
INTRODUCTION

A member of an Indian tribe committing an aggravated assault while on an Indian reservation in South Dakota is subject to a maximum sentence ten times greater than a non-Indian prosecuted for an offense identical in nature and situs. In United States v. Big Crow,1 the Eighth Circuit Court of Appeals held the federal statutory authorization for the above sentencing disparity, the Major Crimes Act,2 to be invalid, as applied, through violation of the fifth amendment due process clause.3

The Major Crimes Act extends federal jurisdiction to thirteen serious crimes committed by an Indian against either another Indian or a non-Indian within “Indian country.”4 However, the

1. 523 F.2d 955 (8th Cir. 1975) [hereinafter cited as Big Crow].
2. 18 U.S.C. § 1153 (1970) [commonly known and hereinafter cited as the Major Crimes Act]: 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 the 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 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, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed. (Emphasis added).
4. “Indian country” is defined by Congress 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 jurisdic-
same offenses committed by a non-Indian against an Indian on a reservation, although still within federal jurisdiction, are prosecuted under a different statute.\(^5\) Until the mid-1960's, when the Major Crimes Act was amended to incorporate state law for the definition and punishment of several of the enumerated crimes,\(^6\) defendants charged under either statute were tried and sentenced in accordance with federal criminal law. Pursuant to these amendments, an Indian committing an aggravated assault on a reservation is charged and sentenced under state law; while a non-Indian, under the same circumstances, is charged and sentenced under Federal law.\(^7\) The inherent dissimilarities between the federal criminal code and those of the several states create situations in which varying prosecutorial burdens and disparate maximum sentences may be applied for the same offense.\(^8\) As this potential for invidious discrimination depends on the defendant's classification as an Indian,\(^9\) the Major Crimes Act has been challenged by Indian
defendants as a deprivation of equal protection of the laws.\textsuperscript{10} Such a constitutional attack arose in \textit{Big Crow}.

The principle issue considered on appeal and the basis of this note is whether the Major Crimes Act, through its incorporation of state law, is violative of the equal protection and due process rights of tribal Indians.\textsuperscript{11} The criminal justice implications and constitutional complexities raised by this issue require analysis of the decision not only in the context of the Act but also in the perspective of the United States' policy toward the American Indian.

**DEVELOPMENT OF CONGRESSIONAL POLICY CONCERNING INDIAN TRIBES**

The Indian and his tribal governments occupy a unique and often complex constitutional and political status in American society.\textsuperscript{12} Exemplifying the anomalous status to which the tribal Indian is subjected is a body of laws which treat him differently than the other citizens of this nation.\textsuperscript{13} These laws, collectively known as "Federal Indian Law," reflect 150 years of judicial and legislative efforts to resolve the dilemma of a quasi-sovereign nation existing within the boundaries of a dominant sovereign state.\textsuperscript{14}

Congress, in exercising its specific and implied power to enact Indian legislation,\textsuperscript{15} has based this law upon two conflicting

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\textsuperscript{11} \textit{Big Crow} at 957.


\textsuperscript{13} 5 U.S. COMM'N ON CIVIL RIGHTS REPORT 125 (1961).

\textsuperscript{14} A. de TOCQUEVILLE, DEMOCRACY IN AMERICA 28 (1947).

\textsuperscript{15} The plenary power of Congress over Indian affairs has become an axiom of Indian law. Justice Blackman, in \textit{Morton v. Mancari}, 417 U.S. 535, 551 (1974) [hereinafter cited as \textit{Mancari}], stated this power of Congress "is drawn both explicitly and implicitly from the Constitution, itself." Judicial recognition of Congress' plenary power was first articulated in Chief
philosophies concerning the proper place of the Indian in American society. One philosophy, commonly known as the "separative premise," views the Indian tribe as an autonomous cultural and political unit that should remain apart from the larger society. The alternate philosophy regards the tribe as an entity that should be dissolved of its members, civilized, and merged with the mainstream of American life. The co-existence of these conflicting policies has created "constant tension and uncertainty of direction in the laws which govern the Indian and his tribe."

Since the early nineteenth century, the Indian tribes have endured several transformations in congressional policy. The federal government initially dealt with the various tribes in a sporadic nature, premised on concepts of international law. The tribes were recognized, during the first quarter century of the republic, as independent foreign nations whose relations were embodied in treaties. In 1830, with the westward surge of "Manifest Destiny," Congress enacted its first comprehensive Indian policy. This policy manifested the separative philosophy, and opened lands to white settlers through the removal of eastern tribes to lands west of the Mississippi River. Such forced migration, which continued for the next four decades, resulted in the systematic settlement of the tribes on federally reserved lands.

