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UNITED STATES V. RENVILLE: THE UNSETTLING CONDITION OF THE SETTLED LAW APPLYING THE ASSIMILATED CRIMES ACT TO INDIANS

Sharon Womack Doty*

There are three federal laws which govern criminal prosecution of Indians and non-Indians for offenses committed in Indian Country.¹ The plain language of these laws seems clear and unambiguous. Their application, however, is neither.

The first of these three laws is the Major Crimes Act (MCA),² which names fourteen serious crimes falling under the exclusive jurisdiction of the federal courts. The MCA applies when the alleged perpetrator is an Indian, regardless of whether the victim is an Indian or a non-Indian.³

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1. "Indian Country" is a term of art defined by 18 U.S.C. § 1151:

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.

18 U.S.C. § 1151 (1988).

2. 18 U.S.C. § 1153 (1988). The Act states:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, maiming, a felony under Chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

3. *Id.*

The second is the General Crimes Act (GCA),⁴ which was originally passed in 1790. After several amendments during the early nineteenth century, the GCA has remained substantially unchanged since 1854. The GCA applies to crimes committed by non-Indians in Indian Country and specifically excludes Indians from its authority.⁵ It grants exclusive jurisdiction to the federal courts for all criminal actions committed by non-Indians within Indian Country.

The third law utilized in this area is the Assimilative Crimes Act (ACA).⁶ The ACA punishes, as a federal offense, any act or omission committed on a federal enclave⁷ which would be punishable under state law if committed under state jurisdiction.⁸ For example, a visitor to a national park arrested in 1990 for rape would be prosecuted in federal court. However, the definition of rape used by the prosecution would be the one found in the law of the state where the park was located. The elimination of rape as a crime covered by the Federal Criminal Code means that the ACA would provide the vehicle for defining the elements of the crime committed in the national park.

4. 18 U.S.C. § 1152 (1988). The Act states:

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 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.

Id.

5. *Id.*

6. 18 U.S.C. § 13 (1988). The Act states, in pertinent part:

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.

Id. § 13(a).

7. One dictionary defines "enclave" as "a territorial or culturally distinct unit enclosed within foreign territory." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 371 (1989). Federal enclaves are national parks, military bases, and other lands which are publicly held by the federal government but located within the territorial boundaries of a state.

8. 18 U.S.C. § 13 (1988).

The ACA only applies if no act of Congress makes the offense punishable under federal law. In other words, if a crime is covered by any provision of federal criminal law, the federal statute governs. If there is no federal law establishing criminal sanctions for the act committed, the ACA gives the federal court access to the more extensive provisions of state criminal statutes for defining and punishing offenses. Thus, the ACA is a gap-filler intended to supplement the Federal Criminal Code as it applies to federal enclaves. The ACA assimilates state law into situations where there is no applicable federal statute.⁹

This note will review how the Eighth Circuit has applied these three laws in criminal cases involving Indian perpetrators. In order to consider the problems presented by the case law in the Eighth Circuit, the note will first review the evolution of the MCA, the GCA and the ACA through the case law. Then, the note will consider the intent of Congress as to the applicability of the ACA to Indians. Finally, the note will examine how current case law regarding this use of the ACA in Indian cases conflicts with long-standing Supreme Court doctrines of tribal sovereignty. This will lead to what the author suggests is the troubling state of the law regarding criminal prosecution of Indians in Indian Country, particularly as Indian criminal law has developed in the Eighth Circuit.

The Eighth Circuit

The Eighth Circuit apparently regards the application of state law to criminal offenses committed by Indians in Indian Country as settled.¹⁰ However, that description would only be accurate if one envisions the law “settled” in the midst of a maze, having been dropped from above with no discernable way in or out. The scope of the unsettled nature of this “settled” law is most apparent in *United States v. Renville*.¹¹

In *Renville*, the Eighth Circuit allowed an unusual application of state law under the ACA. The court affirmed the conviction of an Indian, Renville, for the crime of incest.¹² Because incest is a named offense covered by the MCA,¹³ the conviction, at first

9. *Id.*

10. *United States v. Butler*, 541 F.2d 730 (8th Cir. 1976); see also *United States v. Jones*, 224 F.2d 181 (4th Cir. 1965). The Eighth Circuit has not articulated reasons for applying the ACA in cases where Indians are accused of criminal activities in Indian Country; the court simply does it.

11. 779 F.2d 430 (8th Cir. 1985).

12. *Id.*

13. See 18 U.S.C. § 1153 (1988).

blush, does not appear unusual. The problem arises in the court's affirmation of the use of a South Dakota rape statute to convict Renville of incest.¹⁴

The application of the rape statute instead of the incest law had two obvious effects. The first was the penalty imposed. Rape, under South Dakota law, carried a penalty three times that of incest; therefore, the sentence imposed was thirty years rather than ten years.¹⁵ The second and far more significant effect was the unique expansion of the ACA to reach the conviction and thirty-year sentence. This broadening of the ACA was accomplished without even once addressing how the ACA became part of the analysis.

