lasky, 646 N.W.2d 53 (Wis. Ct. App. 2002); State v. McKee, 648 N.W.2d 34 (Wis. Ct. App. 2002).

142. *See* State v. Hansen, 627 N.W.2d 195 (Wis. 2001). *But see* State v. Petty, 548 N.W.2d 817 (Wis. 1996).

III. PROBLEMS IN THE LEGAL RESTRICTIONS ON THE DUAL SOVEREIGNTY DOCTRINE IN PUBLIC LAW 280 STATES

This survey thus shows that the following five Public Law 280 states have statutory restrictions on the DSD that Indian tribes could possibly exploit: California; Idaho; Minnesota; Montana; and Wisconsin.[143] However, just how useful to tribes are these anti-DSD laws? The case law, as surveyed in the previous Part, reveals a number of problems, both practical and philosophical.

A. Practical Problems

1. Act, Offense, or Transaction Requirements

One problem is that the defendant must meet whatever act, offense, or transaction requirements the anti-DSD statute imposes. This often calls for showing that the two criminal statutes are concerned with the same substantive facts, or even that they have the same elements. Theoretically, it is within the tribe's agency to increase the likelihood of satisfying this requirement. For example, it could redraft some of its own criminal laws so that they have the same language and elements as analogous state laws.

To do this, however, the tribe takes on a difficult two-part task. It not only must get a clear view of those analogous state laws—by consulting the relevant statutes and the cases interpreting them—but also, in redrafting certain criminal laws in light of that view, must commit itself to a construction of those laws as they stand at a fixed point in time. Of course, a primary aim of this Comment is to do much of the first part of that task, by indicating what the relevant statutes are and what the cases have made of them.

But, in the second part of that task, tribes face a risk that subsequent action by a state court or legislature could invalidate their attempts to make their laws meet whatever act, offense, or transaction requirements the statute imposes. This risk is ineradicable.[144] And even if this risk could be eradicated, the cases and construction of the various statutes, as presented above, show that these requirements are almost always difficult to meet.

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143. Alaska is omitted because this is a list of unknowns, while it is clear that Indian tribes can exploit Alaska's anti-DSD statute. *See supra* Part I.C.

144. Consider California, where the case law on the act, offense, or transaction requirements is in flux but, if the recent appellate cases are reliable indicators, seems to be drifting toward a more restrictive approach notwithstanding the broader, more flexible approach adopted in the older state supreme court cases. *See supra* Part II.C.1.

2. Criminal Conviction or Acquittal Requirements

The second practical problem facing an Indian defendant seeking to use an anti-DSD statute on the basis of an earlier tribal prosecution is that he must show that the earlier tribal prosecution was sufficiently criminal in nature to qualify as the kind of proceeding that can trigger the protection of the statute. That is, he must show that the tribal prosecution placed him in what a state court treats as "jeopardy." As with the act, offense, or transaction requirements, it is theoretically within the tribe's agency to increase the likelihood of satisfying this requirement. For example, it could redraft some of its own criminal laws so that they provide for at least the possibility of punishments approximating those associated with the analogous state statutes.

Here, though, tribes face a statutory restriction on criminal penalties totally unknown to the states. Under the ICRA, tribes cannot "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both."[145] Tribes are thus sharply limited as to the kinds of criminal penalties and punishments they can impose, and therefore are limited as to their ability to increase the likelihood of satisfying this particular requirement.

The only case to raise this issue thus far is Alaska's *Booth v. State*.[146] But the issue matters, and seems likely to arise in the future, because it presents one more way in which a court disinclined to grant an Indian defendant the protection of an anti-DSD statute may decline to do so.

3. Governmental or Jurisdictional Requirements

The third and final practical problem is that the tribe must be understood to fit into the governmental or jurisdictional portion of the statute—that is, the portion that reads something like "another state, or a territory,"[147] "another state or country,"[148] "another jurisdiction,"[149] or something similar. Courts could go either way here: Alaska, for example, decided that tribes are governments within the meaning of its anti-DSD statute, while Washington decided that tribes are not governments within

145. 25 U.S.C. § 1302(7) (2000).
146. 903 P.2d 1079 (Alaska Ct. App. 1995); *see supra* Part I.C.
147. ALASKA STAT. § 12.20.010 (2006).
148. WASH. REV. CODE ANN. § 10.43.040 (West 2002).
149. MINN. STAT. ANN. § 609.045 (West 2003); WIS. STAT. ANN. § 939.71 (West 2005).

the meaning of its statute.[150] Despite many arguments why Indian tribes should satisfy this requirement, the problem is fundamentally intractable.

