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The Assimilative Crimes Act

NOTE

THE ASSIMILATIVE CRIMES ACT

An understanding of the Assimilative Crimes Act is necessary for any attorney who may one day find himself defending a client who has allegedly committed a criminal offense in an area under federal jurisdiction. At first blush, the lawyer may think that his client is clearly guilty and plan his defense around the creation of a reasonable doubt in the court's or jury's mind. However, in some instances, steps may be taken prior to a defense on the merits which would raise serious doubts as to the legality of the prosecution, and even if a conviction is forthcoming, objections might also be validly raised against the severity of the punishment offered for the offense. It is in this light that the functions and limitations of the ACA will be examined to the end that Congress should adopt a comprehensive criminal code to be applied uniformly to all areas under federal control.

I. History and Purpose of the Assimilative Crimes Act

The Assimilative Crimes Act of 1948[1] was the product of more than a century of development.[2] In the early days of the Republic only a small part of the nation was under federal jurisdiction. In those limited areas, the commission of acts that were crimes at common law or by adjacent state law became a problem of increasing magnitude because the Federal Criminal Code was wholly ineffective in providing protection.[3] In an effort to remedy this problem, a congressional committee was assigned the task of

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[1] The Assimilative Crimes Act, 18 U.S.C. § 13 (1971) [hereinafter cited as ACA] of 1948 provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enacment 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.

[2] The first ACA was enacted in 1825. Act of March 3, 1825, ch. 65, § 3, 4 Stat. 115. The statute was periodically reenacted. Act of April 5, 1866, ch. 24, § 2, 14 Stat. 13; Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717; Act of March 4, 1909, ch. 321, § 289, 35 Stat. 1145; Act of June 15, 1933, ch. 85, 48 Stat. 152; Act of June 20, 1935, ch. 284, 49 Stat. 394; Act of June 6, 1940, ch. 241, 54 Stat. 234.

[3] 1 Story, Life of Story 244 (1851). Justice Story was the author of the bill which was the basis for the ACA of 1825. He said:

> The criminal code of the United States is singularly defective and inefficient.

establishing a criminal code for the federal enclaves throughout the United States. The committee, however, rejected the concept of a uniform criminal code and, instead, proposed legislation adopting for each enclave the crimes punishable by the state in which the enclave was located.[4] This proposal established the basic policy of the ACA, to make the federal law in each enclave conform as nearly as possible to the laws of the state in which the enclave is located.[5]

The first ACA, the Act of 1825,[6] was limited to the adoption of the state law in force at the time of its enactment. As state legislatures made subsequent changes in their own law, the conformity that had once existed was soon lost as the ACA of 1825 had made no provision for any future additions or deletions in the state law. Thus Congress found it necessary to

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> . . . Few, very few, of the practical crimes . . . are now punishable by statutes, and if the courts have no general common law jurisdiction . . . they are wholly dispunishable. The state courts have no jurisdiction of crimes committed on the high seas, or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity. Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction. And can it be less fit that the Government should have power to protect itself in all other places where it exercises a legitimate authority? That Congress has power to provide for all crimes against the United States is incontestible. *Id.* at 293.

[4] 1 GALES & SEATON, REGISTER OF DEBATES IN CONGRESS 338 (1825). Daniel Webster, the sponsor of the bill in the Senate said:

> [I]t must be obvious, that, where the jurisdiction of a small place, containing only a few hundreds of people . . . was ceded to the United States, some provision was required for the punishment of offences; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the state in which the yard . . . might be. He was persuaded that the people would not view it as any hardship, that the great class of minor offenses should continue to be punished in the same manner as they had been before the cession. *Id.* at 338.

[5] The purpose of the ACA is best summarized in United States v. Press Publishing Co., 219 U.S. 1 (1911), wherein the Supreme Court said:

> . . . [I]t becomes manifest that Congress, in adopting . . . [the ACA], seduously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. *Id.* at 9.

The intention of Congress to maintain this desired conformity is evidenced by the periodic reenactments of the ACA from 1825 culminating in the 1948 statute which to a certain degree has brought about simultaneous conformity of the federal law to that of the states.