Renville's conviction was not wrong. He committed the crime of incest against his stepdaughter. Perhaps it does not seem harsh that he is serving thirty years in jail for that crime. The issue, however, is not whether Renville deserved to be punished. The issue is, rather, how the court reformed the ACA in order to achieve the outcome it wanted.

The importance of *Renville's* use of the ACA is most apparent when viewed in light of the history of criminal prosecution of Indians and non-Indians for crimes committed in Indian Country. Three issues are central to an understanding of the difficulties in *Renville*: tribal sovereignty in criminal cases, federal reservation of jurisdiction over specified crimes and defendants, and Congress's intent as to the applicable statutes. Forging a trail through the statutes which govern federal criminal prosecution of offenses committed in Indian Country by both Indians and non-Indians will help clarify the potential damage of the *Renville* opinion.

The Evolution of the Statutes

In 1885, Congress enacted the MCA in response to the decision of the Supreme Court in *Ex parte Crow Dog*.¹⁶ In *Crow Dog*, the Supreme Court held that Indian tribes were sovereign nations and that treaties between sovereigns¹⁷ did not automatically subject individual Indians to federal criminal jurisdiction.¹⁸ *Crow Dog* was convicted of murder in federal district court in the Territory of Dakota. He petitioned the Supreme Court for a writ of habeas corpus alleging that his imprisonment was illegal be-

14. *Renville*, 779 F.2d at 434-35.

15. *Id.* at 432.

16. 109 U.S. 556 (1883).

17. "Sovereigns" here refers to the tribe and the United States.

18. *Crow Dog*, 109 U.S. at 568-69.

cause he was an Indian. Crow Dog's victim was an Indian of the same tribe and the offense occurred in Indian Country. The Court, granting the writ, held that neither the Brule Sioux¹⁹ treaty provisions nor any act of Congress reserved jurisdiction over criminal prosecution of Indian perpetrators to the United States. Therefore, jurisdiction over these crimes remained with the Tribe.²⁰

Crow Dog is based on the jurisdictional assumption of tribal sovereignty which prevails in Indian law.²¹ The basic premise of tribal sovereignty is that a tribe brings full powers of a government to treaty negotiations with the United States. Only those specific powers enumerated in the treaty are relinquished by the tribe in the negotiations. The only other way a tribe's sovereign power can be diminished is by an act of Congress which subsumes the tribal power under the federal government's jurisdiction.²²

In *Crow Dog*, the treaty signed by the Brule Sioux Tribe had not specifically given criminal jurisdiction over Indians to the United States and Congress had not affirmatively taken it away from the Tribe. Therefore, that power had not changed hands with the signing of any treaty then in existence.²³ Jurisdiction was retained by the Tribe and Crow Dog's conviction was overturned.²⁴

Since the *Crow Dog* decision in 1885, amendments to the MCA have addressed the problem of how to define punishment for crimes which are not covered by federal criminal statutes. The 1976 and 1984 amendments specify that incest, burglary, and involuntary sodomy should be defined by the law of the state in which the Indian Country is located.²⁵

These amendments, which are still a part of the MCA today, addressed the problem most often facing prosecutors who were confined to the limited scope of federal criminal statutes. Defining incest, burglary, and involuntary sodomy by the state law where the Indian Country was located provided federal courts with the structure necessary to prosecute Indians for these offenses.

An additional problem arose after the enactment of the MCA. Because tribes are separate sovereigns from the United States, the

19. Brule Sioux was the tribal affiliation of both Crow Dog and the victim.

20. *Crow Dog*, 109 U.S. at 568-69.

21. See e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama*, 118 U.S. 375 (1886); 3 *Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986).

22. *Crow Dog*, 109 U.S. at 570-72.

23. *Id.* at 567-68, 570.

24. *Id.* at 568-69, 572.

25. Pub. L. No. 94-297, § 2, 90 Stat. 585 (1976) (codified at 18 U.S.C. § 1153(a) (1976)) (adding kidnapping to list); Pub. L. No. 98-473, tit 2, § 1009, 98 Stat. 2141 (codified at 18 U.S.C. 1153(a) (1988)) (adding maiming, involuntary sodomy, felony theft, and burglary, and deleting larceny).

Supreme Court determined, in *Talton v. Mayes*,²⁶ that concurrent jurisdiction exists.²⁷ Tribal court powers were not created by and do not spring from the United States Constitution; therefore, tribal courts were not subject to constitutional constraints which normally applied in state and federal law.²⁸ According to the *Talton* Court, the protections of the Bill of Rights, the U.S. constitutional provisions against self-incrimination, and the right to a jury trial did not extend to Indians in tribal courts.²⁹

The issue of concurrent jurisdiction between federal and tribal courts, although never specifically resolved in case law, was rendered moot by the Indian Civil Rights Act of 1968 (ICRA).³⁰ Though the ICRA was enacted primarily to guarantee some civil rights to Indians in tribal court, it also restricted the scope of potential punishment which could be imposed by the tribe.³¹

26. 163 U.S. 376 (1896).

