Comments

INDICTMENT UNDER THE "MAJOR CRIMES ACT" — AN EXERCISE IN UNFAIRNESS AND UNCONSTITUTIONALITY

The handling of Indian criminal affairs is replete with instances of inequality of treatment between Indians and non-Indians. Many of the discrepancies present serious constitutional questions, and until the defects are cured, a substantial number of American citizens will be denied their constitutional rights. *United States v. Hosay*[1] is a case in point.

Daniel Hosay and two other Apache Indians were indicted in Tucson in the United States District Court for the District of Arizona; they were charged with violating 18 *United States Code* section 1153 (Supp. II, 1966), "Aiding and Abetting an Assault, with a Dangerous and Deadly Weapon," as defined in and with punishment as provided by *Arizona Revised Statutes Annotated* section 13-249 (Supp. 1967). The fact that these defendants were Apache Indians changed what should have been a routine operation of the judicial process into a jurisdictional maze. Since Indians who are tried in federal or state courts are entitled to the same protections as other citizens,[2] several weaknesses were inherent in the indictment. First, the grand jury which handed down the indictment was empaneled in an unconstitutional manner, and in violation of the Jury Selection and Service Act of 1968.[3] Second, there existed an equal protection problem since, by enacting 18 *United States Code* section 1153 (Supp. II, 1966), Congress has in some instances burdened the Indian who commits assault with a dangerous weapon with a penalty twice as severe as would be given a non-Indian committing the same crime. Further, section 1153 defines assault with a dangerous weapon differently for Indians than for non-Indians; at times the definition for the former requires less proof for conviction.

The Grand Jury

Hosay and his codefendants were indicted by a federal grand jury randomly selected from voter registration roles. This method is sanctioned by the Jury Selection and Service Act,[4] but is valid only if it provides a "fair cross section" of the population. The Act states:

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[1] Criminal No. c-2673 (D. Ariz., filed Nov. 6, 1967).
[2] *See* Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, p. 617 *supra*.
[3] Jury Selection and Service Act, 28 U.S.C.A. § 1861 (Supp. 1969).
[4] *Id.* § 1863(b)(2). The jury selection plan shall, *inter alia*,
(2) specify whether the names of prospective jurors shall be selected

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.[5]

The Act further provides:

> The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy or protect the rights secured by sections 1861 and 1862 of this title.[6]

Studies indicate that in Arizona's Pima County, Indians are less likely to register to vote than non-Indians.[7] If this is true, a federal grand jury randomly selected from voter registration roles fails to reflect a "fair cross section" of the populace.[8] Therefore, an Indian in Pima County is denied his rights under the Act whenever he is indicted by such a jury.

The meaning of the phrase "fair cross section" is the crucial issue under the Act. As yet, there is no case law defining the term, but it is likely that federal courts will adopt a more exacting standard than the sixth amendment's "impartial tribunal" requirement, otherwise a federal act insuring a "fair cross section" would be unnecessary. While the state courts are not required to comply with the Jury Selection and Service Act, they at least should be required to meet equal protection standards, similar to sixth amendment restrictions, when selecting a jury.[9]

In *Fay v. New York*,[10] a 1947 decision, the United States Supreme

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> from the voter registration lists or of the lists of actual voters of the political subdivision . . . .

[5] *Id.* § 1861.

[6] *Id.* § 1863(b)(2).

[7] According to the ARIZ. COMM'N OF INDIAN AFFAIRS, PAPAGO RESERVATION REPORT 16 (1962); "There is a belief among the leaders that too few Papago people are interested in voting. A need exists for better means of obtaining information as to the importance of participation." And, similarly, the results of a statewide investigation of voting problems of Indian reservations in Arizona indicated that the most serious problem on the Papago Reservation was voter registration. ARIZ. COMM'N OF INDIAN AFFAIRS, RESERVATION SURVEY, LAW AND ORDER — VOTING (1963). Prior to Hosay's trial, names of the persons on the federal grand jury panels who reported on June 13, 1961, January 11, 1965, and September 13, 1966, were obtained. Letters were sent to each grand juror inquiring if he was an Indian. The results were as follows:

1. 30 returned for a better address.
2. 88 replies answering juror was not an Indian.
3. 0 replies answering juror was an Indian.

This could indicate that no Indian had served on a federal grand jury in Pima County between June 13, 1961 and Sept. 13, 1966. Of course, this evidence is not conclusive, because no inquiry was made of those whose address had changed, but it would seemingly be strong enough to raise some interest in the problem.