There are a number of reasons why Indian tribes should satisfy this requirement. First, there is the unquestionable view that tribes have at least some kind of sovereign status.[151] Moreover, they are sovereigns capable of imposing punishment, and therefore should be respected as having—at least for double jeopardy purposes—a status akin to that of the states.

Second, Indian law canons of construction support the view that statutory silence as to whether tribal governments are among those contemplated by anti-DSD statutes should be interpreted as meaning that the tribes are included. These canons are a number of pro-tribal sovereignty presumptions that federal courts have traditionally employed when interpreting contracts and statutes dealing with Indian tribes.[152] Though creatures of federal law, the Indian law canons are fit to migrate to state law; arguably, they already have.[153] Indeed, it is even arguable that the canons are binding on the states. In *Drumm v. Brown*,[154] the Connecticut Supreme Court held that the tribal exhaustion doctrine (not considered here) was binding on Connecticut courts, mainly because it found that the doctrine was "substantive federal law . . . as opposed to merely a federal procedural rule that is based upon, but separate from, the substantive legal strictures embodying the federal policy of supporting tribal self-government."[155] If the canons are "substantive federal law" rather than "federal procedural rule[s]"—and at least one writer has argued that they are[156]—then state courts are as bound by the canons of construction as by the tribal exhaustion doctrine, and ought to reason accordingly.

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150. *See supra* Part II.A.

151. *See, e.g.*, United States v. Lara, 541 U.S. 193, 197 (2004) (upholding the amendment to the ICRA and "recogniz[ing] and affirm[ing]" significant powers of tribal self-government).

152. The leading modern case is *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). For relations between that case and the canons generally, see *Leading Cases*, 113 HARV. L. REV. 389, 392–93 n.32 (1999).

153. In *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 612 N.W.2d 709 (Wis. 2000), the Wisconsin Supreme Court reasoned with a number of pro-tribal sovereignty presumptions that are quite like those of the Indian law canons of construction. *Id.* at 714.

154. 716 A.2d 50 (Conn. 1998).

155. *Id.* at 62–63 (internal citations omitted); *see also id.* at 62 n.10 (collecting cases reaching similar result).

156. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (especially Part IV, "Quasi-Constitutionalism by Interpretation: The Potential Legacy of *Worcester*," arguing that the canons are "quasi-constitutional" in nature).

Third, several of the states considered here have rules or decisions indicating some degree of official recognition of tribal governments as jurisdictions capable of issuing determinations enforceable in state court.[157] Such material would obviously bolster an argument that an Indian tribe is within the governmental or jurisdictional portion of an anti-DSD statute.

But, despite these reasons to find that a tribe fits the governmental or jurisdictional requirement of a state anti-DSD statute, satisfying that requirement is ultimately an intractable problem. There is little or nothing that a tribe can do to make it more likely that a court will find that the tribe satisfies the requirement. For example, the *Moses* court decided that Indian tribes were "not among the sovereigns within [the] meaning" of section 10.43.040 of the Revised Code of Washington; it decided not on the basis of particular facts about the tribe, but rather on the bases of history and the general differences between tribal governments and other governments within the federal union.[158] Under this reasoning—and assuming the Washington Supreme Court were to reconsider whether Indian tribes were sovereigns within the meaning of the statute—the Tulalip tribe could not order its affairs to make it more likely that the court would decide this point in its favor in future cases, because it cannot change facts about history or the general differences between tribal governments and others within the union. This is in stark contrast to the agency, of at least some degree, that tribes have with respect to satisfying the act, offense, or transaction requirements and the criminal conviction or acquittal requirements of anti-DSD statutes, as discussed above.[159]

B. Philosophical Problems

In addition to this range of practical problems, key philosophical problems underlie the strategy of systematic exploitation of state anti-DSD statutes as a means to expand sovereignty under Public Law 280.