27. *Id.* at 380.

28. *Id.* at 382-83.

29. *Id.* at 381-82.

30. 25 U.S.C. §§ 1301-1303 (1988). Section 1302 states:

No Indian tribe in exercising powers of self-government shall

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [sic] a fine of \$5000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Id. § 1302.

31. *Id.*

Under the ICRA, as amended, tribal courts may only impose punishment of not more than one year's incarceration and/or a maximum \$5000 fine.³² The tribe may punish any offense committed by an Indian but only within the limits set by the ICRA.³³ Therefore, while concurrent jurisdiction exists, the ICRA protects Indian defendants from imposition of unreasonable penalties.

Passage of the ICRA diffused any problems arising from the concerns surrounding alleged deprivation of basic civil rights in tribal courts. The question of whether an Indian was subject to double jeopardy,³⁴ though not the subject of the ICRA, was answered by a review of the definitions and application of the concept of double jeopardy. Once again, tribal sovereignty was the determining factor. Defendants could be tried for the same offense in Federal District Court and in tribal court. Tribal courts were not bound by a defendant's prosecution in federal court and neither were federal courts bound by action taken by the tribe.³⁵

The questions surrounding civil rights and double jeopardy were not the only concerns which surfaced after passage of the MCA. Another major problem with the MCA was the issue of interracial law enforcement. Many treaties contained provisions dealing with interracial law enforcement.³⁶ Tribes were denied jurisdiction over non-Indians who committed criminal offenses in Indian Country.³⁷ This left tribes vulnerable to attack and made non-Indian perpetrators virtually untouchable in Indian Country. The GCA was passed by Congress in response to these law enforcement issues. Although the GCA did not do away with all of the problems tribes had in policing their land, it is still the current law governing criminal prosecution of non-Indians on Indian land.

The GCA, while addressing problems of some offenses committed by non-Indians in Indian Country, presented a new di-

32. *Id.*

33. *Id.*

34. Double jeopardy protects defendants from repeated prosecution by a sovereign for the same offense. See 22 C.J.S. *Criminal Law* § 213 (1989).

35. *Talton v. Mayes*, 163 U.S. 376, 380-81 (1896).

36. See F. COHEN, *HANDBOOK OF INDIAN LAW* 287-88 (1942 ed.).

37. While historically the federal government had always treated Indian tribes as lacking jurisdiction over non-Indians, it was not until *Oliphant v. Suquamish*, 435 U.S. 191 (1978) that the Supreme Court stated that premise as the correct interpretation of federal law. In his opinion, Justice Rehnquist said it was never the intention of the federal government to grant jurisdiction to tribes in cases involving non-Indian perpetrators regardless of the nature of the crime committed by the non-Indian in Indian Country.

lemma for prosecutors which Congress addressed in the ACA. Federal criminal statutes are not as comprehensive and detailed as state criminal law. Application of state law in federal court to crimes committed on federal land was an efficient way for Congress to address the problem. Because Indian tribes could not assert criminal jurisdiction over non-Indians in tribal courts and because many criminal offenses are not contained in the Federal Criminal Code without application of state law through the ACA, there would be situations where there would be no charge to bring against criminal offenders. Therefore, some criminal acts would be left unprosecuted.

As with the MCA and the GCA, applying the ACA also created problems. The scope of the ACA was first addressed in *Williams v. United States*.³⁸

The ACA in Case Law

Williams, the seminal case involving application of the ACA, was decided by the Supreme Court in 1946. Williams was convicted of having sexual intercourse with an unmarried Indian girl within the boundaries of the Colorado River Indian Reservation.³⁹ There was no evidence that the girl in *Williams*, who was under eighteen but over sixteen years of age, was a non-consenting participant.⁴⁰ The Court held that the ACA did not allow application of Arizona law to the defendant because the crime for which he was convicted was made punishable by an act of Congress.⁴¹ The fact that the definition of the act under federal law was narrower than the state definition did not mean that state law could be used to expand the scope of federal law.⁴²

The *Williams* court did not mention the MCA because Williams was a white male and the MCA only applies to Indian defendants.⁴³ Because the crime was committed by a non-Indian against an Indian victim in Indian Country, the United States had exclusive jurisdiction under the GCA⁴⁴ and, therefore, the ACA could trigger application of state law.⁴⁵ However, the Court noted that the legislative history of the ACA did not include any indication

38. 327 U.S. 711 (1946).

39. *Id.* at 713.

40. *Id.*

41. *Id.* at 717.

42. *Id.*

43. 1818 U.S.C. §§ 548-549 (1946) (current version at 18 U.S.C. § 1153 (1988)).