[8] This argument of course has its limits. An absolutely perfect cross section could never be obtained and is not required by the Constitution, nor the Federal Act. On the other hand, substantial exclusion of a particular race cannot be tolerated.

[9] *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

[10] 332 U.S. 261 (1947).

Court stated that its supervisory power over lower federal courts, together with the sixth amendment's "impartial jury" guarantee, permitted the Court to scrutinize federal jury composition with greater freedom than they could constitutionally exert over proceedings in state courts.[11] Then, in 1967, the Court intimated that the constitutional standards for federal and state courts are identical:

> For over fourscore years it has been federal statutory law, 18 Stat. 336 (1875), 18 U.S.C. § 243, and the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race.[12]

Thus, regardless of which court hears the matter, it is constitutionally required that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammeled by any arbitrary and systematic exclusions.[13]

There is case law which suggests that proof of scienter may be a requisite for a successful claim of systematic exclusion.[14] Since the purpose of the Act is to insure a "fair cross section," such a requirement is unnecessarily restrictive since exclusion will always result in the denial of a "fair cross section," irrespective of the intent of the persons responsible. Once it is shown that a particular class of persons is consistently excluded from jury duty, regardless of the reason, and a member of that class is being tried, the Act should be held violated. While the same argument could be applied to alleged violations of the sixth and fourteenth amendments "impartial jury" requirement, it would seem to have less efficacy in light of the case law requirement of scienter.

Punishment Greater for Indians Than for Non-Indians

The possibility that Hosay and his codefendants could have been punished more severely than a non-Indian who committed the same crime against the same Indian in the same locale, presented the second weakness in the indictment.[15]

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[11] In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court held the right to trial by jury applicable to serious criminal cases being tried in state courts. Although it does not directly deal with the question of "impartial tribunal," it would seem anomalous to extend the right of jury trial without also holding that the jury should be an impartial one. *See Duncan v. Louisiana, supra* at 149 n.14, where the Court indicates that the fundamental "accouterments" of the right to trial by jury are also going to be protected.

[12] Whitus v. Georgia, 385 U.S. 545, 549 (1967).

[13] Hoyt v. Florida, 368 U.S. 57 (1961).

[14] Responsible as this Court is under the Constitution to redress the jury packing which Bentham properly characterized as a sinister species of art, it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions. Brown v. Allen, 344 U.S. 443, 471 (1953).

[15] Appendix I lists other states wherein this same type of discrimination exists.

Congress has the power to regulate the conduct of Indians by enacting criminal statutes,[16] and while tribal courts usually have jurisdiction over offenses committed by an Indian against another Indian within Indian country,[17] this jurisdiction has been limited. Title 18 *United States Code* section 1153 (Supp. II, 1966), commonly known as the

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[16] United States v. Kagama, 118 U.S. 375 (1886).

[17] Congress defined Indian country in 18 U.S.C. § 1151 (1964):

> 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.

The tribal courts noted in the text are not a new phenomenon. The jurisdiction of the tribal courts is embodied in a series of statutes stretching back to the Act of March 3, 1817, 3 Stat. 383 which established federal jurisdiction over Indian offenses, but declared: "nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian Nation, or to extend to any offense committed by one Indian against another, within any Indian boundary." 18 U.S.C. § 1152 (1964) is the current provision which reserves to the tribal courts jurisdiction over inter-Indian offenses:

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

Section 1152 might be read as insuring exclusive jurisdiction of all inter-Indian offenses to tribal courts. It has not been interpreted that way, however. For example, in Walks on Top v. United States, 372 F.2d 422 (9th Cir. 1967), the court correctly pointed out that § 1152 does not immunize inter-Indian offenses from application of all federal law, but provides only an exception from federal enclave law, when the offense is committed by an Indian against the person or property of another Indian.

The 1968 Civil Rights Act, tit. II, 25 U.S.C.A. § 1301 (Supp. 1969), has imposed constitutional restrictions on the tribal courts in the area of procedure, insuring that Indians will have the minimal civil rights deserving of all citizens. This is a step into an area which prior to the Act was left primarily to the discretion of the tribe. For an examination of the constitutional rights of Indians prior to the 1968 Act, see Kane, *The Negro and the Indian: A Comparison of their Constitutional Rights*, 7 ARIZ. L. REV. 244 (1966).