1. Colonial Domination Via Reflexive Accommodation

The first philosophical problem is that systemic exploitation of state anti-DSD statutes is at odds with tribal efforts to move away from a colonial

157. For state rules, see MINN. GEN. R. PRAC. 10.01 (2004), and WIS. STAT. ANN. § 806.245 (West 1994). For state decisions, see *Wippert v. Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982).

158. State v. Moses, 37 P.3d 1216, 1218 (Wash. 2002).

159. *See supra* Parts III.A.1–III.A.2.

domination model. This tension is closely related to two of the practical problems described above: the pressures involved in meeting the act, offense, or transaction requirements, and the criminal conviction or acquittal requirements.

As stated in the Introduction, a tribe in a Public Law 280 state interested in exploiting anti-DSD statutes so as to reclaim areas of exclusive criminal jurisdiction presumably would be primarily motivated by a desire to move away from a colonial domination model of tribal-federal relations.[160] This is simply a theorized way of saying that such a tribe will be interested in minimizing the extent to which outsiders determine its internal affairs.

Recall that the colonial domination model, as defined above,[161] "envision[s] the eventual disbandment or termination of the tribes and their sovereignty, with individual Indians assimilating into and becoming completely subject to governance by the federal and state authorities."[162] One way to think about the colonial domination model is that laws fitting this model amount to commands, from an Anglo-American sovereign to an indigenous sovereign, to disavow traditional modes of justice and become more Anglo-American—the very essence of assimilation. This phenomenon is here called "accommodation," in the sense that, by these commands, indigenous sovereigns are forced to accommodate the Anglo-American one. Thus, Public Law 280, as an example of a law fitting the colonial domination model,[163] is also an example of accommodation. More specifically, Public Law 280 is an instance of direct accommodation, because it unambiguously, and as its goal, forces accommodation; the tribes it affects simply have no choice as to whether or not to accommodate the Anglo-American sovereign.

This Comment has addressed the implications of a tribal prosecution policy whereby securing the preclusive effect of a state anti-DSD statute would be the preeminent aim in any prosecution. The idea is that by pursuing such a policy, tribes might move their tribal-federal relations away from a colonial domination model, and toward models of greater sovereignty. The question now, in light of this concept of accommodation, is whether such a policy would actually allow for a move away from the colonial domination model.

160. *See supra* Introduction.
161. *See supra* text accompanying note 14.
162. *See* CLINTON ET AL., *supra* note 10, at 14.
163. *See supra* note 16 and accompanying text.

The answer is no. It is incorrect to see the strategy under consideration as a move away from accommodation, and thus away from the colonial domination model. This is because two key aspects of anti-DSD statutes—again, the act, offense, transaction requirements, and the criminal conviction and acquittal requirements—require tribes to accommodate themselves to the Anglo-American sovereign for the strategy to work. They must conform their substantive conceptions of justice to those of the other sovereign, for the various requirements to be satisfied. This unforced yet nonetheless inexorable accommodation is here called reflexive accommodation.

A strategy that calls for reflexive accommodation cannot be a genuine move away from the colonial domination model, as it still requires tribes to import Anglo-American norms if it is to do the tribes any good in terms of exclusive jurisdiction. For example, suppose a tribe decides to make systematic use of an anti-DSD statute so as to enhance its sovereignty through the exercise of quasi-exclusive criminal jurisdiction. The state statute has an act, offense, or transaction requirement and a criminal conviction or acquittal requirement. The tribe's interest in satisfying these requirements in any particular case will demand that it define its crimes, assemble its criminal charges, carry out its prosecutions, and assign its punishments in specific ways.

Now suppose that the state in question chooses to make it more difficult for the tribe to use the anti-DSD statutes by deciding, for example, not to recognize prosecutions by this tribe as sufficiently criminal. If the tribe wishes to continue this sovereignty-building program, it will be pressured to bring its law enforcement practices more in line with those of the state—say, by exactly replicating all elements of relevant crimes in the state criminal code, by assigning prison sentences when it otherwise would not, by amending its rules of criminal procedure to make proceedings more adversarial, and so on.