After the Civil War, congressional policy began to reflect the reduced numbers and decimated power of the tribes and the growing demand for the vast stretches of reservation land. Thus,


21. Kerr, Constitutional Rights, Tribal Justice, and the American Indian, 18 J. Pub. Law 311, 313 (1969). The actual process of removal, often under the direction of the United States Army, was characterized by such frequent examples of inhumanity and brutality that the experience has become known as the "Trail of Tears." Hagan, American Indians 78 (4th ed. 1964).

22. Hass, The Legal Aspects of Indian Affairs from 1887 to 1957, 311
during the 1880's, an era of assimilation developed whereby tribal lands were allotted to the individual members and the remainder opened to the white settlement. The regimented change from tribal hunter to civilized individual farmer had disastrous effects on the Indians. After forty years the result was "a generation of landless, impoverished Indians, shorn of the social cohesiveness of tribal culture." Reacting to the failure of assimilation, Congress, in the 1930's, returned to a separatist philosophy and attempted to strengthen tribal political and land bases.

By 1950, the economic realities of burgeoning Indian programs signalled a return to assimilation. Congress opted for a termination of federal supervision and assistance with an accompanying merger of tribal members and property into the several states. However, like the realization subsequent to the first

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The intent of Congress was embodied in H. Con. Res. 108, 83rd Cong., 1st Sess., 99 Cong. Rec. 9968 (1953), wherein it was stated:

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States... and to grant them all the rights and prerogatives pertaining to American citizenship...


In 1973, President Nixon, in a message to Congress concerning Indian affairs, recommended "the termination resolution of 1953 be repealed." 119 Cong. Rec. 1273 (daily ed. March 1, 1973). No final congressional action has resulted; however, Senate Bill 2010, "The Indian Law Enforcement Improvement Act," is presently before committee. This bill would permit In-
assimilative era, Congress realized the failure of its policy and in the 1960's reintroduced federal recognition and services to the tribes.\(^{28}\)

Currently, the congressional policy is one of neither extreme. Recent federal efforts have been directed toward developing the tribe as a viable alternative to merger by the individual Indian into American society. The crux of this policy is self-determination through self-government and economic development.\(^{29}\)

**DEVELOPMENT OF JUDICIAL POLICY CONCERNING INDIAN TRIBES**

In attempting to mitigate the impact of Congress' fluctuation between extremes, the federal judiciary has, "since the beginning, treated individual Indians as needing special protection and the tribes as dependent nations."\(^{30}\) Judicial cognizance of the Indian tribes as a separate people with sovereign powers has been a central proposition in the development of federal Indian law.\(^{31}\)

In recognition of the emerging dominance of the United States over the tribes and the accompanying demise of the principles of international law as the basis of intercourse between the two

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\(^{29}\) Representative of congressional action directed toward development of the tribes and their governmental structure is the Indian Bill of Rights (or the Indian Civil Rights Act, see note 25 supra) which was passed to extend constitutional protections to the reservation Indian. Significantly, Congress modified the total incorporation of the first through ninth amendments of the Constitution to the tribal governments as a recognition of their unique legal status and cultural autonomy with existing values and interests.


The executive branch of the federal government has also been instrumental in the current policy of developing the tribes to a position of autonomy. In 1970, President Nixon recommended to Congress a policy of "self-determination without termination." 28 Cong. Q. 1820 (July 17, 1970). (See note 15 supra).

\(^{30}\) Brophy & Aberle at 183.

peoples, the Supreme Court, in the 1830's under Chief Justice John Marshall, articulated the legal relationship of the tribes to the white society. While declaring a tribe to be a "state" in the perspective of a "distinct political society, separated from others, capable of managing its own affairs and governing itself,"32 the Court held it to be neither a "state in the sense of a state of the Union nor a "foreign state in the sense of the Constitution."33 Rather, a tribe "was a domestic dependent nation"34 within the jurisdiction and protection of the United States. Envisioning the eventual assimilation of the Indian, the Court characterized the tribes as being in a "state of pupilage."35 Accordingly, their relationship to the federal government during this period of transformation and vulnerability would be as "that of a ward to his guardian."36 And in furtherance of that premise, the Marshall Court subsequently added that the relationship between the United States and the Indians "is, by our Constitution and laws, vested in the government of the United States."37

The judicial precedent of an Indian nation with quasi-sovereign powers came into conflict with the assimilative policy of Congress in the latter part of the Nineteenth Century. Although the Court bowed to congressional prerogative, it maintained continuity while blunting the impact of assimilative legislation by capitalizing on Marshall's "guardian-ward" theory with its notions of tribal weakness and helplessness.38 For almost five decades the Court continued to recognize tribal sovereignty and emphasized the Indian's special wardship status.39