Certain federal offenses involving Indian affairs such as making prohibited contracts with Indian tribes, 18 U.S.C. § 438 (1964), and embezzling or stealing from Indian tribal organizations, 18 U.S.C. § 1163 (1964), are subject to federal jurisdiction regardless of the race of the offender or of the location of the offense. If an Indian commits a crime enumerated in 18 U.S.C. § 1153 (1964) against a non-Indian within Indian country, he is subject to punishment in the federal courts. Further, if he commits any crime listed in the federal code against a non-Indian within Indian country he is subject to punishment in the federal court by force of 18 U.S.C. § 1152 (1964). And, it should be remembered that the specifications of federal crimes in the Code are supplemented by the Assimilative Crimes Act, 18 U.S.C. § 13 (1964), which makes acts not made penal by other laws of Congress, committed upon land within the exclusive jurisdiction of the United States, subject to federal prosecution whenever made criminal by state law. Therefore, the battery of crimes within Indian country is quite large.

"Major Crimes Act," enumerates thirteen major crimes which fall exclusively within the jurisdiction of the federal courts. This statute was enacted in an unusual and piecemeal fashion. Congress, on March 3, 1885, brought under federal jurisdiction certain offenses *committed by Indians against Indians.* These were murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny.[18] Assault with a dangerous weapon was added to the statute by the Act of March 4, 1909.[19] Robbery and incest were added by the Act of June 28, 1932.[20] Assault with intent to commit rape, and carnal knowledge of any woman not one's wife who has not attained the age of sixteen years were added by an amendment on November 2, 1966.[21] That amendment further provided that as used in section 1153, the offenses of rape and assault with intent to rape would be defined in accordance with the laws of the state wherein the offense was committed; and that the offenses of burglary, assault with a dangerous weapon, and incest, would be both defined and punished in accordance with the laws of the state wherein the offense was committed. Finally, assault resulting in serious bodily injury was added by the Civil Rights Act of 1968.[22]

Crimes committed by non-Indians against Indians within Indian

[18] Act of March 3, 1885, 23 Stat. 385. See note 22 *infra* for the full text of the Act as amended. As originally drawn, the enumerated crimes were within the jurisdiction of the territorial courts when sitting as such, irrespective of whether the offense was committed within the boundaries of the Indian reservation. An excellent history of the Act can be found in the famous case of United States v. Kagama, 118 U.S. 375 (1886). The history of the provision goes back to early treaties, some of which precede the Federal Constitution, stipulating that Indians committing certain offenses against citizens of the United States should be delivered up by their tribes to the nearest post, to be punished according to United States ordinances. *See, e.g.,* Treaty with the Wiandot, Jan. 21, 1785, art. IX, 7 Stat. 17; Treaty with the Cherokees, Nov. 28, 1785, art. VI, 7 Stat. 19. The first federal enactment dealing with crimes against non-Indians in Indian country was the Act of March 3, 1817, 3 Stat. 83, which became part of § 3 of the Act of March 27, 1854, 10 Stat. 270, from which 18 U.S.C. §§ 1152 & 1153 were derived.

[19] Ch. 14, § 328, 35 Stat. 1151.

[20] Ch. 284, 47 Stat. 337.

[21] Act of Nov. 2, 1966, 80 Stat. 1100.

[22] 25 U.S.C.A. § 1301 (Supp. 1969). 18 U.S.C. § 1153 (Supp. III, 1968), reads as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
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> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.
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> As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

country are within federal jurisdiction when the offense is one specified by the *United States Code* as being a federal crime. This jurisdiction arises out of section 1152.[23] An Indian who commits a crime while he is off the reservation is, like a non-Indian, subject to the laws of the state in which he has committed the criminal act.[24] Consequently, the problem of discrimination comes into play only when the offense is committed within Indian country. The diagram below illustrates the allocation of criminal jurisdiction over major crimes within Indian country.

Place of offense	*Race of offender*	*Race of victim*	*Place of trial*	*Statute creating jurisdiction and source of law*
Indian country	Indian	Indian or non-Indian	federal court	18 U.S.C. § 1153: law comes from federal code except rape, and assault with intent to commit rape, where state def'n is applicable, and except burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest, where state def'n and punishment are applied
Indian country	non-Indian	Indian	federal court	18 U.S.C. § 1152: law comes from federal code
Indian country	non-Indian	non-Indian	state court	state law is applied exclusively
Outside Indian country	Indians treated like any other citizen.			