[6] Act of March 3, 1825, ch. 65, § 3, 4 Stat. 115.

re-enact comparable ACA's to pursue its goal of conformity with state law.[7] The ACA of 1933[8] made assimilation conditional upon the state law "remaining in force at the time of the doing or omitting the doing of such act or thing. . . ." This act enabled Congress to maintain greater conformity between the federal law and the state law by "reflecting future deletions from the state laws as soon as made." [9]

The ACA in its present form was enacted in 1948.[10] This final version of the ACA of 1825 provides for the assimilation of state laws "in force at the time of" the alleged offense. Congress intended this revised statute to make periodic re-enactments unnecessary in order to keep abreast of the future changes in state law and thus further promote the policy of maintaining conformity between the law of the federal enclave and the state in which it lies.[11]

II. Constitutionality of the Assimilative Crimes Act

The ACA may be broadly classified as legislation by reference, a form of lawmaking which has become increasingly popular among legislators.[12] Lawmakers have found the incorporation technique to be useful where

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[7] United States v. Sharpnack, 355 U.S. 286, 291 (1958).

[8] Act of June 15, 1933, ch. 85, 48 Stat. 152.

[9] United States v. Sharpnack, 355 U.S. 286, 292 (1958).

[10] Note 1 *supra*.

[11] United States v. Sharpnack, 355 U.S. 286, 292-93 (1958).

[12] Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 Iowa L. Rev. 705 (1953). Mr. Poldervaart provides an excellent discussion of this subject:

> Legislators, cognizant of the constantly increasing volume of measures they are turning out, and chronically pressed for time, are falling victim more and more to the use of the treacherous expedient known as legislation by reference. While in its broadest sense the term connotes almost every form of legislation in which a reference is made to another statute, referential legislation of special legal significance divides itself into three main types. These are: (1) amendatory statutes, the most common form; (2) the statute later in point of time which adopts provisions in part or in their entirety from other already existing laws without republication; and (3) statutes which provide explicity or by implication for incorporation within them not only all acts of a particular nature already passed but also those which may be passed in the future, either by a subsequent legislature of the same jurisdiction or by an agency of another state. . . .
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> Use of the referential device has become increasingly popular with legislators for several reasons. Constantly pressed by their constituents and their fellow legislators for economies in legislation they have sought ways to reduce the bulk of their proposed enactments as well as to cut down on the cost of publication. Referential acts can be quickly drawn when time is short. Bare reference sometimes points up better than the completely incorporated act the portion of a statute which is being amended. There is also the pithy, albeit somewhat legalistic consideration that referential provisions bring precepts of proved merit, established by court decision or usage and custom, into the new statute with a minimum of legislative tinkering. *Id.* at 705-06.

uniformity or conformity is the desired result.[13] However, legislation by reference is not without its evils which often tend to exceed its virtues.[14] The question of constitutionality is one such evil which makes referential legislation questionable in many situations and clearly invalid in others.[15]

There are three basic constitutional objections that might be raised against referential legislation.[16] They are lack of due process, denial of equal protection, and the improper delegation of legislative authority. A question of due process is raised because the referring statute does not explicitly set forth the law to be incorporated. Instead, it requires a look beyond the four corners of the statute to materials outside the referring body's jurisdiction, a procedure which often results in confusion and ambiguity over what the law really is.[17] Equal protection may be denied as a result of possible discrimination, especially with regard to the ACA, as the federal law would differ in the enclaves of the various states.[18] A complete abdication

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[13] Hayes, *Effect of Changes in Legislation Incorporated by Reference*, 43 MINN. L. REV. 89, 96 (1958).

[14] *See*, Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705 (1953). The author mentions three of the most glaring evils:

> (1) [t]he difficulty of ascertaining just what it is that is being incorporated by reference; (2) the opportunity it affords unscrupulous legislators and lobbyists to secure enactment of legislation which otherwise would fail of passage; and (3) the increased likelihood of improvident legislation enacted "without that intelligent consideration and understanding of the matters involved which is so essential to the procurement of wise and wholesome legislation." [quoting from Manchester Township Supervisors v. Wayne County Comm'r., 257 Pa. 442, 448, 101 A.736, 738 (1917).] *Id.* at 707.

[15] *Id.* at 708.