44. See 18 U.S.C. §§ 217, 218 (1946) (current version at 18 U.S.C. § 1152 (1988)).

45. *Williams*, 327 U.S. at 713.

that Congress, after defining a penal offense, would allow the scope of the offense to be expanded by application of the state definition.⁴⁶ Congress intended to use the ACA to fill in where no congressional action had taken place.⁴⁷ The ACA did not have the power to modify or repeal existing federal law by applying state law to a case within the exclusive jurisdiction of the United States.⁴⁸

Several sections in the federal criminal code were applicable to the *Williams* facts. The offenses of rape, assault with intent to commit rape, having carnal knowledge of a girl, adultery, and fornication were all made punishable under the federal code.⁴⁹ However, Williams's conviction could not be sustained under the federal rape statute because all the required elements of proof were not present.⁵⁰ There was no proof of the use of force and the evidence indicated that the victim was a willing partner. Conviction for rape required proof of force on a non-consenting victim. Since there was also no proof that the girl was under sixteen at the time of the offense, Williams could not be convicted of having carnal knowledge of a girl.⁵¹

The offense with which Williams was charged came within the Arizona statutory definition of rape.⁵² The section of the Arizona Code dealing with rape expanded the definition to include "statutory rape," which was defined as sexual intercourse with a girl under the age of eighteen, rather than as sexual intercourse with a girl under the age of sixteen, which is how the federal law defined rape.⁵³

Under the federal criminal code, the statutory punishment for rape was imprisonment for not more than fifteen years for a first offense and not more than thirty years for a subsequent offense.⁵⁴ There was no minimum sentence. The Arizona Code punished rape by imprisonment for life or any term not less than five years.⁵⁵ Thus, application of the Arizona statute dramatically changed the range of potential punishment and imposed a minimum sentence.

46. *Id.* at 717-18.

47. *Id.*

48. *Id.*

49. See 18 U.S.C. § 457 (1946) (rape); *id.* § 458 (carnal knowledge of female under 16 years of age); *id.* § 516 (adultery); *id.* § 518 (fornication).

50. *Williams*, 327 U.S. at 715.

51. *Id.* at 715-16.

52. See ARIZ. REV. STAT. ANN. § 43-4901 (1939).

53. *Id.*

54. See 18 U.S.C. § 458 (1946) (rape).

55. ARIZ. REV. STAT. ANN. § 43-4901 (1939).

The Court reversed Williams' conviction and held that the crime could not be redefined and expanded by application of the ACA if it was already defined by federal criminal law.⁵⁶ The acts covered by the crime of "statutory rape" in Arizona were completely within the federal definition of either adultery or fornication.⁵⁷ The state created a different crime by changing the age of consent of the female to eighteen rather than sixteen.⁵⁸

The *Williams* Court held that the attempt to interpret the ACA to apply to the particular actions of a party was inconsistent with congressional intent to prohibit acts of a general type and kind.⁵⁹ Congress covered both the generic offense, with the definition of carnal knowledge,⁶⁰ and the specific act, with the definition of adultery.⁶¹ Further investigation of legislative history by the Court revealed that Congress' purpose was to cover rape and all related offenses in federal penal legislation.⁶² Congress specified the age of consent as sixteen.⁶³ If Congress had intended that state law apply to define rape related offenses or to establish the age of consent, it would have left one of these two elements for definition by state law through the ACA. It did not; therefore, state law does not apply.⁶⁴

The primary consideration by the *Williams* Court was whether the generic type of act was covered by congressional enactment. The Court refused to allow use of the ACA merely to broaden a federal definition. Since *Williams*, however, a number of cases have attempted to invoke the ACA for that very purpose. Courts have focused on specific kinds of offenses governed by federal statute. In some cases, the ACA has been applied and in others its use was denied.

In *United States v. Jones*,⁶⁵ a case decided in 1965, the court held that a charge of disorderly conduct could be brought under the ACA.⁶⁶ In *Jones*, the defendants were arrested and charged with disorderly conduct because they blocked the doorways and entrances to the federal courthouse by chaining doors closed and

56. *Williams*, 327 U.S. at 724-25.

57. *Id.* at 718-23.

58. *Id.* at 718.

59. *Id.* at 724-25.

60. See 18 U.S.C. § 458 (1946).

61. See 18 U.S.C. § 516 (1946).

62. *Williams*, 327 U.S. at 724.

63. See 18 U.S.C. § 458 (1946).

64. *Williams*, 327 U.S. at 725.

65. 244 F. Supp. 181 (S.D.N.Y. 1965).

66. *Id.* at 183.

chaining themselves to some entrances. These actions prevented everyone from entering or exiting the building.

The defendants claimed that the offense with which they were charged was indictable under the federal statute prohibiting picketing and parades.⁶⁷ The defendants relied on *Williams* in claiming that the charge of disorderly conduct was not cognizable under the ACA. They argued that the existence of a federal offense, which made their actions indictable, precluded use of the state law of disorderly conduct.⁶⁸ The court held that *Williams* was distinguishable because it dealt with assimilation of state law to expand the scope of existing federal law. In *Jones*, the defendants were charged under a legal theory of disorderly conduct, which was a completely different theory than that underlying the law regarding picketing and parading.⁶⁹

The court viewed disorderly conduct and picketing and parading as separate and distinct offenses.⁷⁰ In contrast, *Williams* concerned one offense which was defined narrowly in one law and broadly in another.⁷¹ Therefore, the general intent of Congress to punish generic types of crimes, which was the basis of the *Williams* decision, was not evident in *Jones*.