Although Congress does have the power to legislate for Indians, that power cannot be exercised in an arbitrary and unreasonable manner. Legislation is unconstitutional if it discriminates against a group when there is no rational justification for such discrimination.[25] As noted

[23] *See* note 17 *supra*. The exceptions contained in § 1152 relating to offenses by Indians against Indians, and to offenders punished by tribal law, are not applicable to offenses committed by non-Indians against Indians. The third exception in § 1152 regarding the situation where a treaty reserves exclusive jurisdiction over offenses has no current application, since no such treaty appears to be in force. As noted earlier, because of the Assimilative Crimes Act, 18 U.S.C. § 13 (1964), the battery of crimes within Indian country is quite large. However, as pointed out by W. BROPHY & S. ABERLE, THE INDIAN — AMERICA'S UNFINISHED BUSINESS 50 (1966):

> Non-Indian petty offenders-the cheats, the frauds, and the brawlers-often are not prosecuted, because the federal courts are so busy with larger matters that they have no time for petty cases. Needless friction results, much of which could be avoided if federal judges would routinely designate special commissioners to handle such less important cases.

If a non-Indian commits a crime against another non-Indian within Indian country he is subject to state court jurisdiction, as Title 18 of *United States Code* does not extend to him. New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

[24] Buckman v. State, 139 Mont. 630, 366 P.2d 346 (1961).

[25] *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Virginia Bd. of Elections v. Hamm, 230 F. Supp. 156 (E.D. Va. 1963), *aff'd mem.*, 379 U.S. 19 (1964).

above, section 1153, under which Hosay was indicted, establishes the crime of assault with a dangerous weapon for *Indians* who commit the crime on an Indian reservation.[26] And, as also pointed out, the crime is defined and punished by the law of the state where the crime was committed, the law in this instance being *Arizona Revised Statutes Annotated* section 13-249 (Supp. 1967).

> A person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, shall be punished by imprisonment in the state prison for not less than one nor more than ten years, by a fine not exceeding five thousand dollars, or both.

On the other hand, section 1152 applies to an offense committed by a *non-Indian* against an Indian in Indian country, bringing into play 18 *United States Code* section 113(c) (1964), which establishes the punishment for assault with a dangerous weapon.

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows: . . . (c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.

Thus, for the same crime, in the same area, conceivably against the same person, an Indian would be subject to a fine of $5,000 and imprisonment for ten years and a non-Indian would be subject to a fine of only $1,000 and five years. Surely, the fifth amendment to the United States Constitution[27] is violated by such blatant discrimination.

A difference in punishment was upheld in *Gray v. United States*,[28]

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[26] *See* note 22 *supra*.

[27] U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

[28] No. 21,409 (9th Cir., May 2, 1968). The problem of differences in treatment between Indians and non-Indians has arisen in other contexts. In United States v. Red Wolf, 172 F. Supp. 168 (D. Mont. 1958) the court pointed out that the state law (applicable to an Indian pursuant to § 1153) defined rape as carnal knowledge of a female under the age of 18, whereas the federal statute (applicable to a non-Indian pursuant to § 1153) made the age of consent 16. Thus, if § 1153 were construed to incorporate the state definition for statutory rape, the result would be that where an Indian and a non-Indian carnally, but consensually, knew a 17-year-old female Indian in Indian country, the Indian would have committed a crime and the non-Indian would not have. *Accord*, United States v. Rider, 282 F.2d 476 (9th Cir. 1960). Recognizing the obvious discrimination that would result to an Indian from a finding of incorporation, the court in *Red Wolf* construed the word "rape" in the federal statute to exclude the crime of statutory rape. *But see* United States v. Red Bear, 240 F. Supp. 633 (D.S.D. 1966), where the word "rape" in the same federal statute was construed to include the crime of statutory rape. This situation could no longer arise since Congress, recognizing the problem, amended § 1153 to provide that the age of consent for statutory rape is 16, irrespective of the race of the offender. *See* note 22 *supra*.

The *Gray* decision has been sharply criticized as being based upon cultural distinctions between Indians and non-Indians which have no basis in fact.

The attitudes toward Indians which prevailed at about the time Congress

where four Indians were accused of raping a non-Indian on the Navajo Reservation. *Gray*, however, is distinguishable since the bias was in favor of the Indian defendant raising the constitutional question. The court justified the discrimination by pointing out that Indians are wards of Congress, thus presumably giving a "rational" basis for the discrimination, but an important factor was the court's conclusion that an Indian defendant could not challenge on fifth amendment due process grounds a statute that was of benefit to him. Had the defendant been non-Indian, in which case he would have been prejudiced, his argument would have been much stronger.

