

CRIMINAL JURISDICTION IN INDIAN COUNTRY

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS
SECOND SESSION
ON
CRIMINAL JURISDICTION IN INDIAN COUNTRY

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(III)

CRIMINAL JURISDICTION IN INDIAN COUNTRY

WEDNESDAY, MARCH 10, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 219 Cannon House Office Building, the Honorable William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate and Hyde.

Also Present: Thomas W. Hutchison, counsel; Robert A. Lembo, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. HUNGATE. The subcommittee will be in order. Today we will consider legislation dealing with criminal jurisdiction in Indian country. There are three bills before the subcommittee: H.R. 2470, sponsored by Representatives Rhodes and Steiger; H.R. 7592, sponsored by Representatives Rodino and Hutchinson, at the request of the Attorney General; and S. 2129, which passed the Senate early last month, on February 4.

[Copies of H.R. 2470, H.R. 7592, and S. 2129 follow:]

H. R. 2470

IN THE HOUSE OF REPRESENTATIVES

JANUARY 30, 1975

Mr. RHODES (for himself and Mr. STEIGER of Arizona) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 53 of title 18 of the United States Code to provide the same penalties for certain crimes against Indians as are provided for those crimes when the victim is a non-Indian.

- 1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That the second paragraph of section 1152 (relating to cer-
 4 tain offenses in Indian territory other than those committed
 5 by Indians against the person or property of other Indians)
 6 of title 18 of the United States Code is amended by striking

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- 1 out "to offenses committed by one Indian against the person
 2 or property of another Indian, nor".

- 3 SEC. 2. Section 1153 (relating to certain offenses com-
 4 mitted by Indians against the person or property of other
 5 Indians) of title 18 of the United States Code is repealed.

H. R. 7592

IN THE HOUSE OF REPRESENTATIVES

JUNE 4, 1975

Mr. ROBINO (for himself and Mr. HURCHINSON) introduced the following bill;
which was referred to the Committee on the Judiciary

A BILL

To provide for the definition and punishment of certain crimes in accordance with the Federal laws in force within the special maritime and territorial jurisdiction of the United States when said crimes are committed by an Indian in order to insure equal treatment for Indian and non-Indian offenders.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 1153 of title 18, United States Code, is amended
4 to read as follows:

5 "Any Indian who commits against the person or prop-
6 erty of another Indian or other person any of the following
7 offenses, namely, murder, manslaughter, rape, carnal knowl-

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1 edge of any female, not his wife, who has not attained the
2 age of sixteen years, assault with intent to commit rape,
3 incest, assault with intent to kill, assault with a dangerous
4 weapon, assault resulting in serious bodily injury, arson,
5 burglary, robbery, and larceny within the Indian country,
6 shall be subject to the same laws and penalties as all other
7 persons committing any of the above offenses, within the
8 exclusive jurisdiction of the United States.

9 "As used in this section, the offenses of burglary and
10 incest shall be defined and punished in accordance with the
11 laws of the State in which such offense was committed as
12 are in force at the time of such offense.

13 "In addition to the offenses of burglary and incest, any
14 other of the above offenses which are not defined and pun-
15 ished by Federal law in force within the exclusive jurisdic-
16 tion of the United States shall be defined and punished in
17 accordance with the laws of the State in which such offense
18 was committed as are in force at the time of such offense."

19 SEC. 2. Section 113 of title 18, United States Code, is
20 amended by adding the following new subsection:

21 "(f) Assault resulting in serious bodily injury, by fine
22 of not more than \$10,000 or imprisonment for ten years, or
23 both."

S. 2129

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 1976

Referred to the Committee on the Judiciary

AN ACT

To provide for the definition and punishment of certain crimes in accordance with the Federal laws in force within the special maritime and territorial jurisdiction of the United States when said crimes are committed by an Indian in order to insure equal treatment for Indian and non-Indian offenders.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Indian Crimes Act of
4 1976".

5 SEC. 2. Section 1153, title 18, United States Code, is
6 amended to read as follows:

7 "§ 1153. Offenses committed within Indian country

8 "Any Indian who commits against the person or prop-

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1 erty of another Indian or other person any of the following
2 offenses, namely, murder, manslaughter, kidnaping, rape,
3 carnal knowledge of any female, not his wife, who has not
4 attained the age of sixteen years, assault with intent to
5 commit rape, incest, assault with intent to commit murder,
6 assault with a dangerous weapon, assault resulting in serious
7 bodily injury, arson, burglary, robbery, and larceny within
8 the Indian country, shall be subject to the same laws and
9 penalties as all other persons committing any of the above
10 offenses, within the exclusive jurisdiction of the United
11 States.

12 "As used in this section, the offenses of burglary and
13 incest shall be defined and punished in accordance with the
14 laws of the State in which such offense was committed as are
15 in force at the time of such offense.

16 "In addition to the offenses of burglary and incest, any
17 other of the above offenses which are not defined and pun-
18 ished by Federal law in force within the exclusive jurisdiction
19 of the United States shall be defined and punished in ac-
20 cordance with the laws of the State in which such offense
21 was committed as are in force at the time of such offense."

22 SEC. 3. Section 1113 of title 18, United States Code, is
23 amended by adding at the end thereof the following new
24 subsection:

In view of this unsettling situation created by the confusion over the unconstitutionality of the later amendments to Section 1153, and the possibility of gross cases of injustice that could result therefrom, I urge this Committee to take immediate and positive action to amend Title 18 U.S.C. Sections 1152 and/or 1153, to correct the language of Section 1153 thereby making it once more constitutionally viable.

STATEMENT OF HON. JAMES ABDNOR OF SOUTH DAKOTA

Thank you, Mr. Chairman for permitting me to present to your Subcommittee this statement concerning the proposed amendments to the Indian Major Crimes Act.

Recent court decisions have found flaws in the amendments applied to the Major Crimes Act in 1966 and 1968. I feel that the void which allows certain extremely serious offenses from being federally prosecuted must be remedied. It is essential that the security and tranquility of reservation areas must be restored.

The crime problems that have arisen on Indian reservation lands have reached a deplorably high rate, and this crime rate continues to increase. In my state of South Dakota, the problem has reached a staggeringly high level; and as a result, South Dakota has on the reservation areas one of the highest violent crime rates in the country. This situation must be remedied.

The continued violence has caused the residents of the reservations to live in constant fear for their safety. Violence has become a way of life—a way of life that most certainly should not be allowed to continue, for we now have a climate of despair replacing what should be productive and useful activities.

These bills will help alleviate a serious legal obstacle to federal efforts to reduce the major crime rate on reservations. The uniformity in definition and punishment provided would be extremely helpful in deterring continued problems. The prime result would be in making law enforcement on Indian reservations easier and more equitable.

The most beneficial aspect of the legislation would be to restore the sorely missed law and order that would lead to returning reservation areas to a state of peace rather than remaining in the state of flux existing today which has made life even more precarious for reservation residents.

Thank you again for allowing me to express my support for this legislation.

STATEMENT OF REPRESENTATIVE SAM STEIGER

Mr. Chairman, I would like to make a brief statement in support of H.R. 2470, of which I am a co-sponsor.

In 1974, the Ninth Circuit Court of Appeals found 18 USC 1153 to be unconstitutional in that prosecutions discriminated against Indian defendants "in that Indians are subjected to harsher punishment than non-Indians for the same offenses . . . and the Government is given a lighter burden of proof in prosecuting Indians than is required in prosecuting non-Indians".

The United States Attorney is the local prosecutor for major offenses which occur on Indian reservations. The result of this decision is to leave the United States Attorney's office without an effective statute for enforcement purposes.

H.R. 2470 would simply repeal section 1153 and amend section 1152, the effect of which would be the removal of the unconstitutional defects found by the Ninth Circuit Court.

The crime situation being what it is today, I urge swift passage of this bill in order to provide to the United States Attorneys a means to vigorously prosecute offenders.

Mr. HUNGATE. All right. Mr. Pauley, you may proceed as you see fit. You have a prepared statement, do you?

Mr. PAULEY. Yes. I do, Mr. Chairman.

Mr. HUNGATE. Without objection, it will be made a part of the record at this point and you may proceed as you choose.

[The statement of Mr. Pauley follows.]

STATEMENT OF ROGER PAULEY, DEPUTY CHIEF, LEGISLATION AND SPECIAL PROJECTS SECTION CRIMINAL DIVISION

Mr. Chairman and members of the Subcommittee: I am pleased to be here today to present the views of the Department of Justice on S. 2129 and related bills to amend the federal statutes pertaining to the prosecution of crimes committed in Indian country so as to assure equal treatment for Indian and non-Indian offenders.

The Department of Justice supports the prompt enactment of S. 2129, which passed the Senate on February 4, 1976. This bill, with two minor changes, is identical to H.R. 7592, introduced on behalf of the Administration by Congressmen Rodino and Hutchinson. In the view of the Department, S. 2129 represents a sound solution to a perplexing and urgent problem, the upshot of which, as a result of recent federal appellate court holdings, is that prosecution is currently precluded for certain serious offenses involving Indian victims on Indian reservations, contrary to the intent of Congress when it enacted 18 U.S.C. 1152 and 1153.

Let me briefly review for the Subcommittee the applicable statutes and court decisions which have given rise to the difficulty. 18 U.S.C. 1153, the so-called Major Crimes Act, extends federal jurisdiction to thirteen major felonies committed by Indians in Indian country. The original act was passed in 1885 to remedy the loophole contained in 18 U.S.C. 1152, which exempted "offenses committed by one Indian against the person or property of another Indian" from the general rule that the criminal laws of the United States applicable in any place within the exclusive jurisdiction of the United States, except the District of Columbia, apply within Indian country. As enacted initially, the act was limited to seven offenses.

Section 1153, in its first paragraph, sets forth the basic principle that any Indian who commits any of the enumerated felonies therein "shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." The reference to statutes that apply within the exclusive jurisdiction of the United States includes such crimes, listed in 18 U.S.C. 1153, as murder (18 U.S.C. 1111), manslaughter (18 U.S.C. 1112), rape (18 U.S.C. 2031), carnal knowledge of a female under the age of sixteen (18 U.S.C. 2032), various kinds of assault (18 U.S.C. 113), robbery (18 U.S.C. 2111), and larceny (18 U.S.C. 661). In addition, the Assimilative Crimes Act, 18 U.S.C. 13, applicable within the exclusive jurisdiction of the United States, provides for the incorporation of State crimes, not specifically defined by federal statutes, that are committed on federal lands or enclaves within a particular State. This would include such offenses as arson, incest, and burglary, all proscribed by Section 1153.

The problem in enforcing the Major Crimes Act results principally from amendments to the statute made in 1966 and 1968. The 1966 amendment added the offenses of carnal knowledge and assault with intent to commit rape; it further provided that the offenses of rape and assault with intent to commit rape "shall be defined in accordance with the laws of the State in which the offense was committed." Moreover, the same amendment required assault with a dangerous weapon and incest to be defined and punished in accordance with the laws of the State in which the offense occurred.

The 1968 amendment added the offense of assault resulting in serious bodily injury and provided that it too be defined and punished in accordance with the laws of the State where it was committed.

The difficulty with these provisions lies in the fact that, as to some of the offenses—rape and various forms of assault—there exist, as noted above, federal statutes applicable within the special maritime and territorial jurisdiction of the United States that provide for their definition and punishment (i.e. 18 U.S.C. 2031 and 113). Thus, by operation of 18 U.S.C. 1152, which renders those statutes applicable to offenses committed by non-Indians against Indians,¹ a non-Indian committing rape or an assault with intent to commit rape or with a dangerous weapon, upon an Indian victim, may be tried under a different definition of the offense, and be subjected to a different penalty, from that applicable to an Indian offender committing an identical crime, depending on whether the State law defining and punishing the offense (which is incorporated under 18 U.S.C. 1153) differs from the federal law applicable through 18 U.S.C. 1152.

¹ Although on its face 18 U.S.C. 1152 applies also to offenses by Indians against non-Indians, it has been held that, as to the 13 offenses listed in 18 U.S.C. 1153, which also covers such conduct, the latter statute controls and must be used as the prosecutive vehicle, thus limiting 18 U.S.C. 1152 to non-Indian-committed offenses. *Henry v. United States*, 432 F. 2d 114 (9th Cir. 1970), cert. denied, 400 U.S. 1011 (1971).

Recently, federal courts of appeals have recognized that this statutory system has the potential for invidious discrimination and have held 18 U.S.C. 1153 invalid as applied to Indian defendants where the State law's definition or punishment of the offenses (which in the cases decided thus far have all involved assaults of various types) was more onerous than that which would have applied to a non-Indian charged with the same crime under 18 U.S.C. 1152. See *United States v. Cleveland*, 503 F. 2d 1067 (9th Cir. 1974); *United States v. Big Crow*, 523 F. 2d 955 (8th Cir. 1975); see also *United States v. Analla*, 490 F. 2d 1204 (10th Cir.), vacated and remanded on other grounds, 419 U.S. 813 (1974). The result of these decisions is to create a gap within which certain extremely serious offenses by Indians cannot be federally prosecuted, notwithstanding the clear intention of Congress in enacting 18 U.S.C. 1153 and its various amendments. This is a serious and pressing problem, for, aside from the fact that as a consequence lawbreakers are now enabled to go unpunished, these statutory defects place in jeopardy the tranquility of life in those Indian reservations affected, particularly with respect to Indian residents therein who as potential victims of criminal conduct have had the protection of the law removed from them. As observed by Senator Fannin upon the introduction of S. 2129:

"The most important result of this legislation and the principal reason for its introduction, would be the beneficial effect it would have on the Indians themselves. This bill, if passed, would help to restore security and tranquility to reservation life. By increasing the possibility for effective prosecution of criminals, serious and violent crimes on Indian lands would be significantly reduced."

To cure the constitutional infirmities in the present statutes, S. 2129 would, in essence, revert the Major Crimes Act to its pre-1966 form by amending 18 U.S.C. 1153 to insure equal treatment for Indian defendants accused of committing aggravated assaults upon other Indians within the Indian country. This involves, among other things, deleting the language in 18 U.S.C. 1153 that now requires looking to State law for the definition and punishment of the offenses of assault with a dangerous weapon and assault resulting in serious bodily injury. Also, since as to the latter of these offenses it is arguable that 18 U.S.C. 113 (defining assaults within the special maritime and territorial jurisdiction) contains no comparable offense,² it is necessary to amend Section 113 to define and punish the offense of assault resulting in serious bodily injury. An alternative solution would have been to delete this offense from 18 U.S.C. 1153. However, the solution reflected in the bill preserves the basic congressional judgment in 1968 that added this offense to the Major Crimes Act. The penalty is fixed at up to ten years' imprisonment, equivalent to assault with intent to commit a felony under 18 U.S.C. 113(b), in consideration of the required element that serious bodily injury must have ensued from the assault.

In addition to the foregoing aggravated assault-type offenses, a similar constitutional problem potentially exists within the present structure of 18 U.S.C. 1153 as to the offenses of rape and assault with intent to commit rape. Currently the Major Crimes Act refers to State law for the definition of these offenses, yet it allows the Indian defendant to be imprisoned "at the discretion of the court." By contrast, 18 U.S.C. 2031 (rape) and 18 U.S.C. 113(a) (assault with intent to commit rape) prescribe the federal law applicable to non-Indians who commit these crimes against other persons, including Indian victims, within the special maritime and territorial jurisdiction. Here again, the policy of equal treatment requires that the references to State law be deleted, and that these offenses be defined as well as punished according to generally applicable federal laws. S. 2129 implements these conclusions.

Before turning to the other, less vital features of the bill, it is important to note what the bill would not do. The bill would not deal with another difference in the treatment of Indian versus non-Indian offenders. This results from the Supreme Court's interpretation, in a series of cases, of 18 U.S.C. 1152 as not extending, despite its plain language to the contrary, to offenses committed by non-Indians against non-Indians in Indian country. As to such offenses, State law through prosecution in State tribunals is the sole available remedy. *New York ex rel. Roy v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 14 (1881). Because of this construction of Sec-

² The most nearly comparable form of assault proscribed in 18 U.S.C. 113 is assault "by striking, beating, or wounding," a misdemeanor punishable by only up to 6 months' imprisonment. However, this offense does not require as an element that serious bodily injury resulted from the assault.

tion 1152, an Indian who commits against a non-Indian one of the major enumerated felonies under 18 U.S.C. 1153, punishable by reference to federal law (e.g. murder), is liable to be treated substantially differently from a non-Indian committing the identical offense. The Indian will be tried in federal court under the federal statute defining the offense, whereas the non-Indian is relegated to the State courts and to the State's law. Quite recently, a federal court of appeals determined that this disparity, like that in the *Cleveland*, *Big Crow*, and *Analla*, line of cases, was constitutionally invidious, and it reversed the conviction of an Indian found guilty of an especially heinous murder of a non-Indian on a reservation in Idaho. *United States v. Antelope*, 523 F.2d 400 (9th Cir. 1975). The Department of Justice filed a petition for a writ of certiorari to the Supreme Court, in which we took the position that, unlike the situations addressed by S. 2129, the difference in treatment in the *Antelope* type of situation is not constitutionally impermissible since it occurs as a consequence of a reasonable congressional determination not to extend federal jurisdiction as to a class of offenses and to leave such offenses to State and Local prosecution. Alternatively, the petition argued, if this disparity in result is deemed to raise serious constitutional questions, then the Court should reverse its prior decisions and hold that 18 U.S.C. 1152 does reach offenses by non-Indians against non-Indians, thereby obviating the disparity. The Supreme Court granted the petition for certiorari in *Antelope*, on February 23, 1976, and presumably will decide the case early in its next Term. Since this issue is presently before the Court, the Department does not recommend that legislative action be taken at this time with respect to it. If the United States prevails, it may well be that no legislation will be needed. Even if the Supreme Court affirms the appellate court's decision, its opinion will very likely be helpful in indicating the type of remedial legislation necessary. Notably, it has been our experience that the potential solutions available to deal with the *Antelope* problem are far more controversial than those required to cure the defects in 18 U.S.C. 1153 identified by the *Cleveland* line of cases, at which S. 2129 is aimed. For this reason, too, we believe that the *Antelope* question is best deferred until after the Supreme Court has had an opportunity to express its views on the issue.

Returning to S. 2129, the bill makes three improvements to the current 18 U.S.C. 1153, not related to the constitutional problems noted above. First, the bill amends the offense of "assault with intent to kill" in the Major Crimes Act so that it reads "assault with intent to commit murder". This conforms the language of the offense to that found in 18 U.S.C. 113(a) and thus insures that the crimes will be treated identically.³

Second, S. 2129 adds kidnapping to the list of offenses in the Major Crimes Act. This incorporates the suggestion of Senator Abourezk, contained in a separate Senate bill. There is no question that kidnapping is one of the most serious crimes against the person. Under 18 U.S.C. 1201, when committed within the special maritime and territorial jurisdiction, kidnapping is punishable by up to life imprisonment. Therefore, by operation of 18 U.S.C. 1152, a non-Indian who kidnaps an Indian on an Indian reservation, or an Indian who kidnaps a non-Indian therein, is subject to federal prosecution and punishment under the terms of 18 U.S.C. 1201. An Indian who kidnaps another Indian on a reservation, however (and who does not transport his victim across any State or national boundaries), would not be federally punishable and would be subject to prosecution, if at all, only by a tribal court which can impose no more than six months' imprisonment. 25 U.S.C. 1302(7). This disparity, which discriminates against Indian victims, will be eliminated by the inclusion of kidnapping as a crime under 18 U.S.C. 1153.

Finally, S. 2129 contains language requiring current conformity with State law where such law is incorporated to define and punish offenses in 18 U.S.C. 1153 other than those defined and punished according to federal law. Some lower courts have held that Section 1153 incorporates State law only as it existed as of the last reenactment of the Major Crimes Act. E.g. *United States v. Gomez*, 250

³ There is authority to the effect that the two offenses are different in that assault with intent to commit murder contains an extra element of malice. E.g., *United States v. Barnaby*, 51 Fed. 2d 20; 22 (D. Mont. 1892); *Jenkins v. State*, 238 A.2d 922, 925 (Ct. Spec. App. Md. 1968); see also 40 C.J.S., p. 935. A district court in Arizona in 1971 relied on this rationale to hold that the offense of assault with intent to kill in 18 U.S.C. 1153 was void for lack of a prescribed punishment *United States v. Ataha*, unpublished opinion, No. CR-70-412.

F. Supp. 535 (D. N.M. 1966).⁴ This interpretation, while perhaps plausible in terms of the phraseology used in the statute, clearly represents poor policy, since it mandates trial and conviction by reference to a State statute which the State itself may well have modified or repealed at the time of the defendant's conduct. This result is at variance with the congressional policy embodied in the general federal Assimilative Crimes Act, 18 U.S.C. 13, which mandates the incorporation of State law as it existed at the time of the alleged offense. S. 2129 would conform 18 U.S.C. 1153 to this salutary policy.

In conclusion, Mr. Chairman, the Department of Justice believes that S. 2129 as written is a beneficial measure that would both provide some urgently needed amendments to remedy present constitutional defects in 18 U.S.C. 1153, and that would make other significant improvements to the statute. We can perceive no reason for controversy about the bill and we urge its rapid enactment.