[16] Hayes, *Effect of Changes in Legislation Incorporated by Reference*, 43 MINN. L. REV. 89, 100 (1958).

[17] "The person who would know the law and avoid penalty must obtain the statutes of another jurisdiction and read those, obtain the rules, read them, and then keep up on all changes both in the statute and the rules." WALKER, THE LEGISLATIVE PROCESS 344 (1948); Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705, 720-21 (1953). *See also* McCartin, *The Constitutionality of the Federal Assimilative Crimes Act*, 17 FED. B. J. 157, 164 (1957).

[18] *See generally* Hayes, *Effect of Changes in Legislation Incorporated by Reference*, 43 MINN. L. REV. 89, 102-03 (1958).

> An argument which may primarily be directed toward the Assimilative Crimes Act and some other federal referential legislation is that of discrimination. McCartin [McCartin, *The Constitutionality of the Federal Assimilative Crimes Act*, 17 Fed. B. J. 157, 165 (1957)] illustrates this with the example of a father, visiting his soldier son stationed at an army post in State K, who while on the post sells his car either to the son or to another soldier on Sunday. State K has a law prohibiting Sunday sales, and this sale in federal territory may therefore be in violation of the Assimilative Crimes Act. But were the army post in State O, which has no such Sunday law, no federal crime would be committed. It must be noted that even though the father was from State N and unfamiliar with the laws of either K or O, if he made the sale outside the enclave and on adjoining

of legislative power or even a delegation of this power to another which lacks sufficient standards and control may result in an improper delegation of legislative authority.[19]

The Supreme Court found the ACA of 1948 which adopted prospective state law to be constitutional in *United States v. Sharpnack*.[20] The Court considered the constitutional evils of incorporation by reference and dismissed them as non-existent in the ACA.[21] The *Sharpnack* decision, however, does not seem to be based upon sound judicial logic, as the Court appears to have been considerably influenced by the practicality and con-

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land in state jurisdiction, he would have committed an offense in K but not in O. The objection, then, is not because of the father's lack of knowledge, and is not primarily addressed to the *in futuro* aspect of the reference. *Id.* at 102.

[19] See Hayes, *Effect of Changes in Legislation Incorporated by Reference*, 43 MINN. L. REV. 89, 103 (1958); Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 283 (1941); Note, *The Constitutionality of Laws Providing for Incorporation of Other Laws, Rules, and Regulations in Futuro*, 8 U. CIN. L. REV. 310 (1934); 27 VA. L. REV. 700 (1941).

[20] 355 U.S. 286 (1958). The constitutionality of the former ACAs which adopted only the state law in existence and not the future changes in the state law was established in Franklin v. United States, 216 U.S. 559 (1910).

[21] Without citing any authorities in support of its position, the Court determined that the ACA was not a violation of due process, asserting that "[w]hether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves." 355 U.S. 286, 293 (1958). Nor was the ACA found to be an improper delegation by Congress of its legislative powers to the States. The Court said:

> . . . [I]t is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective States for their own government. Congress retains power to exclude a particular state law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State. *Id.* at 294.

Consequently, the Court held "[t]he application of the Assimilative Crimes Act to subsequent adopted state legislation . . . a reasonable exercise of congressional legislative power and discretion." *Id.* at 297.

In touching upon the issue of equal protection, the *Sharpnack* Court indicated that it is within Congress' power to enact a completed code for each enclave and it would not be an unconstitutional discrimination if the various codes differed.

Although the dissenting Justices in *Sharpnack* concurred with the majority in finding that Congress may incorporate some prospective legislation, they objected to the incorporation as provided by the ACA claiming it to involve an inadequate determination of basic policy to guide the states. The dissenters said that the essence of lawmaking requires that Congress determine this policy. Furthermore, they declared that under the scheme approved by the majority, " . . . a State makes such federal law, applicable to the enclave, as it likes, and that law becomes federal law, for the violation of which the citizen is sent to prison." *Id.* at 299.