This difference in treatment would seem more likely to raise an equal protection objection than one based on traditional concepts of due process, but the differences between the two seem minimal. In *Bolling v. Sharpe*,[29] where segregation in the District of Columbia public schools was struck down as violative of the due process clause of the fifth amendment, the opinion of the Chief Justice established that although the fifth amendment does not contain an equal protection clause, the concepts of equal protection and due process are not mutually exclusive.[30]

PROOF REQUIRED FOR CONVICTION OF INDIAN ON CHARGE OF ASSAULT WITH A DANGEROUS WEAPON IS LESS THAN REQUIRED FOR CONVICTION OF NON-INDIAN WHO COMMITS THE SAME CRIME

As noted earlier, under section 1153 state law is referred to for the definition of the crime of assault with a dangerous weapon when it is committed in Indian country and the offender is Indian. However,

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enacted the distinction in punishments suggest that Congress might well have acted with no proper purpose at all, but only upon the unfounded assumption that Indians were so degenerate that heavy penalties were wasted upon them. 82 HARV. L. REV. 697, 702 (1969).

[29] 347 U.S. 497 (1954). The doctrine that the equal protection and due process clauses of the fourteenth amendment are not mutually exclusive, and that the due process clause of the fifth amendment contains the guaranty of equal protection is not limited to school segregation cases. *See, e.g.*, Schneider v. Rusk, 377 U.S. 163 (1966).

[30] "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." Bolling v. Sharp, 347 U.S. 497, 499 (1954). *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964):

> We deal here with a racial classification embodied in a criminal statute. In this context where the power of the state weighs most heavily upon the individual or group, we must be especially sensitive to the policies of the Equal Protection Clause . . . .

See also Loving v. Virginia, 388 U.S. 1 (1967). In *Loving*, Chief Justice Warren emphasized that the Court had consistently repudiated racial distinctions as "odious" and added if they were ever to be upheld, they would have to be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination. Since the constitutional objection raised here must come under the fifth amendment, the countervailing necessary objective would have to be federal. It is extremely difficult to perceive of a rational basis for such discrimination.

when the offender is a non-Indian and the victim Indian, section 113(c) is applicable. Since there are different definitions under the respective statutes, Hosay and his codefendants were again subject to a denial of equal protection.

The definition of assault with a dangerous weapon is found in *Arizona Revised Statutes Annotated* section 13-249 (Supp. 1967):

> A person who commits an assault upon the person of another *with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury* . . . . (emphasis added).

18 *United States Code* section 113(c) (1964) defines the same crime for a non-Indian as follows:

> Whoever, within the special maritime and territorial jurisdiction of the United States is guilty of an assault shall be punished as follows: . . . (c) Assault *with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse* . . . . (emphasis added).

It is evident that the crime of assault with a dangerous weapon as applied to non-Indians is more restrictively defined, and thus more difficult to prove than the same crime as applied to Indians. Assume, for example, an assault made by a defendant with a fist, by force calculated to do serious bodily injury or result in death. A non-Indian might not be convicted under section 113(c) for lack of a dangerous weapon.[31] Yet, an Indian could be convicted under section 1153, incorporating *Arizona Revised Statutes Annotated* section 13-249 (Supp. 1967), because a fist may be a means of producing great bodily injury.[32]

It is hard to imagine arguments which would validate such discrimination against Indians. Certainly, the status of wardship is not sufficient by itself. Although it might be argued that Indians have a greater propensity to commit assaults on reservations than do non-Indians, and that when they do so, they are less likely to use a dangerous weapon, one would expect this argument to receive immediate rejection by any twentieth century court.

Although no court has held section 1153 unconstitutional on equal protection grounds, in the *Hosay* case a timely motion to quash was filed presenting the arguments set out above. The judge did not grant the motion, but the Government did cease prosecution on the assault indictment; however, Hosay was reindicted for another crime — aiding and abetting an assault with intent to commit rape. Interestingly

[31] State v. Calvin, 209 La. 257, 265, 24 So. 2d 467, 469 (1945); People v. Eaton, 25 App. Div. 2d 692, 694, 268 N.Y.S.2d 255, 257 (1966); People v. Vollmer, 299 N.Y. 347, 350, 87 N.E.2d 291, 292 (1949).