TESTIMONY OF ROGER PAULEY, DEPUTY CHIEF, LEGISLATION AND SPECIAL PROJECTS SECTION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. PAULEY. At the outset I think I should introduce my colleague, Roger Adams. He is an attorney in the General Crimes Section of the Criminal Division, which has direct supervisory responsibility for the enforcement of the statutes under discussion this morning.

I am pleased to be here today to present the views of the Department of Justice on S. 2129 and related bills to amend the Federal statutes pertaining to the prosecution of crimes committed in Indian country so as to assure equal treatment for Indian and non-Indian offenders.

The Department of Justice supports the prompt enactment of S. 2129, which passed the Senate recently on February 4 of this year. This bill, with two relatively minor changes, is identical to H.R. 7592, introduced on behalf of the administration by Chairman Rodino and Congressman Hutchinson of this committee.

In the view of the Department, S. 2129 represents a sound solution to an urgent problem, the upshot of which, as a result of recent Federal appellate court holdings, is that prosecution is currently precluded for certain serious offenses involving Indian victims on Indian reservations, contrary to the intent of Congress when it enacted sections 1152 and 1153 of title 18. Let me briefly review for the subcommittee the applicable statutes and court decisions which have given rise to the difficulty.

The so-called Major Crimes Act, 18 U.S.C. 1153, extends Federal jurisdiction to 13 major felonies committed by Indians in Indian country. The original act was passed in 1885 to remedy the exception contained in section 1152 of title 18, which exempts "offenses committed by one Indian against the person or property of another Indian" from the general rule that the criminal laws of the United States applicable in any place within the exclusive jurisdiction of the United States, except the District of Columbia, apply within Indian country.

Section 1153, in its first paragraph, sets forth the basic principle that any Indian who commits any of the enumerated felonies therein, "shall be subject to the same laws and penalties as all other persons

⁴ Three recent unreported cases from the District of Montana have followed *Gomez*, one of which, *United States v. Russell*, Cr. No. 75-39 EG (Dec. 12, 1975), is presently being appealed to the Ninth Circuit.

committing any of the above offenses, within the exclusive jurisdiction of the United States."

The reference to statutes that apply within the exclusive jurisdiction of the United States includes such crimes, listed in section 1153, as murder, manslaughter, rape, carnal knowledge of a female under the age of 16, various kinds of assault, robbery, and larceny.

In addition, the Assimilative Crimes Act, section 13 of title 18, applicable within the exclusive jurisdiction of the United States, provides for the incorporation of State crimes, not specifically defined by Federal statutes, that are committed on Federal lands or enclaves within a particular State. This would include such offenses as arson, incest, and burglary, all proscribed by section 1153.

The problem in enforcing the Major Crimes Act results principally from amendments to the statute made in 1966 and 1968. The 1966 amendment added the offenses of carnal knowledge and assault with intent to commit rape; it further provided that the offenses of rape and assault with intent to commit rape—and this is crucial—"shall be defined in accordance with the laws of the State in which the offense was committed."

Moreover, the same amendment required assault with a dangerous weapon and incest to be defined and punished in accordance with the laws of the State in which the offense occurred.

Mr. HUNGATE. That's "punished" and not "published"?

Mr. PAULEY. That's correct. That is a typographical mistake in my written statement. The 1968 amendment added the offense of assault resulting in serious bodily injury and provided that it too be defined and punished in accordance with the laws of the State where it was committed.

The difficulty with these provisions lies in the fact that, as to some of the offenses—rape and various forms of assault—there exist, as noted above, Federal statutes applicable within the special maritime and territorial jurisdiction of the United States that provide for their definition and punishment: That is, sections 2031 and 113 of title 18. Thus, by operation of section 1152 of title 18, which renders those statutes applicable to offenses committed by non-Indians against Indians, a non-Indian committing rape or an assault with intent to commit rape or with a dangerous weapon upon an Indian victim may be tried under a different definition of the offense and be subjected to a different penalty from that applicable to an Indian offender committing an identical crime, depending on whether the State law defining and punishing the offense—which is incorporated under the Major Crimes Act—is different from the Federal law applicable through section 1152.

Recently, Federal courts of appeals have recognized that this statutory system has the potential for invidious discrimination and have held the Major Crimes Act invalid as applied to Indian defendants where the State law's definition or punishment of the offenses—which in the cases decided thus far have all involved assaults of various types—was more onerous than that which would have applied to a non-Indian charged with the same crime under section 1152. The cases are: *United States v. Cleveland*, in the 9th circuit; *United States v. Big Crow*, in the 8th circuit; and the 10th circuit has also noted the dis-

parity in result, but has justified it in a case named *United States v. Analla*.

The result of these decisions is to create a gap within which certain extremely serious offenses by Indians cannot be federally prosecuted, notwithstanding the clear intention of Congress in enacting 18 U.S.C. 1153 and its various amendments. This is a serious and pressing problem, for, aside from the fact that as a consequence lawbreakers are now enabled to go unpunished, these statutory defects place in jeopardy the tranquillity of life in those Indian reservations affected, particularly with respect to Indian residents therein who, as potential victims of criminal conduct, have had the protection of the law removed from them.

As observed by Senator Fannin upon the introduction of S. 2129:

The most important result of this legislation, and the principal reason for its introduction, would be the beneficial effect it would have on the Indians themselves. This bill, if passed, would help to restore security and tranquillity to reservation life. By increasing the possibility for effective prosecution of criminals, serious and violent crimes on Indian lands would be significantly reduced.

To cure the constitutional infirmities in the present statutes, S. 2129 would, in essence, revert the Major Crimes Act to its pre-1966 form by amending section 1153 to insure equal treatment for Indian defendants accused of committing aggravated assaults upon other Indians within the Indian country.

This involves, among other things, deleting the language in 18 U.S.C. 1153 that now requires looking to State law for the definition and punishment of the offenses of assault with a dangerous weapon and assault resulting in serious bodily injury.

Since, as to the latter of these offenses, assault resulting in serious bodily injury, it is also arguable that section 113 of title 18, defining assaults within the special maritime and territorial jurisdiction, contains no comparable offense, it is necessary, in addition, to amend that section to define and punish the offense of assault resulting in serious bodily injury.

An alternative solution would have been to delete this offense altogether. However, the solution reflected in the bill preserves the basic congressional judgment in 1968 that added this offense to the Major Crimes Act.

In addition to the foregoing aggravated assault-type offenses, a similar constitutional problem potentially exists within the present structure of the Major Crimes Act as to the offenses of rape and assault with intent to commit rape. Currently, the Major Crimes Act refers to State law for the definition of these offenses, yet it allows the Indian defendant to be imprisoned "at the discretion of the court."

By contrast, sections 2031, rape, and 113(a), assault with intent to commit rape, in the present title 18, prescribe the Federal law applicable to non-Indians who commit these crimes against other persons, including Indian victims, within the special maritime and territorial jurisdiction.

Here again, the policy of equal treatment requires that the references to State law be deleted, and that these offenses be defined as well as punished according to generally applicable Federal laws. S. 2129 implements these conclusions.

Before turning to the other features of the bill, it is important to note what the bill would not do. The bill would not deal with another difference in the treatment of Indian versus non-Indian offenders. This results from the Supreme Court's interpretation, in a series of cases, of section 1152 as not extending, despite its plain language to the contrary, to offenses committed by non-Indians against non-Indians in Indian country.

As to such offenses, State law through prosecution in State tribunals is the sole available remedy. Because of this construction of section 1152, an Indian who commits against a non-Indian one of the major enumerated felonies under the Major Crimes Act, punishable by reference to Federal law—for example, murder—is liable to be treated substantially differently from a non-Indian committing the identical offense.

The Indian will be tried in Federal court under the Federal statute defining the offense, whereas the non-Indian is relegated to the State courts and to the State's law.

Quite recently, a Federal court of appeals determined that this disparity, like that in the *Cleveland* and *Big Crow* line of cases, was constitutionally invidious, and it reversed the conviction of an Indian found guilty of an especially heinous murder of a non-Indian on a reservation in Idaho. That is the *Antelope* case.

The Department of Justice filed a petition for a writ of certiorari to the Supreme Court in which it took the position that, unlike the situations addressed by S. 2129, the difference in treatment in the *Antelope* type of situation is not constitutionally impermissible, since it occurs as a consequence of a reasonable congressional determination not to extend Federal jurisdiction at all as to a class of offenses and to leave such offenses to State and local prosecution.

Alternatively, the petition argued, if this disparity in result is deemed to raise serious constitutional questions, then the Court should reverse its prior decisions and hold that section 1152 does reach offenses by non-Indians against non-Indians, thereby obviating the disparity.

The Supreme Court granted the Government's petition for certiorari in *Antelope* on February 23 of this year, and presumably will decide the case early in its next term. Since this issue is presently before the Court, the Department does not recommend that legislative action be taken at this time with respect to it.

If the United States prevails, it may well be that no legislation will be needed. Even if the Supreme Court affirms the lower court's decision, its opinion will very likely be helpful in indicating the type of remedial legislation necessary.

Notably, moreover, it has been our experience that the potential solutions available to deal with the *Antelope* problem are far more controversial than those required to cure the defects in the Major Crimes Act identified by the *Cleveland* and *Big Crow* line of cases, at which S. 2129 is aimed.

For this reason as well, we believe that the *Antelope* question is best deferred until after the Supreme Court has had an opportunity to express its views on the issue.

Returning to S. 2129, the bill makes three improvements to the current Major Crimes Act not related to the constitutional problems

noted above. First, the bill amends the offense of "assault with intent to kill" in the Major Crimes Act so that it reads "assault with intent to commit murder." This conforms the language of the offense to that found in section 113 of title 18 and thus insures that the crimes will be treated identically.

Second, S. 2129 adds kidnaping to the list of offenses in the Major Crimes Act. This incorporates the suggestion of Senator Abourezk contained in a separate Senate bill. There is no question that kidnaping is one of the most serious crimes committed against the person. Under section 1201 of title 18, when committed within the special maritime and territorial jurisdiction, kidnaping is punishable by up to life imprisonment. Therefore, by operation of section 1152, a non-Indian who kidnaps an Indian on an Indian reservation or an Indian who kidnaps a non-Indian therein, is subject to Federal prosecution and punishment under the terms of section 1201.

An Indian who kidnaps another Indian on a reservation, however—and who does not transport his victim across any State or national boundaries—would not be federally punishable and would be subject to prosecution, if at all, only by a trial court which can impose no more than 6 months' imprisonment. This disparity, which discriminates against Indian victims, will be eliminated by the inclusion of kidnaping as a crime under 18 U.S.C. 1153.

And finally, S. 2129 contains language requiring current conformity with State law where such law is incorporated to define and punish offenses in the Major Crimes Act other than those defined and punished according to Federal law. Some lower courts have held that section 1153 incorporates State law only as it existed as of the last reenactment of the Major Crimes Act.

This interpretation, while perhaps plausible in terms of the phraseology used in the statute, clearly represents poor policy, since it mandates trial and conviction in Federal court by reference to a State statute which the State itself may well have modified or repealed at the time of the defendant's conduct. This result is at variance with the congressional policy embodied in the general Federal Assimilative Crimes Act, which directs the incorporation of State law, as it existed at the time of the alleged offense.

S. 2129 would conform the Major Crimes Act to this salutary policy. In conclusion, Mr. Chairman, the Department of Justice believes that S. 2129 as written is a beneficial measure that would both provide urgently needed amendments to remedy present constitutional defects in the Major Crimes Act and that would make other significant improvements to that statute.

We perceive no reason for controversy about the bill and we urge its rapid enactment.

Mr. HUNGATE. Thank you, Mr. Pauley. Mr. Hyde?

Mr. HYDE. I have no questions. I'm sure counsel may have some that he may want to ask—in lieu of me.

Mr. HUNGATE. That's all right, certainly—5 minutes.

Mr. SMIETANKA. I want to congratulate you for a very well-thought out and well-researched presentation. But I do want to ask you some questions about the problem as it occurred and how it arose.

You state the law would be reverted by S. 2129 to pre-1966 state, but as I understand it, the statute was actually changed in 1932 to

include, for the first time, reference to State law for the crime of rape. Would it not be more accurate, then, to say that while in a sense the law is returning to its pre-1966 condition, basically it is being returned to its pre-1932 state, in which no reference was made to State law for the definition of crimes; is that correct?

Mr. PAULEY. Well, my statement was made in the context of a sentence which included only the aggravated assault provisions. You are correct as to the rape offense.

There are, of course, other references to State law in section 1153, such as for the crimes of incest and burglary. But those references pose no problem since no Federal statute applicable within the exclusive jurisdiction of the United States defines those offenses. Rather, Federal courts, under the Assimilative Crimes Act, now incorporate the State law's definition and punishment of those offenses.

Therefore, those references to State law are quite proper and should be left untouched.

Mr. SMIETANKA. I'm curious. I don't know if you're personally familiar with the reasons why the Congress chose to amend the law in 1932 to include this reference to State law as to rape. But it seems to me that that was the bad seed that was planted in this statute. Would you have any knowledge as to why the Congress so acted?

Mr. PAULEY. I do not, but let me defer to Mr. Adams.

Mr. ADAMS. I believe the answer is that rape, back in 1932, was defined or more correctly was punished under the Federal Code as a capital offense. Therefore, adding the provision that an Indian would be punished at the discretion of the court is a way of making the potential punishment less serious for Indians.

Mr. SMIETANKA. Was there any attempt by the Congress, or any desire, to acquire the benefit of a different age standard for statutory rape? In other words, if the State had a higher age of consent, would the Congress seek to get the benefit of this—whereas the age of consent was 16, I believe, under the Federal statute?

Mr. ADAMS. That would be a consideration. I'm just not sure what the Congress had in mind there.

Mr. SMIETANKA. On the question of the non-Indian versus non-Indian crime, you defer making any recommendations. But if the Supreme Court continues its *Draper* line of cases, what possibilities do you see for statutory revisions? Would you recommend or do you see a major overhaul of the entire concept of Federal jurisdiction over Indians?

Mr. PAULEY. Well, the Court would have to do more than adhere to its *Draper* line of cases to create a problem. It would also have to find—as did the lower court—that by adhering to that line of cases, a constitutionally impermissible disparity and treatment was created. But I take it that your question is assuming that it did both.

Mr. SMIETANKA. Right.

Mr. PAULEY. What forms of solution might then be available—well, I can think of two, neither of which is particularly attractive unless it is compelled to obviate a constitutional defect. One is to simply change the entire structure of the Major Crimes Act and indeed reverse the trend which S. 2129 would further by, instead of referencing to Federal law for the definition and punishment of offenses

committed in Indian country, using an Assimilative Crimes Act approach across the board so that an Indian committing an offense against a non-Indian, by virtue of an Assimilative Crimes Act provision in the Major Crimes Act, would be referenced to the same State statute that he would be tried under by a State court if, as a non-Indian, he committed the identical crime against a non-Indian. That's one possible solution.

Another possible solution is for the Congress, assuming it is constitutionally permissible as an exercise of Federal power, to overturn the results of the *Draper* line of cases and simply extend, by express statutory provision, Federal jurisdiction over non-Indian versus non-Indian crimes on Indian reservations.

Mr. SMIETANKA. I have one question more. It is on the bill as introduced by Mr. Rhodes. Are you familiar with it generally?

Mr. PAULEY. Yes, I am.

Mr. SMIETANKA. It was my observation that the bill possibly might result in the relinquishment of at least exclusive Federal jurisdiction over the major crimes and return to the tribal courts at least concurrent jurisdiction in this field. Is that your observation?

Mr. PAULEY. I think generally—and this is the reason why the Department does not support that admittedly simpler approach to the problem—is that it would have the opposite effect of expanding Federal jurisdiction to an unwarranted or at least a highly-controversial extent over Indian reservations. Because under that approach which eliminates 1153 altogether and then broadens 1152, 1152 would include—as it does now—the Assimilative Crimes Act. And therefore, the Federal Government would be exercising jurisdiction as to Indian defendants over every offense defined by the law of the State in which that reservation was located. Whereas now, because of the limitation in the Major Crimes Act to the 13 felonies enumerated therein, the Federal Government is only enabled to prosecute those Indians for those crimes (which are all Federal felonies) defined by statute within the exclusive jurisdiction of the United States; no misdemeanors are included.

Mr. SMIETANKA. Well, the point being that while it would expand Federal jurisdictions to misdemeanors, to all crimes, it would also repeal the Major Crimes Act, which is a congressional exercise of exclusive jurisdiction, a congressional abrogation of tribal jurisdiction over those particular crimes.

At least as those crimes are concerned, it would seem that it returns to the tribes at least concurrent jurisdiction.

Mr. PAULEY. It would be arguable. There is currently some dispute, I believe, as to whether, under the terms of other statutes in title 25, tribal courts may exercise jurisdiction over felonies. They are limited to the punishment that they can impose to up to 6 months imprisonment.

Some argue that because the Federal statute limits only the punishment provision that it does not affect the jurisdiction of tribal courts and that, indeed, they can try offenses such as kidnaping and other major felonies that are not listed in 1153. But others argue that the congressional intent, because of the punishment limitation, must also have limited the jurisdiction to minor offenses since it couldn't have

been intended that a tribal court convict you of kidnaping, but be limited to such a low level of penalty.

Mr. SMIETANKA. It would make it most attractive to plead out to a charge of first degree murder and take 6 months in the tribal jail, I assume. Thank you very much.

Mr. HUNGATE. As I understand, the Department supports the enactment of S. 2129, which is virtually identical with H.R. 7592?

Mr. PAULEY. That's correct.

Mr. HUNGATE. And do you prefer that to H.R. 2470 sponsored by Representatives Rhodes and Steiger?

Mr. PAULEY. Yes. We do, for the reasons I touched upon in my answer to Mr. Smietanka. That approach is beguiling in its simplicity and, indeed, it embodies an approach which S. 1, in an earlier version, embodied. And that approach was found in the other body to generate considerable controversy on the part of tribes who were not happy at the extension of Federal jurisdiction over minor offenses—misdemeanor-type offenses—

Mr. HUNGATE. I see.

Mr. PAULEY [continuing]. That presently tribal courts have exclusive authority to punish.

Mr. HUNGATE. And what you're saying is that the people most affected—or some of the people most affected—are more pleased, apparently, by the S. 2129 approach?

Mr. PAULEY. That's correct.

Mr. HUNGATE. Could you tell us a little bit about the Assimilative Crimes Act? In other words, this is not quite like it is when you draw a will and incorporate by reference a paper that's going to be changed later? With that you have to incorporate things that already exist. But apparently under the Assimilative Crimes Act you can agree to incorporate State law, even though it's later changed or repealed?

Mr. PAULEY. Yes, in general. The problem results from the fact that the United States Code today is not a complete code in terms of Federal enclaves such as forts, Indian reservations, and other areas over which the Federal Government exercises exclusive or concurrent jurisdiction.

Some offenses, like assault and murder, are the subject of specific Federal statutes. Others—even serious offenses like burglary and incest and so forth, as well as a host of public morals-types offenses like bigamy and others—are not defined by any Federal statute. So the congressional solution to that problem has been, in order to prevent these Federal enclaves from becoming havens within States for the violation of otherwise statewide applicable local laws, to enact an Assimilative Crimes Act Provision, that provides that if you engage in conduct within such a Federal enclave within the boundaries of a State that is not proscribed by a specific Federal statute applicable to the conduct, then you are guilty of an offense triable in Federal court, but under the same terms of the State statute.

Mr. HUNGATE. State law, yes.

Mr. PAULEY. Now, that Assimilative Crimes Act provision is one of the laws applicable within the exclusive jurisdiction of the United States and it therefore applies through section 1152 to crimes committed in Indian country by non-Indians against Indian victims.

Mr. HUNGATE. And it includes the measure that we mentioned earlier where we have a case on a Federal enclave and there's no Federal statute for the crime, then we assimilate the State law on that crime?

Mr. PAULEY. That's correct.

Mr. HUNGATE. Not only the State laws that existed at the time that act was passed, but any future State law on that subject as it may be amended, right?

Mr. PAULEY. Yes. Under the Assimilative Crimes Act, that's true. That's not the case arguable under the Major Crimes Act, which is one of the faults that this—

Mr. HUNGATE. This strikes me as a large delegation, but I guess it is a large delegation of congressional legislative authority to what we know not.

Mr. PAULEY. It reflects a basic policy judgment that the residents of Federal enclaves should be generally subject as to these minor offenses which the Congress has left not specifically defined to the identical—

Mr. HUNGATE. Are there no major offenses included there?

Mr. PAULEY. Well, there are some. As I say—

Mr. HUNGATE. It depends on what you think a major offense is.

Mr. PAULEY. Burglary would almost certainly be considered a major offense, yet Congress has never defined—

Mr. HUNGATE. Well, that's not our problem today. I just got as far as the State planning and I didn't understand it fully.

Mr. PAULEY. S. 1 would deal with that more effectively.

Mr. HUNGATE. And you're suggesting that with kidnaping, that it should be added to the list here of major crimes?

Mr. PAULEY. Yes.

Mr. HUNGATE. And "assault with intent to commit murder," is how the act should read, rather than "assault with intent to kill"?