33. Id. at 11, 5 Pet. at 16.
34. Id. at 12, 5 Pet. at 17.
35. Id.
36. Id.
38. See Comment, 58 CALIF. L. REV. 445, 466-471 (1970). See also U.S. v. Thomas, 151 U.S. 577, 585 (1894) wherein the Court held that 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.
39. A portrayal of the Supreme Court's view of the Indian during this period is found in Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943):
In the exercise of war and treaty powers, the United States overcame the Indians and took possession of their lands, . . . leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians
During the last twenty years a contemporary judicial notion of tribal sovereignty has been articulated in light of efforts to expand state jurisdiction. While guarding the right of self-government, it appears that the courts will allow states to exercise their authority over other reservation affairs in the absence of federal preemption. In 1973, the United States Supreme Court reviewed the tribal sovereignty doctrine and stated that it had not "remained static during the [past] 141 years," but had "undergone considerable evolution in response to changing circumstances." The doctrine is no longer a "definite resolution" to assertions of state intrusion but merely a "useful backdrop against which applicable treaties and statutes must be read."

CRIMINAL JURISDICTION WITHIN INDIAN COUNTRY

Criminal jurisdiction within "Indian country" has developed in an era of congressional vacillation between separation and assimilation, and judicial evolution of tribal sovereignty.

Until the latter part of the Nineteenth Century, the basis of criminal jurisdiction on reservations was the tribal attribute of self-government to which Congress adhered by exempting from federal jurisdiction crimes involving only Indians. Like tribal sovereignty, however, that adherence was limited. The federal government asserted jurisdiction whenever a non-Indian was involved as either the defendant or victim of a crime. In the 1870's and

to take their place as independent, qualified members of the modern body politic.

The one exception to the Court's continuity of position during that period was Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). It has been suggested that that opinion was a reflection of the Court's awkwardness in continued recognition of tribal sovereignty during a period of legislative assimilation.


42. Id.

43. Id. at 172.

44. Tribal jurisdiction over offenses between Indians did not originate with the federal government but as an essential element of a sovereign nation. Congressional policy respecting tribal jurisdiction over Indian offenses was evidenced in the Act of March 3, 1817, 3 Stat. 383, the statutory origin of 18 U.S.C. § 1152.

45. Federal jurisdiction over Indians committing offenses against non-Indians dates back to the 1780's. The first federal statute dealing specifically with such crimes was the Act of March 3, 1817, 3 Stat. 383 (codified at 18 U.S.C. § 1152 (1970)). The statutory basis of federal jurisdiction over crimes by non-Indians against Indians was the Trade and Intercourse Act, Act of July 22, 1790, §§ 5–6, 1 Stat. 137, 138.
1880's when Congress turned to an assimilation policy, tribal retention of such a sovereign attribute was regarded as a vestige of separatism no longer desired.

The inevitable clash between judicial precedent of an Indian sovereignty and the realigned congressional objective of detribalization and civilization occurred in Ex parte Crow Dog. The Supreme Court held that because of statutory exclusion the Federal courts were without jurisdiction over a crime between Indians in Indian country. Although recognizing the authority of Congress through its plenary power over Indian affairs to confer federal jurisdiction, the Court asserted that such a departure from "the general policy of the government towards the Indians would "require a clear expression of the intention of Congress." Until such explicit congressional direction was established, it was reasoned that the tribes, through the precedent of Indian sovereignty, retained exclusive jurisdiction to punish crimes among their people. Congress, stating their conviction for the "advancement and civilization of the Indian," promptly filled the statutory void referred to by the Court with the Major Crimes Act.

As the criminal jurisdiction facet of the assimilative philosophy, the Act subjected to federal jurisdiction seven serious offenses com-

46. 109 U.S. 556 (1883) [hereinafter cited as Crow Dog]. That spectacular murder trial gained considerable attention because of not only the legal issues involved but also the cast of characters. Spotted Trail, a great warrior-chief of the Brule Sioux Band of the Sioux Nation, was murdered by Crow Dog, a member of the same tribe, in retaliation for the seduction of a crippled friend's wife, BROPHY & ABERLE at 49.


49. Id. at 572. For the Supreme Court's own recount of that case see Keeble v. United States, 412 U.S. 205, 209-10 (1973).

50. 16 CONG. REC. 934 (1885) (the remarks of Representative Cutcheon):

   It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the "blood-avenger"—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him. . . . I do not believe that we shall ever succeed in civilizing the Indian race until we teach them regard for law and show them that they are not only responsible to the law but amenable to its penalties.

mitted by Indians within Indian country.\textsuperscript{52} Within a year the Court, in United States v. Kagama,\textsuperscript{53} upheld the constitutionality of new legislation by resort to the doctrines of wardship and congressional plenary power to protect the tribes in their helpless and weak condition.