[32] *See* Kelly v. State, 12 Tex. Ct. App. R. 245 (1882).

enough, as to the latter charge, there is no definite statutory difference in punishment based upon race.

Going beyond the problem of discrepancies in treatment between Indians and non-Indians, a convincing argument can be made that section 1153 is unconstitutional as applied to the Navajo Reservation, since the treatment of Navajos committing certain major crimes against other Navajos differs within the reservation — treatment being dependent on whether the crime was committed on that part of the reservation located in Arizona, New Mexico or Utah. Under section 1153, state definition is looked to for the crimes of rape, assault with intent to commit rape, burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest. And, state punishment is looked to for burglary, incest, assault resulting in serious bodily injury, and assault with a dangerous weapon.[33] The definitions and punishments of these crimes are not always the same in the three states cornering in the reservation. For example, in New Mexico rape requires penetration of the vagina,[34] whereas in Arizona the penetration need only be of the vulva.[35] Utah has a less exact requirement; any sexual penetration, however slight, is sufficient.[36] This refinement of a medical question can be the difference between guilt and innocence. In Utah assault with a dangerous weapon is punishable by a maximum penalty of five years imprisonment and $1,000 fine,[37] whereas in Arizona the maximum penalty is ten years imprisonment and a $5,000 fine.[38]

Congress should not be able to allocate different punishments and definitions of crimes for the same class depending on locale, merely to remain consistent with the geography of the separate states. However, it would appear that the United States Supreme Court has taken a contrary position. In *Missouri v. Lewis*,[39] the Court said:

> The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies . . . . If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.[40]

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[33] *See* note 22 *supra*.
[34] N.M. STAT. ANN. § 40 A-9-1 (1953).
[35] State v. Pollock, 57 Ariz. 415, 114 P.2d 249 (1941).
[36] UTAH CODE ANN. § 76-53-17 (1953). The argument that there should be no unjustifiable discrimination between Indians on the same reservation has equal force when used to argue that the mere fact that Indians, wards of the government, are on separate reservations, is not sufficient justification for differences in punishment for major crimes. If they all stand in the same relationship to their government, why should differences in geographic location make a difference as to definition and punishment for major crimes.
[37] UTAH CODE ANN. § 76-7-6 (1953).
[38] ARIZ. REV. STAT. ANN. § 13-249 (Supp. 1967).
[39] 101 U.S. 22 (1879).
[40] *Id.* at 31.

Lewis is distinguishable since the Court was concerned with state action under the fourteenth amendment, necessitating considerations of federalism. In the area under discussion, the concept of federalism should not restrict the court, because, when considering the treatment of the Navajos, we are dealing only with the actions of the federal government in relation to a class of *its* citizens and not those of a state or states.[41] Further, the Supreme Court has made it abundantly clear that discrimination of a political nature based on geography is unconstitutional.[42] And, in *Avery v. Midland County, Texas*,[43] Justice Fortas in dissent, stated:

> *Reynolds v. Sims*, did not put the Equal Protection Clause to a radical or new use. Its holding is in the main stream of our equal protection cases. Our cases hold that people who stand in the same relationship to their government cannot be treated differently by that government.[44]

For a practical view, imagine yourself in a Navajo's shoes. Would it not be odd to have all major crimes tried in the district courts of the various states and defined and punished in different ways because of geographic state lines within your reservation, which to you are irrelevant?

The equal protection problem is further complicated when it is considered that a non-Indian defendant, who has committed an assault with a dangerous weapon against another non-Indian on an Indian reservation, may be discriminated against since he will be indicted in and punished by a state court applying state law;[45] whereas, another non-Indian defendant, who happens to be fortunate enough to pick an Indian victim, will be tried in the federal court which will apply the federal definition and punishment — which in some instances will be less severe.[46] In support of this discrimination it could be argued that there are two different crimes involved and, therefore, different standards can be rationally applied. Nevertheless, can one seriously make this argument, knowing that both victims are human beings and American citizens? The difference in treatment is reminiscent of the kind of discrimination that occurred prior to *Erie v. Tompkins*,[47] when nonresidents were allowed to take advantage of the federal common law and residents were compelled to rely on the law of the state. Although there is no forum shopping as occurred prior to *Erie* (unless one

[41] Although there are other considerations discussed in the last section of this comment which might be argued to justify the differences in treatment within the Navajo reservation, they would not seem to counterbalance the basic unfairness of the system.