Mr. PAULEY. Yes. Those are the two aspects in S. 2129 which represent the sole differences from H.R. 7592.

Mr. HUNGATE. Does that make it perhaps necessary or desirable to amend another statute dealing with some of these offenses? Does it also come under §3242?

Mr. PAULEY. 3242, I think, probably should be amended. That statute provides that whoever commits—and then it lists the offenses in 1153, any of those offenses—shall be tried in the same courts and in the same manner as all other persons committing those offenses.

Mr. HUNGATE. It would seem perhaps at first that if you agree that these other changes are all right, it would just be a conforming amendment.

Mr. PAULEY. Yes. I think that is an oversight of the bill as presently drafted.

Mr. HUNGATE. It is not a major change. It wouldn't change the thrust of the bill, would it?

Mr. PAULEY. No. It would not.

Mr. HUNGATE. And also, as a conforming amendment, "larceny on Indian country" should be changed to "larceny within Indian country." That would be a § 3242 problem also.

Now, your comment on page 6 of your statement that "despite its plain language to the contrary" in title 18, § 1152, the Supreme

Court has construed § 1152 as not applying or extending to offenses committed by non-Indians against non-Indians in Indian country. Has that been directly tested on appeal?

Mr. PAULEY. Well, it will be tested or it may conceivably be tested in the *Antelope* case.

Mr. HUNGATE. That could be before us. All right, sir. You discussed that.

Now, I want to be sure that I understand, on page 7 of your statement you say that the certiorari petition on *Antelope* was granted on February 23d of this year. Then in the following sentence you say, "If the United States prevails, it may well be that no legislation will be needed." You don't mean that the bills we're considering today would not be needed?

Mr. PAULEY. I mean that no legislative action to deal with the problem—

Mr. HUNGATE. You mean the problem addressed by the *Antelope* case. All right, thank you. But you still see a need for this legislation?

Mr. PAULEY. Oh, yes.

Mr. HUNGATE. On page 9, you mentioned that there's a discrimination and a disparity against Indian victims in kidnaping cases at the present time. Of course, it also discriminates in a sense in favor of Indian defendants, I suppose, or would it, if they kidnaped someone?

Mr. PAULEY. Well, it definitely would, I just can't—

Mr. HUNGATE. You only get 6 months for kidnaping.

Mr. PAULEY [continuing]. Imagine the class of persons of Indian kidnapers being deemed a particularly sympathetic constituency.

Mr. HUNGATE. Now, again, back to section 3242, which I think deals with Federal court venue for the major crimes of section 1153—might it be wise to amend that section to include all section 1153 crimes as now included or which will be in our present proposal?

Mr. PAULEY. Yes. I—

Mr. HUNGATE. Would it cover that for venue purposes?

Mr. PAULEY. Yes; I think so. In fact, in 1968, when Congress added to the Major Crimes Act the offense of assault resulting in serious bodily injury, it failed to make the necessary conforming change to 3242, and the Supreme Court noted that in a later case.

Mr. HUNGATE. And then we could at this time perfect 3242—

Mr. PAULEY. Yes.

Mr. HUNGATE [continuing]. To be consistent with what we now propose to do?

Mr. PAULEY. Yes.

Mr. HUNGATE. What happens now or, if you know, what is the practice in those circuits that have held that Section 1153 violates due process? How are major crimes handled by prosecutors in those circuits?

Mr. PAULEY. Let me defer to Mr. Adams.

Mr. ADAMS. Yes. In the *Cleveland* case, in denying the petitions for rehearing, the ninth circuit noted that nothing would preclude prosecution under 1153, with reference to Federal law. In other words, they said you could go back and look at 1153 before the 1966 amendment. So we have taken the position that in any case where the defendant uses a dangerous weapon, it's permissible to indict under 1153 and 113(c) and that's the procedure that we're following.

Mr. HUNGATE. Yes. That's what's handled for those offenses now. About how many cases do you think are involved in a year?

Mr. ADAMS. Pardon?

Mr. HUNGATE. How many cases does that affect in a year, would you think?

Mr. ADAMS. The most recent statistics that we have are for fiscal year 1973.

Mr. HUNGATE. Yes.

Mr. ADAMS. In that year there were 404 defendants against whom court actions were begun under 1153. We don't have it broken down by offenses under 1153, but—

Mr. HUNGATE. But some would still be permissible, if prosecuted there; is that right?

Mr. ADAMS. Yes. But our experience has shown that about 80 percent of the offenses under 1153 involve some type of assault.

Mr. HUNGATE. I see. So 300 or so—that's a rough approximation as to those figures?

Mr. ADAMS. That's correct.

Mr. HUNGATE. I understand that burglary and incest are not defined in title 18, so State law, then, under the Assimilative Crimes Act applies both to Indians and non-Indians located there? Is that the case?

Mr. PAULEY. That's correct.

Mr. ADAMS. That's the case.

Mr. HUNGATE. Well, should I understand that tribal jurisdiction is not that adequate to deal with the major offenses of Section 1153 because of the limitation on sentencing, or are there other grounds for not doing it?

Mr. PAULEY. It's mainly the sentencing aspect. I think that the Congress and the people of the country would still be somewhat uneasy if, in their present state, not subject to the article III protections of a dispassionate Federal judiciary, those courts were to be given jurisdiction to try and punish persons at a felony level.

Mr. HUNGATE. Thank you. I apologize for taking so much time. Mr. Hyde?

Mr. HYDE. I have a couple of totally irrelevant questions to ask as to the situation of Indian citizenship. Are Indians citizens and can they vote?

Mr. PAULEY. Indians are citizens and it's my understanding that they do vote in the State as well as Federal elections.

Mr. HYDE. OK. What are Mr. Pottinger's plans or what is your Department's plan for integrating the Indian populace with the rest of us? I know there's a great militancy to integrate our schools and our urban areas. It seems to me that their policy is just the reverse as it refers to Indians. Is that so and why the contradiction? I know that's a tough question to throw at you. It's not your field.

Mr. PAULEY. I'm unfortunately not familiar with Mr. Pottinger's position in this area. I can certainly relay your question to his office and have them respond. I would just note that I think that some of the difference in policy, if indeed it exists, is probably at the instance of the tribes themselves in some instances.

Mr. HYDE. Well, I would think it is. And I would think that the response to that feeling among the tribes is one of accommodation,

contrary to the response to other communities who would like to be accommodated as well. I just see a disparity between a strong militant policy to integrate schools and communities and housing here and total withdrawal from the Indian situation. And I have trouble reconciling the philosophical concept of, "If integration is so good for everyone else, why isn't it good for Indians?"

I mean, it's an unfair question to put to you and I wish you were Mr. Pottinger. I should address it to Mr. Pottinger. And if you could, I would appreciate hearing comments as to why the difference.

Mr. PAULEY. Fine.

Mr. HUNGATE. Counsel has a few questions here.

Mr. HUTCHISON. Just to make sure, I want to put some of the statistics about the number of offenses in some perspective. It's the eighth and the ninth circuits which have declared these provisions unenforceable and 80 percent of the prosecutions that you have involve the offenses that have been declared unconstitutional.

Mr. PAULEY. That's correct.

Mr. HUTCHISON. Do the eighth and the ninth circuits constitute the bulk of your section 1153 prosecutions? Do they contain most of the Indian country about which we're talking?

Mr. PAULEY. Yes; it does. There are some in the 10th circuit, but there are a great many more—if you total the 8th and 9th together, there are a great many more than in the 10th.

Mr. HUTCHISON. So these two decisions, of themselves, have a major impact on the Department's ability to prosecute these offenses in Indian country?

Mr. PAULEY. Yes.

Mr. HUTCHISON. That's all.

Mr. HUNGATE. Thanks again, Mr. Pauley, and your associate has been helpful as usual. I believe that concludes the witnesses we have before us this morning. Unless there's objection we would file for the record a letter from the Department of the Interior which recommends enactment of this legislation. It's dated February 12, 1976, from the Commission of Indian Affairs, Morris Thompson, and addressed to Mr. Rodino; a letter addressed to the Speaker from the Office of the Attorney General under date of May 20 of last year urging similar legislation and that is from the Attorney General; and an article by Tim Vollmann entitled "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict" from the *Kansas Law Review* at 22 *Kans. L. Rev.* 387 (1974); and then some cases that deal with this problem in some particularity: *United States v. Analla*, 490 F. 2d 1204 and this is in the 10th circuit; *United States v. Cleveland*, the 9th circuit, 503 F. 2d 1067; *United States v. Big Crow*, 523 F. 2d at 955, and that is from the 8th circuit.

[The documents referred to follow:]

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., February 12, 1976.

HON. PETER W. RODINO,
Chairman, Committee on the Judiciary, House of Representatives
Washington, D.C.

DEAR MR. CHAIRMAN: There is pending before your Committee H.R. 7592, a bill "To provide for the definition and punishment of certain crimes in accordance with the Federal laws in force within the special maritime and territorial jurisdic-

tion of the United States when said crimes are committed by an Indian in order to insure equal treatment for Indian and non-Indian offenders."

We strongly recommend that the bill be enacted. This bill is needed to cure a serious defect which now exists with regard to the prosecution of certain criminal offenses in Indian country.

The Major Crimes Act (18 U.S.C. § 1153) provides that 13 enumerated offenses committed by Indians within Indian country (as defined by 18 U.S.C. 1151) shall be subject to the same laws and penalties applicable within the exclusive jurisdiction of the United States. However, in 1966 the Act was amended to provide that certain of these offenses—namely burglary, assault with a dangerous weapon, assault resulting in serious bodily harm, and incest—shall be defined and punished in accordance with the laws of the State in which such offenses were committed. This Act applies exclusively to Indians whether the victim be Indian or non-Indian. A non-Indian committing these identical offenses against an Indian in Indian country is subject to the provisions of 18 U.S.C. § 1152 which extends Federal criminal jurisdiction over such non-Indians, and provides that punishment will be defined by Federal law. (A non-Indian who commits an offense against another non-Indian in Indian country is tried and punished in State court). State definition and punishment for these offenses often differ from Federal law and, in many cases, State law prescribes a more severe punishment than the Federal law applicable within Indian country.

Because of the disparities between Indians and non-Indians in penalties given, both the Eighth and Ninth Circuits recently declared portions of the Major Crimes Act to be unconstitutional, specifically those regarding aggravated assault (*United States v. Cleveland*, 9th Cir., 1974; *United States v. Seth Henry Big Crow*, 8th Cir., 1975). Therefore, the Federal Government is now unable to prosecute Indians who commit assault resulting in serious bodily harm in Indian country in either of these two jurisdictions, which encompass a major portion of Indian country under Federal criminal jurisdiction. The problem is acute and leaves Indian communities without the protection not only of Federal law but of any law except in the sense that a person might be prosecuted for a lesser included offense. Tribal courts are restricted to jurisdiction over misdemeanors by the Indian Civil Rights Act of 1968, and except where a State has been granted criminal jurisdiction by Public Law 83-280 or other Acts of Congress, States do not ordinarily possess jurisdiction over offenses committed by Indians in Indian country. It is urgent that laws declared invalid be replaced as soon as possible.

H.R. 7592, a bill proposed by the Department of Justice, would restore the ability of the Federal Government to prosecute certain serious offenses by Indians under 18 U.S.C. § 1153 which was lost as a consequence of the recent court decisions. This bill would delete the requirement that Federal courts look to State law for the definition and/or punishment of certain crimes when the accused is an Indian. This would eliminate the possibility of a disparity in the definition or punishment of an offense under 18 U.S.C. § 1153, depending upon whether the accused is an Indian or a non-Indian, and would thus renew the validity of that statute as to all the offenses it enumerates.

H.R. 7592 would also add a new paragraph to 18 U.S.C. § 1153 to provide for automatic referral to State law if Congress should add an offense to the section not otherwise found among the Federal enclave laws.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

MORRIS THOMPSON,
Commissioner of Indian Affairs.

OFFICE OF THE ATTORNEY GENERAL,
Washington D.C., May 20, 1975.

THE SPEAKER,
The House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Enclosed for your consideration and appropriate reference is a legislative proposal to amend 18 U.S.C. 1153 and 18 U.S.C. 113 so as to provide for the definition and punishment of certain major crimes in accordance

with the federal laws in force within the special maritime and territorial jurisdiction of the United States when said crimes are committed by an Indian. Such legislation is urgently needed to restore Federal ability to prosecute certain major offenses by Indians, which ability has been lost as a result of recent Federal court decisions invalidating aspects of current statutory law.

18 U.S.C. 1153, the Major Crimes Act, extends Federal jurisdiction to certain "major crimes" committed on Indian reservations by one Indian against another. This Act was passed in 1885 to remedy the loophole created by 18 U.S.C. 1152 which exempted intra-Indian crimes from Federal jurisdiction.

The Major Crimes Act requires that Indians "shall be subject to the same laws and penalties as all other persons" committing any of the enumerated offenses. Further, as a matter of equal protection, the Fifth Amendment would prohibit discriminatory punishment for Indians vis-a-vis all other persons. Prior to 1966, the aggravated assault crimes listed in Section 1153 were defined and punished according to Federal enclave law, 18 U.S.C. 113(c), (assaults within the maritime and territorial jurisdiction of the United States). In 1966, Congress amended the Act to require that the crime of assault with a dangerous weapon be defined and punished according to state law. In 1968 Congress further amended the Act by adding the offense of assault resulting in serious bodily injury and requiring that this new offense be defined and punished according to state law.

The uniqueness of the state laws has created a situation where state definition and punishment for aggravated assaults may differ from the Federal statute, 18 U.S.C. 113(c), and District Courts in the 8th, 9th, and 10th Circuits have recently held that these differences in treatment for Indians (as opposed to non-Indian defendants who are punished with reference to Federal law) constitute a denial of equal protection and due process under the Fifth Amendment. The effect of such decisions dismissing Federal indictments for aggravated assaults has been to invalidate the authority presently available to the government under Section 1153 to prosecute Indians who commit either the crime of assault with a dangerous weapon or assault resulting in serious bodily injury on Indian reservations in states such as Arizona, where the local law is more severe than Federal law applicable within the Indian Country. See, e.g., *United States v. Cleveland*, 503 F.2d 1067 (9th Cir. 1974); *United States v. Boone*, 347 F.Supp. 1031 (D.N.Mexico 1972); but compare *United States v. Analla*, 490 F.2d 1204 (10th Cir.) remanded for reconsideration, —U.S.— (October 15, 1974).

To remedy this situation and remove a major stumbling block to the effective prosecution of these offenses, it is proposed that the Major Crimes Act be reverted to its pre-1966 form by amending 18 U.S.C. 1153 and 18 U.S.C. 113 to insure equal treatment for Indian defendants accused of committing aggravated assaults upon other Indians within the Indian Country. This requires conforming the punishment for the aggravated assaults enumerated within Section 1153 to that provided in the equivalent Federal enclave law; and also expanding the Federal assault statute, 18 U.S.C. 113, to define and punish the offense of assault resulting in serious bodily injury.

In addition to the offenses of aggravated assault, and although no court has so yet ruled, a similar constitutional problem is potentially present within the provisions of Section 1153 for rape and assault with intent to commit rape. At present the Major Crimes Act refers to state law for the definition of these offenses yet allows the Indian to be imprisoned at the discretion of the Court. However, 18 U.S.C. 113(a), assault with intent to commit rape, and 18 U.S.C. 2031, rape, provide the Federal law applicable to non-Indians who commit these crimes against other persons, including Indian victims. Here again, the policy of equal treatment requires that references to state law be deleted, and that these offenses be punished and defined according to Federal law.

The proposed legislation would also add a new paragraph to Section 1153 in order to provide for automatic referral to state law if Congress should add an offense to the section not otherwise found among the Federal enclave laws. Non-Indians who commit the same crimes are also prosecuted in such instances with references to state law through the Assimilative Crimes Act, 18 U.S.C. 113.

Finally, the proposal includes language requiring current conformity with state law where state law is incorporated to define and punish certain enumerated offenses in Section 1153 other than those defined and punished according to Federal law. Some courts have held that Section 1153 incorporates state law only as it existed as of the last re-enactment of the Major Crimes Act. See *United States v. Gomez*, 250 F. Supp. 535 (D. N.M. 1966); *United States v. Sky Child Big Knife*, —F. Supp.—(D. Mont., 1974). This interpretation of Section 1153 is

at variance with the Congressional policy set forth in 18 U.S.C. 13. The amendment will make clear that Sections 13 and 1153 express the same policy of current conformity regarding the assimilation of state law.

The Office of Management and Budget has advised that there is no objection to the submission of this proposed legislation from the standpoint of the Administration's program.

Sincerely,

EDWARD H. LEVI,
Attorney General.

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CRIMINAL JURISDICTION IN INDIAN COUNTRY: TRIBAL
SOVEREIGNTY AND DEFENDANTS' RIGHTS IN CONFLICT

Tim Vollmann*

Law enforcement in Indian Country¹ is a complicated matter. On most Indian reservations federal, state, and tribal governments all have a certain amount of authority to prosecute and try criminal offenses. This jurisdictional maze results from a combination of Congressional enactment, judge-made law, and the principle of inherent tribal sovereignty. Thus a determination of who has authority to try a particular offense depends upon a multitude of factors: the magnitude of the crime, whether the perpetrator or the victim is an Indian or a non-Indian, and whether there are any statutes ceding jurisdiction over certain portions of Indian Country from one sovereign to another.

Because of this divisive jurisdictional scheme, law enforcement in Indian Country is not always the most efficient. Federal and state prosecutors and courts are often many miles from a reservation,² and as a result, crimes within their jurisdictions, especially misdemeanors, sometimes go unprosecuted.³ Tribal governments often find themselves without the necessary resources to punish the crimes over which they have jurisdiction.⁴

This jurisdictional crazy-quilt can also work against the best interests of the Indian defendant. Not only must he sometimes stand trial hundreds of miles away from his community, but he is not even guaranteed all the procedural protections afforded the non-Indian defendant.⁵ This is often not a

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¹ "Indian Country" is defined in 18 U.S.C. § 1151 (1970):

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

² For example, some portions of the Navajo Indian Reservation in the State of Arizona are over 400 miles from the office of the U.S. Attorney in Phoenix. And some Arizona county seats, where the state courts are located, are as much as 200 miles from Indian territory which is within their jurisdiction for purposes of trying certain offenses.

³ NATIONAL INDIAN JUSTICE PLANNING ASSOCIATION, CRIMINAL JURISDICTION IN INDIAN COUNTRY: THE POLICEMAN'S DILEMMA 53-54 (1972).

⁴ W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 59 (1966).

⁵ Before passage of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.* (1970), tribal courts did not have to afford a criminal defendant the protections enumerated in the Bill of Rights. The United States Supreme Court had held earlier that the Bill of Rights did not apply to tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act now applies most of the protections of the Bill of Rights to tribal tribunals. However, an accused is entitled to counsel only "at his own expense." 25 U.S.C. § 1302(6) (1970).

Federal statutes also treat Indian defendants somewhat differently from non-Indians for purposes of prosecution in federal court. See Comment, *Red, White, and Gray: Equal Protection and the American Indian*, 21 STAN. L. REV. 1236 (1969); see also Comment, *Indictment Under the "Major Crimes Act" — An Exercise in Unfairness and Unconstitutionality*, 10 ARIZ. L. REV. 691 (1968).

result of intentional discrimination, but a vagary of this haphazard jurisdictional scheme.

Moreover, in attempting to assert what he considers to be his procedural rights, the Indian defendant is sometimes confronted by the prosecutor's contention that a court ruling in favor of such rights would undermine tribal sovereignty and self-government. This conflict is not the inherent clash between a sovereign's need to rule effectively and the rights of an individual under its domain. The court in such cases is not confronted with the need to strike a balance between tyranny and anarchy. Indeed, the issue usually arises in federal court where the tribe is not even a party to the proceedings. The conflict, instead, is a curious result of the jurisdictional scheme for the punishment of crimes committed in Indian Country.

A civil libertarian might demand a resolution of the conflict in favor of the defendant, whatever the consequences to any claims of "sovereignty." But this legal concept of "sovereignty" is of utmost importance to American tribal Indians. It gives Indian tribes powers far beyond those of other local governments. The functions of the latter are enumerated by statute, and therefore limited.⁶ As quasi-sovereign entities, however, Indian tribes possess whatever power is necessary to maintain self-government⁷—subject to restrictions imposed by Congress.⁸ Effectuation of tribal sovereignty enables tribal governments to preserve centuries old, local tribal customs; subjecting tribes and their members to outside laws has often been criticized as but another example of excessive paternalism and ethnocentrism.⁹ Thus, the conflict between individual rights and tribal sovereignty, as caused by the criminal jurisdictional scheme for Indian Country, presents a problem without a simple solution.

This Article attempts to examine that scheme, especially insofar as it creates such a conflict. First, an overview of the scheme is presented, accompanied by brief descriptions of some of the problems it creates. Then the conflict between the prerogatives of tribal sovereignty and the procedural rights of Indian defendants is analyzed by examining two recent cases which highlight that conflict: *Keeble v. United States*¹⁰ and *United States v. Kills Plenty*.¹¹ These judicial resolutions of the conflict are shown to have been less than entirely satisfactory. Some recent legislative proposals for reform are then presented and criticized. Finally, this writer offers some general proposals as a guide to eventual reform of the scheme for criminal jurisdiction in Indian Country.