\textbf{THE MAJOR CRIMES ACT TODAY}

The Major Crimes Act has continued as the basis of federal jurisdiction over serious crimes committed by Indians on reservations. Since its inception, the Act has been amended on several occasions to include six additional offenses, four of which involve assault.\textsuperscript{54}

In 1966 and 1968, amendments to the Act incorporated the law of the state in which the offense was committed for the definition and punishment of two of the assault offenses.\textsuperscript{55} Prior to these amendments, the Act, pursuant to its own language, subjected an Indian defendant "to the same laws and penalties as all other persons committing any of the . . . offenses, within the exclusive jurisdiction of the United States."\textsuperscript{56} By incorporating state law the amended act created not only an internal inconsistency but a situation where criminal definition and punishment sharply different from federal law could be applied to Indians.

Although the Major Crimes Act is often considered to be the focus of the Indian criminal jurisdictional structure within Indian country, it is theoretically the exception rather than the rule. It is still the intent of Congress that the tribes and their courts retain jurisdiction over Indian offenses on reservations.\textsuperscript{57} The extent of this jurisdiction is to be limited only when explicitly decreed by Congress.\textsuperscript{58} However, aside from the Major Crimes Act, tribal

\textsuperscript{52} That statute extended federal jurisdiction to the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.
\textsuperscript{53} 118 U.S. 375 (1886).
\textsuperscript{54} 18 U.S.C. § 1153. (See note 2 supra for the full text of the Act).
\textsuperscript{58} Since 1953, Public Law 280 has created an exception to this statement by allowing six states to assert civil and criminal jurisdiction over the reservation Indians of those states. See note 27 supra. See United States v. Quiver, 241 U.S. 602, 605-6 (1916), wherein the Court expressed that the long-established policy of Congress has always been that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws
jurisdiction has been eroded by the assumption of the federal courts over offenses which, regardless of situs, are in violation of the general laws of the United States.\(^5^9\)

Generally crimes by Indians against non-Indians on reservations are within federal jurisdiction when the offense is one specified by the United States Code as being a federal crime. However, there are exceptions: first, when the accused “has been punished by the local law of the tribe;” and secondly, “where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.”\(^6^0\) Although the states are without jurisdiction in this area, their laws can be of importance through the Assimilative Crimes Act. This federal statute provides for the incorporation of state law into the federal code when no act of Congress makes a defendant’s conduct punishable.\(^6^1\)

A non-Indian committing an offense against an Indian or his property within Indian country is subject to federal jurisdiction.\(^6^2\) However, the exclusiveness of this jurisdiction to the ouster of tribal courts is uncertain. Because of “continu(ing) assaults on tribal claims of jurisdiction over non-Indians, most tribal courts no longer attempt to exercise such jurisdiction.”\(^6^3\)

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59. See Walks on Top v. United States, 372 F.2d 422 (9th Cir. 1967), wherein the Court held that the general laws of the United States are applicable to a violation of 18 U.S.C. § 1114 (assaulting a federal officer) which involved only Indians. The Indian defendant is not immunized from federal jurisdiction by 18 U.S.C. § 1152 (see note 4 supra) as the exception therein is from federal enclave law (18 U.S.C. § 1153) and not from the general laws.


Although on its face 18 U.S.C. § 1152 applies to crimes committed by an Indian that have a non-Indian victim, the courts have held that, in view of the overlap with 18 U.S.C. § 1153, the latter statute must be utilized as the prospective vehicle in these circumstances, as to the crimes there numerated, thus limiting 18 U.S.C. § 1152 to non-Indian offenses. See Henry v. United States, 432 F.2d 114, cert. denied, 400 U.S. 1011 (1971).


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 like punishment.


63. Vollmann, Criminal Jurisdiction in Indian Country: Tribal Sover-
The Supreme Court recently enforced the proposition of federal dominance by holding that tribal courts could extend jurisdiction over non-Indians on reservations, but only upon "Congress' decision to vest in tribal courts . . . portion of its own authority." 64

As this brief overview indicates, criminal jurisdiction within Indian country is a legal labyrinth with three political bodies competing for authority. It is no surprise that a portion of this scheme, the Major Crimes Act, has been challenged on the constitutional grounds of equal protection and due process.

UNITED STATES v. SETH HENRY BIG CROW

Appellant, Seth Henry Big Crow, an Indian, was convicted under the Major Crimes Act of assault with intent to inflict great bodily injury upon another Indian65 while on an Indian reserva-

65. Big Crow at 956.

Appellant was indicted under the Major Crimes Act on three counts: Assault with a dangerous weapon (Count I); assault with intent to inflict bodily harm (Count II); and burglary (Count III). The federal jury returned a verdict of not guilty on Count I, but guilty of the lesser included offense of simple assault; guilty as charged on Count II; not guilty on Count III, but guilty of the lesser included offense of fourth degree burglary. Respective sentences of three months, five years and three years were imposed. Brief for Appellant at 6-7, United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975).