[42] Reynolds v. Sims, 377 U.S. 533 (1964).

[43] 390 U.S. 474 (1968).

[44] *Id.* at 498 n.2.

[45] Draper v. United States, 164 U.S. 240 (1896). *See* note 19 *supra*.

[46] *See* note 17 *supra*.

[47] 304 U.S. 64 (1938).

chooses to assault only Indians) the discrepancies in treatment are quite as real.

Clearly, Congress must amend section 1153 before it will meet the requirements of equal protection mandated by the Constitution. The bewildering aspect of the problem is congressional insistence on applying the definitions and punishments set out in Title 18 of the *United States Code* to some committing major crimes within Indian country, while applying the state definition and punishment of the same crime to others. There is no sufficient difference between Indians and non-Indians to warrant the application of different statutes. The only by-product of the existing distinction is confusion and unfairness.

SOLUTIONS

Complete termination of federal criminal jurisdiction over Indian country is one possible solution to the problems of inequality created by section 1153. This is certainly not a new suggestion. In 1953, Congress gave consent to all states to assume jurisdiction with respect to criminal offenses or civil actions within their state.[48] This grant was subsequently limited by the 1968 Civil Rights Act,[49] which reaffirmed that the states may assume jurisdiction, but made assumption of such jurisdiction contingent upon

> consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption . . . .[50]

Complete termination, therefore, does not seem likely unless requested by the Indians. As stated by Brophy and Aberle:

> Termination of the long-established relations between the federal government and the Indians should occur only after there is adequate information before the federal government, the Indians, the local inhabitants, and their governments as to what will happen to all four parties at interest if the tribe is terminated. This requires the solution of legal, governmental, financial, and human problems.[51]

A simpler and less drastic solution would be to make section

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[48] Act of August 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588.

[49] Civil Rights Act of 1968, 25 U.S.C.A. § 1301 (Supp. 1969). *See* Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, p. 617 *supra*. The Indian tribes have been critical of the 1953 Act however:

> Tribes have been critical of Public Law 280 ('53 Act) because it authorizes unilateral application of State law to all tribes without their consent and regardless of their needs and special circumstances. Moreover, it appears that tribal laws were unnecessarily preempted and, as a consequence there was no law and order in some tribal communities. S. REP. No. 721, 90th Cong., 1st Sess. 32 (1967).

[50] Civil Rights Act of 1968, 25 U.S.C.A. § 1301 (Supp. 1969).

[51] W. BROPHY & S. ABERLE, THE INDIAN — AMERICA'S UNFINISHED BUSINESS 211 (1966).

1153 applicable to all persons who commit any of the crimes specified therein against anyone within Indian country, while at the same time insuring that all of these crimes are defined and punished pursuant to the law of the state in which the crime was committed. Following this plan, the definitions and punishments for any of the thirteen major crimes would be the same irrespective of the race of the offender or victim, or of the location of the criminal act within a state. In addition, there would result a highly desirable uniformity of jurisdiction for all persons committing major offenses within the boundaries of Indian country.[52]

The problem raised as to intra-Navajo Reservation discrimination between Indians would not be resolved by this solution, since state law of the separate states cornering in the reservation still would be applicable. But a special set of definitions and punishments solely for major crimes on the Navajo Reservation, although eliminating problems of discrimination within the reservation, would create differences in punishments for persons on and off the reservation. It ultimately becomes a question of priority of sovereignties — the reservations or the states. The desirability of uniformity of punishment and definition for *all* persons who are citizens of the same state is a sufficient justification for the differences in punishment and definition that would remain within the Navajo Reservation. There is, however, a consequent duty on the part of each state with a corner in the Navajo Reservation to demonstrate to that Indian population why their state citizenship *is* of such a countervailing importance.

Does Congress have the power to extend federal jurisdiction to cover non-Indians who commit crimes against non-Indians within Indian country?[53] Although a fair reading of section 1152 would suggest Congress has already exercised such power,[54] as of this time that section has not been construed to authorize such jurisdiction. For example, in *United States v. McBratney*,[55] the United States Supreme Court held that if both the victim and the offender are non-Indians, the state has jurisdiction. It reasoned that Colorado on becoming a state had acquired jurisdiction over its own citizens and other white persons throughout the whole of the territory within the state's boundaries. The Court did

[52] Under this proposal, jurisdiction over all major crimes would rest with the federal courts. All that is suggested is that all federally defined and punished crimes such as 18 U.S.C. § 113(c) (1964) be ignored, and that state definitions and punishments for major crimes be applied exclusively whenever a crime is specified in 18 U.S.C. § 1153 (Supp. II, 1966). This would readily dispose of the problem presented by *Hosay*, since under this proposal both Indians and non-Indians committing assaults within Indian country would be subject to state punishment.