The deciding factor in determining whether the ACA applies in other cases since *Williams* has focused on analysis of the generic nature of conduct. Courts have attempted to discern the generic nature of the actions prohibited by Congress and relate that to the specific acts of the defendant. For example, in *Butler v. United States*,⁷² the Eighth Circuit vacated the conviction of Dean Butler for possession of a firearm.⁷³ The court's decision was based on an assessment of the general intent of congress in federal firearm statutes.

Butler was convicted of possession of a firearm by a felon. The act occurred in Indian Country. Butler was initially indicted for violation of the National Firearms Act (NFA).⁷⁴ He was also charged with illegal possession of a firearm through the ACA by application of South Dakota law.⁷⁵

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See *Williams*, 327 U.S. at 717-18.

72. 541 F.2d 730 (8th Cir. 1976).

73. *Id.* at 737.

74. 18 U.S.C. app. §§ 1201-1203 (1976). Butler was originally charged with receipt and possession of a firearm under § 1202(a)(1). See *Butler*, 541 F.2d at 731.

75. *Butler*, 541 F.2d at 731.

The *Butler* court held that the application of state law was inconsistent with both the plain meaning of the ACA and the legislative intent and purpose of the ACA.⁷⁶ Because the government had previously dropped the NFA charge for unrelated reasons,⁷⁷ the court vacated the conviction.⁷⁸

The court held that, as in *Williams*, the key determination was whether the generic conduct had been made punishable by any act of Congress.⁷⁹ The court held that the NFA intended to proscribe the generic conduct of acquisition and possession of firearms by felons.⁸⁰

According to the *Butler* court, the additional requirements of proof of interstate commerce and venue under the federal charge did not determine which law was applicable.⁸¹ The test for applicability of the ACA did not turn on whether the same elements of proof were necessary for each crime. Rather, the test was whether the offense was made punishable by any enactment of Congress.⁸² The use of state law to broaden the NFA was rejected by the court and Butler walked away a free man.⁸³

Butler is also notable because Dean Butler was an Indian. Even though the court's analysis of the purpose of the ACA is excellent,⁸⁴ the validity of the ACA's application to an offense committed by an Indian defendant is ignored. In *Butler*, the Eighth Circuit makes the statement that "any felon, whether White, Black or Indian, could be prosecuted under the ACA for possession of a firearm."⁸⁵ The court provides no explanation of this statement and no further explanation of the presumption it implies; that Indian defendants may come within the ACA.

The assumption that Indian defendants come within the scope of the ACA had no adverse effect on Dean Butler. His conviction was overturned. The importance of the case centers on its clear articulation of the test for determining the applicability of the

76. *Id.* at 733.

77. The *Butler* opinion indicates the government voluntarily dismissed the charge of receipt and possession of a firearm before the case came to trial. No reason is stated in the opinion for dropping the charge. See *Butler*, 541 F.2d at 731.

78. *Butler*, 541 F.2d at 737.

79. *Id.* at 735.

80. *Id.* at 736.

81. *Id.*

82. *Id.* at 737.

83. *Id.*

84. See *id.* at 733-34.

85. *Id.* at 732.

ACA.⁸⁶ This focus on the assessment of whether the ACA is controlling does not, however, decrease the subtle impact of the assumptions in this 1976 case on future cases involving Indian perpetrators and the ACA. The presumption in *Butler* is that, were conditions different, an Indian defendant would naturally be subject to prosecution for offenses through use of the ACA. This presumption created a powerful precedent for future cases, even though *Butler* himself was unaffected by the presumption.

In the same year that *Butler* was decided by the Eighth Circuit, the Seventh Circuit rendered an opinion regarding the ACA in the case of *United States v. Chaussee*.⁸⁷ Chaussee was an inmate at the United States Penitentiary at Marion, Illinois. He was convicted of stabbing another inmate. The court held that the defendant was entitled to be sentenced under federal, rather than state law.⁸⁸

Chaussee was convicted of aggravated battery under an Illinois statute which provided for imprisonment for one to ten years.⁸⁹ The federal statute prohibiting assault with a dangerous weapon with intent to do bodily harm carried only a five-year maximum sentence.⁹⁰ The court held that Congress intended the term "assault," in federal statutes, to include the acts described in the Illinois "aggravated battery" statute; therefore, the federal statute governed.⁹¹ State law could be applied through the ACA only after a search revealed no federal statute which could be construed as applicable to the circumstances presented. Once again, the controlling consideration rested on the generic acts prohibited by Congress as opposed to a careful scrutiny of the precise acts and analysis of specific characteristics of the particular offense.