venience which the ACA presents and by a manifest congressional intent to maintain conformity between state and federal law in the enclaves.[22] A careful analysis of the constitutional issues raised by referential legislation with respect to the ACA reveals a marked weakness in the *Sharpnack* decision. First, the due process issue is extremely cogent since it would be difficult to ascertain what is criminal under such an adoptive statute without examining both the state and federal codes.[23] However, it is a debatable point and due deference should be given to the Court's opinion that certainty, clarity, and definiteness are present.[24] Second, a denial of equal protection may occur when persons committing the same act on a federal enclave in different states results in one person being prosecuted for a crime under an assimilated state law while the other person is not prosecuted because the state in which his enclave is located has no such law.[25] Nevertheless, it should be noted that the Court in *Erie Railroad Co. v. Tompkins*[26] allowed results in federal courts to vary according to the state law in diversity cases. An analogy to *Erie Railroad Co. v. Tompkins* would lend support to the Court's holding in *Sharpnack*, that it is within the power of Congress to enact a complete code for each enclave and it would not be unconstitutional discrimination if the various codes differed.[27]

The objection of primary concern is that the ACA, by incorporating state law, may be an unconstitutional delegation of legislative power. The basis for this objection is found in such constitutional phrases as: "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ."[28] and "[Congress is authorized] to make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers. . . ."[29] Such phrases have generally been interpreted as adopting the doctrine of separation of powers.[30] However, it is difficult to define

22 Recognizing its underlying policy of 123 years' standing, Congress has thus at least provided that within each federal enclave, to the extent that offenses are not pre-empted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated. *Id.* at 292-93.

23 *See* note 17 *supra.*

24 355 U.S. 286, 293 (1958).

25 *See* note 18 *supra.*

26 304 U.S. 64 (1938).

27 It should be noted that Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), dealt with diversity in civil cases whereas the requirement of equal protection would be much greater under criminal procedure.

28 U.S. CONST. art. I, § 1.

29 U.S. CONST. art. I, § 8.

30 *See, e.g.*, A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). *See generally* 16 AM. JUR. 2D CONSTITUTIONAL LAW § 240-43 (1964). Legal writers and philosophers have also interpreted such phrases in the Constitution

precisely to what degree Congress may constitutionally delegate its legislative power.

The very theory of the delegation of legislative power seems to prohibit any type of delegation of congressional power to the states. Mr. Justice McReynolds in *Knickerbocker Ice Co. v. Stewart*[31] said that "Congress cannot transfer its legislative power to the States—by nature this is non-delegable." [32] Further opposition to the delegation of congressional power is found in two significant Supreme Court decisions in which federal statutes delegating congressional power to the President were held to be unconstitutional.[33]

However, delegation of congressional power is not absolutely prohibited; rather, it appears to be permissible if maintained within proper limits.[34] If a limited degree of delegation is permissible, where does this limit beyond which "there is no constitutional authority to transcend" lie?[35] *United States v. Grimaud*[36] indicates that such limits have not been precisely drawn.[37] The basic test for determining where the limits lie requires that a court "discover in the terms of the act a standard reasonably clear whereby discretion must be governed." [38] If a court determines that Congress "has declared no policy, has established no standard, has laid down no rule," [39] the delegation would clearly be improper. Thus the Supreme Court said in *Schechter Poultry Corp. v. United States:*

> [W]e look to the statute to see whether Congress has overstepped these limitations [of its authority to delegate],—whether Congress . . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards has attempted to transfer that function to others.[40]

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which provide for separation of powers to prohibit the delegations of legislative authority. See LUCE, LEGISLATIVE PROBLEMS 4 (1935); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927).

[31] 253 U.S. 149 (1920).

[32] *Id.* at 164.

[33] *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (both cases dealing with aspects of the National Industrial Recovery Act of 1933).

[34] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[35] *Id.* at 430.

[36] 220 U.S. 506 (1911).

[37] *Id.* at 517.

[38] Panama Refining Co. v. Ryan, 293 U.S. 388, 434 (1935) (Cardozo, J. dissenting). "I concede [to the majority] that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed."

[39] *Id.* at 430.

[40] 295 U.S. 495, 530 (1935).

The *Sharpnack* Court concluded that because Congress retained power to exclude a particular state law from the assimilative effect of the Act, there was no improper delegation of congressional legislative power violating constitutional requirements.