The indictment under Count II was charged according to the state statute incorporated by the third paragraph of the Major Crimes Act (see note 3 supra). The statute selected, S.D. COMP. L. § 22-18-12, (1967) reads as follows:

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.

The appellant was not charged with an assault specified in the Major Crimes Act (assault resulting in serious bodily injury), but instead with the state statute being most nearly equivalent in essential elements. Two questions, although not presented by the appellant, are raised by that indictment; first, whether assault with intent to inflict great bodily injury is a crime under the Major Crimes Act, and second, whether an indictment which charges assault with intent to inflict grave bodily injury in violation of 18 U.S.C. § 1153 (1970) (the Major Crimes Act) and Neb. Rev. Stat. § 26-413 (Cum. Supp. 1974) (S.D. COMP. L. § 22-18-12) is a sufficient indictment. Both these questions were negatively answered by the Federal Dis-
The Federal District Court imposed the maximum sentence of five years imprisonment as prescribed by the incorporated state law. Contending that a non-Indian charged with an identical offense would be prosecuted under federal law and subject to a maximum sentence of six months, the defendant appealed the conviction, on the constitutional grounds that the statutory authorization of disparate maximum penalties was "an invidious discrimination" based solely on race and, as applied, a deprivation of equal protection of the laws in violation of the fifth amendment due process clause. Accordingly, in Big Crow, the Eighth Circuit faced a two-tier issue: First, would a non-Indian committing an assault identical to that of the Indian defendant be subjected to federal or state law for punishment of the crime? Secondly, if a non-Indian defendant was subjected exclusively to federal punishment, would the disparity in maximum sentences violate the constitutional rights of the Indian?

Resolution of the first issue was a matter of judicial interpretation of the Assimilative Crimes Act. That Act, which adopts
state criminal statutes relating to acts or omissions committed within territorial enclaves over which the federal government maintains jurisdiction and which are not made penal by any enactment of Congress, was designed to supplement the Federal Criminal Code.\textsuperscript{71} Therefore, the Assimilative Crimes Act has no application if the act or omission in question is made punishable by federal statute. Correspondingly, the federal government can incorporate and apply state law only if the conduct in question is not made penal by federal law.

The prosecution contended that the precise act of "assault resulting in serious bodily injury," as enumerated in the Major Crimes Act, was not punishable by the federal assault statute describing "assault by striking, beating, or wounding."\textsuperscript{72} Accordingly, it argued, state law would apply to both an Indian defendant under the Major Crimes Acts and a non-Indian defendant pursuant to the Assimilative Crimes Act and thus no sentencing disparity would arise.\textsuperscript{73}

By declaring a serious bodily injury to be a non-essential element of federally-defined assault,\textsuperscript{74} the court held the federal assault statute "does make penal the precise acts of assault resulting in serious bodily injury."\textsuperscript{75} Moreover, this action confirmed the existence of a disparity in maximum sentencing.

To justify this interpretation the court relied on the Supreme Court's pronouncements in Williams v. United States.\textsuperscript{76} Therein it was stated that the Assimilative Crimes Act does not authorize the enlargement of a congressionally defined offense by the application of state law. Rather its purpose is to supplement federal criminal law without modification or repeal of existing provisions.\textsuperscript{77} It is properly viewed as a tool "to fill in gaps in the Federal Criminal Code where no action of Congress has been taken to define the missing offenses."\textsuperscript{78}

From this perspective, the Big Crow court envisioned no inadequacy in the scope of the federal assault statute. Moreover it stated that if the federal government desires a more severe punishment for an aggravated assault, "the remedy lies in Congress, not in sub-

\textsuperscript{71} United States v. Patmore, 475 F.2d 752, 753 (10th Cir. 1973).
\textsuperscript{73} Big Crow at 957-58.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 959.
\textsuperscript{76} 327 U.S. 711 (1946).
\textsuperscript{77} Id. at 718. See United States v. Patmore, 475 F.2d 752, 753 (10th Cir. 1973).
\textsuperscript{78} Williams v. United States, 327 U.S. 711, 719 (1946).
stitution at the prosecutor’s discretion of the state law for federal law.” Even though this rationale is open to question, it permits progression to the crux of the case—the review of the constitutionality of the Major Crimes Act as applied.