In 1980, the Fourth Circuit also held that a defendant's convictions under state law were preempted by federal statute. In *United States v. Eades*,⁹² the defendant was charged in a nine-count indictment with a variety of crimes which occurred on the campus of the United States Naval Academy at Annapolis, Mar-

86. According to the *Butler* court, state law may not be assimilated under the ACA where "any enactment of Congress" punishes the conduct. If any Congressional act covers the actions of the defendant, the ACA is not implicated and state law cannot be triggered. *Id.* at 731.

87. 536 F.2d 637 (7th Cir. 1976).

88. *Id.*

89. *Id.* at 639.

90. *Id.* at 643.

91. *Id.* at 644.

92. 615 F.2d 617 (4th Cir. 1980).

yland. The court upheld Eades' challenge to the use of state law under the ACA because the Maryland third-degree sexual assault statute was merely a particular form of assault and battery.⁹³

In making the determination that state law did not apply in *Eades*, the court looked at all of the provisions of the federal assault statutes rather than just that section dealing with rape or sexual assault. As a result, the court noted the fact that the Maryland statute could not be violated without also violating some provision of federal law.⁹⁴ The court treated sexual assault as a generic offense of assault.⁹⁵ The *Eades* court did not require that the federal statute contain all of the characteristics of the particular criminal offense. A federal statute covering the generic type of offense governed.⁹⁶

In addition to the cases discussed above, other cases assessing the application of the ACA demonstrate the Eighth Circuit's diligence in pursuing all possible avenues in the federal statutes before applying state law through the ACA.⁹⁷ Against the backdrop of consistent refusal to use the ACA to unnecessarily broaden the scope of federal criminal law, the Eighth Circuit decided *United States v. Renville*.⁹⁸

United States v. Renville

Renville, an Indian, was accused of two counts of sexually abusing his eleven-year-old stepdaughter.⁹⁹ His crime was "incest" under the MCA, which defines "incest" by the statutes in the state where the crime is committed.¹⁰⁰ *Renville* was actually convicted under the MCA and, through the ACA, under South Dakota's rape law.¹⁰¹ On appeal, Renville stipulated that the state definition of "incest" applied to Indian cases in federal court.¹⁰² He challenged the applicability of state "rape" statutes when the MCA specifically defined "incest" as an offense and contended

93. *Id.* at 621.

94. *Id.*

95. *Id.* at 622.

96. *Id.*

97. See also *United States v. Provost*, 875 F.2d 172 (8th Cir. 1989); *United States v. Howard*, 654 F.2d 522 (8th Cir. 1981); *United States v. Taylor*, 562 F.2d 572 (8th Cir. 1977); *State v. Marek*, 112 Idaho 860, 736 P.2d 1314 (Idaho 1987).

98. 779 F.2d 430 (8th Cir. 1985).

99. *Id.* at 431.

100. 18 U.S.C. § 1153 (Supp. II 1984).

101. S.D. CODIFIED LAWS ANN. § 22-22-1 (1979 & Supp. 1983). See *Renville*, 779 F.2d at 431.

102. *Renville*, 779 F.2d at 432.

that he should have been charged under South Dakota incest law.¹⁰³ The Eighth Circuit upheld the conviction and affirmed the use of the South Dakota rape statute.¹⁰⁴

Under South Dakota law, the definition of incest specifically excluded "sexual penetration."¹⁰⁵ The acts Renville committed included penetration.¹⁰⁶ Renville's primary objective in challenging the use of the rape statute instead of the incest law was clear. The maximum punishment for incest under South Dakota law was five years.¹⁰⁷ The maximum penalty for rape was fifteen years.¹⁰⁸ Renville was sentenced to two consecutive fifteen-year terms.¹⁰⁹

The *Renville* decision contained no discussion as to whether the ACA was applicable when the defendant was an Indian. However, the arguments Renville presented provided the court with an opportunity to address, in detail, its historical interpretation of the ACA as it related to crimes in Indian Country.¹¹⁰ The court did not address the question of whether the ACA was applicable when the defendant was an Indian; it only confirmed that the Eighth Circuit had consistently allowed the ACA to be used against Indian defendants for offenses committed in Indian Country.

Renville did not challenge the use of the ACA on the basis that it did not apply to Indian perpetrators. Rather, he argued that the ACA was inapplicable because his conduct was punishable under the MCA.¹¹¹

Renville challenged his conviction by attempting to focus the court's attention on the plain language of the MCA.¹¹² Renville

103. See S.D. CODIFIED LAWS ANN. § 22-22-19 (Supp. 1983).

104. *Renville*, 779 F.2d at 435.

105. See S.D. CODIFIED LAWS ANN. § 22-22-19 (Supp. 1983). The South Dakota criminal code does not define the term "sexual intercourse." It appears consistent with the common law definition of the term which both parties in *Renville* admitted does not cover Renville's acts. In *State v. Brammer*, the South Dakota Supreme Court construed the terms "rape" and "sexual contact" as mutually exclusive. *State v. Brammer*, 304 N.W.2d 111, 113-14 (S.D. 1981). In *Brammer*, the defendant was charged under both provisions of state law. The court held that "sexual contact" was a separate offense intended to cover acts of persons who sexually molest young children without raping them. *Id.* at 114.