[53] *See* United States v. Bailey, 1 McLean 234 (Cir. Ct. Tenn. 1834).

[54] *See* note 17 *supra*.

[55] 104 U.S. 621 (1882); *accord*, Draper v. United States, 164 U.S. 240 (1896); New York *ex rel.* Ray v. Martin, 326 U.S. 521 (1946).

not hold that Congress would be without power to exercise jurisdiction over non-Indians committing crimes against non-Indians within Indian country, but rather that Congress had not acted to reserve such jurisdiction.[56] In the Department of the Interior's treatise on Indian law, this point is made very clearly:

> The denial of State jurisdiction is a matter of constitutional power within the control of Congress . . . .
>
> . . . .
>
> The constitutional authority of the Federal government to prescribe laws and administer justice upon the Indian reservation is plenary.[57]

The author goes on to state:

> So considered, the general jurisdiction of the state over non-Indians extends throughout the territorial limits of the state *save as may be limited by Federal enactment.*[58] (emphasis added).

Some might suggest that the proposed solutions call for some major surgery. In response it may be suggested that it is time for just such an operation. The proposals will in no way prevent the tribal courts from handling the minor crimes among Indians,[59] and, hopefully under the new Civil Rights Act, those courts will begin to serve the educational and disciplinary function for which they were originally designed.[60] The Indians' legal plight is no secret even to Congress:

> One needs only to read a sampling of court decisions to realize that the Indian lives in a legal no man's land. In many instances he is subject to three sovereigns — the Federal Government, State government and tribal law — which present conflicting claims on the Indians life.[61]

Congress should take a step toward elimination of that "no man's land" by providing uniformity of jurisdiction, crime definition and punishment for all who commit major crimes within Indian country.

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[56] United States v. McBratney, 104 U.S. 621, 624 (1882).
[57] U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 447 (1958).
[58] *Id.* at 513.
[59] Section 1152 would remain intact and would not be altered in its reservation of jurisdiction to the tribes over primarily inter-Indian matters.
[60] United States v. Clapox, 35 F. 575 (D. Ore. 1885), makes it clear that one of the original purposes of the tribal courts was to provide a means of educating Indians to handle their own problems in a judicial manner.
[61] S. REP. No. 721, 90th Cong., 1st Sess. 30 (Nov. 1967).

APPENDIX # 1

STATES WHERE PUNISHMENT FOR ASSAULT WITH A DANGEROUS WEAPON IS GREATER FOR NON-INDIAN, 18 U.S.C. § 113(c), THAN FOR INDIAN, 18 U.S.C. § 1153*.

North Dakota, N.D. CENT CODE § 12-26-08 (1960).
Louisiana, LA. REV. STAT. § 14:37 (1950).
Idaho, IDAHO CODE ANN. § 18-912 (Supp. 1967).
Colorado, COLO. REV. STAT. ANN. § 40-2-34 (1963).
South Dakota, S.D. CODE § 13.2404 (1939).
Nevada, NEV. REV. STAT. § 200.470 (1967).

STATES WHERE PUNISHMENT FOR ASSAULT WITH A DANGEROUS WEAPON IS GREATER FOR INDIAN, 18 U.S.C. § 1153, THAN FOR NON-INDIAN, 18 U.S.C. § 113(c).

Oregon, ORE. REV. STAT. § 163.240 (1967).
Washington, WASH. REV. CODE § 9.11.020 (1965).
Arizona, ARIZ. REV. STAT. ANN. § 13-249 (Supp. 1967).
Montana, MONT. REV. CODES ANN. § 94-602 (Supp. 1967).
Minnesota, MINN. STAT. ANN. § 609.225 (1964).
New Mexico, N.M. STAT. ANN. § 40a-3-2 (1953).
Mississippi, MISS. CODE ANN. § 2011 (1942).
Michigan, MICH. STAT. ANN. § 28.279 (1962).

* Under 18 U.S.C. § 1153 state law is looked to for definition and punishment of the crime of assault with a dangerous weapon when the offender is an Indian and the crime is committed within Indian country.