The Big Crow court held that authorization of disparate maximum sentences premised solely on the defendant’s classification as an Indian was invalid as a denial of equal protection in violation of the due process clause of the fifth amendment. In so holding, it appeared that the court utilized three standards of analysis for review of legislative classifications. Although reaching the same result by all standards, the court’s resistance to

79. Big Crow at 958.
80. The court acknowledged an opposing view supported by Fields v. United States, 438 F.2d 205, 207-08 (2d Cir. 1971), cert. denied, 403 U.S. 907 (1971). Therein the Second Circuit held that the Assimilative Crimes Act does not require the government to proceed under a federal statute, but allows prosecution under a state law prohibiting batteries of a specific class, since the state statute provided a theory essentially different from that provided in the federal statute.
81. Big Crow at 959-60.
82. Id. The Supreme Court has articulate three standards of analysis for constitutional review of a statutory classification challenged on grounds of equal protection. The Court’s traditional mode of legislative review is one of minimal scrutiny. Under this “rational basis” test, the classification will be overturned only if it lacks a reasonable relationship to a proper governmental objective and is therefore purely arbitrary. This lenient standard, highlighted by the Court’s use of hypothesized relationships, was used to invalidate only one state law between 1937 and 1970. See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

In regard to classifications that discriminate against discrete and insular minorities or impinge on fundamental rights, the Court has constructed a rigid review standard of strict scrutiny. Considering a minority classification to be inherently suspect, the Court has held classifications, such as those based on race, to be justifiable only when “necessary to a compelling government interest.” Only one statutory classification analyzed under this test of rigid scrutiny has been held to be valid. See Korematsu v. United States, 323 U.S. 214 (1944); Graham v. Richardson, 403 U.S. 365 (1971).

Until the early 1970’s the “rational basis” and “compelling state interest” tests formed a usually inflexible system of judicial review that predicated the result on the standard used. In several current decisions, a standard of intermediate scrutiny has been developed that applies the traditional test of reasonable relation but demands that the legislative classification be substantially related in fact to the statutory objective. Under this analysis, the Court purportedly will refuse “to hypothesize the existence of facts that would indicate that the challenged classification was reasonably related to legitimate governmental goals.” Comment, 40 U. Ctr. L. Rev. 807, 819 (1973). See Jimenez v. Weinberger, 417 U.S. 628 (1974); Eistenstadt v. Baird, 405 U.S. 438 (1972). See generally Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).
a resolution of the issue by a single criterion fails to clarify this unsettled area.  

The Eighth Circuit initially appears to have resolved the equal protection issue under the lenient rational basis standard by deciding that a disparity in sentencing practices based on the Indian-non-Indian classification was not reasonably related to a proper governmental objective of establishing a special guardianship status for Indians. Because of the blatancy of the discrimination involved, this resolution would seem persuasive. However, if the court was actually employing the traditional minimal scrutiny standard, such a conclusion would be unusual from the standpoint of prior judicial leniency when reviewing legislative classifications. Emphasizing this departure from precedent is the court’s allusion to a recent Tenth Circuit decision upholding the same statutory classification under the more stringent standard of review, i.e., an “inherently suspect criteria.” If the Big Crow court, in its stated disagreement with that decision, failed to understand the Tenth Circuit’s declaration of the sufficiency of a reasonable relation to satisfy that more rigid and demanding test, their resort to a lower level of scrutiny as a means of explanation is not beneficial in the establishment of precedent for future cases.

Perhaps the above discord was alleviated by an unarticulated use of an intermediate standard of equal protection. This standard of review requires both a reasonable nexus between the classification and the objective, and a “substantial relation in fact” to an end ascertainable from the legislation’s history. In an apparent refusal to hypothesize a conceivable set of facts to justify any rational relationship, only the federal government’s unique guardian obligation of protecting the tribal Indian was referred to in the decision. As to that objective, the court recognized the validity of legislation singling out the Indian for special treatment but implied that such a classification is not rationally related if burdensome upon that group. Thus, a standard of review equating “reasonable” with “favorable” was used.

83. Big Crow at 959-60. See note 10 supra for cases which illustrate the judicial divergence of opinion on the constitutional validity of the Major Crimes Act as applied.
84. Big Crow at 959.
85. See note 82 supra.
87. Big Crow at 959-60. See note 82 supra.
88. Big Crow at 959.
The validity of such a standard is reinforced by the Supreme Court's decision in *Morton v. Mancari*. The Court in *Mancari* recognized the unique and favored status of the Indian, and upheld the constitutionality of the statute authorizing beneficial discrimination for tribal members.

While appearing to resolve the constitutional issue through an intermediate level of review, the Court proceeded to question the appropriateness of such a standard, and subsequently employed the strict review standard requiring a compelling state interest for justification of the classification. The use of that standard was based on the presence of racially-premised invidious discrimination. Several questions are raised by that premise.