⁶ 56 AM. JUR. 2d *Municipal Corporations* § 125 (1971).

⁷ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832).

⁸ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-66 (1903).

⁹ E.g., *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., at 65 (1965); Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. Law 311, 330 (1969).

¹⁰ 412 U.S. 205 (1973).

¹¹ 466 F.2d 240 (8th Cir. 1972), cert. denied, 410 U.S. 916 (1973).

I. THE JURISDICTIONAL SCHEME

The central proposition governing criminal jurisdiction in Indian Country is that Indian tribes were once independent sovereign nations, that they retain vestiges of their original sovereignty, and that they therefore have residual authority to govern their own affairs. Their sovereign qualities were initially recognized by the federal government when it negotiated treaties with them as if they were foreign nations. Chief Justice John Marshall based his analysis of that relationship on a description of Indian tribes as "domestic dependent nations,"¹² subject to the ultimate authority of the United States. The Chief Justice later guaranteed his position in history as the prime architect of Indian Law when he held that "the several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive . . ."¹³ He further held that the states within which Indian territory lies have no authority therein, and that the tribes might even exclude the citizens of such states from their borders.¹⁴

Today, however, there exists a wealth of federal statutes which have limited tribal self-government considerably. The Supreme Court recently referred to "Platonic notions of Indian sovereignty,"¹⁵ and called the tribal sovereignty doctrine "a backdrop against which the applicable treaties and federal statutes must be read."¹⁶ It is against this backdrop, then, that we examine the scheme for criminal jurisdiction in Indian Country.

Since jurisdiction often turns on whether the accused or the victim is an Indian or a non-Indian, most reviews of the scheme divide their analyses into four parts: Indian against Indian offenses, Indian against non-Indian offenses, non-Indian against Indian offenses, and non-Indian against non-Indian offenses.¹⁷ That approach will be followed here.

A. Crimes Committed by Indians against Indians

The holdings of Chief Justice Marshall indicate that, in the absence of federal legislation, an Indian tribe in the exercise of its inherent powers of self-government retains, at the very least, exclusive jurisdiction over offenses committed by and against members of the tribe. This proposition was challenged in the case of *Ex parte Crow Dog*¹⁸ in 1883. There a member of the Brule Sioux Tribe had assassinated the Tribe's great warrior-chief, Spotted Tail. He was convicted of murder in the federal court for Dakota Territory, but the Supreme Court reversed the conviction, thereby upholding the principle of inherent tribal sovereignty.¹⁹

¹² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

¹³ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

¹⁴ *Id.* at 561.

¹⁵ *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

¹⁶ *Id.*

¹⁷ E.g., F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 362-65 (1st ed. 1942).

¹⁸ 109 U.S. 556 (1883).

¹⁹ By this time, Indian against Indian crimes were already excepted from federal jurisdiction by the Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270. But the Supreme Court noted that the purpose of the exception was to secure tribal self-government. 109 U.S. at 568.

The indignation of Congress was quick. Upset that the Indians were allowed to deal with as serious a crime as murder, and perhaps concerned for the future of the uneasy peace with the Sioux,²⁰ Congress passed the Major Crimes Act.²¹ That act subjected to federal jurisdiction seven major crimes, when committed by Indians in Indian Country. Today, the Act includes thirteen offenses and is codified in Title 18 of the United States Code.²²

The Act has been generally interpreted as eliminating tribal jurisdiction over the major crimes,²³ though not much authority exists for that proposition.²⁴ In fact, many tribal courts exercise jurisdiction over the crime of theft in spite of the fact that larceny is a major crime.²⁵ In any event, whether or not it has in fact done so, there appears to be little doubt that Congress has the power to abrogate tribal criminal jurisdiction, if it so desires.²⁶

The basic jurisdictional structure, then, for Indian against Indian crimes in Indian Country gives the United States jurisdiction over those offenses enumerated in the Major Crimes Act, and leaves exclusive jurisdiction over all other crimes with the tribes.²⁷ There are some exceptions to this scheme,

²⁰ The massacre at Wounded Knee followed the *Crow Dog* decision by 7 years.

²¹ Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385.

²² 18 U.S.C. § 1153 (1970) provides:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

18 U.S.C. § 3242 (1970) provides:

All Indians committing any of the following offenses; namely murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

The omission from § 3242 of the offense of assault resulting in serious bodily injury has been considered a congressional oversight. *Keeble v. United States*, 412 U.S. 205, 212 n.12.

²³ E.g., *Sam v. United States*, 385 F.2d 213, 214 (10th Cir. 1967).

²⁴ The language of the Act does not explicitly usurp tribal jurisdiction. However, the facts of *United States v. Whaley*, 37 F. 145 (C.C.S.D. Cal. 1888), suggest that tribes no longer possess authority to punish major crimes. That case involved the conviction of four Indian executioners for the major crime of manslaughter. Pursuant to an order of a tribal council, they had executed the tribal medicine man for poisoning to death about 20 members of the Tribe. If jurisdiction over the major crimes of murder and manslaughter was still retained by tribal tribunals after passage of the Major Crimes Act, the defendants would have had sufficient legal justification for their execution of the medicine man. The opinion, however, while holding them guilty of manslaughter, does not specifically hold that tribal courts had been ousted of jurisdiction.

²⁵ The Code of Indian Tribal Offenses, which has been adopted by approximately two-thirds of all tribal courts, includes proscriptions against theft and embezzlement. 25 C.F.R. §§ 11.42, 11.43 (1973). Both offenses are arguably included within the major crime of larceny. None of the statutes distinguishes between petty larceny and grand theft.

²⁶ In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-66 (1903), it was held that Congress has plenary power over Indian affairs, and may even go so far as to abrogate treaty promises made to Indian tribes. Despite the harshness of that proposition, it has remained viable, though it is now said that congressional intention to abrogate or modify a treaty is not to be lightly imputed. *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968).

²⁷ By statute, the United States has been given complete jurisdiction over crimes committed in Indian Country with certain exceptions, including Indian against Indian offenses. 18 U.S.C. § 1152 (1970). See text accompanying note 35 *infra*.

however. Congress has ceded some criminal jurisdiction over Indian Country to certain states.²⁸ The most notorious example of such a cession is Public Law 280,²⁹ which gave five states virtually complete criminal and civil jurisdiction over Indian Country within their borders,³⁰ and which allowed other states to unilaterally assume such jurisdiction. That law was superseded by Sub-chapter III of the Indian Civil Rights Act of 1968.³¹ Under that Act, Indian tribes must now consent before any state assumes such jurisdiction.

There is another possible exception to the basic structure outlined above. Some federal courts have held that they have jurisdiction in Indian Country over all crimes which are denominated "federal" regardless of their situs,³² e.g., assaulting a federal officer.³³ There is an argument, however, that mere congressional definition of a new federal crime should not, by itself, serve to diminish tribal self-government—that such cessions of jurisdiction must be explicit.³⁴

B. Crimes Committed by Indians Against Non-Indians

The federal government has by statute assumed jurisdiction over crimes by Indians against non-Indians:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses . . . shall extend to Indian Country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.³⁵

This statute does not explicitly usurp tribal jurisdiction over Indian against non-Indian offenses; when it is read carefully, it seems clear that Indian tribes still retain such jurisdiction. The second of the three exceptions to federal jurisdiction in the statute bars federal prosecution of an Indian who has already been punished by the tribe. Since Indian against Indian offenses are specifically excepted from the operation of the statute, the tribal punishment provision can only have independent meaning if it refers to Indian offenses against non-Indians as well as Indians.

In actual practice, tribal courts do generally exercise jurisdiction over Indian against non-Indian crimes.³⁶ However, some tribes gave up such jurisdiction

²⁸ E.g., 18 U.S.C. § 3243 (1970), which gives Kansas concurrent jurisdiction with that of the United States.

²⁹ Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588; the criminal portion is codified at 18 U.S.C. § 1162 (1970).

³⁰ Those states are California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was later added to the list. Act of Aug. 8, 1958, Pub. L. No. 85-615, § 1, 72 Stat. 545.

³¹ 25 U.S.C. §§ 1321-26 (1970).

³² E.g., *Walks on Top v. United States*, 372 F.2d 422 (9th Cir. 1967).

³³ 18 U.S.C. § 1114 (1970).

³⁴ It is an elementary principle of Indian law that statutory ambiguities are to be resolved in favor of the Indians. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). See also note 26 *supra*.

³⁵ 18 U.S.C. § 1152 (1970).

³⁶ For example, the Code of Indian Tribal Offenses, 25 C.F.R. § 11.38 *et seq.* (1973), which has been adopted by most tribal courts, proscribes offenses committed by Indians against any other person.

by treaty provisions to the effect that Indians who commit offenses against non-Indians must be delivered up to federal authorities.³⁷ Concurrent jurisdiction of federal and tribal courts is nonetheless the general rule.

States do not exercise jurisdiction over such crimes unless they have been specifically ceded jurisdiction over Indian Country by Public Law 280 or some other federal statute.³⁸ They can, however, significantly influence the exercise of federal jurisdiction. The Assimilated Crimes Act provides for the incorporation of state criminal statutes into substantive federal criminal law.³⁹ Thus, a state can define the scope of proscribed behavior as between Indians and non-Indians. If federal prosecutors choose to enforce all such laws, Indians in Indian Country are forced to conform their behavior, insofar as their relations with non-Indians are concerned, to every *malum prohibitum* defined by state law. This is a far cry from "when in Rome, do as the Romans do!"⁴⁰

C. Crimes Committed by Non-Indians Against Indians

The statute set out above,⁴¹ extending the general criminal laws of the United States to Indian Country, makes it clear that offenses committed by non-Indians against the persons or property of Indians are within federal jurisdiction. Although they have no jurisdiction over such crimes unless Congress has ceded it to them,⁴² states can influence law enforcement in Indian Country because their criminal statutes apply to federal enclaves through the Assimilated Crimes Act.

What is not clear about jurisdiction over non-Indian against Indian crimes is whether Indian tribes should be able to exercise it. The federal jurisdictional statute clearly does not by its terms usurp such jurisdiction. Indeed, the third-listed exception to federal jurisdiction in the statute—where a treaty reserves exclusive criminal jurisdiction over certain offenses to the tribe—admits of some tribal jurisdiction over non-Indian offenses. However, that exception is considered by many to be obsolete because the few treaties which reserved such jurisdiction have probably been long since superseded.⁴³

³⁷ E.g., Treaty with the Ute Indians, Act of Mar. 2, 1868, 15 Stat. 619, 620; Treaty with the Sioux Indians, Act of April 29, 1868, 15 Stat. 635.

³⁸ Application of Denetclaw, 83 Ariz. 299, ..., 320 P.2d 697, 700 (1958); see text accompanying notes 28-31 *supra*.

³⁹ 18 U.S.C. § 13 (1970) provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

⁴⁰ A perfect example of the abusive potential of the Assimilated Crimes Act was demonstrated in 1972 by an attempt by Colorado state officials to get the U.S. Attorney to enforce state gambling laws on the Southern Ute Reservation. In the face of this threat the gambling facilities were closed down.

⁴¹ See text accompanying note 35 *supra*.

⁴² Williams v. United States, 327 U.S. 711, 714 (1946).

⁴³ See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 365 (1st ed. 1942). The exception was originally stated in the Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383, and it has been incorporated into federal jurisdictional statutes with respect to Indian Country ever since.

The principle of inherent tribal sovereignty appears to give tribes the power to punish offenses committed by non-Indian intruders against their own people. Chief Justice Marshall allowed that inside Indian Country tribal authority is exclusive.⁴⁴ And while many federal statutes have since qualified that authority, none has explicitly usurped tribal jurisdiction over non-Indian offenses. Indeed, the Supreme Court has acknowledged in this century that tribes retain the basic power to exclude non-members from their lands and to attach conditions to their presence there.⁴⁵ It should stand to reason that they can punish them.

Nonetheless, federal officials have consistently maintained that tribal courts have no power to punish non-Indians. The Interior Department's Solicitor recently offered such an opinion.⁴⁶ He relied upon one dusty lower court opinion, *Ex parte Kenyon*,⁴⁷ two nineteenth century opinions of the Attorney General,⁴⁸ and the language of past jurisdictional statutes, which, like the current one, 18 U.S.C. § 1152, do not expressly usurp tribal jurisdiction.⁴⁹ Neither the Solicitor nor his sources ever make reference to Marshall's principles of tribal sovereignty and self-government. And he even admits that language in *Kenyon* and in an 1855 opinion of the Attorney General, to the effect that tribal courts have no jurisdiction over offenses by Indians against non-Indians, has not been followed.⁵⁰

Most recently, the Tenth Circuit Court of Appeals concluded that an Indian tribe has no power to exercise any authority over non-Indians.⁵¹ The court said that a tribe is a mere "association of citizens."⁵² And it dismissed "sovereignty" as a concept which defines the relationship between a tribe and the federal or state governments, but which does not give a tribe any status as a governmental agency.⁵³ The court's characterization of Indian tribes as little more powerful than the local Moose Lodge flies in the face of Chief Justice Marshall's description of them as "domestic dependent nations"⁵⁴ and "distinct political communities . . . within which their authority is exclusive."⁵⁵ If that authority needed any twentieth century rehabilitation,

⁴⁴ Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

⁴⁵ Morris v. Hitchcock, 194 U.S. 384, 389 (1904).

⁴⁶ 77 Interior Dec. 113 (1970).

⁴⁷ 14 F. Cas. 353 (C.C.W.D. Ark. 1878). *Kenyon* involved the conviction by a Cherokee court of a non-Indian for larceny. The non-Indian sought a writ of habeas corpus in federal court where it was held that the petitioner had been outside the territorial jurisdiction of the Tribe. But the court went further, holding in addition that Indian Tribes have jurisdiction only over those crimes committed by and against Indians. 14 F. Cas. at 355.

⁴⁸ 2 Op. ATT'Y GEN. 693 (1834); 7 Op. ATT'Y GEN. 174 (1855).

⁴⁹ Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733; Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270.

⁵⁰ 77 Interior Dec. at 114 n.2 (1970). See note 46 *supra*. Very recently, the Solicitor decided to reconsider this opinion, warning in a Jan. 25, 1974, memorandum that the opinion should not be relied upon as authoritative. See AMERICAN INDIAN LAWYER TRAINING PROGRAM, 1 INDIAN LAW REPORTER No. 2 at 51 (1974).

⁵¹ United States v. Mazurie, 487 F.2d 14 (10th Cir. 1973), cert. granted, 94 S. Ct. 1468 (1974).

⁵² 487 F.2d at 19.

⁵³ *Id.*

⁵⁴ See note 12 *supra*.

⁵⁵ See notes 13-14 and accompanying text *supra*.

it was provided by the Supreme Court only last year when it faithfully cited John Marshall's reasoning.⁶⁶

As a result of these continued assaults on tribal claims of jurisdiction over non-Indians, most tribal courts no longer attempt to exercise such jurisdiction.⁶⁷ Since federal prosecutors are often slow to prosecute misdemeanors committed on reservations many miles away, an intolerable situation is created. Many tribes have complained of non-Indian vandalism and dumping of trash, which activities often go unpunished. To counter this, the Salt River and Gila River Indian communities in southern Arizona took matters into their own hands in 1972 and passed the following ordinance: "Any person who enters upon the [community] shall be deemed to have impliedly consented to the jurisdiction of the Tribal Court and therefore [shall be] subject to prosecution in said Court for violations of [the tribal code]."⁶⁸ The ordinance was approved by local Bureau of Indian Affairs officials, and the Commissioner of Indian Affairs did not invalidate it, waiting instead for a judicial ruling on its validity. Since that time the communities have successfully exercised jurisdiction over non-Indian traffic offenders without judicial challenge. Nevertheless, since subject matter jurisdiction cannot be waived by consent, the "implied consent" rationale of the community ordinance is only as strong as the residual sovereignty of tribal governments. We have yet to hear the last on this issue.

D. Crimes Committed by Non-Indians Against Non-Indians

The United States Supreme Court ruled in the last century that offenses committed by non-Indians against other non-Indians within Indian Country were the exclusive concern of the state within which the offenses were committed.⁶⁹ The court so ruled in spite of the fact that the existing federal jurisdictional statutes for crimes in Indian Country⁷⁰ gave federal courts all such jurisdiction with three specific exceptions, which exceptions required deference to tribal jurisdiction.⁶¹ Those statutes are essentially the same as the one governing such jurisdiction today.⁶² No reference is made in any statute to state jurisdiction.

Neither of the two opinions in which the Supreme Court established this rule even attempts to apply the jurisdictional statutes. They refer merely to

⁶⁶ *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973).

⁶⁷ For example, the Navajo Tribal Code applies the Tribe's law and order ordinances only to "[a]ny Indian." 17 *NAVAJO TRIBAL CODE* § 101 (1969). Nor will the Navajo courts assume jurisdiction over civil cases where the defendant is a non-Indian. 7 *NAVAJO TRIBAL CODE* § 133(b) (1969).

⁶⁸ Salt River Ordinance No. 11-72 (1972); Gila River Ordinance No. 12-72 (1972). At publication time the author's attention was called to a recent decision of the United States District Court for the Western District of Washington in *Olipphant v. Schlie*, No. 511-73C2 (April 5, 1974). In that case the federal court upheld an exercise of jurisdiction by the Suquamish Tribe over a non-Indian charged with assaulting a tribal officer on trust property within the reservation. The court held that such jurisdiction was an attribute of the Tribe's sovereign powers.

⁶⁹ *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896).

⁷⁰ Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733; Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270.

⁶¹ See text accompanying note 35 *supra*.

⁶² 18 U.S.C. § 1152 (1970).

the Enabling Acts of Colorado⁶³ and Montana,⁶⁴ the states wherein the case arose, to the effect that those states be admitted to the Union on an "equal footing" with all the other states. And from this it is concluded that federal courts are ousted of jurisdiction over non-Indian against non-Indian crimes in Indian Country in favor of the state courts. Language in the Montana Act to the effect that Indian lands within the State should "remain under the absolute jurisdiction and control of the Congress of the United States" was said by the Court not to signify any retention by the federal government of jurisdiction over intra-non-Indian crimes.⁶⁵

This tortured reasoning has never been questioned by the Supreme Court. Indeed, the impact of these opinions was reaffirmed by the Court in 1946.⁶⁶ And the Court has since made periodic reference to them as recognition of a "State's legitimate interests in regulating the affairs of non-Indians."⁶⁷ Nevertheless, the Supreme Court's stand on this has not been immune from outside criticism.⁶⁸

None of the Supreme Court opinions on the matter make reference to any possible questions of tribal authority over non-Indians. Of course, the opinions would seem to preclude tribal court jurisdiction over non-Indian against non-Indian offenses. Indian tribes, then, are faced with the problem of having no control over non-Indian breaches of the peace. Federal prosecutors have jurisdiction thereover where the victim is an Indian,⁶⁹ and states have exclusive jurisdiction where only non-Indians are involved.

E. "Victimless" Offenses

Since jurisdiction over offenses in Indian Country is almost always determined by looking at both the race of the alleged offender and that of the victim, determination of jurisdiction over so-called "victimless" offenses poses some problems. The word "victimless" is not a term of art in the law, however often it is used in popular discourses on law enforcement. Thus it is necessary to examine each offense to determine whether or not it is in fact "victimless." This is not always a simple task.

Victimless crimes perpetrated by non-Indians are most likely subject to state jurisdiction since the logic of the Supreme Court with respect to non-Indian against non-Indian offenses—however illogical—would seem to apply to victimless non-Indian crimes as well. That Court had barred federal jurisdiction over crimes "committed on a reservation or Indian lands by other than Indians or against Indians."⁷⁰

⁶³ Act of Mar. 3, 1875, ch. 139, § 4, 18 Stat. 474.

⁶⁴ Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676.

⁶⁵ *Draper v. United States*, 164 U.S. 240, 244-45 (1896).

⁶⁶ *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).

⁶⁷ *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973).

⁶⁸ E.g., Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 *UTAH L. REV.* 206, 208-10; Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 *ARIZ. L. REV.* 62, 70 (1959).

⁶⁹ See text accompanying notes 41-58 *supra*.

⁷⁰ *Draper v. United States*, 164 U.S. 240, 247 (1896).