The objection to the delegation of congressional power under the ACA of 1948 is aggravated because of the Act's provision for the adoption of prospective state law. Legal writers are in dispute over the constitutionality of the incorporation of *in futuro* legislation.[41] Two lower federal courts prior to *Sharpnack* took the position that the adoption of future legislation constituted an improper delegation and abdication of legislative duties.[42] However, these decisions were dicta and must be inferentially taken as overruled by *Sharpnack*.

There are certain practical reasons for upholding the validity of the ACA,[43] but practical expediences should never justify the abridgement of constitutional limitations. The ACA should have been found unconstitutional by the *Sharpnack* Court. *Panama Refining Co. v. Ryan*[44] is directly on point. In that case, the Supreme Court found a federal act which permitted the President to prohibit interstate transportation of oil unconstitutional. The Court asserted that the statute:

> [G]oes beyond those limits. . . . [T]he Congress has declared no policy, has established no standard, has laid down no rule. There is no

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[41] Both Cooley and McCartin believe that the incorporation of prospective laws is unconstitutional. *See* 1 COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927) McCartin, *The Constitutionality of the Federal Assimilative Crimes Act*, 17 FED. B. J. 157 (1957). The contrary position has been taken in Note, *The Constitutionality of Laws Providing for Incorporation of Other Laws, Rules, and Regulations in Futuro*, 8 U. CIN. L. REV. 310 (1934).

A number of state courts would uphold such legislation in many instances. *See, e.g.*, Brock v. Superior Court, 9 Cal.2d 291, 299, 71 P.2d 209, 213 (1937); State v. Urquhart, 50 Wash.2d 131, 310 P.2d 261 (1957).

[42] Hollister v. United States, 145 Fed. 773, 779 (8th Cir. 1906) (dictum); United States v. Barnaby, 51 Fed.20, 23 (D. Mont. 1893) (dictum).

[43] Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685 (1957).

> The argument that only Congress has the requisite capacity to enact criminal law for the enclave does not seem justifiable, since the state legislature which is acting in its stead is itself an elected legislature with a similar responsibility for enacting wise criminal laws. Further, since the state laws adopted by the ACA deal with conduct which presents substantially identical problems in an enclave and in the state in which it is situated, the state legislature would seem equally competent to formulate law for both. And since Congress chose to achieve a partial identity in the laws of the enclave and the surrounding territory, the present method would seem to be an exercise and not an abdication of congressional responsibility. *Id.* at 689.

[44] 293 U.S. 388 (1935).

> requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.[45]

Similarly, the ACA presents an inadequate determination of policy for state guidance. Congress has given the states a mandate to enact laws that persons on federal enclaves "*shall not offend.*" Justice Douglas, dissenting in *Sharpnack*, would require that the basic policy at least establish the act which is not to be offended—"*thou shall not speed.*" [46] Therefore, just as the federal act in *Panama Refining Co. v. Ryan*, which permitted Congress to say thou shall not commit any act in interstate commerce which the President prohibits, was held unconstitutional, so should the congressional mandate to the states, which provides that thou shall not commit those criminal offenses which the state prohibits, also be held unconstitutional. Merely because Congress retains the authority to exclude any state law from assimilation does not make its delegation to the states proper and within permissive limits. If such were the case, practically any type of delegation by Congress of its power to another would be valid.

III. Criminal Offenses Under the Assimilative Crimes Act

Before discussing criminal offenses in conjunction with the ACA, it is necessary to consider the jurisdiction of the Act. The ACA provides that it is applicable in the "places now existing or hereafter reserved or acquired as provided in section 7 of this title." [47] However, only subsection 3 of section 7[48] appears to be applicable to the ACA as section 7 defines the total territorial and special maritime jurisdiction of the United States, whereas the words "places . . . reserved or acquired" connotes the ownership of land by the United States as provided for under subsection 3 of section 7.[49]

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[45] *Id.* at 430.