The inclusion of the classification "Indian" as a racially suspect criterion is one such question. What is the scope of "Indian" as used in the Major Crimes Act? Substantial support exists for the proposition that "Indian," as used in federal statutes, is not racially descriptive but a political-cultural designation pertaining only to members of federally recognized Indian tribes. A tribal member may have his wardship status renounced and leave the reservation. Therefore, there are many individuals, who after severance from the tribe, are racially classified as Indians but are not subject to the special protection of the federal guardian. From this per-
spective it is apparent that the statutory language of "Indian" means "tribal Indian" only. That same interpretation has been attributed to the Major Crimes Act. Accordingly, it can be logically argued that "Indian" is not a racial classification, but a criminal justice criterion designed to afford protection for tribal wards. The Eighth Circuit's sole reliance upon a racial classification for implementation of a strict scrutiny test is therefore questionable.

**IMPLICATIONS**

By vacating the conviction of the Indian assailant on the grounds that the Major Crimes Act was unconstitutional as applied, the court in *Big Crow* created a void within the criminal justice system of the tribal Indian. Although theoretically questionable as to jurisdictional exclusiveness, the federal government is regarded as having primary responsibility for the prosecution of serious offenses by Indians on reservations. As a result of *Big Crow* and similar decisions, the current statutory scheme presents the potential for effectively denying the federal government the ability to prosecute with regard to the enumerated offenses punishable in accordance with state law. Whenever the incorporated state law subjects an Indian defendant to the invidious discrimination of a disparate maximum sentence the courts apparently will dismiss the indictment on equal protection grounds. The effect is the inability of the federal authorities to prosecute Indians who commit aggravated assaults on reservations.

Two legislative measures currently before Congress would eliminate the statutory authorization for a sentencing disparity

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99. See note 10 supra.

between Indian and non-Indian defendants. The means by which these bills, the "Criminal Justice Reform Act of 1975,"¹⁰¹ and the "Indian Crimes Act of 1976,"¹⁰² purport to achieve that end are substantially different.¹⁰³

S. 1¹⁰⁴ proposes to rectify the present scheme by repealing the statutes controlling criminal jurisdiction over both Indian and non-Indian criminal activity on reservations. This proposal would absorb "Indian country" into the special federal territorial jurisdiction and thereby delete the current statutory exceptions accorded crimes involving only Indians.¹⁰⁵ Such a sweeping reform would result in a uniform application of offenses and penalties on reservations without regard to the unique legal status of the Indian. To achieve this uniformity the bill expands the current list of thirteen crimes which invoke federal jurisdiction on reservations to forty-six.¹⁰⁶ Furthermore, the Assimilative Crimes Act would be continued and thereby extend state law to cases involving only Indians. The total effect of S. 1 would be the "wholesale expansion of federal jurisdiction over criminal offenses committed on Indian reservations. . . ."¹⁰⁷ S. 1 provides that the federal criminal legislation

¹⁰¹. S.1, 94 Cong., 2d Sess. (1975) [hereinafter referred to as S. 1].
¹⁰². S. 2129, 94 Cong., 2d Sess. (1975) [hereinafter referred to as S. 2129].
¹⁰³. Another legislative proposal dealing with both civil and criminal jurisdiction within Indian country, the "Indian Law Enforcement Improvement Act of 1975" (S. 2010, 94th Cong., 2d Sess. (1975)), is currently before the Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee. This pending legislation, although not directed toward the specific problems of the Major Crimes Act, would affect jurisdiction on the reservations of the six states, which under Public Law 280 (see note 24 supra) are now within state jurisdiction, by allowing for jurisdictional reacquisition by the tribes.
¹⁰⁴. This bill, which is a monumental reform of the federal criminal code, has been before the Judiciary Committee since October, 1975 (after failure in the previous Session) and is under severe criticism. Senator Mansfield, the Majority Leader, recently stated that unless the Act soon progressed through committee, it would be dropped from the calendar.
¹⁰⁵. 18 U.S.C. §§ 1152 and 1153 would be replaced by § 203 of S. 1 which states as follows:

Special Jurisdiction of the United States.
An offense is committed within the special jurisdiction of the United States if it is committed within the special territorial jurisdiction. The special territorial jurisdiction of the United States includes: (3) the Indian country, to the extent provided under section 685 of the Criminal Justice Codification, Revision and Reform Act of 1974 (25 U.S.C. ).
¹⁰⁶. See generally S. 1. As noted, there are thirteen offenses enumerated under the Major Crimes Act.
¹⁰⁷. Statement of Arthur Lazarus, Jr. before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary in Opposition to Certain Provisions in S. 1 Relating to Indian Tribes, 2 In-
is not pre-emptive, and unless otherwise expressly provided it does not prevent an Indian tribe from exercising concurrent jurisdiction. 108