106. *Renville*, 779 F.2d at 432.

107. See S.D. CODIFIED LAWS ANN. § 22-22-19.1 (Supp. 1983). Under South Dakota law, a class five felony was punishable by a maximum of five years.

108. Rape was either a class 2 or class 3 felony as prescribed by S.D. CODIFIED LAWS ANN. § 22-22-1 (1984). Therefore, the maximum penalty for the crime of rape when the victim was eleven years of age, as in *Renville*, was 15 years (class 3 felony maximum).

109. *Renville*, 779 F.2d at 432.

110. *Id.* at 432-35.

111. *Id.* at 434.

112. *Id.* at 435.

argued that he could only be subject to South Dakota's incest law.¹¹³ No one questioned the appropriateness of this interpretation of the ACA. The defendant, the prosecutor and the court all presumed that the ACA was applicable to the case because Renville was charged under the MCA with incest, which meant that the state incest law applied. Everyone involved assumed that the application of state law as the definition of incest in the MCA justified the intervention of the ACA.

Renville was charged with rape under South Dakota law because, according to the court, the definition in that statute more accurately described the acts he committed.¹¹⁴ There seems to be an important step missing in the court's analysis. How did a law, which Congress clearly intended as a vehicle for strengthening federal jurisdiction over non-Indians who commit crimes in Indian Country, magically become applicable to Indians? There is no clear answer. In fact, it was not until the 1987 case of *Pueblo of Santa Ana v. Hodel*¹¹⁵ that a district court considered the possibility that the ACA does not apply to Indians.

Pueblo involved a civil regulatory issue.¹¹⁶ While the ACA refers only to criminal offenses, the Secretary of the Interior cited the ACA as his reason for denial of the tribe's request for approval of a lease agreement for construction of a dog racing facility in Indian Country.¹¹⁷ The Secretary based his decision on the premise that because a dog racing facility would violate New Mexico regulatory provisions, it was illegal under the ACA.¹¹⁸

The *Pueblo* court reviewed the history of the application of the ACA in Indian Country in contrast to longstanding doctrines of tribal insulation from state action.¹¹⁹ The court concluded that application of the ACA in Indian Country was "patently incompatible" with the intents and purposes of Congress when the ACA was enacted.¹²⁰ In addition, the court noted that the Supreme Court's early establishment of the doctrine that Indian tribal sovereigns are "distinct, independent political communities" had not changed through the years.¹²¹

113. *Id.* at 432.

114. *Id.* at 435.

115. 663 F. Supp. 1300 (D.D.C. 1987).

116. *Id.*

117. *Id.* at 1301.

118. *Id.* at 1303.

119. *Id.* at 1310.

120. *Id.*

121. *Id.*

The *Pueblo* court pointed out that contrary to this prevailing doctrine, case law had applied the ACA to offenses in Indian Country.¹²² Because neither the Supreme Court nor Congress had acted in the interim to change this assumption, the precedents were still good law. Although the court felt “bound” to apply the ACA in the *Pueblo* case, it did not see fit to expand the definition of the ACA’s applicability to include civil cases.¹²³

In the process of deciding to apply the ACA in *Pueblo*, the court made some interesting decisions regarding the use of precedent.¹²⁴ It applied the ACA on the basis of precedents available in three of the circuits, as well as the silence of Congress on the issue. While the court noted the serious inconsistency between applying the ACA to Indian perpetrators and the long-standing Supreme Court doctrine placing Indians outside the jurisdiction of the states, it chose to follow the precedents in the circuits—an interesting choice which it based solely on the fact that the Supreme Court has not ruled directly on the issue and Congress has not acted.¹²⁵ Given the vast numbers of petitioners for certiorari each year, and the consistent inaction of Congress on any issue not waving a red flag in its face, the court’s decision seems somewhat illogical.

The only way the ACA could apply to Indian perpetrators is if Congress so stipulated by legislative action. It has not done so. Inaction by Congress is not and never has been a justification for assuming expansion of the United States government’s authority in Indian matters.

The tribe has jurisdiction over all crimes not reserved to the jurisdiction of the United States by the MCA. Only those provisions of the federal criminal code which are named in the MCA apply to Indians.¹²⁶ There is no gap to fill because tribal law is already there. Tribal law covers the offenses specified in the MCA as well as unnamed offenses for which an Indian is subject only to tribal law. There is no opening through which the ACA can intervene. The ACA was intended to help fill in the missing provisions of federal criminal law so that non-Indians could not run rampant in Indian Country with no fear of arrest.

Tribes had law which covered Indians, whether federal law was applicable or not, and that system of laws was not destroyed by

122. *Id.* at 1309.

123. *Id.* at 1310-11.

124. *Id.* at 1310.

125. *Id.*

126. *See* 18 U.S.C. § 1153 (1988).

the treaty process. There was no need for the ACA to apply to Indians.