The problem is that many "victimless" non-Indian offenses, like intra-Indian offenses, often cause a serious breach of the Indian reservation peace. And the tribe is apparently without authority to deal with it. Many of the Indian complaints with respect to a lack of state law enforcement on the reservation have involved what many would consider "victimless" offenses such as trash dumping or speeding.⁷¹ The Indian community is arguably a "victim" of such offenses. Thus if those crimes are not considered "victimless," federal courts should have jurisdiction.⁷² Application of this line of reasoning does not bring satisfactory results either, however, because federal law enforcement officials are rarely more diligent than state officials at prosecuting minor crimes in Indian Country.⁷³

Determining jurisdiction over victimless Indian crimes is even more difficult. When 18 U.S.C. section 1152,⁷⁴ the federal jurisdictional statute, is read literally, it does not except victimless crimes from its purview—only Indian offenses. This reading of the predecessor of that statute was argued before the Supreme Court in *United States v. Quiver*,⁷⁵ a federal prosecution of an Indian for adultery. The court dismissed the indictment and the argument, reasoning (1) that the Indian against Indian offense exception to federal jurisdiction should not be read so strictly; (2) that there was a victim of sorts here and she was an Indian; and (3) that such conduct is purely an internal matter with which the tribe should deal, absent clear congressional direction otherwise.⁷⁶

The court's third rationale was, of course, strongly supportive of tribal self-determination, and its first was a necessary corollary of such reasoning. Unfortunately, in *United States v. Sosseur*,⁷⁷ a circuit court of appeals adopted the second-listed (and weakest) rationale of the *Quiver* opinion by focusing on the existence of non-Indian "victims." It upheld the conviction of a Menominee Indian for operating slot machines on the reservation because non-Indians were using them and were thus victims of the offense,⁷⁸ albeit the victims may have used the machines voluntarily. The law applied was a state statute as incorporated into federal law by the Assimilated Crimes Act.⁷⁹ Thus, the court stretched the arm of state law enforcement a long way to regulate the mores of the Menominee Tribe.

F. The Extent of Tribal Sovereignty

This overview of the jurisdictional scheme should have suggested to the reader that the legal principle of tribal sovereignty sits most precariously

⁷¹ See text accompanying notes 57-58 *supra*.

⁷² See text accompanying notes 41-58 *supra*.

⁷³ See note 3 and accompanying text *supra*.

⁷⁴ See text accompanying note 35 *supra*.

⁷⁵ 241 U.S. 602 (1916).

⁷⁶ *Id.* at 605.

⁷⁷ 181 F.2d 873 (7th Cir. 1950).

⁷⁸ *Id.* at 876.

⁷⁹ See notes 39-40 and accompanying text *supra*.

amid assaults from outside administrators, legislators, and courts. One might cast doubt on the continued validity of the principle, were it not so deeply entrenched in the precedent of Supreme Court opinions.⁸⁰

Nonetheless, even the Supreme Court's decisions suggest that tribal sovereignty may not be as extensive as it was in the days of John Marshall. Its holding that the states have exclusive jurisdiction over non-Indian against non-Indian crimes in Indian Country⁸¹ would indicate that inherent tribal authority is no longer as pervasive as the borders of tribal territory. However, tribal sovereignty must mean more than just jurisdiction over tribal members, since tribes retain the power to exclude non-Indians from their borders.⁸² The Tenth Circuit's recent ruling that tribes are mere "associations of citizens"⁸³ ignores the fact that tribes currently exercise powers which allow them to exclude non-Indians⁸⁴ and to incarcerate Indians.

Thus, it is difficult to define the precise extent of tribal sovereignty. It is apparently not of *territorial* breadth, but it is also more than merely *personal* jurisdiction over members of the tribal organization. One solution is to define inherent tribal jurisdiction as broad enough to deal with any *subject matter* which touches or concerns the tribe or its members. Such a definition would allow a tribe to deal with the problem of non-Indian breaches of the reservation peace. As stated above, Congress has never expressly withdrawn from tribes the power to deal with such matters.

In any event, it should be clear that the principle of tribal sovereignty is a most important tool required by American tribal Indians to enable them to determine the fate of their lives and their traditions. That is why the apparent conflict between that principle and the rights of criminal defendants, as set out below, presents a problem without a simple solution.

II. *Keeble v. United States*

On the evening of March 6, 1971, Francis Keeble and Robert Pomani, Crow Creek Indians, became engaged in a fight at Keeble's home on the Crow Creek Sioux Reservation in South Dakota. The next morning, Pomani's beaten body was found in a field a short distance from the house. It was later determined that he had died from exposure. Keeble was subsequently charged in federal court under the Major Crimes Act with the crime of assault resulting in serious bodily injury.

⁸⁰ The principles of tribal sovereignty did not begin and end in the imagination of John Marshall. Later Supreme Court opinions reaffirmed the idea of inherent tribal authority. *E.g.*, *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57 (1867); *United States v. Kagania*, 118 U.S. 375, 381-82 (1886). In *Williams v. Lee*, 358 U.S. 217 (1959), the court made reference to Marshall's opinion in *Worcester v. Georgia* in these terms: "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained." 358 U.S. at 219.

⁸¹ See text accompanying notes 59-69 *supra*.

⁸² *Morris v. Hitchcock*, 194 U.S. 384 (1904).

⁸³ See text accompanying notes 51-53 *supra*.

⁸⁴ *E.g.*, 17 NAVAJO TRIBAL CODE § 971 *et seq.* (1969).

At trial the defendant offered two defenses—(1) that he had acted in self-defense; and (2) that being intoxicated, he had been unable to construct the necessary specific intent to inflict great bodily injury⁸⁵ and, in fact, had not intended such a result. There was evidence that Keeble had indeed been intoxicated, and to make the most of his second defense he requested that the jury be instructed that they might find him guilty of the lesser included offense of simple assault. The judge refused on the ground that since the offense of assault is not enumerated in the Major Crimes Act, it was exclusively a matter for the Crow Creek Tribe to deal with, and the court lacked jurisdiction to try and convict of that offense.

The Keeble jury faced a dilemma. They had been presented with considerable evidence of some form of assault. However, if they believed the defendant's contention that he had never formed the necessary intent to inflict serious bodily injury, their only alternative would be to acquit him and set him free. They found him guilty, and he was sentenced to the maximum term of five years imprisonment. The conviction was affirmed by the Eighth Circuit, one judge dissenting.⁸⁶ The Supreme Court reversed, holding that Keeble was entitled to an instruction on the lesser included offense.⁸⁷

The Supreme Court found itself confronted with the problem of choosing between denying an Indian defendant a lesser included offense instruction—something to which a non-Indian defendant would be entitled where charged with the identical crime⁸⁸—or undercutting a measure of tribal self-government by allowing a federal court to convict an Indian of a crime which theretofore had been solely within the jurisdiction of the tribal court. The case was pregnant with constitutional issues—namely, whether there had been denials of a criminal defendant's rights to a fair trial and to the equal protection of the laws. While no federal court had ever held entitlement to a lesser included offense instruction tantamount to a constitutional right,⁸⁹

⁸⁵ Under the Major Crimes Act assault resulting in serious bodily injury is to be defined and punished in accordance with the laws of the state in which the offense was committed. See note 22 *supra*. Keeble was therefore charged with violation of S.D. COMP. LAWS ANN. § 22-18-12 (1967):

Whoever assaults another with intent to inflict great bodily injury shall be punished upon conviction thereof by imprisonment in the state penitentiary for not less than one year, nor more than five years, or in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

⁸⁶ *United States v. Keeble*, 459 F.2d 757 (8th Cir. 1972). The published opinion contains no discussion of the lesser included offense issue, both the court and the dissenting judge having relied on their respective opinions in *Kills Crow v. United States*, 451 F.2d 323 (8th Cir. 1971), *cert. denied*, 405 U.S. 999 (1972), which dealt with the identical issue.

⁸⁷ 412 U.S. 205 (1973).

⁸⁸ If a non-Indian commits the offense against an Indian, he is charged under 18 U.S.C. § 1152 (1970), which applies all "the general laws of the United States." See text accompanying note 35 *supra*. Thus, the federal trial court would have jurisdiction over all lesser included offenses and would be able to instruct a jury pursuant to rule 11(c), F.R. CRIM. P.

⁸⁹ But see *Strader v. State*, 210 Tenn. 669, 682, 362 S.W.2d 224, 230 (1962); *Henwood v. People*, 54 Colo. 188, 200, 129 P. 1010, 1014 (1913). Another state court called the failure to instruct on a lesser included offense "prejudicial error." *People v. Miller*, 57 Cal. 2d 821, 830, 372 P.2d 297, 301, 22 Cal. Rptr. 465, 469 (1962).

the federal rules provide for such an instruction,⁹⁰ and the Supreme Court has held that a denial of such is reversible error.⁹¹ Of course, the federal rules cannot by themselves confer jurisdiction.

On the other hand, reversing a conviction for failure to instruct the jury on a lesser included offense involves making the presumption that the jury might not have followed the other instructions on the elements of the crime charged, and perhaps convicted the defendant despite inadequate proof that he possessed the requisite specific intent. On such a presumption the Supreme Court once said:

Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.⁹²

Later the court qualified that statement:

We agree that there are many circumstances in which this reliance is justified. . . . Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.⁹³

That qualification was applied where a trial court had allowed the jury to hear an inadmissible confession, and then instructed them to ignore it. Whether failure to instruct on a lesser included offense would so tax the "human limitations of the jury system" as to deny the defendant his constitutional right to a fair trial is an open question. The Supreme Court did not reach that constitutional issue in its decision in *Keeble*.

The equal protection issue presented in *Keeble* was earlier raised in the identical context before the Eighth Circuit in the case of *United States v. Kills Crow*.⁹⁴ There the court justified the racial classification on the ironic ground that the federal government has full authority to legislate in the field of Indian affairs because of its role as guardian of the American Indian.⁹⁵ Moreover, the court reasoned that the congressional decision to set up a

⁹⁰ FED. R. CRIM. P. 31(c): "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

⁹¹ *Stevenson v. United States*, 162 U.S. 313 (1896).

⁹² *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957), *overruled*, *Bruton v. United States*, 391 U.S. 123 (1968).

⁹³ *Bruton v. United States*, 391 U.S. 123, 135 (1968).

⁹⁴ 451 F.2d 323 (8th Cir. 1971).

⁹⁵ *Id.* at 326. The theory that the federal government possesses trust responsibilities with regard to the American Indian originated with language in an opinion by John Marshall: "[The Indian tribes'] relation to the United States resembles that of a ward to its guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Later this analogy was upgraded to a rule of law in *United States v. Kagami*, 118 U.S. 375, 383 (1886): "These Indian tribes are the wards of the nation," (emphasis in original). The wardship theory has since assumed many aspects. See generally F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 169-73 (1st ed. 1942).

crazy-quilt of criminal jurisdiction over Indian Country is beneficial to Indians in general in that it maintains the importance of tribal courts.⁹⁶ While it was admitted that the guardian-ward relationship is subject to constitutional limitations, the court in *Kills Crow* held that the discriminatory effect of the jurisdictional scheme did not overbalance the value of leaving complete jurisdiction over lesser offenses with the tribal courts.⁹⁷ The Eighth Circuit's opinion appeared to be a patent declaration that the greatest good for the greatest number is far more important than an individual's constitutional right.

The Supreme Court could have avoided any hint of infringing tribal sovereignty—and at the same time avoided the Eighth Circuit conclusion which makes it appear that Indians are treated with gross unfairness in such federal prosecutions—by holding that the Indian defendant is entitled to an instruction to the jury to the effect that if it acquitted him, he would not necessarily go free, but could possibly face tribal prosecution for the lesser offense. The government, in its oral argument before the court, suggested that this would be an adequate safeguard of the defendant's rights.⁹⁸ The court's opinion did not respond to that suggestion, however. It nevertheless has merit, especially insofar as it meets equal protection objections.⁹⁹ The courts have continually held that exact equality is not a prerequisite of equal protection,¹⁰⁰ and that rough accommodations made by government do not violate it unless the lines drawn are invidious.¹⁰¹ However, the classification applied in *Keeble* could be considered one based on race, and the Supreme Court has struck down federal classifications so based, holding that they are constitutionally suspect and should be scrutinized with particular care.¹⁰²

The Supreme Court's decision in *Keeble* managed to avoid the constitutional issues completely. It relied on language in the Major Crimes Act that Indians charged thereunder "shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 18 U.S.C. § 3242 (emphasis added).¹⁰³ Thus, the Indian defendant was held to have the same right to a lesser included offense instruction as does the non-Indian. The Court acknowledged that the jury must be given the best opportunity to find the defendant not guilty of the greater offense if the existence of one of the elements of that offense remains in doubt.¹⁰⁴ Nonetheless, the opinion by Justice Brennan evidenced some concern for the protection of tribal criminal jurisdiction. It concluded:

⁹⁶ 451 F.2d at 326-27.

⁹⁷ *Id.* at 327.

⁹⁸ 13 CRIM. L. REP. 4006 (1973).

⁹⁹ The requirement of equal protection of the laws has been applied to the federal government through the due process clause of the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹⁰⁰ *E.g.*, *Norvell v. Illinois*, 373 U.S. 420, 423 (1963), *rehearing denied*, 375 U.S. 870 (1963).

¹⁰¹ 173 U.S. at 424.

¹⁰² *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹⁰³ 412 U.S. at 212 (footnote omitted).

¹⁰⁴ *Id.* at 213. See text accompanying notes 92-93 *supra*.

Finally, we emphasize that our decision today neither expands the reach of the Major Crimes Act nor permits the Government to infringe the residual jurisdiction of the Tribes by bringing prosecutions in federal court that are not authorized by statute. We hold only that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require that he be deprived of the protection afforded by an instruction on a lesser included offense No interest of the Tribes' is jeopardized by this decision.¹⁰⁵

Does this mean that if a jury returns a verdict of guilty of the lesser included offense in such a prosecution, the federal trial court is still without jurisdiction to convict if the lesser offense is not a crime enumerated in the Major Crimes Act? If so, then a verdict of guilty of the lesser included offense is tantamount to an acquittal. Or did the court's decision mean that a federal conviction for a lesser included offense which is not a major crime could be obtained, but only in special circumstances, *i.e.*, where the accused was indicted for a major crime in the first place, and later requested the lesser included offense instruction himself? If so, was the Supreme Court justified in declaring that the interests of Indian tribes are not thereby jeopardized?

The answers to these questions are not readily apparent. The first of the alternative explanations of the Supreme Court's ruling is easily the more benign. It both resolves the inequity which had theretofore shadowed Major Crimes Act prosecutions, and also preserves the residual criminal jurisdiction of tribal courts. However, application of that interpretation results in such a peculiar procedure—where a verdict of guilty is the equivalent of an acquittal—that one might argue that a more explicit statement of the rule by the Court was called for, if it intended such an interpretation. Justice Stewart, who wrote the dissent, apparently was not certain which interpretation of the majority ruling was intended. He commented:

Were the petitioner's motion for an instruction on simple assault to be granted, and were a jury to convict on that offense, I should have supposed until the Court's decision today that that conviction could have been set aside for want of jurisdiction.¹⁰⁶

But he found equally implausible the first explanation of the court's ruling because he interpreted rule 31(c) of the Federal Rules of Criminal Procedure¹⁰⁷ to provide for an instruction on a lesser included offense only where the offense is a "federal offense," *i.e.*, within the jurisdiction of the trial court.¹⁰⁸

That the Supreme Court's ruling should be interpreted to mean that federal trial courts do have jurisdiction in Major Crimes Act prosecutions to convict

¹⁰⁵ *Id.* at 214.

¹⁰⁶ *Id.* at 217.

¹⁰⁷ See note 90 *supra*.

¹⁰⁸ 412 U.S. at 216. While Justice Stewart's conclusion that a lesser included offense must be a "federal offense" under the federal rule is well-taken, it does not necessarily follow that such an offense must be within the trial court's jurisdiction. Simple assault, the lesser included offense in *Keeble*, is a federal crime when committed within the territorial jurisdiction of the United States [18 U.S.C. § 113(c) (1970)], and thus should be considered a "federal offense," even though it is not within the jurisdiction of a trial court in a Major Crimes Act prosecution.

of a lesser included offense not enumerated in the Act is supported by the Court's footnote 14 in *Keeble*.¹⁰⁹ In that footnote the Court mentions an argument by the government that if a criminal defendant can seek a lesser included offense instruction, then under the principle of mutuality the prosecution should also be able to seek such an instruction. Thus, the argument continues, federal prosecutors would be motivated to seek Major Crimes Act indictments in marginal cases because they could be relatively certain of getting some conviction. Tribal criminal jurisdiction would thus be further infringed. The Supreme Court confronted that argument by suggesting, without deciding, that the principle of mutuality would not be applicable, the implication being that the government would not be entitled to a lesser included offense instruction. However, if the essential ruling of the Court had been that a verdict of guilty of the lesser included offense amounted to an acquittal, then it need not have even answered the government's argument.

The jurisdictional ramifications of the *Keeble* decision are thus far from clear. Not surprisingly, the Eighth Circuit Court of Appeals was very recently confronted with a dispute over the precise meaning of *Keeble*. In *Felicia v. United States*,¹¹⁰ that court held that there was no jurisdictional bar to sentencing an Indian defendant on a conviction for a lesser included offense. Apparently, the court was swayed to a great degree by the suggestion that the lesser included offense instruction would otherwise be "an exercise in futility."¹¹¹ However, this is not completely true. Even if a verdict of guilty on the lesser-included-offense did operate as an acquittal, it would still protect the defendant from an unjustified guilty verdict on the greater offense. We have probably not heard the last on this issue.

If, as a result of the decision in *Keeble*, federal courts in fact have jurisdiction to convict Indians of lesser included offenses not enumerated under the Major Crimes Act, the impact on residual tribal criminal jurisdiction cannot readily be determined. But it is certain that there will be some effect. Even if such convictions can be had only where the defendant has requested the necessary instruction, there is still a tangible decrease in the extent of tribal authority over its own affairs. At the very least, the tribe has been deprived of the alternative of exercising its discretion in such a way as to see that the defendant is *not* punished for the alleged lesser offense—perhaps because tribal custom provides for some justification for striking a blow, which justification is not cognizable in courts of Anglo-Saxon jurisprudence. The simple assault conviction in federal court takes the matter out of the tribe's hands. And it is possible that restrictions against double jeopardy may bar the tribe from punishing the defendant after he has returned from the custody of the federal authorities.¹¹² Who is to say that customary tribal sanctions are not

¹⁰⁹ 412 U.S. at 214.

¹¹⁰ 495 F.2d 353 (8th Cir., decided April 9, 1974). A petition for a writ of certiorari has not been filed.

¹¹¹ *Id.* at 355.

¹¹² See text accompanying notes 118-34 *infra*.

more effective deterrents for such offenses than federal imprisonment or probation?

Moreover, if, in spite of the Supreme Court's dictum in footnote 14 of *Keeble*, federal prosecutors can also obtain lesser included offense instructions in Major Crimes Act prosecutions, then tribal court jurisdiction is further diminished. There is sufficient motivation for prosecutors to utilize Major Crimes Act indictments to seek lesser included offense convictions. The Indian Civil Rights Act of 1968 prevents Indian tribes from imprisoning a criminal for more than six months for any one crime.¹¹³ If a U.S. Attorney feels such punishment is inadequate, he may go for a lesser included offense conviction if there are any grounds for a Major Crimes Act indictment. While overburdened U.S. Attorneys are not notorious for seeking further responsibilities of prosecution in Indian Country, the Department of Justice has, at least once, sought revision of the Major Crimes Act to expand the scope of its prosecutorial duties on Indian reservations.¹¹⁴

Finally, tribal criminal jurisdiction could be substantially diminished if the decision in *Keeble* is interpreted to allow Indians who have been indicted for major crimes to bargain for guilty pleas to lesser included offenses. The Supreme Court opinion in no way explicitly allows this, for it deals only with lesser included offense instructions. Furthermore, the reasoning of the opinion is based on the language of the Major Crimes Act to the effect that Indians charged thereunder "shall be tried . . . in the same manner"¹¹⁵ as non-Indians. Plea-bargaining involves no trial at all. However, the Supreme Court has in the past described plea-bargaining as an "essential part" and a "highly desirable part" of the process of criminal justice administration,¹¹⁶ and it is not wholly illogical to read *Keeble* as allowing for it. Indeed, plea-bargaining over lesser included offenses has already occurred between Indian defendants and U.S. Attorneys since the Supreme Court decision.¹¹⁷ A judicial remedy for this is not apparent since such defendants would be reluctant to appeal such convictions on grounds of want of jurisdiction for fear of having to later stand trial for the greater offense. And the Indian Tribes, whose criminal jurisdiction is being compromised, would evidently be without standing to challenge such convictions. Thus, the problem of lesser included offenses in Major Crimes Act prosecutions remains naggingly difficult.

¹¹³ 25 U.S.C. § 1302(7) (1970).

¹¹⁴ A decade ago the Department sought to revise 18 U.S.C. § 1153 to define the major crime of assault with a dangerous weapon in accordance with state law because the federal definition of the crime required a specific intent which federal prosecutors found difficult to prove. See H. Rep. 1838 (87th Cong., 2d Sess.). This attempt to amend the statute was successful. See 80 Stat. 1101. However, the amendment resulted in different standards of proof based on the race of the defendant. Where non-Indians were prosecuted in federal court for assault with a dangerous weapon, a specific intent was still a requisite element for proof because the crime continued to be defined by federal law in such cases. 18 U.S.C. § 113(c). This inequity was eventually held to be invidiously discriminatory. *United States v. Kuwanyaioma*, No. Cr-70-104 (D. Ariz., July 24, 1970).

¹¹⁵ 18 U.S.C. § 3242 (1970) (emphasis added).

¹¹⁶ *Santobello v. New York*, 404 U.S. 257, 261 (1971).

¹¹⁷ Telephone conversation with Robert Haring, Office of the United States Attorney for the District of South Dakota, Jan., 1974.