[46] Hayes, *Effect of Changes in Legislation Incorporated by Reference*, 43 Minn. L. Rev. 89 (1958). Hayes, in a perceptive interpretation of the majority's holding in *Sharpnack*, says:

> The majority opinion by its terms applies only to the incorporation in the Assimilative Crimes Act of subsequently adopted state legislation, and holds that action, under the limitations prescribed by the Court, to be "a reasonable exercise of congressional legislative power and discrimination." [355 U.S. at 297] But the limitations apparently prescribed, at most, are that Congress act under the federal police power, that it reasonably decide in its discretion whether to incorporate prospective legislation, and that it retain power to change the law if displeased by any subsequent state legislation that would otherwise have been automatically incorporated. *Id.* at 95.

[47] Assimilative Crimes Act, 18 U.S.C.A. § 13 (1969).

[48] 18 U.S.C.A. § 7 (1969).

[49] H. R. Rep. No. 1584, 76th Cong., 3d Sess. I (1940); S. Rep. No. 1699, 76th Cong., 3d Sess. I (1940). 18 U.S.C.A. § 7 (1969) provides that "The term 'special maritime and territorial jurisdiction of the United States,' as used in this title includes:"

A state criminal offense is not made federal law by the ACA if the offense known to the state has been defined and prohibited by the Federal Criminal Code.[50] Similarly, if the congressional definition of an offense is more narrow than that provided for it by the state, it does not mean that the congressional definition is superseded by the state's.[51] Likewise, in situations where the congressional definition conflicts with that of the state, the state definition is not permitted to give a more narrow scope to the offense than that provided for it by Congress.[52] However, one federal court has held that "where the state statute provides a theory essentially different from that provided in the federal statute, the government can proceed on either

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(1) The high seas and any other waters which are within the admiralty and maritime jurisdiction of the United States and outside the jurisdiction of any particular State.
(2) Any vessel registered under the laws of the United States and operating on the waters of the Great Lakes or any waters connecting them.
(3) "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."
(4) Any island containing guano.
(5) Any aircraft which is in flight over any waters within the admiralty and maritime jurisdiction of the United States but outside the jurisdiction of any particular State.

However, there has been at least one case in which the ACA was extended to § 7(2). The defendant was convicted of an assault with intent to commit the felony, sodomy, aboard a boat licensed under the laws of the United States on Lake Michigan. United States v. Gill, 204 F.2d 740 (7th Cir. 1953), *cert. denied*, 346 U.S. 825 (1953).

The areas under § 7(3) are extensive. *See, e.g.*, Williams v. United States, 327 U.S. 711 (1946) (Indian reservations); James Stewart and Co. v. Sadrakula, 309 U.S. 94 (1940) (post offices); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (national parks); United States v. Unzeuta, 281 U.S. 138 (1930) (military reservations and forts); Capetola v. Barclay White Co., 139 F.2d 556 (3d Cir. 1943), *cert. denied*, 321 U.S. 799 (1944) (naval yards); United States v. Heard, 270 F. Supp. 198 (W.D. Mo. 1967) (land used as Jobs Corps Center); Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611 (E. D. Va. 1949) (airports).

For a thorough discussion of jurisdiction under the ACA and the possible existence of concurrent jurisdiction of the federal government with the states, *see* Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685, 685-88 (1957).

[50] Assimilative Crimes Act, 18 U.S.C.A. § 13 (1969): "Whoever . . . 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 . . . shall be guilty of a like offense and subject to a like punishment." The Congress in 1947 indicated that the ACA of 1948 was to be interpreted the same as the 1940 act which provided that a crime is assimilated which is not made penal by any laws of Congress, Act of June 6, 1940, ch. 241, 54 Stat. 234. H. R. REP. No. 304, 80th Cong., 1st Sess. A8 (1947).

[51] *See* Williams v. United States, 327 U.S. 686, 711 (1946).

[52] *Id.*

statute." [53] Thus when the state statute fits the facts of the case more precisely, it is not improper for the government to proceed under it.[54] Therefore, if both the state and Congress have established similar offenses, whether or not the state offense is assimilated depends on whether the requisite ingredients of the one offense are the same as the other.[55]

A problem would seem to exist where the state provides for a crime of lesser degree than that provided for by Congress. For example, the Federal Criminal Code provides for certain consummated crimes but makes no provisions for the corresponding attempts.[56] It would seem doubtful that Congress intended to punish the completed offense yet condone an unsuccessful attempt of a serious crime. Therefore, the state law making the attempted offense a crime should be assimilated.[57]

The ACA assimilates both the state offense and its punishment. However, the punishment of an offense under the ACA cannot be greater than that provided for by federal law.[58] Therefore, if the completed crime is punished more severely by the state law than the federal law, then both the state punishment for the attempted and completed offenses should be adjudged too harsh and the federal punishment for the attempt should be proportioned downward accordingly. That is, the punishment for the attempted crime under federal law would be proportioned to the federal punishment for the consummated offense as the punishment for the at-

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[53] Fields v. United States, 438 F.2d 205, 207 (2d. Cir. 1970).