In making all aspects of its prosecutions—from definition to execution—conform to Anglo-American norms, a tribe would diminish its own sovereignty in a manner that does not meaningfully differ from the manner in which Public Law 280 already diminishes tribal sovereignty. In one case, the tribe is forced to accept Anglo-American conceptions of justice as part of a general dissolution into that culture; in the other, the tribe may voluntarily adopt Anglo-American conceptions of justice in order to increase its exclusive jurisdiction, but, by doing so, it brings itself closer to a general dissolution into that culture. This is reflexive accommodation, and it does not amount to a move away from the colonial domination model of legal relations.

2. Sovereigns as Means

The second philosophical problem has to do with the nature of the contemplated use of state anti-DSD statutes. The argument throughout this Comment is that while tribes in Public Law 280 states should administer their criminal laws as they see fit, they should not *systematically* exploit state anti-DSD statutes as a means to expand sovereignty. Key here is the adverb "systematically," defined in part as according to a policy whereby securing the preclusive effect of a state anti-DSD statute is a primary aim in any prosecution.[164]

If a tribe uses these statutes in this systematic manner, then it is by definition using them without any necessary regard to the rights and values the state wants to vindicate with its criminal laws. Put differently, the tribe is treating the commands of a sovereign—the state—instrumentally and, in so doing, is treating the sovereign itself as a means rather than as an end. This is an ethical scenario that ought to be familiar and repugnant to tribes, as the federal government has often treated them as means rather than ends.[165] And while tribal and state interests will often, in practice, align in any preclusive prosecution, this would usually only be fortuity—just as it is usually only fortuity when tribal and federal interests align. Tribes would thus be using a sovereign in an instrumental manner that somewhat resembles the unethical manner in which they themselves have been treated.

Further, systematic exploitation of state anti-DSD statutes entails exploiting the laws of one sovereign to undermine that of another. Again, the presumed aim of the strategy described in this Comment would be to undermine the effects of Public Law 280 by reclaiming some exclusive criminal jurisdiction that the law stripped from tribes. That may be a proper aim; insofar as Public Law 280 was imposed without tribal consent and in a climate of hostility toward continued tribal existence, it is, as

164. *See supra* pp. 493–94.

165. As Chief Justice Marshall commented, with some likely irony toward the end:

> If courts were permitted to indulge their sympathies, a case better calculated to excite them can hardly be imagined. A people, once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

stated above, a rational aim.[166] But Public Law 280, though it pitted tribes against states, remains a piece of federal legislation. This suggests that efforts to correct for it ought to proceed at the federal level, rather than the state level—even though, as just stated, tribal and state interests will in practice often align in any preclusive prosecution. In sum, the asymmetry about exploiting one sovereign's law enforcement regime in order to undermine that of another raises normative concerns.

CONCLUSION

Public Law 280 undermines tribal sovereignty, principally by making tribes subject to the law enforcement regimes of quasi-foreign political entities with which they have traditionally had bitter dealings. But many states have statutes abrogating the DSD, and in one of them—Alaska, a Public Law 280 state—it is judicially established that a tribal prosecution may, under the abrogating statute, preempt a subsequent state prosecution.[167] It would seem these statutes constitute an intriguing mechanism for advancing tribal sovereignty through the expansion of exclusive criminal jurisdiction.

But, in fact, these statutes will not support a systematic program of expanding criminal jurisdiction, for a number of reasons. First, not all Public Law 280 states have anti-DSD statutes. Moreover, of those that do, the scope of the statutes is such that their consistent applicability is highly unlikely. Finally, even if those problems can be surmounted, normative problems attendant to systematic use of these statutes, of the kind contemplated in this Comment, show such use to be ill-advised. Ultimately, tribes should not seek to reclaim a formal aspect of sovereignty at the expense of their substantive conceptions of justice.

166. *See supra* Introduction.

167. Colorado and New York also both have decided, under their anti-DSD statutes, that a tribal prosecution will bar a subsequent state prosecution. *See* People v. Morgan, 785 P.2d 1294 (Colo. 1990); Hill v. Eppolito, 772 N.Y.S.2d 634 (App. Div. 2004). These cases are beyond the scope of this Comment, because Colorado and New York are not Public Law 280 states.