III. *United States v. Kills Plenty*

On September 5, 1970, one Percy Kills Plenty, an Indian, was driving an automobile on the Rosebud Sioux Reservation in South Dakota when he collided with an oncoming car. His passenger, Matthew Good Kill, also an Indian, was killed in the crash. Kills Plenty was brought before the Rosebud Sioux Tribal Court, charged with driving while intoxicated at the time of the accident. A jury acquitted him.

Five months later he was indicted in the U.S. District Court for the District of South Dakota for the major crime of manslaughter for his role in the death of Good Kill. The indictment charged that Kills Plenty did willfully and unlawfully "engage in the commission of a lawful act in an unlawful manner, by operating or driving a motor vehicle while under the influence of intoxicating liquor and without due caution or circumspection"¹¹⁸ and that such was the cause of the death of his passenger. The wording of the indictment was evidently an attempt to comport with the definition of the federal crime of involuntary manslaughter, which proscribes the killing of a human being without malice "in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."¹¹⁹

Kills Plenty moved to strike that portion of the indictment which referred to driving while intoxicated on the ground that that issue had already been adjudicated in the tribal court and was thus barred by the principle of collateral estoppel. The motion was denied. Evidence of intoxication was then introduced at trial, and Kills Plenty was convicted. The Eighth Circuit affirmed the conviction,¹²⁰ and the Supreme Court denied certiorari.¹²¹

The *Kills Plenty* case illustrates another conflict between the procedural rights of a criminal defendant charged under the Major Crimes Act and the prerogatives of tribal sovereignty. Again, the conflict occurs, not as a result of the inherent clash between a sovereign and an individual, but because of the peculiar jurisdictional scheme for crimes committed in Indian Country.

The procedural right put in issue in *Kills Plenty* is one protected by the fifth amendment, the guarantee against double jeopardy. The Supreme Court has held that the principle of collateral estoppel, insofar as it applies in criminal cases, is embodied in that guarantee.¹²² Therefore, once an issue of ultimate fact is determined by a valid and final judgment in one criminal proceeding, the fifth amendment is a bar to any relitigation of that issue of fact in a subsequent criminal proceeding between the same parties.

"Between the same parties" is an important limitation of the right, however. Just as in civil litigation, where there must be an identity of parties for

¹¹⁸ *United States v. Kills Plenty*, 466 F.2d 240, 241 (1972).

¹¹⁹ 18 U.S.C. § 1112(a) (1970).

¹²⁰ 466 F.2d 240 (8th Cir. 1972).

¹²¹ 410 U.S. 916 (1973).

¹²² *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).

the principle of collateral estoppel to come into play, the sovereign prosecutor must be a party to both criminal proceedings before the defendant may invoke the guarantee against double jeopardy in the second.¹²³ Where one criminal court has entered a final judgment disposing of an issue of ultimate fact, and a second court then hears a contest over the same issue, the defendant may successfully invoke the fifth amendment protection only if the two courts are "arms of the same sovereign."¹²⁴ Thus, the crucial Indian law issue in *Kills Plenty* was whether the Rosebud Sioux Tribal Court and the federal district court were arms of the same sovereign. If so, then the tribal court's determination with respect to the issue of intoxication should have barred relitigation of that issue in federal court. If, however, the Rosebud Tribe were considered a sovereign entity distinct from the United States, then the federal prosecutors were entitled to litigate the issue of intoxication anew. It is apparent that the interests of Percy Kills Plenty were at odds with the proclaimed sovereignty of the Rosebud Sioux Tribe.

Nonetheless, the Eighth Circuit did not find it necessary to dispose of the Indian law issue in *Kills Plenty*. It concluded that the tribal and federal cases did not share an identical issue of ultimate fact, since the defendant's alleged intoxication was not an indispensable element in the crime of involuntary manslaughter as defined by federal law.¹²⁵ The principle of collateral estoppel, then, did not even come into play in the view of the court. A dissenting judge argued persuasively that relitigation of the issue was exceedingly prejudicial in any case, and should have been barred.¹²⁶

The case caused a dispute among the advocates of tribal sovereignty. Some argued traditionally that to consider a tribal court an arm of the sovereign United States would seriously compromise the legal status of Indian tribes. Indeed, the dissenter from the Eighth Circuit's decision in *Kills Plenty* confirmed their worst fears. He came to the conclusion that tribal and federal courts are arms of the same sovereign¹²⁷ by relying heavily on the opinion in *Colliflower v. Garland*,¹²⁸ an opinion which is criticized by tribal sovereignty advocates as diminishing tribal institutions.¹²⁹

Other friends of tribal sovereignty looked beyond the rhetoric of "sover-

¹²³ *Abbate v. United States*, 359 U.S. 187 (1959).

¹²⁴ *Waller v. Florida*, 397 U.S. 387, 393 (1970).

¹²⁵ 466 F.2d at 243. See text accompanying note 119 *supra*. In footnote 3 the appellate court did offer its view, without discussion, that the tribal court is not an arm of the sovereign United States.

¹²⁶ *Id.* at 245-46.

¹²⁷ *Id.* at 247.

¹²⁸ 342 F.2d 369 (9th Cir. 1965). In this case, the court conceded that Indian tribes have some attributes of sovereignty, but went on to hold that the tribal court for the Fort Belknap Indian Community in Montana had sufficient contact with the federal government to allow it to be considered an arm thereof, and that therefore a writ of habeas corpus to the federal district court lay for anyone in the custody of the Tribe. As precedent for the habeas corpus remedy, the case is mooted by passage of section 3 of the Indian Civil Rights Act of 1968, which provides for such a remedy. 25 U.S.C. § 1303 (1970). However, tribal sovereignty advocates take issue with the logic in *Colliflower* to the effect that the increased federal involvement in tribal affairs in the last hundred years has necessarily undercut the intrinsic status of tribal governments. 342 F.2d at 379.

¹²⁹ E.g., Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. Rev. 337, 343-44 (1969).

eignty" and examined what the effect would be of an opinion on the applicability of collateral estoppel as between tribal and federal courts. They noted that if the principle were held not to be applicable—because Indian tribes were considered distinct sovereignties—then federal courts would be able to ignore tribal court determinations at will. If, however, collateral estoppel did apply, then federal judges would have to defer to the adjudications of tribal courts, the emotional impact of "arms of the same sovereign" notwithstanding.

Native American Rights Fund, a privately funded law firm in Boulder, Colorado, took the latter view and filed a brief to the Eighth Circuit as *amicus curiae*. It supported the defendant's claim that the issue of intoxication should have been barred from the trial. The draftsmen of the brief attempted to tread as lightly as possible on the principle of tribal sovereignty, contending that the Rosebud Sioux tribe was not a sovereign distinct from the United States only insofar as the applicability of the principle of collateral estoppel was concerned. The brief argued that the "arms of the same sovereign" limitation on the principle is exclusively a creature of the federal-state dichotomy, a rule which grew out of the prerogatives of federalism, and that it should not be applied to compromise a criminal defendant's guarantee against double jeopardy in any but a state-federal situation.¹³⁰ This very precise view was not accepted by any of the three Eighth Circuit judges.

While the view of NARF—that application of the principle of collateral estoppel in such cases would require deference to tribal court adjudications—undoubtedly has merit, the ramifications of the applicability of that principle as between federal and tribal courts are even broader. The problems it would cause would be similar to those which arise in any concurrent criminal jurisdiction situation. For example, if a tribal adjudication has force and effect in federal court, it is possible that tribal and federal prosecutors may become engaged in a race to conviction in order that an adjudication in one court would not bar a trial in the other. U.S. Attorneys may particularly be so motivated, for fear that a sympathetic tribal jury may dispose of what would be crucial issues in a subsequent Major Crimes Act prosecution. If, ultimately, tribal criminal trials were to become protective mechanisms for potential Major Crimes Act defendants, a political resolution of the situation in Congress would probably result, and that resolution would undoubtedly see a further cutback in tribal criminal jurisdiction.

On the other side of the coin, application of collateral estoppel and the guarantee against double jeopardy would often bar a tribe from prosecuting an Indian for a minor offense.¹³¹ This could occur (1) where the Indian had already been convicted in federal court of a major crime within which the

¹³⁰ Brief for Native American Rights Fund as Amicus Curiae at 12, *United States v. Kills Plenty*, 466 F.2d 240 (8th Cir. 1972); see also *Barthkus v. Illinois*, 359 U.S. 121, 137 (1959).

¹³¹ The Indian Civil Rights Act contains the guarantee against double jeopardy. 25 U.S.C. § 1302(3) (1970).

minor offense is necessarily included;¹³² or (2) where he was already convicted of the minor offense pursuant to the lesser included offense rule of *Keeble v. United States*;¹³³ or (3) where, assuming that *Keeble* stands for the proposition that federal courts have jurisdiction to convict of lesser included offenses, the Indian defendant is *acquitted* of a major crime within which the minor offense is included.¹³⁴ In sum, because concurrent criminal jurisdiction is such a double-edged sword, the problem raised by the *Kills Plenty* case has no satisfactory judicial solution.

IV. RECENT PROPOSALS FOR REFORM

Since the current jurisdictional scheme for crimes committed in Indian Country pleases practically no one who is concerned with law enforcement on Indian reservations, it is not surprising that there have recently been several proposals for reform. Indeed, the whole statutory scheme for federal criminal law has been subject to revision and reform in recent years, the National Commission on Reform of Federal Criminal Laws having offered a proposal which completely revises Title 18 of the United States Code.¹³⁵

The same commission drafted a proposed statute which could simplify criminal jurisdiction in Indian Country.¹³⁶ The draftsmen denominated that proposal "25 U.S.C. § 212."¹³⁷ The new statute was said to "continue the existing relationships" among federal, state, and tribal courts,¹³⁸ and, in fact, it incorporated the essence of a number of current statutes. However, in their effort to simplify the statutory scheme, the draftsmen actually made very

¹³² A conviction for a greater crime always bars subsequent prosecution for a lesser included offense under the guarantee against double jeopardy. *Ex parte Nielsen*, 131 U.S. 176, 187 (1889).

¹³³ See text accompanying note 112 *supra*.

¹³⁴ "Acquittal of the greater crime is always a bar to prosecution for a lesser, whenever the accused could have been convicted of the lesser on the first prosecution." *United States v. Wexler*, 79 F.2d 526, 528 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936) (emphasis added).

¹³⁵ NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971). [Hereinafter referred to as FINAL REPORT.]

¹³⁶ 3 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1521 (1971). [Hereinafter referred to as WORKING PAPERS.]

¹³⁷ *Id.* The proposal of the National Commission on Reform of Federal Criminal Laws can be summarized as follows:

25 U.S.C. § 212. Jurisdiction in Indian Country.

(1) *Indian Country Within Special Jurisdiction.* [This subsection adopts almost the exact wording of 18 U.S.C. § 1151, and thus does not change existing law.]

(2) *State Jurisdiction Over Indian Country.* (a) *Offenses Not Involving Indians.* Any state's jurisdiction over an offense committed within Indian Country but not committed by or against an Indian or against his property, and the force and effect of its criminal laws with respect thereto, shall be the same as elsewhere within the state. (b) *Any Offense.* A state's jurisdiction over any offense committed within the areas of Indian Country listed below, and the force and effect of its criminal laws with respect thereto, shall be the same as elsewhere within the state:

[The proposal then lists the same states as are listed in 18 U.S.C. § 1162 (1970), with the addition of Kansas. See notes 28-31 and accompanying text *supra*.]

(3) *Offenses Committed by Indians.* (a) *Nonfelonies.* Federal jurisdiction under this section shall not extend to any offense which is not a felony if it is committed by one Indian against the person or property of another Indian, unless section 202 of Title 18 applies. (b) *Multiple Prosecutions.* Punishment of an Indian under the local law of the tribe for conduct constituting a federal offense which is not a felony shall be a bar to a subsequent federal prosecution of such Indian under this section. Otherwise sections 707 and 709 of Title 18 apply to a federal prosecution subsequent to a prosecution or similar proceedings under the law of the tribe as if such tribal prosecution or similar proceedings were a prosecution in a state:

¹³⁸ WORKING PAPERS, *supra* note 136, at 1524.

significant changes in the jurisdictional relationships, and they did so in spite of their admission that they did not have any "special knowledge" of the workings of the current scheme which would enable them to determine who should hold the greater authority to punish crimes in Indian Country.¹³⁹

For example, proposed section 212(2)(a), which gives states exclusive jurisdiction over "offense[s] committed within Indian country but not committed by or against an Indian or against his property,"¹⁴⁰ would codify the Supreme Court-made rule regarding non-Indian against non-Indian offenses.¹⁴¹ While that rule has not been judicially challenged in 100 years, it nevertheless lacked cogent reasoning and has often been criticized by tribal sovereignty advocates for the way it has severely compromised the territorial integrity of tribal jurisdiction.¹⁴² To give a statutory blessing to that rule without examining the role of tribal criminal courts should strike one as being particularly insensitive to the needs of law enforcement in Indian Country.

But it was the proposed section 212(3) which would have worked the most significant alterations in the current jurisdictional scheme. Subdivision (a) provided, "Federal jurisdiction under this section shall not extend to any offense which is not a felony if it is committed by one Indian against the person or property of another Indian, unless section 202 of Title 18 applies."¹⁴³ By implication, federal jurisdiction would extend to *all* felonies committed in Indian Country. The draftsmen apparently thought that such a shorthand provision would more than adequately replace the verbose and complicated Major Crimes Act. Their commentary stated that tribal courts currently have no jurisdiction to try any felonies;¹⁴⁴ thus, enumerating "major crimes" is an idle act and it creates "loopholes" by leaving out some felonies, like kidnapping, where neither federal, state, nor tribal courts have jurisdiction.¹⁴⁵ This is plainly wrong. Except insofar as tribal courts are limited to punishing offenders with six months imprisonment,¹⁴⁶ they are not barred from trying felonies which are not enumerated in the Major Crimes Act. The logic of *Ex parte Crow Dog*, giving them residual jurisdiction over tribal internal affairs, is sufficient to provide tribal courts with the exclusive jurisdiction to try any Indian against Indian felony which is not a major crime.¹⁴⁷ Therefore, the attempt by the proposed statute to give all felony jurisdiction to federal courts would clearly diminish the jurisdiction of tribal courts.

The proviso in subdivision (a) that federal jurisdiction may extend to Indian against Indian nonfelonies if section 202 of Title 18 applies is an attempt to resolve the problem confronted in *Keeble v. United States*. The

¹³⁹ *Id.* at 1524, 1526.

¹⁴⁰ See note 137 *supra*.

¹⁴¹ See text accompanying notes 59-69 *supra*.

¹⁴² *Id.*

¹⁴³ See note 137 *supra*.

¹⁴⁴ WORKING PAPERS, *supra* note 136, at 1523.

¹⁴⁵ *Id.* at 1524.

¹⁴⁶ 25 U.S.C. § 1302(7) (1970).

¹⁴⁷ See text accompanying note 18 *supra*.

proposed section 202 provided for federal jurisdiction over lesser included offenses.¹⁴⁸ This unquestionably goes far beyond the intended impact of the Supreme Court decision in *Keeble*,¹⁴⁹ for it declares that federal jurisdiction in fact exists over all lesser included offenses, and it opens the door to lesser included offense instructions requested by both defendant and prosecutor and also to unlimited plea-bargaining. The draftsmen's commentary did not acknowledge the possibility that this would further reduce the tribal role in law enforcement in Indian Country.

Finally, subdivision (b) of the proposed section 212(3)¹⁵⁰ deals directly with the problem raised by the case of *United States v. Kills Pleasy*. It incorporates two sections from the Commission's proposed Title 18 which would essentially eliminate the "arms of the same sovereign" limitation on applications of the guarantee against double jeopardy and of the principle of collateral estoppel.¹⁵¹ Federal courts would thus be compelled to honor tribal court adjudications.¹⁵² The draftsmen commented that such a provision "has the virtue of adding significance to tribal sovereignty . . ."¹⁵³ This was the only acknowledgement in their commentary that tribal self-government might have some value. They ignored the fact that concurrent criminal jurisdiction can be a double-edged sword.¹⁵⁴

The Commission's proposal on revision of the jurisdictional scheme for the punishment of crimes in Indian Country came under such a unified attack from tribal sovereignty advocates in late 1972 that it was never introduced in Congress in bill form. Last year, however, a bill which would substantially revise Title 18 of the United States Code was introduced,¹⁵⁵ and it also contained provisions governing jurisdiction over crimes in Indian Country. Those provisions are so poorly drafted that it is difficult to tell what their effect on tribal criminal jurisdiction would be. The most logical interpretation of the language of those provisions seems to eliminate much of the exclusiveness of tribal court jurisdiction, making it concurrent with federal power in many cases.

Essentially, this proposed scheme would extend federal jurisdiction to almost all crimes committed in Indian Country "except to the extent that a state has exclusive criminal jurisdiction thereover . . . or to the extent that the local tribe, band, community, group, or pueblo has tried an offense com-

¹⁴⁸ FINAL REPORT, *supra* note 135, at 17.

¹⁴⁹ § 202, *Jurisdiction Over Included Offenses*.

"If federal jurisdiction of a charged offense exists, federal jurisdiction to convict of an included offense defined in a federal statute likewise exists."

¹⁵⁰ See text accompanying notes 103-09 *supra*.

¹⁵¹ See note 137 *supra*.

¹⁵² FINAL REPORT, *supra* note 135, at 62-64.

¹⁵³ See text following note 129 *supra*.

¹⁵⁴ WORKING PAPERS, *supra* note 136, at 1525.

¹⁵⁵ See text accompanying notes 131-34 *supra*.

¹⁵⁶ S. 1400, 93d Cong., 1st Sess. (1973).

UNITED STATES of America,
Plaintiff-Appellee,
v.
Frank Alfred ANALLA, Jr., Defendant-
Appellant.
No. 73-1635.
United States Court of Appeals,
Tenth Circuit.
Argued and Submitted Jan. 7, 1974.
Decided Jan. 29, 1974.

Defendant, an Indian, was convicted in the United States District Court for the District of New Mexico, Howard C. Bratton, J., of assault resulting in serious bodily injury to another Indian and he appealed. The Court of Appeals, Hill, Circuit Judge, held that federal statute providing that any Indian who

administration"), and that nothing in the Bankruptcy Act "requires us to collapse these important distinctions between an arrangement proceeding and a superseding bankruptcy" The question in *Nicholas* was whether the Government could claim interest and penalties, in a superseding bankruptcy, on a tax liability accumulated during an abortive Ch. XI proceeding. That case thus raised issues totally different from this one.

commits against the person of another Indian assault resulting in serious bodily injury shall be subject to the same laws and penalties as all other persons committing the offense is consistent with New Mexico aggravated battery statute requiring "great bodily harm"; that indictment was sufficient to fairly notify defendant of the charge against him even though it did not contain an allegation of specific intent inasmuch as the federal statutory language and the reference to the state statute were incorporated within the indictment; and that racial distinction embodied in the federal statute was not invidious.

Affirmed.

1. Indians \S 26

Indictment charging defendant, an Indian, with assault resulting in serious bodily injury as defined in New Mexico aggravated battery statute did not fail to charge a crime against the United States on theory that crime of assault resulting in serious bodily injury lacked a definition and a prescribed penalty. 18 U.S.C.A. \S 1153; 1953 Comp.N.M. \S 40A-3-5.

2. Indians \S 26

Statute providing that any Indian who commits against the person of another Indian assault resulting in serious bodily injury shall be subject to the same laws and penalties as all other persons must be strictly construed and cannot be extended by intendment to crimes not clearly within its terms. 18 U.S.C.A. \S 1153.

3. Assault and Battery \S 48

A consummated assault is a "battery." 1953 Comp.N.M. \S 40A-3-5.

See publication Words and Phrases for other judicial constructions and definitions.

4. Indians \S 26

Federal statute providing that any Indian who commits against the person of another Indian assault resulting in serious bodily injury shall be subject to the same laws and penalties as all other

persons is consistent with New Mexico aggravated battery statute relating to great bodily harm, and the latter statute comes within the terms of the federal statute. 18 U.S.C.A. \S 1153; 1953 Comp. N.M. \S 40A-3-5.

5. Indictment and Information

\S 71.2(2, 4)

To be legally sufficient an indictment must apprise an accused of the nature of the charges which he must meet, and the allegations contained therein must be sufficiently specific to stand as a bar to further prosecution.

6. Indictment and Information \S 71.4(5)

Indictment charging Indian with assault resulting in serious bodily injury as defined in New Mexico aggravated battery statute was sufficient to fairly notify defendant of the charge against him even though it contained no allegation of specific intent since both the language of the federal statute and the reference to the state statute were incorporated within the indictment. 18 U.S.C.A. \S 1153; 1953 Comp.N.M. \S 40A-3-5.

7. Constitutional Law \S 253(2)

Although the equal protection clause of the Fourteenth Amendment does not apply to the federal government, federal discrimination may be so gross as to be unconstitutional by virtue of the Fifth Amendment's due process clause. U.S.C.A.Const. Amends. 5, 14.