[54] *Id.* at 208.

[55] *See* Dunaway v. United States, 170 F.2d 11 (10th Cir. 1948). The defendant was being tried for two offenses, burglary and larceny. The defendant intended that the state crime of burglary should not be incorporated by the ACA as the burglary offense is "comprehended and made penal by the federal larceny statute." *Id.* at 12. The federal court said:

> The federal larceny statute penalizes only the taking and carrying away, with intent to steal, any personal property of another. The crime of burglary is complete with the act of breaking and entering the building with intent to steal although the intended theft may be frustrated or abandoned. The taking and carrying away of the goods of another are essential elements of the offense of larceny, while the breaking and entering of a building in the nighttime are not requisite ingredients of such offense . . . . Thus, burglary and larceny are two separate and distinct offenses and a conviction may be had for both although committed in the same transaction. *Id.* at 12.

[56] The federal crimes of larceny (18 U.S.C.A. § 661 (1966)) and robbery (18 U.S.C.A. § 211 (1970)) as set out in the Federal Criminal Code do not appear to include attempts, but only the completed offenses.

[57] Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 684, 692 (1957).

[58] *See* Dunaway v. United States, 170 F.2d 11 (10th Cir. 1948). Assimilated crimes which are punished as felonies under state law are made felonies under federal law. *See* United States v. Coppersmith, 4 F. 198 (W. D. Tenn. 1880).

tempted state offense is proportionate to the punishment for the completed state offense.[59]

Certain problems, related to but not directly concerned with the adoption of state criminal law, may arise under the ACA. Although the state definition of an assimilated crime governs in a federal court, the procedure of prosecution remains a federal prerogative.[60] However, certain matters are not capable of being defined as either substantive or procedural. One such matter is the statute of limitations for a criminal offense. The question of the application of the statute of limitations has arisen in at least one federal case where it was held that since the time within which prosecution must be brought is not an element of the offense, the application of the federal statute of limitations must control.[61] Another matter which is not directly related to the adoption of state criminal laws concerns the problem of double jeopardy. The possibility of double jeopardy may arise when either the federal and state governments have concurrent jurisdiction over the enclave, or when the defendant's criminal act has contacts with both the state and federal jurisdictions.[62]

IV. Limitations of the Assimilative Crimes Act

The limitation placed on the assimilation of state law by the ACA should be broader than merely prohibiting the assimilation of state law where an equivalent federal law already exists. In addition, the ACA should not be construed to asssimilate state law which either conflicts with congressional policy or regulations issued pursuant to statutory authority.[63] Furthermore,

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[59] For example, if completed crime X is punished by 5 years imprisonment under a federal statute, but the same offense is punished by 10 years imprisonment by state law, then if the punishment for attempted crime X by state law is 8 years, its punishment under federal law should therefore be set at 4 years. *See generally* Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 691-93 (1957).

[60] *See* McCoy v. Pescor, 145 F.2d 260 (8th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945) (sufficiency of indictment determined by federal law).

[61] United States v. Andem, 158 F. 996 (D. N.J. 1908).

[62] Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 697 (1957). Before an issue of double jeopardy can arise, the defendant must be brought to trial a second time with the offense being charged at the second trial growing out of the same evidence on which the charge was based in the first trial. United States v. Cooper, 143 F. Supp. 76, 78 (N.D. Cal. 1956). United States v. Lanza, 260 U.S. 377 (1922) upheld as constitutional a double prosecution under the National Prohibition Act because the single act was an offense against both state and federal sovereignties. However, United States v. Mason, 213 U.S. 115 (1909) may qualify *Cooper*. In that case, the Court held that a criminal statute which adopted state law like the ACA was intended to allow the federal government to prosecute a defendant only if he had not yet been tried in the state court and was thus constitutional.