S. 1 is opposed by Indian groups as having a “significant adverse impact upon the continued vitality and utility of tribal courts. . . .” 109 It is feared that the jurisdiction now enjoyed by the tribal courts, restricted only by the Major Crimes Act and the general laws of the United States, would be placed in jeopardy. The drastic changes of S. 1 belie not only the current federal policy of promoting tribal self-government but also “the unique status which historically has been accorded Indian tribes by the Supreme Court and the Congress . . . as a separate people, with the power of regulating their internal and social relations. . . .” 110

Unlike S. 1, the second congressional proposal S. 2129, 111
would rectify the constitutional infirmities of the Major Crimes Act through limited remedial legislation. The bill would delete the statutory incorporation of state law for definition and punishment of aggravated assault.\(^{112}\) Furthermore, the legislation would amend the federal assault statute by addition of the specific offense of "assault resulting in serious bodily injury."\(^{113}\) The effect of S. 2129 would be to "revert the Major Crimes Act to its pre-1966 form . . . [of] insur[ing] equal treatment of Indians accused of committing aggravated assaults upon another Indian within Indian country."\(^{114}\) Through its continuation of the Major Crimes Act, without its existing jurisdictional impediment, the bill reflects a congressional intent to perpetuate the prevailing policy of allowing the tribal courts to retain jurisdiction over numerous minor offenses involving only Indians.

Although either proposal would alleviate the equal protection dilemma apparent in decisions like Big Crow, neither is totally consistent with the current emphasis on tribal development and self-government. Inherent within each of the reforms is a continuation of the philosophy that the tribal Indian is unable to cope with a self-controlled system of criminal justice.

**CONCLUSION**

The constitutional invalidity of the Major Crimes Act, as highlighted in cases like Big Crow, and its disabling effect on reservation criminal justice should soon be rectified by congressional action. However, one must ask if the current proposals are any more than a myopic solution to an even deeper issue.

For over 140 years the federal government has recognized the doctrine of tribal sovereignty. Attempts to dismantle that doctrine and its attributes by programs designed to assimilate the Indian tribes into the American society have resulted in dismal failures. The current federal policy of self-determination emphasizes a development of the Indian through his own sense of tribal autonomy and self-government. The issue of criminal justice is but one

\(^{112}\) S. 2129, § 2.

\(^{113}\) This was the specific offense charged in Big Crow.

\(^{114}\) 121 CONG. REC. § 12692 (July 16, 1975) (remarks of Senator Fan- nin).
facet of the totality of that self-government. A rejection of the continuing policy that the Indian is not capable of maintaining an effective yet just system of criminal justice may be needed to further the new national policy.

An alternative to the two existing proposals, which only continue or further the restriction of tribal jurisdiction, would be a territorial criminal jurisdiction scheme premised on a tribe’s control of its people and its land.\textsuperscript{115} It is evident that there would be many obstacles in the creation of such an expanded scheme of tribal jurisdiction. However, problems such as sufficient funding, maintaining a staff of qualified personnel, and correlating tribal decisions with state and federal precedent could be overcome through concerted efforts. If obstacles are encountered or a tribe is hesitant to assume the responsibility, a partial implementation or a variation of the plan could be enacted, or the federal government could retain concurrent jurisdiction during a transitional period. The possibility of an effective system of criminal justice rooted in the culture and sovereignty of the tribe deserves the opportunity to be pursued, and if deserving, to become reality.\textsuperscript{116}

David P. Senkel—’77

\textsuperscript{115} Exemplifying the feasibility of such a plan is the Najajo Tribe which now possesses its own police force, courts, and judges. \textsc{Brophy \& Aberle} at 59.

\textsuperscript{116} In support of this proposition see Chino, \textit{Should the Criminal Justice System be Different for Indians?}, presented to Indian Civil Rights Hearing in the Hearings before the United States Comm. on Civil Rights, held in Albuquerque, N.M., 394, at 396 (Nov. 14-15, 1972), wherein the Indian leader (Mr. Chino is President of the Mescalero Apache Tribe) recounts the difficulty encountered by Indians in supporting the development of a “foreign” court system and how the tribal courts have well served the Indian people.

The Indian tribes by the use of Indian Tribal Courts, the Court of Indian offenses or the traditional Indian courts have demonstrated their ability to adopt and adapt themselves to the court system that the Tribal customs and practices including tribal autonomy demanded. Based on these experiences of the Indian people in the various court systems, justice and fair play are not foreign to them.

\textit{Id.} at 396.

To subject any people prematurely to any kind of system that is alien to their own way of life—in this case a judicial system—would be doing them a grave injustice and a great disservice.

\textit{Id.} at 400.