8. Constitutional Law \S 253(2)

Test for determining whether racial discrimination is so gross as to be unconstitutional by virtue of the Fifth Amendment's due process clause is whether the racial distinction embodied in the statute is reasonably related to any proper governmental objective or whether it is invidious or capricious. U.S.C.A.Const. Amend. 5.

9. Constitutional Law \S 253(3)

Indians \S 26

Racial classification made by statute providing that any Indian who commits against the person of another Indian assault resulting in serious bodily

injury shall be subject to the same laws and penalties as all other persons committing the offense is not invidious and does not violate the Fifth Amendment's due process clause. U.S.C.A. Const. Amends. 5, 14; 18 U.S.C.A. § 1153.

10. Indians ⇐38(1)

Inasmuch as statute providing that any Indian who commits against the person of another Indian assault resulting in serious bodily injury shall be subject to the same laws and penalties as all other persons committing the offense provides that "assault resulting in serious bodily injury" shall be defined in accordance with applicable state law, trial court properly refused defendant's instructions attempting to define the crime in terms of a federal statute. 18 U.S.C.A. §§ 114, 1153; 1953 Comp.N.M. § 40A-3-5.

11. Criminal Law ⇐814(10)

Accused must introduce some evidence of insanity before he is entitled to an insanity instruction.

12. Indians ⇐38(1)

Evidence in prosecution of Indian for committing against the person of another Indian an assault resulting in serious bodily injury that defendant was distraught and had vivid recollections of past combat activity while a soldier would not support instruction on temporary insanity. 18 U.S.C.A. § 1153; 1953 Comp.N.M. § 40A-3-5.

13. Criminal Law ⇐753.2(8)

In deciding whether to grant motion for acquittal, trial court must consider evidence in light most favorable to the prosecution.

14. Indians ⇐38(5)

Evidence in prosecution of Indian for assault resulting in serious bodily

1. 18 U.S.C. § 1153 (Supp.1973) provides in part:

Any Indian who commits against the person . . . of another Indian . . . assault resulting in serious bodily injury . . . shall be subject to the same laws and penalties as all other persons committing any of the

injury to person of another Indian that victim at whom defendant fired shotgun was hit by at least two pellets, one of which struck his liver, tearing a one-inch by two-inch hole in that organ, causing internal bleeding, was sufficient to prove serious bodily injury. 18 U.S.C.A. § 1153; 1953 Comp.N.M. § 40A-3-5.

15. Indians ⇐38(7)

Defendant, an Indian convicted of assault resulting in serious bodily injury to person of another Indian, a third-degree felony in New Mexico for which penalty was not less than two nor more than ten years, was properly sentenced to ten years. 18 U.S.C.A. § 1153; 1953 Comp.N.M. § 40A-3-5.

16. Criminal Law ⇐993

Under New Mexico's indeterminate sentencing theory, a sentence is in effect for the maximum time, subject to reduction, and any reduction in sentence is a function of the state's probation and parole authorities, and not the sentencing court.

Winston Roberts-Hohl, Asst. Federal Public Defender, Albuquerque, N. M., for defendant-appellant.

Richard J. Smith, Asst. U. S. Atty. (Victor R. Ortega, U. S. Atty., Albuquerque, N. M., on the brief), for plaintiff-appellee.

Before HILL, BARRETT and DOYLE, Circuit Judges.

HILL, Circuit Judge.

This is an appeal from a conviction of assault resulting in serious bodily injury under 18 U.S.C. § 1153,¹ as defined in N.M.S.A. § 40A-3-5,² Aggra-

above offenses, within the exclusive jurisdiction of the United States.

2. N.M.S.A. § 40A-3-5 (1953) provides in part:

(A) Aggravated battery consists of the unlawful touching or application of force to the

Cite as 490 F.2d 1204 (1974)

vated Battery. Trial was to a jury in the United States District Court for the District of New Mexico.

The evidence is virtually undisputed. Appellant, an Indian, resided on the Laguna Indian Reservation in New Mexico. Late in the evening of April 7, 1973, or early in the morning of April 8, 1973, his younger brother was badly beaten in a fist fight with several other Indians. When the young man returned home, appellant, who had been drinking earlier in the evening, became angry at what had happened. He ascertained the identities of the assailants and, accompanied by a friend, left his residence in search of the men. They took appellant's pickup truck, in which a 12-gauge shotgun and several shells were stored, and drove to the home of Melton Cheromiah, one of the men involved in the fight. Several other men who were involved in the fight also were there, drinking beer and discussing the evening's activities.

Appellant and his companion parked their vehicle some distance past Cheromiah's house, and walked back. Appellant carried the shotgun and his companion carried the shells. Upon reaching the house the men hid in a nearby ditch. Appellant instructed his friend to throw rocks on the roof of the house to lure the occupants outside. His friend did as instructed, and Cheromiah appeared at the front door. Appellant then fired seven or eight shots into the house, one of them striking Cheromiah. Appellant subsequently fired a few more shots into vehicles parked nearby, and then he and his friend left.

Upon these facts appellant was indicted and charged with violating 18 U.S.C. § 1153, as defined in N.M.S.A. § 40A-3-5. Pre-trial motions to dismiss the indictment for failure to state an offense against the United States and for failure to allege essential elements were denied. Appellant's re-

quested instructions on temporary insanity also were denied. The jury found appellant guilty as charged, and he was sentenced to ten years imprisonment.

[1] Appellant's first argument is that the indictment does not charge a crime against the United States. Relying upon *Acunia v. United States*, 404 F.2d 140 (9th Cir. 1968), he contends the crime of assault resulting in serious bodily injury lacks both a definition and a prescribed penalty, and that any indictment based thereon must be dismissed. We do not agree. *Acunia* involved a conviction for incest under § 1153. At the time of the alleged offense, however, there was no penalty prescribed for incest; therefore § 1153 was unenforceable as to that crime. The court in *Acunia* noted, however, that incest would be enforceably proscribed if § 1153 included it among the offenses to be defined and punished in accordance with the law of the state where the offense was committed. Since assault resulting in serious bodily injury is defined and punished by reference to state law, we find appellant's position in this regard to be without merit.

[2-4] Because the indictment defines assault resulting in serious bodily injury as a lesser included offense of the more serious crime of aggravated battery, appellant contends, the indictment still is defective. He argues that § 1153 must be strictly construed and cannot be extended by indictment to crimes not clearly within its terms. We agree with these legal principles, but we nevertheless find that the plain language of § 1153 and N.M.S.A. § 40A-3-5 supports the indictment. Section 1153 requires more than a mere assault intended to cause serious injury; it requires an assault culminating in a serious injury. It therefore is consistent with N.M.S.A. § 40A-3-5 because a consummated assault is a battery. *State v. Grayson*, 50 N.M. 147, 172 P.2d 1019 (N.

person of another with intent to injure that on or another.

(C) Whoever commits aggravated battery inflicting great bodily harm or does so with

a deadly weapon . . . is guilty of a third degree felony.

M.1946); 6 C.J.S. Assault and Battery § 57 (1937). Nor are the two statutes different in the type of injury that must be sustained. Section 1153 requires "serious bodily injury" and the state statute requires "great bodily harm". The difference in wording throughout the statutes amounts only to a difference in nomenclature, and not substantive law. The same elements are present in both.

Appellant's final argument concerning the indictment's defectiveness is that it is insufficient for failure to set forth the element of intent, as required by N.M.S.A. § 40A-3-5.

[5,6] To be legally sufficient an indictment must apprise an accused of the nature of the charge(s) which he must meet, and the allegations contained therein must be sufficiently specific to stand as a bar to further prosecution. Although the indictment in question is not a model of proper criminal pleading, we do not believe its imperfections are prejudicial. It does not, as appellant correctly contends, contain an allegation of specific intent. However, the sufficiency of the indictment must be determined on the basis of practical rather than technical considerations. *Robbins v. United States*, 476 F.2d 26 (10th Cir. 1973). The gravamen of the charge is a violation of federal law, which the indictment sets forth in the language of § 1153. It therefore is not necessary to allege the elements of the state substantive offense. *United States v. Karigianis*, 430 F.2d 148 (7th Cir. 1970). Both the statutory language of § 1153 and a reference to the state statute are incorporated within the indictment. This is all that the law requires and is sufficient to fairly notify appellant of the charge against him. No prejudice appearing, such an omission furnishes no ground for reversal of the conviction.

Appellant's second argument is that he has been denied equal protection of the laws. Section 1153 expressly provides that Indians charged thereunder "shall be subject to the same laws and penalties as all other persons committing

any of the above offenses, within the exclusive jurisdiction of the United States." Appellant states this conflicts with the later provision declaring that assault resulting in serious bodily injury is to be defined and punished in accordance with applicable state law.

[7-9] In considering this argument, it is to be noted that although the equal protection clause of the Fourteenth Amendment does not apply to the federal government, federal discrimination may be so gross as to be unconstitutional by virtue of the Fifth Amendment's due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The test for determination of this equal protection issue under the Fifth Amendment is whether the racial distinction embodied in § 1153 is reasonably related to any proper governmental objective or whether it is invidious or capricious. To be sure, § 1153 is based upon a racial classification. The constitutionality of such a classification, however, is apparent from the history of the relationship between Indians and the federal government. *See Kills Crow v. United States*, 451 F.2d 323 (8th Cir. 1971); *Gray v. United States*, 394 F.2d 96 (9th Cir. 1967). That relationship from the beginning has been characterized as resembling that of a guardian and ward. As an incident of such guardianship the federal government has full authority:

to pass such laws . . . as may be necessary to give to [Indians] full protection in their persons and property, and to punish all offenses committed against them or by them within [federally granted] reservations.

United States v. Thomas, 151 U.S. 577, 585, 14 S.Ct. 426, 429, 38 L.Ed. 276 (1894). Given such a perspective, we are unable to ascribe to § 1153 an invidious classification, and we conclude that appellant's argument thereon must fail.

[10] Appellant next contends the trial court erred in refusing his instructions on the elements of assault and the

definition of serious bodily injury, and his requested instructions on temporary insanity. Addressing ourselves first to the requested instructions on "assault resulting in serious bodily injury," we find that such instructions attempted to define the crime in terms of 18 U.S.C. § 114. Section 1153, however, provides that "assault resulting in serious bodily injury" shall be defined in accordance with applicable state law. We therefore find no error in the trial court's refusal to instruct on § 114, and its subsequent instruction on the basis of N.M.S.A. § 40A-3-5.

[11,12] Turning our attention to the requested instructions on temporary insanity, it is equally clear that no error was committed in refusing these instructions. Appellant presented no medical evidence on the issue. Virtually the only evidence raising the question was appellant's own testimony that he was distraught and that he had vivid recollections of past combat activities while soldier in Viet Nam. An accused must introduce some evidence of insanity before he is entitled to an insanity instruction. The trial court did not view the evidence presented as sufficient to raise the issue. We have carefully examined the record, and are in complete agreement with the trial court's decision.

[13,14] The next argument presented by appellant is that his motion for acquittal should have been granted because the government failed to prove serious bodily injury. In deciding whether to grant a motion for acquittal, a trial court must consider the evidence in a light most favorable to the prosecution. *United States v. Mallory*, 460 F.2d 243 (10th Cir. 1972), cert. denied, 409 U.S. 870, 93 S.Ct. 197, 34 L.Ed.2d 120. The evidence established that the victim sustained a gunshot wound. There were wounds of entry, located on the lower right side of his chest, where he had been hit by at least two double aught buckshot pellets. One of the pellets struck his liver, tearing a one-inch by 3/4-inch hole in that organ, and causing

internal bleeding. Based upon this evidence, we cannot say that serious bodily injury has not been proven.

[15,16] Appellant's final argument is that his sentence according to state law was illegal. We do not agree. Section 1153 provides that assault resulting in serious bodily injury is to be punished in accordance with applicable state law. Appellant was convicted of what is a third degree felony in New Mexico, the penalty being imprisonment for not less than two nor more than ten years. The trial court sentenced him to ten years. This was not error. *See, e. g., State v. Henry*, 78 N.M. 573, 434 P.2d 692 (1967). Under New Mexico's indeterminate sentencing theory, a sentence is in effect for the maximum time, subject to reduction. *State v. Deats*, 83 N.M. 154, 489 P.2d 662 (1971). Any reduction in a sentence is a function of the state's probation and parole authorities, and not the sentencing court. The sentence was not improper.

The judgment of the trial court is affirmed.

UNITED STATES v. CLEVELAND
Cite as 503 F.2d 1067 (1974)

UNITED STATES of America,
Appellant,
v.
Stuart CLEVELAND and Augustine
Cleveland, Appellees.

UNITED STATES of America,
Appellant,
v.
Daven CHIAGO and Sanford Chiago,
Appellees.
Nos. 73-3604, 74-1113.

United States Court of Appeals,
Ninth Circuit.
Sept. 25, 1974.
Rehearing Denied Jan. 27, 1975.

Defendants, four Indians, were
charged with assault with a deadly

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weapon on named Indians and non-Indians following an affray on Arizona Indian reservation and with aiding and abetting an assault resulting in serious bodily injury to a fellow Indian. The United States District Court for the District of Arizona, Walter Early Craig, Chief Judge, and C. A. Muecke, J., dismissed the indictment on constitutional grounds, and the Government appealed. The Court of Appeals, Hufstедler, Circuit Judge, held that prosecution for assaulting a non-Indian did not violate equal protection or due process since non-Indians who assault non-Indians and Indians who assault non-Indians are both subject solely to Arizona law, that 1966 and 1968 federal statutory amendments adopting Arizona law in defining and punishing assault with a dangerous weapon and assault resulting in serious bodily injury alleged to have been committed by Indian against an Indian on a reservation are violative of equal protection sanction of the Fifth Amendment, and that court would not sever those parts of the amendments that were unconstitutional for the purpose of saving the indictments drawn under the amended statute.

Affirmed in part and reversed and remanded in part.

1. Indians \S 38(2)

State in which an Indian reservation is situated has exclusive jurisdiction over crimes committed by non-Indians against non-Indians on an Indian reservation. 18 U.S.C.A. \S 1152.

2. Constitutional Law \S 250.3(1), 270

Prosecution of two Indian defendants for assault with a deadly weapon on a non-Indian on Arizona Indian reservation did not violate due process or equal protection on ground that a non-Indian defendant who assaults a non-Indian with a dangerous weapon is subject to the heavier burden of proof on the Government and to less harsh penalty under federal law while an Indian who assaults a non-Indian is subject to lighter governmental burden and harsher penalties of Arizona law, since non-Indians who assault non-Indians and Indians who as-

sault non-Indians are both subject solely to Arizona law. 18 U.S.C.A. $\S\S$ 113, 1152, 1153; A.R.S. $\S\S$ 13-245 [A] [5] [C], 13-249.

3. Constitutional Law \S 270

The 1966 and 1968 amendments to statute governing commission of an offense by an Indian against another Indian on a reservation as applied to adopt Arizona law in defining and punishing assault with a dangerous weapon and assault resulting in serious bodily injury are violative of equal protection requirement of the Fifth Amendment. 18 U.S.C.A. $\S\S$ 113(c, d), 1153; A.R.S. $\S\S$ 13-245 [A] [5], [C], 13-249 [A]; U.S.C.A. Const. Amend. 5.

4. Statutes \S 64(6)

On striking down those portions of 1966 and 1968 statutory amendments adopting Arizona law of assault as applied to an Indian's assault on an Indian on the reservation the court would not sever the unconstitutional parts of the amendment for purpose of saving indictments drawn under the amended statute; court would not rewrite the penalty provision to equalize the punishment of Indians and non-Indians charged with assaulting Indians. 18 U.S.C.A. \S 1153.

5. Constitutional Law \S 70.1(10)

Fixing the punishment for crimes is a legislative, rather than a judicial, function.

On Denial of Rehearing

6. Indictment and Information \S 15(4)

Although 1966 and 1968 amendments to statute governing commission of an offense by one Indian against another Indian on a reservation were held unconstitutional, with result that convictions obtained under the amended statute were invalidated, such result did not foreclose a new indictment based on the statute as it read prior to the amendments. 18 U.S.C.A. \S 1153.

David Adler, Crim. Div., Dept. of Justice (argued), Washington, D. C., for appellant.

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Cite as 503 F.2d 1067 (1974)

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Tom Karas (argued), Federal Public Defender, Phoenix, Ariz., Nick L. Rayes (argued for 74-1113), Phoenix, Ariz., for appellees.

Before BARNES and HUFSTEDLER, Circuit Judges, and ENRIGHT, District Judge.*

OPINION

HUFSTEDLER, Circuit Judge:

Defendants Stuart and Augustine Cleveland, who are Indians, were charged under 18 U.S.C. § 1153 with assault with a deadly weapon upon named Indians and non-Indians, following an affray on an Arizona Indian reservation among the Clevelands and tribal and Arizona police. Defendants Daven and Sanford Chigo, also Indians, were charged with aiding and abetting an assault resulting in serious bodily injury to another Indian, an offense likewise occurring on an Indian reservation in Arizona. The district court dismissed the indictments on the ground that the statutes on which the prosecutions were founded unconstitutionally discriminated against these Indians in that Indians are subjected to harsher punishment than

non-Indians who commit the same offenses, and, in prosecutions for assault with a dangerous weapon, the Government is given a lighter burden of proof in prosecuting Indians than is required in prosecuting non-Indians.

Federal jurisdiction for the prosecution of crimes committed on Indian reservations and the choice of federal or state criminal law in such prosecutions are based on 18 U.S.C. §§ 1152, 1153. Under section 1152 crimes committed by non-Indians against Indians and by Indians against non-Indians, with certain exceptions for Indian offenders, are subject to federal prosecution under federal substantive criminal law.¹ Section 1153, before the 1966 and 1968 amendments, applied federal substantive criminal law to listed major offenses committed by Indians against Indians and non-Indians, including assault with a dangerous weapon.² The relevant 1966 and 1968 amendments added assault resulting in serious bodily injury to the listed offenses and adopted state law to define that offense and assault with a dangerous weapon and to prescribe the punishment for both offenses.³

and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

"As used in this section, the offense of burglary shall be defined and punished in accordance with the laws of the State in which such offense was committed." June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, § 20, 63 Stat. 94.

3. These amendments are italicized:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

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The federal assault statute that is applicable to offenders subject to federal law is section 113, which in pertinent part, states:

"Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

* * * * *

"(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than \$1,000 or imprisonment for not more than five years, or both.

"(d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six months, or both."

The pertinent Arizona assault statutes are Arizona Revised Statutes sections 13-245(A)(5), 13-245(C), and 13-249. Section 13-245(A)(5) defines aggravated assault or battery as that in which "a serious bodily injury is inflicted upon the person assaulted," for punishment of which section 13-245(C) prescribes a minimum of five years in prison. Section 13-249 provides:

"Assault with deadly weapon or force; punishment

"A. A person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, shall be punished

"B. A crime as prescribed by the terms of subsection A, committed by a person armed with a gun or deadly weapon, is punishable by imprisonment in the state prison, for the first offense, for not less than five years

[1] Crimes committed by non-Indians against non-Indians on an Indian reservation are excluded from section 1152 because, absent a contrary provi-

"As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the

sion in a treaty with the Indians, the state in which the reservation is situated has exclusive jurisdiction over such crimes. (New York ex rel. Ray v. Martin (1946) 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261; United States v. Ramsey (1926) 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039; United States v. McBratney (1881) 104 U.S. (14 Otto) 621, 26 L.Ed. 869.)

The interaction of sections 1152 and 1153, as amended, together with the impact of *Martin*, *Ramsey* and *McBratney*, produces the following results in cases of assault with a dangerous weapon and assault resulting in great bodily injury, when these offenses are committed on Indian reservations in Arizona:

(1) The Arizona law of assault applies to an offense committed by a non-Indian against a non-Indian because no federal jurisdiction exists.

(2) Federal law applies to an assault by a non-Indian against an Indian.

(3) Arizona law applies to an assault by an Indian against either an Indian or a non-Indian.

I

[2] Counts II through VII of the Cleveland indictments each involve an assault by an Indian against a non-Indian. The due process and equal protection challenges to these counts are based on the claim that a non-Indian defendant who assaults with a dangerous weapon a non-Indian is subjected to the heavier burden of proof on the Government and to the less harsh penalties of 18 U.S.C. §§ 113(c), 113(d), whereas an Indian who assaults a non-Indian, is subjected to the lighter governmental burden and the harsher penalties of Arizona law. The constitutional attacks must fail because the premise is wrong. Non-Indians who assault non-Indians and Indians who assault non-Indians are both subject solely to Arizona law. The federal government has no jurisdiction to prosecute or to punish crimes in the

State in which such offense was committed."

As amended Nov. 2, 1966, Pub.L. 89-707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub.L. 90-284, Title V, § 501, 82 Stat. 80.

* Honorable William B. Enright, Southern District of California, sitting by designation.

1. Section 1152 provides:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

2. Section 1153 then provided:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws

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former category, and Congress has adopted Arizona law in respect of the latter class. In the face of *Martin*, *Ramsey* and *McBratney*, *supra*, Congress could not have asserted federal jurisdiction to define the crime or to prescribe the punishment for non-Indian assaults on non-Indians. The effect of the 1966 and 1968 amendments to section 1153, subjecting Indians who assault non-Indians to state law was to create equal treatment of non-Indian and Indian defendants for this category of offenses,⁴ excepting only that the Indians are prosecuted in federal courts and non-Indian defendants are prosecuted in the state courts. The Indians do not contend that the difference in jurisdiction denies them either due process or equal protection.