[63] Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 694 (1957).

the ACA should not assimilate state criminal laws which would interfere with activities in conjunction with the intended purpose of the federal enclave.[64] It should also be construed that Congress did not desire to adopt state criminal laws which were purely regulatory, such as laws connected with health, game laws, and building codes.[65]

Although Congress intended to fill the gaps in the Federal Criminal Code by adopting state law through the ACA,[66] some gaps still remain. A major reason for this failure is that state legislatures have also adopted the use of referential legislation. The state statutes employing legislation by reference fall into two categories. First, there are the laws which provide for the regulation of certain broad types of conduct, leaving the details to be filled in by the local governments of the state. A second category provides for state administrative bodies to establish certain regulations governing conduct specified by the state legislature. A simple example of the first classification is a state statute which authorizes local governments to enact parking regulations, the violation of which is a crime.[67] An example of the second type can be found in a directive by the state legislature that the State Highway Commission may designate and provide for highway and road sign markings and that the failure of a driver to comply with these official markings is a crime.[68] In a case arising under either of these situations, the court is faced with a problem of double delegation of a congressional authority; that is, Congress to the state and then the state to the local government or administrative body. In the first instance, where the state has made a delegation to the local government, the federal enclave should completely lack any federal law touching upon the conduct which

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[64] *Id.*

[65] *Id.* at 695.

[66] Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611, 612 (E.D. Va. 1949).

[67] *See, e.g.*, VA. CODE ANN. § 46.1-252 (1972). The text of the statute is as follows:

> The council or other governing body of any city or town may, by a general ordinance, provide for the regulation of parking within its limits . . . and may delegate to the appropriate administrative official or officials the authority to make and enforce such additional rules and regulations as parking conditions may require and may prescribe penalties for failure to conform thereto.

It is interesting to note that the Supreme Court of Virginia upheld this delegation to the municipality as a reasonable exercise of its police power. Leesburg v. Tavenner, 196 Va. 80, 82 S.E.2d 597 (1954).

[68] *See, e.g.*, VA. CODE ANN. § 46.1-173 (1972). The text of the statute is as follows:

> The State Highway Commission may classify, designate and mark State highways and provide a uniform system of markings and signing such highways under the jurisdiction of this State . . . . The driver of a motor vehicle . . . shall obey and comply with the requirements of road signs erected upon the authority of the State Highway Commission . . . and the failure of such driver to obey such signs or comply with this provision shall constitute a misdemeanor and upon conviction shall be punished . . . .

the state allowed the local government to control.[69] As to the state delegation to administrative bodies, it is questionable whether mere conformity by the federal enclave to the administrative regulations would be sufficient to bring the enclave under the protection of the state law by its assimilation into the Federal Code.[70]

V. Conclusion

Congress has both the authority and the duty to provide an effective, efficient, and just code of criminal law for the areas under federal jurisdiction. The enactment of the ACA has been an effort by Congress to meet this duty. However, the ACA is singularly ineffective, inefficient, and unjust. The basic policy of Congress to provide conformity between state and federal law does not warrant the sacrifices which must be made. Congress should resolve itself to the task of adopting a comprehensive criminal code to be applied uniformly to all areas under federal jurisdiction. Until that time, a more perfect justice may only be obtained by a diligent consideration of the constitutional and procedural limitations of the ACA in the courts themselves.

J. H. M.

[69] The simple reason for this is that there is no state law to assimilate. The only law covering the offensive conduct lies within the local ordinances. No provision is made in the ACA for the adoption of local ordinances in the area in which the federal enclave is located.

[70] The Virginia statute expressly says that the road signs must be "erected upon the authority of the State Highway Commission." Va. Code Ann. § 46.1-173 (1972). Mere conformance by the federal enclave to the markings erected by the State Highway Commission throughout the State would not be a compliance with the state statute which specifically requires authorization from the State Highway Commission to erect such signs. However, even if the State Highway Commission came onto the federal enclave and authorized the erection of signs, this would still fail to make the statute applicable to the enclave as the Commission would then be acting outside of the jurisdictional authority provided it by the State.