A logical-historical consideration of the MCA and the ACA leads to the observation that they are incompatible. The MCA was enacted to give the federal courts jurisdiction over some specific crimes committed by Indians in Indian Country. Its authority is limited to those offenses named in the plain language of the statute. The ACA, however, was adopted to expand federal jurisdiction over non-Indians to offenses not punishable under the federal criminal code. The purpose and intent of these two statutes are very different and they apply to different defendants. The MCA is not applicable to non-Indians because they are already subject to federal law and the government need not take affirmative action to assume jurisdiction over them. Until the MCA, Indians in Indian Country were outside federal jurisdiction. Thus, the scope of federal authority over Indian defendants is limited to the boundaries as set by the MCA.

In *Renville*, however, the court applied both the MCA and the ACA to circumstances involving an Indian perpetrator in Indian Country.¹²⁷ The crime was incest. The MCA says incest is defined by the state law which would apply if the crime were not committed by an Indian.¹²⁸ The South Dakota rape law neither defined nor punished incest.¹²⁹ The only way the court could have used the South Dakota statute was through the application of the ACA. So, the court reasoned that because the MCA provided that "incest" should be defined by the state law, and South Dakota's incest law did not describe what *Renville* did, it could apply the ACA to find a state statute that more accurately described *Renville*'s actions. Once the ACA was triggered, prosecutors could roam through state statutes to find a law which punished *Renville*'s actions.

In addition to the problem of applying the ACA to an Indian through the MCA, the fact that the ACA was applied based on the assumption that *Renville* was guilty of incest did not automatically allow the expansion of the definition of incest to include rape. Congress described how incest committed by an Indian was to be treated under federal law in the MCA.¹³⁰ Congress also named rape and carnal knowledge of a female under the age of sixteen in the MCA.¹³¹ Federal criminal statutes for rape and

127. *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985).

128. 18 U.S.C. § 1153 (Supp. II. 1984).

129. See S.D. CODIFIED LAWS ANN. § 22-22-1 (1979).

130. See 18 U.S.C. § 1153 (Supp. II 1984).

131. *Id.*

carnal knowledge of a female under eighteen were comprehensive enough to cover Renville's crimes without this distortion of the ACA. If the prosecution was really interested in procuring the most severe punishment for Renville, it could have charged Renville with appropriate federally defined crimes and achieved the same result.

Conclusion

Renville was an Indian. There are few other differences between him and Williams, a white man. Yet Williams went free after having sex with an unmarried Indian girl because the Supreme Court determined that Congress intended to prohibit the generic offense. Renville went to prison for thirty years for committing incest when the penalty for two counts of incest under the MCA was only ten years. The Eighth Circuit could have put Renville in jail for thirty years without applying the ACA and, thus, avoided creating this precedent. If the purpose was to put Renville behind bars for a longer term, there was an easier way. He could have been charged with rape under the federal criminal code. He was not—and the Eighth Circuit allowed Renville's conviction, by way of the ACA and South Dakota rape statutes, to stand.

Precedent determines future law. Case law forms our understanding of how statutes apply. *Renville* is precedent which further undermines the sovereign authority of Indian tribes. It does so by assuming the application of the Assimilative Crimes Act to Indians in Indian Country without any action on the part of Congress to appropriate that expanded authority to the federal government.

Since 1985, the *Renville* decision has been cited in fifty-three cases, and followed in four.¹³² Each of the four cases which followed *Renville* cited to a portion of the decision dealing with hearsay evidence in child abuse cases. This case is being read by judges, attorneys and law clerks because of the hearsay ruling. *Renville* has become an important case, and the first section of the opinion contains both the facts and the problematic application of the ACA. Thus, this portion of the opinion has gone unchallenged but not unread. The long-term damage resulting from the application of the ACA in *Renville* is incalculable.

Renville distorts the clear and unambiguous language of the MCA, the GCA, and the ACA. The frequent reading of the

132. *United States v. Provost*, 875 F.2d 172 (8th Cir. 1989); *Morgan v. Forelick*, 846 F.2d 941 (4th Cir. 1988); *United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987); *United States v. Frazier*, 678 F. Supp. 499 (D.C. Penn. 1986).

opinion by legal professionals will be instrumental in the formation of the legal community's beliefs as to the application of these statutes to Indian defendants. Judges, attorneys, and law clerks who read the opening section of *Renville* are presented with what appears to be a precise and accurate statement of the law. Indian law is a specialized area of law. Attorneys who are not knowledgeable about Indian law may erroneously assume from *Renville* that the law as applied through the ACA to an Indian defendant is the settled state of the law in this area. The reputation of the Eighth Circuit is that of a strong court, knowledgeable about and staunchly protective of Indian rights and tribal sovereignty. It has a special duty to provide the legal community with carefully crafted, well-founded opinions regarding Indians. *Renville* is an anomaly. The court has simply misapplied the statutes.

Because the Eighth Circuit has substantial influence in the field of Indian law, the court cannot ignore the erroneous legal concepts adopted in *Renville*. Therefore, the Eighth Circuit should reconsider and revise *Renville* to reflect an accurate application of the law regarding criminal prosecution of Indians in Indian Country.