II

[3] Count I of the indictment against Augustine Cleveland, Count VIII against both Clevelands, and the indictment against the Chiagos each charge an assault offense committed by an Indian against an Indian. [The equal protection arguments strike home in this instance because the 1966 and 1968 amendments to section 1153 created substantial disparities between Indian defendants and non-Indian defendants who are charged with committing identical offenses.⁵ The sole distinction between the defendants who are subjected to state law and those to whom federal law applies is the race of the defendant. No federal or state interest justifying the distinction has been suggested, and we can supply none.] The 1966 and 1968 amendments to section 1153 as applied to adopt Arizona law in defining and punishing assault with a dangerous

4. In a case involving offenses committed by Indians against non-Indians, similar constitutional arguments were rejected by this Circuit for similar reasons. *Henry v. United States* (9th Cir. 1970) 432 F.2d 114.

5. The statutory scheme, as applied in these cases, makes Indians subject to more severe punishment than are non-Indians (compare 18 U.S.C. § 113(c), (d) with *Ariz.Rev.Stat.* §§ 13-249, 13-245(A)(5), (C)) and reduces the prosecutor's burden of proof (compare 18 U.S.C. § 113(c) with *Ariz.Rev.Stat.* § 13-249(A)).

weapon and assault resulting in serious bodily injury alleged to have been committed by an Indian against an Indian are violative of the equal protection requirement of the Fifth Amendment. (*E. g.*, *Johnson v. Robison* (1974) 415 U.S. 361, 364-365 n. 4, 94 S.Ct. 1160, 39 L.Ed.2d 389; *McLaughlin v. Florida* (1964) 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (applying the equal protection clause of the Fourteenth Amendment); *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884.⁶ *Cf.* *Keeble v. United States* (1973) 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844.)

III

[4,5] The entire indictment of the Chiagos and Count I and VIII of the Clevelands' indictment were properly dismissed. Although we have struck down only those portions of the challenged 1966 and 1968 amendments to section 1153 that adopt the Arizona law of assault as applied to an Indian's assault on an Indian, we refuse to sever from the statute those parts of the amendments that are unconstitutional for the purpose of saving the indictments drawn upon the amended statute.

We firmly reject the Government's invitation to rewrite the penalty provisions of the applicable statutes to equalize the punishment of Indians and non-Indians charged with assaulting Indians. Fixing the punishment for crimes is a legislative, rather than a judicial function. (*Cf.* *United States v. Evans* (1948) 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823.)

The dismissal of the Chiago indictment is affirmed. The dismissal of Counts I and VIII of the Cleveland in-

6. *Mull v. United States* (9th Cir. 1968) 402 F.2d 571 upheld against constitutional attack the assault provisions of § 1153 as applied to an Indian assaulting with a dangerous weapon a non-Indian before the challenged amendments became effective. Prior to the amendments, assaults with a dangerous weapon committed by an Indian on an Indian were subject to federal law the same as a similar assault by a non-Indian on an Indian.

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dictment is affirmed. The dismissal of Counts II through VII of the Cleveland indictment is reversed, and the cause is remanded to the district court.

OPINION ON DENIAL OF RE-HEARING

PER CURIAM:

[6] Nothing in our opinion forecloses a new indictment based on 18 U.S.C. § 1153 as it read prior to the amendments that have been constitutionally invalidated.

UNITED STATES v. BIG CROW

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Cite as 523 F.2d 955 (1975)

UNITED STATES of America,
Appellee,

Seth Henry BIG CROW, Appellant.
No. 75-1164.

United States Court of Appeals,
Eighth Circuit.

Submitted June 12, 1975.

Decided Oct. 7, 1975.

Indian was indicted under the Major Crimes Act for assault with a dangerous weapon, assault resulting in serious bodily injury, and burglary, all of which offenses occurred on the Rosebud Indian Reservation in South Dakota. After trial by jury, the United States District Court for the District of South Dakota, Andrew W. Bogue, J., entered judgment convicting defendant as charged on the second count and of lesser included offenses on the two remaining counts, and he appealed. The Court of Appeals, Lay, Circuit Judge, held that (1) in respect to his conviction of assault resulting in serious bodily injury, defendant was denied equal protection of the laws, since a non-Indian committing an assault upon an Indian on the Reservation would be subject to only six months' imprisonment, whereas an Indian committing the identical crime is subject to up to five years' imprisonment, and (2) where the trial court's instructions set forth the express language of statute governing the offense of fourth-degree burglary, and where the instructions included the provision which requires that the place broken and entered be a "dwelling house," the court's subsequent misstatement that one essential element of the offense was that defendant broke or entered a "building" in which personalty belonging to another person was kept did not affect the substantial rights of defendant and did not constitute "plain error."

Judgment of conviction on count II vacated and cause remanded for dismissal;

al; judgment of conviction on count III affirmed.

1. Constitutional Law ⇐270

Defendant, an Indian who was charged under the Major Crimes Act with assault resulting in serious bodily injury on the Rosebud Indian Reservation in South Dakota, was denied equal protection of the laws in violation of the (due process clause of the Fifth Amendment), since a non-Indian committing an assault upon an Indian on the Reservation would be subject, under the statutory scheme, to only six months' imprisonment, whereas an Indian committing the identical crime is subject to up to five years' imprisonment. 18 U.S.C.A. §§ 1152, 1153; SDCL 22-18-12; U.S.C. A.Const. Amend. 5.

2. Criminal Law ⇐16

Under the Assimilative Crimes Act, (the government can resort to state law only if no act of Congress makes a defendant's conduct punishable.) 18 U.S.C.A. § 13.

3. Criminal Law ⇐16

Federal statute providing "Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows * * * (d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six months, or both" makes the offense of assault resulting in serious bodily injury punishable by an act of Congress within the meaning of the Assimilative Crimes Act so as to bar resort to state law. 18 U.S.C.A. §§ 13, 113, 113(d).

4. Constitutional Law ⇐215

Government has the burden of showing a compelling interest necessitating racially discriminatory treatment.

5. Criminal Law ⇐1038.1(4), 1038.3

While defendant claimed on appeal that the district court erred in its instructions concerning burglary in the fourth degree, his conviction thereof would be affirmed unless the instruc-

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tions constituted "plain error," since defendant did not at trial submit requested instructions on that offense or object to the instructions supplied by the court. SDCL 22-32-9, 22-32-11, 22-32-14; Fed.Rules Crim.Proc. rules 30, 52(b), 18 U.S.C.A.

6. Criminal Law ⇐1038.1(1)

To find "plain error" in an unobjected to instruction, the defendant must demonstrate that the instruction affected his substantial rights resulting in a miscarriage of justice.

7. Criminal Law ⇐1038.1(4)

Where the trial court's instructions set forth the express language of statute governing the offense of fourth-degree burglary, and where the instructions included the provision which requires that the place broken and entered be a "dwelling house," the court's subsequent misstatement that one essential element of the offense was that defendant broke or entered a "building" in which personalty belonging to another person was kept did not affect the substantial rights of defendant resulting in a miscarriage of justice and did not constitute "plain error." SDCL 22-32-11, 22-32-14; Fed. Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

Stan Whiting, Jerry Pechota, Winner, S. D., for appellant.

David R. Gienapp, Asst. U. S. Atty., Sioux Falls, S. D., for appellee.

1. Title 18 U.S.C. § 1153 provides:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

The defendant, Seth Henry Big Crow, an Indian, was indicted under the Major Crimes Act, 18 U.S.C. § 1153, for assault with a dangerous weapon (Count I), assault resulting in serious bodily injury (Count II), and burglary (Count III). The alleged offenses occurred on the Rosebud Indian Reservation in the State of South Dakota. After trial by jury, the defendant was convicted as charged on Count II and of lesser included offenses on the two remaining counts. He received sentences of 90 days on Count I and three years on Count III, each to run concurrently with a five-year sentence he received on Count II.

Only the convictions on Counts II and III are challenged on appeal. The defendant argues that his conviction on Count II is invalid in that he received a greater sentence than a non-Indian could have received for the same offense, in violation of the Fifth Amendment Due Process Clause. On Count III he argues that the district court committed plain error in its instructions to the jury. The conviction on Count II is reversed and remanded for dismissal by the district court. The conviction on Count III is affirmed.

I. Count II: Assault Resulting in Serious Bodily Injury Under 18 U.S.C. § 1153.

The Major Crimes Act, 18 U.S.C. § 1153¹ provides that certain offenses by

As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

Cite as 523 F.2d 853 (1975)

Indians within a reservation must be tried in federal courts. The Act also provides that some of these federal offenses, including assault resulting in serious bodily injury of which defendant was convicted on Count II, are to be defined and punished according to the laws of the state in which the offense was committed. In the instant case, the government selected the following South Dakota statute to define the essential elements and punishment under Count II:

Assault with intent to inflict great bodily injury.—Whoever assaults another with intent to inflict great bodily injury shall be punished upon conviction thereof by imprisonment in the state penitentiary for not less than one year, nor more than five years, or in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

SDCL 22-18-12.

The defendant argues that a non-Indian who committed the same offense would be subject to a maximum sentence of six months, rather than the five years imposed on the defendant under § 1153. Thus, defendant argues that as applied here, § 1153 unlawfully discriminates against Indians in violation of the Fifth

2. Title 18 U.S.C. § 1152 provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

3. Title 18 U.S.C. § 113 provides:

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

Amendment Due Process Clause and contrary to the express language of that statute, fails to "subject [Indians] to the same laws and penalties as all other persons" committing this offense "within the exclusive jurisdiction of the United States."

[1] A non-Indian cannot be charged under 18 U.S.C. § 1153 so as to incorporate state law, since the Act applies exclusively to Indians. A non-Indian who commits an identical assault on a federal enclave is governed by that portion of 18 U.S.C. § 1152 which extends federal criminal jurisdiction to crimes committed by non-Indians against Indians on reservations.² On this basis, the defendant contends that a non-Indian would have to be charged under subsection (d) of 18 U.S.C. § 113, the federal statute prescribing assaults.³ Thus a non-Indian committing an assault upon an Indian on the reservation is subject to only six months imprisonment, whereas an Indian committing the identical crime is subject to up to five years imprisonment. The defendant urges that he is denied equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment. *Cf. Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[2] The government argues in response that a non-Indian would in fact

(a) Assault with intent to commit murder or rape, by imprisonment for not more than twenty years.

(b) Assault with intent to commit any felony, except murder or rape, by fine of not more than \$3,000 or imprisonment for not more than ten years, or both.

(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than \$1,000 or imprisonment for not more than five years, or both.

(d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six months, or both.

(e) Simple assault, by fine of not more than \$300 or imprisonment for not more than three months, or both.

be chargeable under the same state statute and subject to the same sentence as the defendant. The government asserts that the Assimilative Crimes Act, 18 U.S.C. § 13, requires this result. The Assimilative Crimes Act provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. (emphasis added).

Under 18 U.S.C. § 13, the government can resort to state law only if no Act of Congress makes a defendant's conduct punishable. *United States v. Sharpnack*, 355 U.S. 286, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958); *Williams v. United States*, 327

U.S. 711, 66 S.Ct. 778, 90 L.Ed. 922 (1946). The government urges that that is the case here, for "assault resulting in serious bodily injury" is actually assault and battery, while 18 U.S.C. § 113 in its view covers only assault, not actual batteries.

[3] We disagree. In our view, 18 U.S.C. § 113(d) makes the offense of assault resulting in serious bodily injury punishable by an Act of Congress without the meaning of the Assimilative Crimes Act so as to bar resort to state law. Section 113(d) punishes "assault by striking, beating, or wounding."

The fact that an assault actually results in serious bodily injury does not preclude use of § 113(d), even though that result is not an essential element of that offense. If the government believes that the maximum punishment under § 113 is inadequate for some aggravated assaults, the remedy lies in Congress, not in substitution at the prosecutor's discretion of the state law for federal law. As the Supreme Court said in

4. In *Fields v. United States*, 438 F.2d 205 (2nd Cir. 1971), cert. denied, 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 (1971), a non-Indian committed assault and battery on an Air Force Base. He was convicted under 18 U.S.C. § 13 and Ohio battery statutes. The defendant urged that since his acts were made criminal under the federal assault statute, 18 U.S.C. § 113, resort to state law was improper. The Second Circuit disagreed, saying:

[I]t has been held that where the state statute provides a theory essentially different from that provided in the federal statute, the government can proceed on either statute. *United States v. Jones*, 244 F.Supp. 181 (S.D.N.Y.), aff'd, 365 F.2d 675 (2nd Cir. 1965). What the government may not do is proceed under the state statute when the precise act prohibited by the state statute is defined and prohibited by a federal statute, *Williams v. United States*, supra, but that is not what the government has done here. The applicable state and federal statutes in this case are quite different. The federal statute proscribed assaults. The Ohio law prohibits batteries. Moreover, the state statute deals with a very specific class of batteries—those involving shootings, cuttings or stabbings. The Ohio statute fits the facts of this case more precisely and it was not improper for the government to proceed under it.

438 F.2d at 207-08.

We take a different view of this matter. As we interpret *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 922 (1946), the Assimilative Crimes Act bars resort to state law when the precise conduct has been made penal by a federal law. In *Williams*, the Assimilative Crimes Act had been applied against a married non-Indian male who had apparently consensual sexual relations with an unmarried Indian girl whose age was between 16 and 15. Under Arizona law, this act constituted statutory rape so long as the female was less than 18. Under federal law, however, statutory rape required proof that the woman was less than 16. The Supreme Court held that the Assimilative Crimes Act and the Arizona definition of statutory rape were not applicable because:

(1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. 327 U.S. at 717; 66 S.Ct. at 781 (emphasis added).

liams v. United States, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946):

[T]he Assimilative Crimes Act discloses nothing to indicate that, after Congress has once defined a penal offense, it has authorized such definition to be enlarged by the application to it of a State's definition of it. It has not even been suggested that a conflicting state definition could give a narrower scope to the offense than that given to it by Congress. We believe that, similarly, a conflicting state definition does not enlarge the scope of the offense defined by Congress. The Assimilative Crimes Act has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code.

327 U.S. at 718, 66 S.Ct. at 782.

Since § 113(d) does make penal the precise acts of an assault resulting in serious bodily injury, a non-Indian who committed the same offense as the defendant herein could not have been charged under state law and would have been subjected to a much lighter sentence than that actually received by the defendant. Two other courts of appeals have agreed that the federal enclave laws do subject an Indian to a greater penalty than a non-Indian for assault resulting in serious bodily injury, although they differed on the constitutionality of that result. Compare *United States v. Cleveland*, 503 F.2d 1067, 1071 (9th Cir. 1974) with *United States v. Analla*, 490 F.2d 1204, 1208 (10th Cir. 1974), vacated and remanded on other grounds, 419 U.S. 813, 95 S.Ct. 28, 42 L.Ed.2d 40 (1974).

In *Cleveland*, the Ninth Circuit reversed the conviction, stating:

The sole distinction between the defendants who are subjected to state law and those to whom federal law applies is the race of the defendant. No federal or state interest justifying the distinction has been suggested, and we can supply none. The 1966 and 1968 amendments to section 1153 as

applied to adopt Arizona law in defining and punishing assault with a dangerous weapon and assault resulting in serious bodily injury alleged to have been committed by an Indian against an Indian are violative of the equal protection requirement of the Fifth Amendment.

503 F.2d at 1071.

The Tenth Circuit affirmed the conviction in *Analla*, however, holding that the racial classification was "reasonably related" to the special relationship between reservation Indians and the federal government.

That relationship from the beginning has been characterized as resembling that of a guardian and ward. As an incident of such guardianship the federal government has full authority:

to pass such laws . . . as may be necessary to give to [Indians] full protection in their persons and property, and to punish all offenses committed against them or by them within [federally granted] reservations.

Given such a perspective, we are unable to ascribe to § 1153 an invidious classification, and we conclude that appellant's argument thereon must fail.

490 F.2d at 1208.

[4] We cannot agree with the Tenth Circuit in this matter. While the Supreme Court has approved legislation singling out Indians for special treatment, such special treatment must at least be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974); see also *Ute Indian Tribe v. Probst*, 423 F.2d 491, 498 (10th Cir. 1970). It is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection. We further question whether the rational basis test is the appropriate standard where racial classifications are used to impose burdens on a

minority group rather than, as in *Mancari*, to help the group overcome traditional legal and economic obstacles. It is a generally settled rule that the government bears the burden of showing a compelling interest necessitating racially discriminatory treatment. *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 643, 98 L.Ed. 884 (1954). The government has failed to offer any justification for this disparate treatment of Indians; it rests its case on the argument rejected above that no disparity exists. Under the circumstances, we are constrained to hold that 18 U.S.C. § 1153 cannot constitutionally be applied so as to subject an Indian to a greater sentence than a non-Indian could receive for the same offense.

II. Count III: Burglary.

[5] In Count III defendant was charged with burglary in the third degree under SDCL 22-32-9,⁵ but he was convicted of burglary in the fourth degree under SDCL 22-32-11 submitted at his request as a lesser included offense.⁶ The sole question raised by the defendant on this count is whether the district court erred in its instructions governing burglary in the fourth degree. The defendant did not submit requested instructions on the lesser included offense or object to the instructions supplied by the court, as required by Fed.R.Cr.P. 30. Under the circumstances, the conviction must be affirmed unless the instructions constituted "plain error" under Fed.R.Cr.P. 52(b). See *United States v. Phillips*, 522 F.2d 388 (8th Cir. filed Aug. 26, 1975).

5. SDCL 22-32-9 provides:

Breaking curtilage—Vehicles.—A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree.

The defendant complains that the jury was not adequately apprised of the need to find entry into a dwelling house, defined in SDCL 22-32-14, as a prerequisite to conviction of the lesser included offense. The instruction given by the district court stated:

Every person who breaks and enters the dwelling house of another at any time in such manner as not to constitute burglary in the third degree defined in count III of these instructions with intent to commit the crime of assault therein as defined in the instructions, is guilty of burglary in the fourth degree.

The essential elements of the offense of burglary in the fourth degree, each of which the Government must prove beyond a reasonable doubt, are:

1. That the Defendant broke or entered a building in which personal property belonging to another person was kept.

2. That he did so with the specific intent to commit a crime therein. Transcript at 203. (Emphasis added).

[6] SDCL 22-32-11 requires proof that the place broken and entered was dwelling house rather than merely building in which personal property belonging to another person was kept. Dwelling house is defined under South Dakota law as a building customarily used as a place of lodging in the nighttime not merely a building in which personal property is kept. SDCL 22-32-11. It is urged that the court's instructions did not fully define the elements to be proven in order to convict the defendant of fourth degree burglary. However, we find "plain error", the defendant must

6. SDCL 22-32-11 provides:

Burglary in fourth degree—Entry of dwelling house not constituting other burglary.—Every person who breaks and enters a dwelling house of another at any time in such manner as not to constitute burglary otherwise specified in this chapter with intent to commit a crime is guilty of burglary in the fourth degree. (emphasis added).

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to demonstrate that the instruction affected substantial rights resulting in a miscarriage of justice. *West v. United States*, 359 F.2d 50 (8th Cir.), cert. denied, 385 U.S. 867, 87 S.Ct. 131, 17 L.Ed.2d 94 (1966).

[7] The trial court's instruction sets forth the express language of the statute governing the offense of fourth degree burglary. The instruction includes the provision which requires that the place broken and entered into be a dwelling house. While the subsequent enumeration of the elements contained in the term "building" rather than "dwelling house", the instructions must be read as a whole and the error was such that it could easily have been corrected by proper exception pursuant to rule 30. There is a close relationship between the two terms; every dwelling house is a building, although as defined by South Dakota law the converse is not necessarily true. The term "dwelling house" is a commonly known term and without a specific request for further definition, it is not necessary. Cf. *United States v. Robinson*, 448 F.2d 715 (8th Cir. 1971), cert. denied, 405 U.S. 927, 92 S.Ct. 977, 30 L.Ed.2d 800 (1972); *Bohn v. United States*, 260 F.2d 773, 779 (8th Cir. 1958), cert. denied, 358 U.S. 931, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959). In our view, there was sufficient evidence to find that the defendant entered a "dwelling house" and the verdict on Count III must be sustained. We feel the partial misstatement did not affect the substantial rights of the defendant resulting in a miscarriage of justice. Under the circumstances, we reject the claim of "plain error." See *United States v. Phillips*, *supra*.

The judgment of conviction on Count II is hereby vacated and the cause is remanded to the district court for dismissal; the judgment of conviction on Count III is affirmed.

Mr. HUNGATE. Unless there's something further—yes, sir, Mr. Hyde?

Mr. HYDE. May I just belatedly congratulate Mr. Pauley and Mr. Adams on their usual excellent presentation before this subcommittee.

Mr. PAULEY. Thank you.

Mr. ADAMS. Thank you.

Mr. HUNGATE. Unless there are further questions or further witnesses to be heard, the committee will be adjourned.

[Whereupon, at 10:55 a.m., the subcommittee adjourned, subject to the call of the Chair.]

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